

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

FIRST SECTION

CASE OF OSMANOVIĆ v. CROATIA

(Application no. 67604/10)

JUDGMENT

STRASBOURG

6 November 2012

FINAL

06/02/2013

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



In the case of Osmanović v. Croatia,

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

Anatoly Kovler, *President,*
Nina Vajić,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges,*
and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 16 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 67604/10) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Kabir Osmanović ("the applicant"), on 29 October 2010.

2. The applicant was represented by Mr N. Sladaković, a lawyer practising in Pula. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

3. On 24 October 2011 the complaints concerning the reasons for the applicant's detention and the Constitutional Court's decision declaring the applicant's constitutional complaint inadmissible were 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

4. The applicant was born in 1985 and lives in Pula.

5. On 9 October 2009 the applicant was arrested on suspicion of a breach of public peace and order.

6. On the same day, the Istarska Police Department (*Policijska uprava Istarska*) indicted the applicant in the Pula Minor Offences Court

(*Prekršajni sud u Puli*) on charges that he had disturbed public peace and order in that he and two others had attacked two off-duty police officers.

7. Still on the same day, the applicant was brought before a judge of the Pula Minor Offences Court who, after she had heard the applicant, remanded him in custody for eight days under Section 135 § 1 of the Minor Offences Act in connection with the above charges. The reasoning reads as follows:

> "On 9 October 2009 the Istarska Police Department submitted to this court an indictment in urgent proceedings against the accused, Kabir Osmanović, in connection with a minor offence under section 6 of the Minor Offences against Public Order and Peace Act, with a request that he be remanded in custody because he had repeatedly committed similar offences. Since this case concerns a grave breach of public peace and order, in which N.R. sustained grievous bodily injury, and specific circumstances justify a fear that the accused would commit the same minor offence, the judge agreed to the request [by the police] and remands the accused in custody for a period of eight days."

8. On 12 October 2009 the applicant lodged an appeal, arguing that the decision remanding him in custody had not been sufficiently reasoned.

9. On 14 October 2009 the High Minor Offences Court (*Visoki prekršajni sud Republike Hrvatske*) upheld the first-instance decision. The relevant part of the reasoning reads as follows:

> "... After considering this case and the allegations in the appeal, this panel of the High Minor Offences Court of the Republic of Croatia, on the basis of section 211(3) of the Minor Offences Act, has found that the first-instance decision on the accused's detention was correct and lawful.
>
> This court agrees with the first-instance judge who detained the accused for the said period because there was a risk that he might repeat the same minor offence, which arises from the circumstances in which the offence described in the indictment was committed, and from the medical documentation in the case file.
>
> Remanding the accused in custody prevents him from repeating the same minor offence."

10. On 17 October 2009, when the eight-day time period had expired, the applicant was released from custody.

11. On 20 November 2009 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) arguing that there had been no reason to remand him in custody, that the lower courts had not put forward any such reasons, and that the assertion that there was a risk that he might reoffend had not been substantiated in any way. In particular, he stressed that he had not previously been convicted of the same or similar offences. He also complained that the judge had not heard him prior to ordering his detention.

12. On 25 March 2010 the Constitutional Court declared the applicant's constitutional complaint inadmissible on the ground that the applicant had

been released in the meantime. This decision was served on the applicant on 30 April 2010.

13. On 20 April 2010 the Pula Minor Offences Court found the applicant guilty of a breach of the public peace and order and sentenced him to nine days' imprisonment. The period of detention already served was to be included in his sentence.

14. On 17 May 2010 the applicant lodged an appeal with the High Minor Offences Court against that judgment of the Pula Minor Offences Court, but withdrew it on 1 April 2011.

15. On 21 October 2011 the High Minor Offences Court declared the applicant's appeal of 17 May 2010 inadmissible on the ground that he had lost interest in pursuing his appeal.

II. RELEVANT DOMESTIC LAW

16. The relevant part of the Minor Offences against Public Order and Peace Act (*Zakon o prekršajima protiv javnog reda i mira*, Official Gazette nos. 5/1990, 47/1990 and 29/1994) reads:

Section 6

"Anyone who behaves in a particularly offensive or rude manner in a public place by insulting citizens or disturbing the peace shall be liable to a fine ... or to a term of imprisonment not exceeding sixty days."

17. The relevant part of the Minor Offences Act (*Prekršajni zakon*, Official Gazette, no. 107/2007) reads:

Detention

Section 135

"1. If a person is indicted for a minor offence which concerns a breach of public order, or domestic violence, or is punishable by imprisonment or a fine above 10,000 [Croatian kunas], the court can, of its own motion or upon a proposal from the prosecutor, and after the defendant has been heard and it has been determined that there are no reasons to dismiss the indictment under Section 161 of this Act, remand that person in custody if:

1. there are circumstances which show that there is a risk hat [the defendant] will abscond (or is in hiding);

2. if there is a risk that he or she might destroy, hide, alter or forge evidence or traces relevant for the minor offences proceedings or might suborn witnesses, or where there is a risk of collusion;

3. special circumstances justify the suspicion that the person concerned might reoffend.

18. Section 62(1) of the Constitutional Act on the Constitutional Court (*Ustavni zakon o Ustavnom sudu*, Official Gazette no. 29/2002) reads:

> "1. Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that a decision *(pojedinačni akt*) of a State body, a body of local and regional self-government, or a legal person with public authority, concerning his or her rights and obligations or suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms, or his or her right to local and regional self-government guaranteed by the Constitution (hereinafter: constitutional right) ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 5 §§ 3 AND 4 OF THE CONVENTION

19. The applicant complained that there had not been sufficient reasoning for remanding him in custody, and that the proceedings by which he sought to challenge his detention had not been in conformity with the guarantees provided under Article 5 of the Convention. The Court shall examine these complaints under Article 5 §§ 3 and 4 of the Convention, which, in so far as relevant, read as follows:

> "3. 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.
>
> 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."

A. Admissibility

1. The parties' arguments

20. The Government submitted that by withdrawing his appeal against the first-instance judgment in the minor offences proceedings the applicant had acknowledged that he did not consider himself to be a victim of any violation of the domestic law or the Convention. Had the applicant pursued his appeal against the first-instance judgment, the applicant would provide an opportunity to the High Minor Offences Court to asses his detention which had been deducted from his sentence. They also pointed out that the applicant had failed to address the issues he had raised before the Court in his constitutional complaint lodged with the Constitutional Court.

21. The applicant contested this view, arguing that the first-instance judgment and the decisions on his detention had concerned two distinct issues which could not be associated. He also argued that he had exhausted all available domestic remedies in the proceedings concerning his detention.

2. The Court's assessment

22. The Court reiterates that, in accordance with Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, 22 September 1994, § 33, Series A no. 296-A, and *Remli v. France*, 23 April 1996, § 33, *Reports* 1996-II). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. To hold otherwise would mean to duplicate the domestic process with proceedings before the Court, which would hardly be compatible with the subsidiary character of the Convention (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008). Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *John Sammut and Visa Investments Limited v. Malta* (dec.), no. 27023/03, 28 June 2005).

23. The Court notes that the applicant's complaints submitted before the Court under Article 5 of the Convention concern the alleged lack of sufficient grounds and adequate reasoning of the decisions ordering his detention, as well as alleged flaws in the procedure for challenging his detention.

24. The applicant contested the decision to detain him by lodging an appeal and in a constitutional complaint, which were both unsuccessful. He has thus exhausted all domestic remedies available against the decision ordering his detention, the same decision he is now challenging before the Court.

25. When a judgment on the merits of the charges held against the applicant was adopted later, it did not concern the grounds for his detention in any manner. The fact that in that judgment the applicant's detention was deducted from his sentence concerned the domestic rules of sentencing, and not the ground nor the procedure for ordering his detention. Therefore, contrary to the Government's contention, by withdrawing his appeal against his conviction the applicant did not in any way express that he was not a victim of the violation claimed.

26. The Court further notes that in his constitutional complaint the applicant argued that the Minor Offences Court had not given sufficient ground for his decision. He further argued that the assertion that there was a risk that he might reoffend had not been substantiated in any way. Therefore, the Court considers that the applicant had given the domestic authorities an adequate opportunity to assess the grounds and reasoning for his detention.

27. Against the above background, the Government's objection in respect of the applicant's victim status and the exhaustion of domestic remedies must be rejected.

28. The Court notes that this part of the application 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

1. Compliance of the decisions ordering the applicant's detention with Article 5 § 3 of the Convention

(a) The parties' arguments

29. The applicant submitted that when the Pula Minor Offences Court had ordered his detention there had been no circumstances that could justify the fear that he would reoffend. He pointed out that he had not been previously convicted of or prosecuted for the same or similar offences. The applicant also argued that the domestic courts had failed to provide relevant and sufficient reasons when ordering his detention.

30. The Government argued, reiterating the arguments adduced by the domestic courts, that there had been relevant and sufficient reasons justifying the fear that the applicant might reoffend, which had been based on all relevant circumstances of the case. In the Government's view the decisions of the domestic courts had been sufficiently reasoned and based on an assessment of the relevant reasons for ordering the applicant's detention.

(b) The Court's assessment

(i) General principles

31. The Court reiterates that Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual, and as such its importance is paramount (see *Castravet v. Moldova*, no. 23393/05, § 29, 13 March 2007). Its key

purpose is to prevent arbitrary or unjustified deprivations of liberty (see *Lukanov v. Bulgaria*, judgment of 20 March 1997, *Reports* 1997-II, § 41; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II, § 46; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 461, ECHR 2004-VII).

32. A person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention (see *Yağcı and Sargın v. Turkey*, 8 June 1995, § 52, Series A no. 319-A).

33. 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 (see *Contrada v. Italy*, 24 August 1998, § 54, *Reports* 1998-V; *I.A. v. France*, 23 September 1998, § 102, *Reports* 1998-VII; *Toth v. Austria*, 12 December 1991, § 67, Series A no. 224; and *B. v. Austria*, 28 March 1990, § 42, Series A no. 175).

34. The arguments for and against release must not be "general and abstract" (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 63, ECHR 2003-IX). Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of specific matters outweighing the rule of respect for individual liberty must be convincingly demonstrated (see *Ilijkov v. Bulgaria*, no. 33977/96, § 84 *in fine*, 26 July 2001).

(ii) Application of these principles to the present case

35. The Court firstly notes that there is no dispute between the parties that depriving the applicant of liberty in connection with the proceedings for breach of public peace and order falls within the scope of Article 5 § 3 of the Convention.

36. In this respect the Court would also reiterate that breach of the peace must be regarded as an "offence" within the meaning of Article 5 § 1 (c) of the Convention (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 49, *Reports of Judgments and Decisions* 1998-VII) and that sub-paragraph (c) of Article 5 § 1 must be read in conjunction both with sub-paragraph (a) and with paragraph 3, which forms a whole with it (see *Ciulla v. Italy*, 22 February 1989, § 38, Series A no. 148).

37. The period of the applicant's detention to be taken into consideration began on 9 October 2009, the date of the arrest, and ended on 17 October 2009, when the applicant was released, which in total amounts to eight days.

38. In this respect, and having regard to the importance of the fundamental rights that protect the liberty and physical security of an individual, the Court considers that justification for any period of detention,

no matter how short, must be convincingly demonstrated by the authorities (see *Belchev v. Bulgaria*, no. 39270/98, § 82, 8 April 2004, and *Castravet,* cited above, § 33).

39. The Court notes that in the present case, after the applicant had been arrested on suspicion of causing a breach of public peace and order by attacking two off-duty police officers and inflicting serious injuries to one of them, he was immediately brought before a single judge of the Pula Minor Offences Court who examined the circumstances of the case and ordered the applicant's eight-day detention on the ground of the risk that he would reoffend.

40. In its reasoning, the Pula Minor Offences Court relied on the gravity of the breach of public peace and order and particular circumstances of the case, namely the grave injuries sustained by one of the attacked police officers. The same approach was taken by the High Minor Offences Court which, acting as an appellate court upon the applicant's appeal, endorsed the Pula Minor Offences Court's reasoning.

41. Against the above background, the Court considers, in view of the fact that the applicant was charged with breach of the public peace and order by attacking two off-duty police officers, that the domestic authorities provided relevant and sufficient reasons in justifying the short eight-day period of the applicant's detention.

42. There has accordingly been no violation of Article 5 § 3 of the Convention.

2. Failure of the Constitutional Court to decide the applicant's complaints on merits

(a) The parties' arguments

43. The applicant contended that his right to an effective judicial supervision under Article 5 § 4 the Convention had been violated by the Constitutional Court when declaring his constitutional complaint inadmissible without examination of his complaints on merits.

44. The Government argued that the applicant had lodged an appeal against the decision ordering his detention, and that it had been examined by the High Minor Offences Court on merits. They stressed that the applicant had lodged his constitutional complaint after he had been released from detention and that in such circumstances the Constitutional Court could not have decided his complaints on merits.

(b) The Court's assessment

(i) General principles

45. The Court reiterates that the purpose of Article 5 § 4 is to assure to persons who are arrested and detained the right to judicial supervision of the lawfulness of the measure to which they are thereby subjected (see, *mutatis mutandis*, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 76, Series A no. 12, and *Ismoilov and Others v. Russia*, no. 2947/06, § 145, 24 April 2008). A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but also in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision (see, *mutatis mutandis*, *Stoichkov v. Bulgaria*, no. 9808/02, § 66 *in fine*, 24 March 2005, and *Vachev v. Bulgaria*, no. 42987/98, § 71, ECHR 2004-VIII). The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy (see, *mutatis mutandis*, *Čonka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I).

(ii) Application of these principles to the present case

46. The Court notes that the Constitutional Court declared the applicant's constitutional complaint by which he sought to challenge the lawfulness and grounds for his detention inadmissible solely on the ground that in the meantime the applicant had been released.

47. The Court has already found a violation of Article 5 § 4 of the Convention in several cases against Croatia where the Constitutional Court declared constitutional complaints inadmissible solely on the ground that, in the meantime, a fresh decision had been adopted further extending an applicant's detention. The Court held that the Constitutional Court's failure to decide the merits of constitutional complaints in these circumstances made it impossible to ensure the proper and meaningful functioning of the system for the review of detention, as provided for by the national law (see *Peša v. Croatia*, no. 40523/08, § 126, 8 April 2010; *Hađi v. Croatia*, no. 42998/08, § 47, 1 July 2010; *Getoš-Magdić v. Croatia*, no. 56305/08, § 106, 2 December 2010; *Bernobić v. Croatia*, no. 57180/09, § 93, 21 June 2011; and *Šebalj v. Croatia*, no. 4429/09, § 223, 28 June 2011).

48. The Court notes that the present case differs from the above-mentioned cases in that the Constitutional Court decided on the applicant's constitutional complaint after he had been released.

49. In this respect the Court has already held that a former detainee may well have a legal interest in the determination of the lawfulness of his or her

detention, even after release, as an issue can arise, for example, as regards the "enforceable right to compensation" guaranteed by Article 5 § 5 of the Convention (see *S.T.S. v. the Netherlands*, no. 277/05, § 61, 7 June 2011). Therefore the guarantee of efficiency of the review should continue to apply even thereafter (see *Kormoš v. Slovakia*, no. 46092/06, § 93, 8 November 2011).

50. The Court notes that under section 62 of the Constitutional Court Act, anyone who deems that an individual act of a State body determining his or her rights and obligations, or a suspicion or accusation of a criminal act, has violated his or her human rights or fundamental freedoms may lodge a constitutional complaint against such act and reasonably expect that his complaint would be examined and accordingly decided.

51. Having that in mind, the Court considers that by declaring the applicant's constitutional complaint inadmissible simply because he had no longer been detained, the Constitutional Court deprived it of whatever further effect it might have had which did not satisfy the requirement of effectiveness of the review as required under Article 5 § 4 of the Convention.

52. There has accordingly been a violation of Article 5 § 4 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

53. The applicant also complained under Articles 6, 13 and 17 of the Convention, as well as Article 2 of Protocol No. 7 without any further substantiation of his complaints.

54. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court considers that this part of the application does not disclose any appearance of a violation of the Convention. It follows that it is inadmissible under Article 35 § 3 as manifestly ill-founded and must be rejected pursuant to Article 35 § 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

57. The Government considered the applicant's claim excessive, unfounded and unsubstantiated.

58. Having regard to all the circumstances of the present case, the Court accepts that the applicant has suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Making its assessment on an equitable basis, the Court awards the applicant 2, 500 euros (EUR) in respect of non-pecuniary damage, plus any tax that may be chargeable to him.

B. Costs and expenses

59. The applicant also claimed EUR 30 for postal and other expenses for sending his submissions to the Court.

60. The Government considered that the applicant failed to substantiate his claim for the costs and expenses in any respect.

61. 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. Making its assessment on an equitable basis and in the light of its practice in comparable cases, the Court considers it reasonable to award the applicant the requested sum of EUR 30 plus any tax that may be chargeable to the applicant on these amounts.

C. Default interest

62. 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 complaints concerning the alleged lack of reasoning in ordering the applicant's detention and the alleged flaws in the procedure of challenging his detention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 5 § 3 of the Convention;

3. *Holds* that there has been a violation of Article 5 § 4 of the Convention concerning the failure of the Constitutional Court to decide the applicant's complaints on merits;

4. *Holds*

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

(i) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 30 (thirty 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 6 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Anatoly Kovler
President