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

FIRST SECTION

DECISION

Application no. 23244/16
Mijo JANKOVIĆ against Croatia
and 4 other applications
(see list appended)

The European Court of Human Rights (First Section), sitting on 21 September 2021 as a Chamber composed of:

Péter Paczolay, *President,*
Ksenija Turković,
Krzysztof Wojtyczek,
Alena Poláčková,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges,*

and Renata Degener, *Section Registrar,*

Having regard to the above applications lodged on the various dates indicated in the appended table,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

THE FACTS

1. A list of the applicants is set out in the appendix.

2. The Croatian Government ("the Government") were represented by their Agent, Ms S. Stažnik.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. The first applicant, Mijo Janković (application no. 23244/16)

4. The first applicant alleged that he had been held in inadequate conditions of detention in several prison facilities between 1991 and 2016. In particular, he alleged that the cells in which he had been held were overcrowded and failed to meet basic hygiene and sanitary requirements. Throughout his confinement, he had had less than 3 sq. m of personal space. Moreover, the nutrition had been inadequate, and he had not had access to sufficient recreational, vocational or other out-of-cell activities.

5. In December 2011, July 2012, May and December 2013, May 2014, and May 2016, the first applicant complained to a sentence-execution judge of the relevant County Court about the conditions of his detention. These complaints resulted in the following decisions:

– On 7 March 2012 the sentence-execution judge dismissed as unfounded the applicant's complaint of December 2011;

– On 18 September 2013, in relation to the complaint of July 2012, the sentence-execution judge found a violation of the applicant's rights relating to the insufficient personal space in detention and ordered the prison authorities to remove him from those inadequate conditions. She dismissed the remainder of the complaints. This decision was upheld on appeal by a three-judge panel of the County Court on 1 November 2013;

– On 27 September 2013 the sentence-execution judge dismissed as unfounded the applicant's complaint of May 2013;

– On 10 February 2014 the sentence-execution judge dismissed as unfounded the applicant's complaint of December 2013;

– On 22 August 2014 the sentence-execution judge dismissed as unfounded the applicant's complaint of May 2014. This decision was upheld on appeal by a three-judge panel of the County Court on 10 September 2014;

– On 21 June 2016 the sentence-execution judge dismissed as unfounded the applicant's complaint of May 2016. This decision was upheld on appeal by a three-judge panel of the County Court on 13 July 2016.

6. In the meantime, in December 2012, the first applicant lodged a civil action against the State before the Zagreb Municipal Civil Court (*Općinski građanski sud u Zagrebu*; hereinafter: "the Municipal Court") seeking damages for inadequate conditions of detention.

7. On 9 March 2016 he informed the Municipal Court that he had lodged an application with the Court and asked for a stay of the proceedings pending the outcome of the case before the Court. His request was denied.

8. On 5 April 2018 the Municipal Court dismissed the first applicant's civil action as unfounded. This judgment was confirmed on appeal on 4 July 2019.

9. On 4 October 2019 the first applicant lodged a constitutional complaint before the Constitutional Court (*Ustavni sud Republike Hrvatske*) complaining that he had been placed in inadequate conditions of detention

and about the outcome of the civil proceedings, and the absence of an effective remedy concerning his complaints.

10. The proceedings before the Constitutional Court are still pending.

2. The second applicant, Marko Grgić (application no. 26032/16)

11. The second applicant alleged that he had been held in inadequate conditions of detention in several prison facilities between 2007 and 2014. In particular, he alleged that he had been held in inadequately equipped cells, which were overcrowded and failed to meet basic hygiene and sanitary requirements. Throughout his confinement he had had less than 3 sq. m of personal space. Moreover, the nutrition had been inadequate, and he had not had access to sufficient recreational, vocational or other out-of-cell activities. In addition, he had not been given adequate medical treatment and had not been separated from smokers. Furthermore, he contended that in Lepoglava State Prison, instead of three visits per month, he had been entitled to only two visits per month and his wife had been refused access to visit him five or six times without any justified reason being given.

12. In April 2010 and March 2012, the second applicant complained to a sentence-execution judge of the relevant County Court about the conditions of his detention. These complaints resulted in the following decisions:

– On 21 October 2011, with respect to the applicant's complaint of April 2010, the sentence-execution judge found a violation of his rights relating to the insufficient personal space in detention and ordered the prison authorities to remove him from those inadequate conditions. The judge dismissed the remainder of the complaints. This decision was upheld on appeal by a three-judge panel of the County Court on 16 December 2011;

– On 6 March 2013 the sentence-execution judge dismissed the applicant's complaint of March 2012 on the grounds that he had in the meantime been moved to another prison.

13. On 18 February 2014 the second applicant lodged a civil action against the State in the Municipal Court seeking damages for inadequate conditions of detention. He also complained that his contact with his family had been unjustifiably hindered.

14. On 8 March 2016 the second applicant informed the Municipal Court that he had lodged an application with the Court and asked for a stay of the proceedings pending the outcome of the case before the Court. This request was denied.

15. On 14 January 2020 the Municipal Court dismissed the second applicant's civil action as unfounded. The applicant lodged an appeal against this judgment and the appeal proceedings are currently pending before the relevant County Court.

3. The third applicant, Ivan Časek (application no. 26636/16)

16. The third applicant alleged that he had been held in inadequate conditions of detention in several facilities between 2008 and 2011. In particular, he alleged that the cells in which he had been held were overcrowded and failed to meet basic hygiene and sanitary requirements. Throughout his confinement he had had less than 3 sq. m of personal space. Moreover, the nutrition had been inadequate, and he had not had access to sufficient recreational, vocational or other out-of-cell activities. Furthermore, he complained that he had not been given adequate medical treatment for his hepatitis infection and for his drug addiction.

17. In August, September and October 2011, the third applicant complained to a sentence-execution judge of the relevant County Court about the conditions of his detention. These complaints resulted in the following decisions:

– On 7 September 2011, with regard to the applicant's complaint of August 2011, the sentence-execution judge found a violation of his rights relating to his insufficient personal space detention and ordered the prison authorities to remove him from those inadequate conditions. She dismissed the remainder of the complaints. This decision was upheld on appeal by a three-judge panel of the County Court on 14 September 2011;

– On 6 October 2011 the sentence-execution judge dismissed the applicant's complaint of September 2011. This decision was upheld on appeal by a three-judge panel of the County Court on 12 October 2011;

– On 17 October 2011 the sentence-execution judge dismissed the applicant's complaint of October 2011.

18. On 1 October 2012 the third applicant lodged a civil action against the State in the Municipal Court seeking damages for inadequate conditions of detention.

19. On 22 March 2016 the third applicant informed the Municipal Court that he had lodged an application with the Court and asked for a stay of the proceedings pending the outcome of the case before the Court. This request was denied.

20. On 24 October 2018 the Municipal Court dismissed the third applicant's civil action as unfounded. This judgment was quashed on appeal and the case remitted.

21. On 22 July 2020, in the resumed proceedings, the Municipal Court partially upheld the third applicant's civil action and awarded him 10,000 Croatian kunas (HRK; approximately 1,320 Euros (EUR)) for non-pecuniary damage and HRK 10,500 (approximately EUR 1,400) for costs and expenses of the proceedings. This judgment was upheld on appeal on 15 April 2021.

22. In June 2021 the applicant lodged a constitutional complaint with the Constitutional Court alleging that the civil courts had erroneously dismissed part of his civil action. In parallel, the third applicant and the State

Attorney's Office sought leave to lodge an appeal on points of law before the Supreme Court (*Vrhovni sud Republike Hrvatske*).

23. The proceedings before the Constitutional Court and the Supreme Court are still pending.

4. The fourth applicant, Jozo Jurič (application no. 28279/16)

24. The fourth applicant alleged that he had been held in inadequate conditions of detention in two prison facilities between 2011 and 2013. In particular, he alleged that the cells in which he had been held were overcrowded and failed to meet basic hygiene and sanitary requirements. Throughout his confinement in Zagreb Prison he had had less than 3 sq. m of personal space. In addition, he had not been given adequate medical treatment for his gastritis.

25. On 23 December 2014 the fourth applicant lodged a civil action against the State in the Municipal Court seeking damages for inadequate conditions of detention.

26. On 8 April 2016 the fourth applicant informed the Municipal Court that he had lodged an application with the Court and asked for a stay of the proceedings pending the outcome of the case before the Court. His request was denied.

27. On 19 June 2020 the Municipal Court dismissed the fourth applicant's civil action as unfounded. The applicant lodged an appeal against this judgment and the appeal proceedings are still pending.

5. The fifth applicant, Nedeljko Nikolić (application no. 29622/16)

28. The fifth applicant alleged that he had been held in inadequate conditions of detention in two prison facilities between 2011 and 2014. In particular, he alleged that the cells in which he had been held were overcrowded and failed to meet basic hygiene and sanitary requirements. Throughout his confinement in Zagreb Prison he had had less than 3 sq. m of personal space. In addition, he had not been given adequate medical treatment.

29. In August 2013 the fifth applicant complained to a sentence-execution judge of the relevant County Court about the conditions of detention in Sisak Prison. On 15 November 2013 the judge found a violation of the applicant's rights relating to his insufficient personal space and ordered the prison authorities to remove him from those inadequate conditions. The judge dismissed the remainder of the complaints. This decision was upheld on appeal by a three-judge panel of the County Court on 2 December 2013.

30. On 18 February 2014 the fifth applicant lodged a civil action against the State in the Municipal Court seeking damages for inadequate conditions of detention.

31. On 8 April 2016 the fifth applicant informed the Municipal Court that he had lodged an application with the Court and asked for a stay of the proceedings pending the outcome of the case before the Court. His request was denied. He had then made a similar request in July 2019, which he then withdrew.

32. The civil proceedings are still pending.

B. Relevant domestic law and practice

33. The relevant domestic law and practice are set out in *Ulemek v. Croatia*, no. 21613/16, §§ 38-57, 31 October 2019.

34. On 4 February 2020, in the case no. U-III-2757/2018 (published in the Official Gazette No. 26/2020 of 10 March 2020), the Constitutional Court examined the case of an appellant, who had been detained in Zagreb Prison, who, on an unspecified date in 2018, lodged a constitutional complaint against a civil court judgment dismissing his civil action for damages concerning allegations of inadequate conditions of detention in that prison. In his constitutional complaint the appellant relied on Articles 14 (equality before the law), 16 (restriction on rights), 23(1) (prohibition of ill-treatment), 25(1) (protection of detainees), 26 (equality before the authorities) and 29 (right to a fair trial) of the Constitution and Article 3 of the Convention.

35. The Constitutional Court considered that the case should be examined under Articles 23(1) and 25(1) of the Constitution (see *Ulemek*, § 38, for the text of these provisions) and Article 3 of the Convention, and declared it inadmissible. The relevant parts of the decision read as follows:

> "3. The constitutional complaint [against the civil courts' judgment] is inadmissible because one of the conditions for lodging a constitutional complaint has not been met, namely the relevant legal remedies had not been exhausted.
>
> In particular, before lodging a civil action for damages, during his stay in the prison the appellant had not used the remedy for the protection of his rights as provided by the Enforcement of Prison Sentences Act ... and therefore the relevant remedy concerning his constitutional complaint under Articles 23 and 25 of the Constitution, and Article 3 of the Convention, was not exhausted.
>
> This decision of the Constitutional Court represents a departure from its earlier case-law [see paragraph 27 above] for which the relevant reasons are provided below.
>
> ...
>
> *General principles*
>
> 7. The Constitutional Court begins from noting that the civil action for damages is only one aspect of the overall system of effective remedies for prisoners concerning the conditions of their detention. The first aspect of the overall system [of remedies] concerns the preventive remedy under the Enforcement of Prison Sentences Act which aims at improving the conditions of detention of prisoners: in other words, [it aims at] bringing the ongoing violation relating to inadequate conditions of detention to an end. [On the other hand], the civil action for damages concerning inadequate

conditions of detention is the other part of the overall [system of remedies] (the compensatory remedy).

8. As regards the effectiveness of remedies [in the context of conditions of detention], the Constitutional Court accepts the general principles developed in the case-law of the European Court of Human Rights under Article 13 of the Convention [see further the relevant principles set out in *Ulemek*, §§ 71, 83-86] ...

11. The Constitutional Court notes that, in accordance with the Enforcement of Prison Sentences Act, prisoners have at their disposal an effective remedy capable of bringing to an end breaches of their rights guaranteed under Articles 23(1) and 25(1) of the Constitution and Article 3 of the Convention ... In particular, prisoners have a possibility to use a complaint [before the prison administration] under Section 15 of the Enforcement of Prison Sentences Act and a complaint to the sentence-execution judge under Section 17 of the Enforcement of Prison Sentences Act.

In this connection, the Constitutional Court stresses the importance of the powers granted to the sentence-execution judge under [the cited Act], which represent the expression of the State's duty to ensure adequate conditions of detention. Having regard to this duty, it is sufficient that the prisoner raises an arguable claim that the conditions of his or her detention or treatment in prison are contrary to the requirements of Articles 23(1) or 25(1) of the Constitution, or Article 3 of the Convention, and then it is for the State authorities to examine such a claim and to establish the facts. These are in fact the powers vested in the sentence-execution judge.

On the other hand, the civil court which is called upon to examine an action for the compensation of damage does not have the inquisitorial powers and its [examination of the case] is limited to the parties' proposals and the rules on the burden of proof, according to which it is exclusively on the claimant to prove his or her claim. Having regard to the special nature of the duty which the State has towards prisoners, the civil proceedings are not an adequate legal remedy for the protection of prisoners from inhumane conditions [of detention] or conduct [by the prison administration]. Moreover, the civil proceedings are not adequate to put an end to the [ongoing] breaches. In addition, the sentence-execution judge has the duty to act in a manner in which, according to the relevant principles, an *effective* protection of the prisoners' rights and interests is guaranteed (Section 44(2) of the Enforcement of Prison Sentences Act), which is achieved, *inter alia*, through the short time-limits for the taking of the actions [by the sentence-execution judge] ...

12. As regards the civil proceedings for damages concerning conditions of detention, the Constitutional Court stresses that appellants, who had not used the preventive remedy under the Enforcement of Prison Sentences Act, cannot raise before the Constitutional Court in their constitutional complaints, lodged against the civil courts' judgments concerning their actions for the compensation of damage for inadequate conditions of detention, the complaints under Articles 23(1) and 25(1) of the Constitution.

While the court in the civil proceedings for damages relating to the breaches of personality rights concerning inadequate conditions of detention establishes the existence of the legal conditions for the compensation of damage, the subject matter of the Constitutional Court's assessment relating to the conditions of detention ... is different and goes beyond the scope of the judicial assessment conducted in the civil proceedings for damages.

13. When the Constitutional Court examines the appellants complaints under Articles 23(1) and 25(1) of the Constitution and Article 3 of the Convention, the focus of its assessment is not on the civil proceedings for damages but on the conditions in which the appellant served or serves his or her sentence of imprisonment and the manner in which the State responded to his or her complaints [in this respect].

If the appellant failed to give an opportunity to the State to respond to such a complaint, namely to protect him or her from inhumane conditions of imprisonment in breach of Articles 23(1) and 25(1) of the Constitution and Article 3 of the Convention, he or she cannot raise that issue in a constitutional complaint lodged against the civil courts' judgment concerning his or her action for the compensation of damage [relating to the allegedly inadequate conditions of detention].

Application of these principles to the present case

14. ... The inspection of the [civil court's] case file shows that the appellant did not use the remedies under the Enforcement of Prison Sentences Act; he did not lodge a complaint [before the prison administration] under Section 15 of the Enforcement of Prison Sentences Act, nor did he lodge a complaint [to the sentence-execution judge] under Section 17 of the Enforcement of Prison Sentences Act.

Given that he spent in the prison sixty-five days, the Constitutional Court considers that the appellant had sufficient time to use the remedies under the Enforcement of Prison Sentences Act.

In view of the above, the Constitutional Court finds that the appellant failed to use the relevant legal remedy, namely the effective remedy for the protection of his constitutional rights under Articles 23(1) and 25(1) of the Constitution, and thus he cannot successfully raise these complaints in the constitutional complaint.

15. It was therefore decided [to declare the constitutional complaint inadmissible]."

36. A research on the Constitutional Court's online database of jurisprudence shows that the Constitutional Court has followed the above-cited leading decision in some other cases before it:

– Where appellants had duly used the preventive remedy with respect to the relevant period of imprisonment (in so far as it lasted more than 30 days) in allegedly inadequate conditions of detention, and then subsequently lodged a civil action for damages before lodging their constitutional complaints, the Constitutional Court examined their complaints on the merits as regards the issues covered by the use of the preventive remedy, and declared inadmissible the complaints concerning issues that had not been subject to examination in the context of the use of the preventive remedy (see, for instance, U-III-1655/2018 of 30 April 2020; U-III-3643/2018 of 25 June 2020; U-III-1359/17 of 7 July 2020; U-III-4307/2018 of 9 September 2020; U-III-3678/2020 of 22 September 2020; U-III-203/2020 of 15 October 2020; U-III-4995/2016 of 12 November 2020; U-III-2774/2018 of 10 December 2020; U-III-4209/2017 of 1 April 2021);

– Where appellants had not at all used the preventive remedy concerning allegations of inadequate conditions of detention, but then subsequently lodged a civil action for damages before lodging their constitutional complaints in that respect, the Constitutional Court declared their

complaints inadmissible for non-exhaustion of the relevant preventive remedy (see, for instance, U-III-1208/2019 of 25 June 2020; see also cases following the same approach but raising some other issues unrelated to conditions of detention, U-III-4656/2016 of 15 July 2020; U-III-4685/2018 of 16 July 2020; U-III-1090/2019 of 17 September 2020; U-III-1358/2017 of 4 March 2021; U-III-4835/2020 of 18 March 2021).

COMPLAINTS

37. The applicants complained, under Articles 3 and 13 of the Convention, that they had been held in inadequate conditions of detention and that there had been no effective domestic remedy in that connection.

38. The second applicant also complained, under Article 8 of the Convention, about unjustified restrictions on his family visits.

THE LAW

A. Joinder of the applications

39. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single decision.

B. Alleged violation of Articles 3, 8 and 13 of the Convention

40. Complaining of inadequate conditions of detention, and lack of an effective domestic remedy in that respect, the applicants relied on Articles 3 and 13 of the Convention. The second applicant also relied on Article 8 of the Convention complaining about unjustified restrictions on family visits in detention.

41. The cited provisions of the Convention read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8

"1. Everyone has the right to respect for his ... family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

1. The parties' submissions

(a) The Government

42. The Government argued that the applicants had failed to exhaust properly the available and effective domestic remedies in relation to their allegations of inadequate conditions of detention. In particular, the fourth applicant had never lodged a complaint with the sentence-execution judge and the other applicants had done so only in respect of certain periods of their imprisonment, and they had later failed to challenge before the Constitutional Court the decisions of the sentence-execution judges dismissing their complaints. In addition, the applicants had not brought their complaints before the Court within six months following the termination of the proceedings in their respective cases before the sentence-execution judges. As to the applicants' civil actions for damages, the Government argued that, in so far as the cases were pending before the civil courts, the applications to the Court had been premature. The Government stressed that a civil action for damages was an effective remedy for the protection of prisoners' rights and that the applicants should have properly availed themselves of that avenue of redress before lodging their applications with the Court.

43. As regards the new developments in the Constitutional Court's case-law, the Government argued that the decision no. U-III-2757/2018 of 4 February 2020 (see paragraphs 34-36 above) had been in compliance with the Court's case-law in *Ulemek* and that the Constitutional Court had construed effective rules on the exhaustion of remedies in this context.

(b) The applicants

44. The applicants argued, with regard to the preventive remedy, that, in general, this was not an effective remedy for complaints concerning inadequate conditions of detention. The applicants further contended that a civil action for damages had proved to be an ineffective compensatory remedy for inadequate conditions of detention. In particular, it could be brought only after an onerous procedure to seek a friendly settlement with the State Attorney's Office, in practice it had provided no relief to prisoners, and the civil courts had made claimants bear excessive procedural costs. A further complaint in this connection before the Constitutional Court would also be ineffective. There had therefore been no reason for them to await the termination of the domestic proceedings in order to bring their complaints

before the Court. Moreover, in the applicant's view, no issue arose as regards their compliance with the six-month time-limit.

45. As regards the new developments in the Constitutional Court's case-law in relation to decision no. U-III-2757/2018 of 4 February 2020 (see paragraphs 34-36 above), the applicants argued that the Constitutional Court had changed its earlier established practice without any prior explanation or notice. Moreover, this new case-law applied retroactively, which was contrary to the Constitution and the principle of legal certainty in the Court's case-law. This all finally rendered the domestic remedies ineffective.

2. The Court's assessment

46. The Court considers that it is not necessary to address all the Government's objections as the applicants' complaints are in any event inadmissible for the reasons set out below.

(a) Domestic remedies concerning allegations of inadequate conditions of detention assessed in *Ulemek*

47. In its recent leading *Ulemek* judgment (cited above), the Court elaborated extensively on the different aspects of its case-law concerning the effectiveness of remedies and compliance with the six-month rule in conditions of detention cases (§§ 81-92).

48. In this connection, the Court noted that the Croatian legal system provided for both preventive and compensatory remedies in respect of inadequate prison conditions under Articles 3 and/or 8 of the Convention: the preventive remedy was exercised by making a complaint to the prison administration and/or the sentence-execution judge directly, while the compensatory remedy related to the possibility of obtaining damages from the State in proceedings before the relevant civil courts. In the event of an unfavourable outcome after using the preventive and/or compensatory remedy, applicants were able to lodge a constitutional complaint with the Constitutional Court (Ibid., §§ 93-110).

49. Following a careful examination of the different practical aspects in the operation of these remedies (preventive, compensatory and the constitutional complaint) at the relevant time, the Court confirmed its earlier case-law as to the existence of effective remedies in Croatia concerning allegations of inadequate conditions of detention (Ibid., § 111).

50. On the facts of the case in *Ulemek* (§§ 112-118), the Court noted that the applicant had served his prison sentence in two prisons, where the situation differed in terms of the prison regime and conditions of detention. The Court therefore stressed the following:

> "114. According to the Court's case-law, this would have in general required the applicant to bring to the Court any possible complaints he might have had concerning the conditions of his confinement within six months following the final decision in the

process of exhaustion of the domestic remedies and, if such remedies did not properly operate in the particular circumstances of the case, six months following his removal from the particular adverse conditions of detention or detention regime.

115. Thus, the applicant was normally required to use the preventive remedy, namely to complain to the prison administration and/or the sentence-execution judge directly and, in case of an unfavourable outcome, bring his complaints first before the Constitutional Court and then, if necessary, before the Court within a period of six months following his receipt of the Constitutional Court's decision. On the other hand, if the use of the preventive remedy was successful, the applicant should have used the compensatory remedy by lodging a civil action for damages and then, in case he was dissatisfied with the outcome, by bringing his complaint in that respect before the Constitutional Court and afterwards, if needed, before the Court within a period of six months following his receipt of the Constitutional Court's decision ..."

51. However, the Court noted that with regard to the conditions of his detention in one prison, the applicant had not availed himself of the preventive remedy before the prison administration and/or the sentence-execution judge, and that he had not properly used the preventive judicial remedy concerning his stay in the other prison. Nevertheless, after his release the applicant had initiated the civil proceedings seeking damages for the allegedly inadequate conditions of detention in both prisons. Following the unfavourable outcome of those proceedings he had lodged a constitutional complaint and the Constitutional Court examined and dismissed it on the merits, in accordance with its, at the time relevant, case-law (see paragraph 34 above). After the dismissal of his constitutional complaint, the applicant lodged an application with the Court within six months following the receipt of the Constitutional Court's decision (Ibid., §§ 116-117).

52. In these circumstances, the Court concluded as follows:

"118. ... [A]n issue may be raised as regards the applicant's proper exhaustion of the relevant domestic remedies (preventive and compensatory) for some of the periods of his imprisonment, as required under the Court's case-law, and consequently with his compliance with the six-month time-limit for bringing his complaints to the Court. However, it should be noted that the Constitutional Court, as the highest court in the country, examined on the merits the applicant's complaints of inadequate conditions of detention for the overall period of his confinement in Zagreb Prison and Glina State Prison, and the applicant duly lodged his application with the Court after obtaining that decision of the Constitutional Court ... The Court thus considers that, as the Constitutional Court's case-law currently stands, the applicant's complaints cannot be dismissed for failure to exhaust domestic remedies and/or non-compliance with the six-month time limit ..."

(b) The post *Ulemek* developments

53. Following the adoption of *Ulemek*, there would not appear to be any changes in the operation of the preventive (before the prison administration and/or the sentence execution judge directly) or compensatory (civil action for damages) remedies in Croatia which the Court did not already assess in that judgment. As the *Ulemek* assessment also encompassed the issues in

the operation of these remedies raised by the applicants in the present case (see paragraph 45 above), the Court finds no reason to revisit this assessment and confirms the effectiveness of the preventive and compensatory remedies at issue.

54. However, after the adoption of *Ulemek* there have been changes in the Constitutional Court's case-law (see paragraph 35 above; § 3 *in fine* of the Constitutional Court's decision). In the decision no. U-III-2757/2018, adopted on 4 February 2020, the Constitutional Court established the principle according to which an appellant cannot successfully raise his or her complaints of inadequate conditions of detention in a constitutional complaint after the use of a civil action for damages if he or she has not first properly exhausted the preventive remedy during his stay in detention.

55. This contrasts the Constitutional Court's earlier position – applicable at the time of the *Ulemek* assessment – according to which for the purposes of the exhaustion requirement before lodging a constitutional complaint with it, appellants had not been required first to use the preventive remedy if they later availed themselves of a civil action for damages (the compensatory remedy) before the relevant civil court concerning allegations of inadequate conditions of detention (see, for further details of this case-law, *Ulemek*, §§ 39 and 51-54, and paragraph 51 above).

56. The question, therefore, now before the Court is whether the constitutional complaint is still an effective remedy which the applicants are required to exhaust for the purpose of Article 35 § 1 of the Convention, it being understood that the answer to this question extends beyond the sole interests of the applicants in the instant case.

57. In making this assessment, the Court finds it important to reiterate that it is not its intention to question the decisions of the Constitutional Court as to the relevant criteria for assessing the admissibility of individual constitutional complaints (compare *Arrozpide Sarasola and Others v. Spain*, nos. 65101/16 and 2 others, § 104, 23 October 2018). This is a matter in the sole domain of the Constitutional Court and in the context of which legal practices and case-law may legitimately evolve (see, *inter alia*, *Kušić and Others v. Croatia* (dec.), no. 71667/17, § 87, 10 December 2019).

58. The evolution of the Constitutional Court's case-law in the decision no. U-III-2757/2018 is substantively in line with the Court's case-law in *Ulemek* concerning the complementary nature of the preventive and compensatory remedies in the context of conditions of detention (see *Ulemek*, § 83 *et seq.*, and paragraphs 35 and 49 above). The effectiveness of the remedy before the Constitutional Court cannot therefore be called into question from the perspective of the manner in which the Constitutional Court construed the duty of exhaustion of the preventive and compensatory remedies available before the lower authorities.

59. However, the Court shares the applicants' concerns as regards the retroactive nature of the Constitutional Court's new case-law. The leading

decision in the case no. U-III-2757/2018 was adopted in February 2020 with regard to a case introduced in 2018 (see paragraph 34 above). While the same approach seems to have been later followed in a certain number of other cases (see paragraph 36 above), the particular details of these cases are not known to the Court and the parties failed to raise or comment on them in their submissions. In consequence, the Court is unable to draw any conclusive findings in that respect.

60. The Court has held that in cases like the present one, where the remedy in question was the result of interpretation by the courts, it normally takes six months for such a development of the case-law to acquire a sufficient degree of legal certainty before the public may be considered to be effectively aware of the domestic decision which had established the remedy and the persons concerned be enabled and obliged to use it (see *Kirinčić and Others v. Croatia*, no. 31386/17, § 115, 30 July 2020, with further references).

61. Having regard to the fact that the decision no. U-III-2757/2018 was published on 10 March 2020 (see paragraph 34 above), and to the above finding as regards the substance of that decision (see paragraph 58 above), it follows that no issue as regards the effectiveness of the constitutional complaint arises for those applicants who would be in a position to use the relevant remedies after 10 September 2020. Such applicants, in order to comply with the relevant domestic requirements of exhaustion of the domestic remedies (see, *inter alia*, *Agbovi v. Germany* (dec.), no. 71759/01, 25 September 2006), would need to use the relevant remedies in the manner indicated in the decision no. U-III-2757/2018 and then, in the event of an unfavourable outcome, lodge a constitutional complaint with the Constitutional Court before bringing their complaints to the Court (see *Ulemek*, cited above, § 104).

62. On the other hand, in the absence of a transitionary period or any indication as regards the manner in which the decision no. U-III-2757/2018 would apply in time, the retrospective application of the admissibility criteria for a constitutional complaint established in that decision raises an issue of effectiveness of the constitutional complaint for all applicants who would use the compensatory remedy but have not used the preventive remedy before 10 September 2020, and are no longer in a position to do so with respect to the particular conditions of detention.

63. As already noted, by relying on the earlier case-law of the Constitutional Court, the applicants in such situations could have expected that the Constitutional Court would examine their complaints of inadequate conditions of detention, irrespective of the fact that they had not first properly used the preventive remedy, if they later used the compensatory remedy before the civil courts (see paragraph 55 above). Thus, for these applicants, the retrospective application of the Constitutional Court's leading case-law raises an issue of foreseeability, and thus effectiveness, of

the constitutional complaint as a remedy in the conditions of detention context (compare *Broca and Texier-Micault v. France*, nos. 27928/02 and 31694/02, § 20, 21 October 2003, where the Court held that, as a matter of fairness, an applicant cannot be required to use a remedy newly incorporated into the judicial system of a State following a change in case-law without a certain transitionary period; see also *Arrozpide Sarasola*, cited above, § 106 *et seq.*, where the Court found that the Constitutional Court's unforeseeable subsequent case-law rendered the relevant constitutional remedy ineffective and deprived the applicants of their right of access to a court).

64. However, despite these concerns as regards the manner in which the Constitutional Court's case-law in the decision no. U-III-2757/2018 is applied, the Court would find it inappropriate, at this stage, to consider the constitutional complaint to be an ineffective remedy due to the retroactive application of that case-law. In this connection, the Court is in particular mindful of the evolving nature of the Constitutional Court's case-law in this context and the substantive adequacy of the findings in the decision no. U-III-2757/2018 (see paragraphs 58 and 61 above).

65. As the Court has often stated, the primary responsibility for protecting the rights set out in the Convention lies with the domestic authorities (see *Hutchinson v. the United Kingdom* [GC], no. 57592/08, § 71, 17 January 2017). It has also constantly emphasised that before bringing complaints against Croatia to it, in order to comply with the principle of subsidiarity applicants are in principle required to afford the Constitutional Court, as the highest court in Croatia, the opportunity to remedy their situation (see *Pavlović and Others v. Croatia*, no. 13274/11, § 32, 2 April 2015).

66. That said, the Court would be prepared to change its approach as to the effectiveness of the remedy in question for applicants in the situation as described above in paragraph 62, should the practice of the Constitutional Court show that constitutional complaints are continually being refused on the basis of the retroactive application of the case-law in the decision no. U-III-2757/2018, without the elaboration of a transitionary period or any indication as regards the manner in which that case-law would apply in time. Any future review of the Court will involve determining whether the manner in which the Constitutional Court's case-law is applied is in conformity with the relevant Convention standards.

(c) Application of the above findings to the present cases

67. Having regard to the above considerations, and the fact that the present applicants' cases are pending either before the civil courts (see paragraphs 15, 27 and 32 above) or before the Constitutional Court (see paragraphs 10 and 23 above), the Court finds that their complaints under

Articles 3 and/or 8 of the Convention are premature and must be rejected under Article 35 §§ 1 and 4 of the Convention.

68. With regard to the applicants' complaint under Article 13 of the Convention, the Court finds, having regard to the reasoning and conclusions set out above, that this complaint is manifestly ill-founded. It must therefore be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

69. The Court would also stress that it remains open for the applicants, following the termination of the relevant proceedings instituted by them at the domestic level, and the exhaustion of the domestic remedies in this respect, to bring their complaints before the Court if they still consider themselves to be victims of the violations of the Convention in relation to the conditions of their detention and the lack of an effective remedy in that respect.

For these reasons, the Court, unanimously,

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 30 September 2021.

{signature_p_2}

Renata Degener
Registrar

Péter Paczolay
President

Appendix

No.	Application no.	Lodged on	Applicant Year of Birth	Represented by
1.	23244/16	20/04/2016	**Mijo JANKOVIĆ** 1969	Lidija HORVAT
2.	26032/16	03/05/2016	**Marko GRGIĆ** 1962	Lidija HORVAT
3.	26636/16	06/05/2016	**Ivan ČASEK** 1982	Lidija HORVAT
4.	28279/16	16/05/2016	**Jozo JURIČ** 1978	Lidija HORVAT
5.	29622/16	23/05/2016	**Nedeljko NIKOLIĆ** 1975	Lidija HORVAT