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

FIRST SECTION

DECISION

Application no. 29998/15
Zsolt Tamás HERNADI
against Croatia

The European Court of Human Rights (First Section), sitting on 3 September 2019 as a Chamber composed of:

Krzysztof Wojtyczek, *President,*
Ksenija Turković,
Aleš Pejchal,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski,
Raffaele Sabato, *judges,*
and Abel Campos, *Section Registrar,*

Having regard to the above application lodged on 15 June 2015,

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

Having regard to the comments submitted by the Hungarian Government,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Zsolt Tamás Hernádi, is a Hungarian national, who was born in 1960 and lives in Kisoroszi (Hungary). He was represented before the Court by Mr M. O'Kane, a lawyer practising in London.

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

A. The circumstances of the case

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

1. Background to the case

4. The applicant is the Chairman and Chief Executive Officer ("CEO") of the Hungarian national oil and gas company MOL.

5. In 2003, in the context of the privatisation of the Croatian national oil company INA-Industrija Nafte d.d. (hereinafter "INA"), MOL became the strategic investor and shareholder in INA. Following a further agreement in 2009, MOL formally assumed management control over INA.

6. In June 2011 the Croatian State Attorney's Office for the Suppression of Corruption and Organised Crime (*Ured za suzbijanje korupcije i organiziranog kriminaliteta*; hereinafter "the State Attorney's Office") opened an investigation in respect of the former Croatian Prime Minister I.S., the former Vice Prime Minister and Minister of the Economy D.P., and the applicant, in connection with suspected bribery in relation to the business agreement of 2009 by which MOL assumed control over INA.

7. On 15 June 2011 the State Attorney's Office requested legal assistance from the Hungarian authorities to serve the relevant documents from the investigation on the applicant and to question him as a suspect. The State Attorney's Office relied on the 1959 European Convention on Mutual Assistance in Criminal Matters and the 1968 Agreement on Mutual Legal Exchange between the then Socialist Federal Republic of Yugoslavia and the People's Republic of Hungary.

8. On 14 July 2011 the Hungarian Prosecutor General's Office informed the State Attorney's Office that its request could not be executed on the grounds that its execution would threaten Hungarian national security interests. The Hungarian Prosecutor General's Office also asked to be provided with the relevant evidence from the file as the alleged bribery constituted a criminal offence under Hungarian law and thus needed to be investigated.

9. Further to the Hungarian reply, on 21 September 2011 a meeting between the respective prosecution services from Croatia and Hungary was held in Zagreb. At the meeting, the Croatian authorities informed their Hungarian counterparts about the developments in the investigation and gave them copies of the relevant part of the investigation file. They also announced that there would be another request for mutual legal assistance.

10. On 2 December 2011 the State Attorney's Office for the second time requested legal assistance from the Hungarian authorities in order to question the applicant as a suspect.

11. On 6 February 2012 the Hungarian Prosecutor General's Office refused to execute the request, again citing reasons of national security. It

also informed its Croatian counterparts that an investigation had been conducted in Hungary and that the investigation had not established that the impugned conduct related to the 2009 INA-MOL agreement constituted a criminal offence. In the course of the investigation, the applicant was questioned as a witness.

12. On 12 March 2012 the State Attorney's Office sent a third request seeking mutual legal assistance from the Hungarian authorities, this time asking that the applicant be summoned for questioning in Zagreb.

13. On 9 May 2012 the Hungarian authorities refused this request citing reasons of national security and the need to ensure the proper functioning of MOL.

14. On 7 December 2012 the State Attorney's Office discontinued the investigation in respect of the applicant on the grounds that he was not available to the Croatian authorities and thus, at that stage, further proceedings could not be conducted.

15. On 1 July 2013 Croatia became a full member of the European Union (EU).

16. On 4 July 2013 the State Attorney's Office re-opened the investigation in respect of the applicant on the grounds that following Croatia's accession to the EU different possibilities had opened up to ensure the applicant's participation in the proceedings.

17. On 9 July 2013 the State Attorney's Office sent a fourth request seeking mutual legal assistance from the Hungarian authorities, asking that the applicant be summoned for questioning in Zagreb.

18. On 12 September 2013 the Hungarian Prosecutor General's Office refused to execute the request, again citing reasons of national security.

19. In the meantime, on 11 July 2013, a certain I.B., who is a shareholder of MOL, lodged a criminal complaint against the applicant before the relevant Hungarian prosecution office for causing damage to MOL by allegedly engaging in bribery for the conclusion of the 2009 INA-MOL agreement.

20. On 16 July 2013 the Hungarian prosecution office rejected this criminal complaint on the grounds that, as already established (see paragraph 11 above), the impugned conduct did not constitute a criminal offence.

21. I.B. challenged this decision before the higher prosecution office but her complaint was dismissed. She was also informed that she could pursue a private prosecution before the relevant court.

22. In September 2013 I.B. brought a private criminal action against the applicant in the Budapest Metropolitan Court. On 26 May 2014 that court acquitted the applicant on the grounds that it had not been established that he had committed a criminal offence.

23. I.B. appealed against this judgment before an appeal court in Budapest. On 3 December 2014 that court dismissed the private case against

the applicant on the grounds that his impugned act should be characterised as bribery, an offence for which a private prosecution could not be instituted. It also stressed that the fact that I.B. had been erroneously advised to the contrary by the prosecution services (see paragraph 21 above) was of no relevance in this respect.

24. Meanwhile, I.B. lodged another criminal complaint against the applicant concerning the same facts and on 1 June 2015 the relevant Hungarian prosecution office rejected it, referring to its previous decision (see paragraph 20 above).

2. European arrest warrants against the applicant

25. On 26 September 2013 the State Attorney's Office asked the Zagreb County Court (*Županijski sud u Zagrebu* – hereinafter the "County Court") to order the applicant's pre-trial detention on the grounds that he was absconding from justice. It pointed out that the Croatian authorities had not been able to contact the applicant but that it followed from the statements of a number of witnesses and the media reports, including the applicant's media interviews, that he had been aware of the criminal investigation against him and his duty to appear for questioning.

26. On 27 September 2013 the County Court ordered the applicant's pre-trial detention as requested by the State Attorney's Office. A duty lawyer assigned to the applicant in Croatia challenged this decision arguing, in particular, that he had never been properly summoned to appear before the Croatian authorities and thus it could not be concluded that he was evading justice. This appeal was never examined.

27. On the basis of the detention order, on 30 September 2013 the State Attorney's Office issued an international arrest warrant in respect of the applicant. On 1 October 2013 that Office also issued a European arrest warrant ("EAW") for the applicant's arrest and surrender to Croatia.

28. On 7 October 2013 the Budapest Metropolitan Court refused to give effect to the EAW on the grounds that the investigation into the same facts had already been conducted in Hungary (see paragraph 11 above), which was one of the grounds on which an EAW could be refused.

29. On 31 March 2014 the State Attorney's Office indicted the applicant in the County Court on charges of bribery. It also asked that the applicant be tried *in absentia* on the grounds that he was not available to the Croatian authorities. On 10 June 2014 the County Court confirmed the indictment and ordered the applicant's trial *in absentia*. The order on the trial *in absentia* was confirmed by the Supreme Court (*Vrhovni sud Republike Hrvatske*) on 18 July 2014.

30. In the meantime, on 9 June 2014, the applicant's lawyers in Croatia asked for the lifting of the detention order of 27 September 2013 (see paragraphs 26 above and 68 below). They argued, in particular, that the applicant had never been properly summoned to appear before the Croatian

authorities. On 10 June 2014 the County Court refused this request on the grounds that the detention order had been properly issued. This decision was confirmed by the Supreme Court on 18 July 2014.

31. Following the confirmation of the indictment, on 15 December 2015 the County Court issued an EAW in respect of the applicant in order to ensure his surrender and presence at the trial.

32. On 27 January 2017 the 2015 EAW was sent directly to the Hungarian authorities.

33. On 5 April 2017 an official of the Hungarian Ministry of Justice sent an email to the contact person in the County Court informing her that there was no reason for the Hungarian authorities to reconsider their decision on the earlier EAW (see paragraphs 26-27 above) simply because in the meantime an indictment had been lodged in the relevant court.

34. According to the Hungarian Government, the Croatian authorities issued a third EAW on 28 June 2017. This EAW is substantially the same as that of 15 December 2015 but contains some further details and clarifications concerning the applicant's case.

35. In the meantime, on 16 May 2017, the County Court referred a request for a preliminary ruling before the Court of Justice of the European Union ("CJEU") in connection with Hungary's refusal to execute the initial EAW with reference to the fact that an investigation, in which the applicant had only participated as a witness, had been closed, and to examine an EAW issued after the opening of the criminal proceedings against the applicant in that court.

36. On 25 July 2018 the CJEU in the case C-268/17 found as follows:

> "1. Article 1(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as requiring the judicial authority of the executing Member State to adopt a decision on any European arrest warrant forwarded to it, even when, in that Member State, a ruling has already been made on a previous European arrest warrant concerning the same person and the same acts, but the second European arrest warrant has been issued only on account of the indictment, in the issuing Member State, of the requested person.
>
> 2. Article 3(2) and Article 4(3) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that a decision of the Public Prosecutor's Office, such as that of the Hungarian National Bureau of Investigation in question in the main proceedings, which terminated an investigation opened against an unknown person, during which the person who is the subject of the European arrest warrant was interviewed as a witness only, without criminal proceedings having been brought against that person and where the decision was not taken in respect of that person, cannot be relied on for the purpose of refusing to execute that European arrest warrant pursuant to either of those provisions."

37. Following the CJEU's judgment, the Budapest-Capital Regional Court examined whether the requirements for the applicant's surrender pursuant to the EAW issued by the Zagreb County Court on 15 December

2015 were met. It found that the applicant could not be surrendered to Croatia as there were substantial grounds for believing that his surrender would give rise to a grave violation of his right to a fair trial and also because his surrender was barred by the application of the *ne bis in idem* principle related to the case brought against him in Hungary by I.B. (see paragraphs 19-23 above).

3. Processing of the international warrant/EAWs against the applicant

(a) INTERPOL

38. On the basis of the international arrest warrant and the 2013 EAW (see paragraph 27 above), on 1 October 2013 INTERPOL Zagreb asked the INTERPOL General Secretariat to issue a Red Notice against the applicant (international alert indicating that the applicant is wanted for prosecution).

39. The request was accepted and a Red Notice was issued on 2 October 2013.

40. After the Red Notice was issued, the applicant complained to the INTERPOL Commission for the Control of Files ("CCF") that the criminal prosecution against him had been politically motivated and that his extradition would breach the *ne bis in idem* principle.

41. As a result of the applicant's complaint, the CCF issued a recommendation to the INTERPOL General Secretariat to suspend the diffusion of the Red Notice through the INTERPOL channels. In the period between February 2014 and February 2015 the Red Notice was suspended. It was again activated when the Croatian authorities provided further details and clarifications concerning the applicant's case.

42. In November 2015, on the basis of another complaint by the applicant, the INTERPOL General Secretariat again suspended the diffusion of the Red Notice through the INTERPOL channels.

43. In December 2015 the CCF found that there had been no breaches of the relevant INTERPOL regulations by the use of its channels for the diffusion of the Red Notice. However, it would appear that the Red Notice was not reinstated in the INTERPOL system.

44. In March 2016 the INTERPOL General Secretariat asked the Croatian authorities to provide further clarifications and assurances concerning the applicant's case. The Croatian authorities provided such details and assurances but the Hungarian authorities opposed the use of the INTERPOL channels for the diffusion of a Red Notice concerning the applicant.

45. Eventually, the INTERPOL Executive Committee decided that the Red Notice would not be diffused through the INTERPOL channels on the grounds that the two countries needed to resolve their dispute bilaterally. It also stressed that the *ne bis in idem* issue and the EAW needed to be

resolved before the relevant EU authorities. This decision was confirmed by the INTERPOL General Assembly in October 2016.

46. In November 2018 the INTERPOL General Secretariat, on the basis of the Executive Committee's instruction, decided to diffuse the Red Notice through the INTERPOL channels but not to publish it on the INTERPOL website.

(b) EU communication channels

47. On 29 July 2014 the Croatian authorities communicated the 2013 EAW through the EU communication network EUROPOL Secure Information Exchange Network Application ("SIENA").

48. According to the Government, fourteen countries (Cyprus, the Czech Republic, Estonia, Germany, Greece, Ireland, Italy, Latvia, Luxembourg, Poland, Portugal, Romania, Slovakia and the United Kingdom) replied that it was not possible to register the search for the applicant in their national search databases in the manner requested by the Croatian authorities. Eight countries (Belgium, Bulgaria, Denmark, Finland, Lichtenstein, Malta, the Netherlands and Slovenia) replied that they had entered the search in their national databases.

49. According to the applicant, the following responses were received in connection with the request of the Croatian authorities:

- Cyprus, Estonia, Italy, Latvia, Luxembourg, Norway, Romania, Slovakia and Sweden replied to the effect that no action was possible, without elaborating on the meaning of that response;

- Belgium, Bulgaria, Denmark, Finland, Ireland, Liechtenstein, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia and Switzerland replied stating that they had entered the applicant in the national search databases;

- the Czech Republic and the United Kingdom requested a valid INTERPOL search request;

- Greece forwarded the EAW to its national supplementary information requests at the national entry bureau ("S.I.Re.N.E.") for further action;

- Austria and Germany refused to register the search in their national databases.

50. In June 2017 Croatia joined the Schengen information system "SIS II", in which user countries can register their search records. On 28 June 2017 the Croatian authorities registered the 2013 and 2015 EAWs against the applicant (see paragraphs 27 and 31 above) in the SIS II system.

51. On the same day, the Hungarian authorities indicated ("flagged") that the registered search in SIS II was without any effect for Hungary. On 30 June 2017 the same indication was made by Germany. These indications were made with reference to the fact that the applicant had already been prosecuted in Hungary for the same acts for which he was wanted by Croatia.

52. For other countries, the EAWs issued by the Croatian authorities remain validly registered in SIS II.

4. Proceedings before the Constitutional Court

53. On 9 January 2014 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) challenging the County Court's order for his pre-trial detention of 27 September 2013 (see paragraph 26 above). He argued that by issuing the pre-trial detention order, the County Court breached the following Constitution and Convention rights: the right to a fair trial and hearing within a reasonable time under Article 29 § 1 of the Constitution and Articles 5 § 1 and 6 § 1 of the Convention; right to personal liberty under Article 22 in conjunction with Article 16 § 2 of the Constitution and Article 5 § 1 of the Convention; the principle of the rule of law under Articles 3 and 5 of the Constitution; equality before the law under Article 14 of the Constitution; and the presumption of innocence under Article 28 of the Constitution.

54. The applicant argued, in particular, that the proceedings related to the decision on his pre-trial detention, having regard to the lack of response to his appeal against the detention order (see paragraph 26 above), had been excessively long, which was also a reason for rendering the maintenance of the EAW unlawful. He further argued that the detention order could not be issued on the grounds of his absconding from justice as he had never been properly summoned by the Croatian authorities. The applicant also contended that there was a breach of the relevant domestic legislation concerning the judicial cooperation between EU member States, since Croatian authorities had never attempted to resolve their bilateral dispute with the Hungarian authorities concerning his case by using the available EU mechanisms of cooperation. Instead, in the applicant's view, the Croatian authorities had made the detention order and issued the EAW in order to circumvent their bilateral misunderstandings with the Hungarian authorities. The applicant argued that in this manner the Croatian authorities had not used the EAW in a lawful manner or for legitimate reasons.

55. On 22 January 2014 the applicant also asked the Constitutional Court to suspend the effects of the impugned pre-trial detention order, including the issuing of the EAW, pending its decision in his case. He contended, among other things, that there was a risk of serious damage due to the fact that he was unable to perform his business activities by travelling abroad without a risk of being arrested on the basis of the issued EAW.

56. On 30 September 2014 the applicant lodged another constitutional complaint before the Constitutional Court by which he challenged the County Court's refusal, upheld by the Supreme Court, to lift the pre-trial detention order (see paragraph 30 above). In his constitutional complaint the applicant relied on the following provisions of the Constitution and the Convention: Article 22 in conjunction with Article 16 § 2 of the

Constitution and Article 5 § 1 of the Convention; Article 29 of the Constitution and Article 6 §§ 1 and 3 (c) of the Convention; and Articles 14 §§ 1 and 2 and 26 of the Constitution.

57. The applicant contended, in particular, that the decision on his pre-trial detention had not been properly made, given that he had never formally been summoned to appear before the Croatian authorities. There was therefore nothing to suggest that he was evading justice. In his view, the issuing and maintaining of the detention order was arbitrary as he was made to suffer the consequences of a political decision of Hungary not to comply with the Croatian requests for legal assistance in criminal matters. He also argued that it was not justified to maintain the EAW in a situation in which there was a bilateral dispute between Hungary and Croatia in their cooperation in the criminal case at issue. In this connection, he stressed that he was bound to comply with Hungarian laws and therefore he could not, on his own initiative and contrary to the position of the Hungarian authorities, cooperate with the Croatian authorities.

58. On 10 December 2014 the Constitutional Court declared the applicant's constitutional complaint of 9 January 2014 (see paragraphs 53-54 above) inadmissible on the grounds that a decision on pre-trial detention could not be challenged if the applicant was not, and had never been, detained on the basis of that decision. It also stressed that for the same reasons no issue of a breach of the applicant's right arose with regard to the fact that his appeal against the decision on pre-trial detention had still not been decided (see paragraph 26 above).

59. On the same day, the Constitutional Court examined the merits and dismissed the applicant's constitutional complaint of 30 September 2014 (see paragraphs 56-57 above). The Constitutional Court stressed that it examined the applicant's complaints from the perspective of the right to a fair trial under Article 29 of the Constitution. It found that there had been no arbitrariness in the decisions to impose and maintain the pre-trial detention order against the applicant, particularly since the Croatian authorities had duly used the available means to secure the applicant's presence in the criminal proceedings in Croatia but the Hungarian authorities had failed to cooperate and serve the relevant documents on the applicant. The Constitutional Court thus considered that such failure by the Hungarian authorities could not be imputed to Croatia. It also stressed that it remained open to the Croatian authorities to seek to settle their disagreements with Hungary through the relevant EU mechanisms. However, that was not an issue of the applicant's Constitutional rights but a matter of the bilateral relationship between the two States.

60. The decision of the Constitutional Court was notified to the applicant on 18 December 2014.

5. Other relevant facts

61. Following the criminal investigation and proceedings concerning the alleged bribery (see paragraph 6 above), on 19 November 2012 I.S. was convicted in the County Court and his conviction was upheld by the Supreme Court. However, upon his constitutional complaint, on 24 July 2015 the Constitutional Court quashed his conviction on the grounds of a number of procedural failures and ordered a retrial. It would appear that the proceedings are still pending.

62. The criminal proceedings against the applicant conducted *in absentia* before the County Court (see paragraph 29 above) are also still pending.

63. On 26 November 2013, MOL instituted proceedings against Croatia in the International Centre for Settlements of Investment Disputes (ICSID) seeking redress for the alleged breaches of the INA-MOL agreements. These proceedings are still pending.

64. On 17 January 2014 Croatia submitted a request for arbitration before the Permanent Court of Arbitration (PCA) seeking to declare the business agreement by which MOL assumed control over INA null and void on the grounds of, among other things, the alleged bribery related to the conclusion of the agreement.

65. On 23 December 2016 the PCA dismissed as unfounded Croatia's claims based on bribery and all other alleged breaches of its agreement with MOL.

B. Relevant domestic law and practice

1. Relevant domestic law

66. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/1990, with further amendments) read as follows:

Article 3

"Freedom, equality ... respect for human rights ... the rule of law ... are the highest values of the constitutional order of the Republic of Croatia and the grounds for the interpretation of the Constitution."

Article 5

"In the Republic of Croatia statutes must be in compliance with the Constitution, and other regulations in compliance with the Constitution and statutes.

Everyone shall abide by the Constitution and law and respect the legal order of the Republic of Croatia."

Article 14

"Everyone in the Republic of Croatia shall enjoy rights and freedoms regardless of their race, colour, sex, language, religion, political or other belief, national or social origin, property, birth, education, social status or other characteristics.

All shall be equal before the law."

Article 16

"Rights and freedoms may only be restricted by law in order to protect the rights and freedoms of others, the legal order, public morals or health.

Every restriction of rights and freedoms should be proportionate to the nature of the necessity for the restriction in each individual case. ..."

Article 22

"Personal freedom and integrity are inviolable.

No one shall be deprived of his or her liberty, nor shall his or her liberty be restricted, save in accordance with the law, and [any such deprivation or restriction] shall be examined by a court."

Article 26

"Every citizen of the Republic of Croatia and [every] foreigner shall be equal before the courts and other State or public authorities."

Article 28

"Everyone shall be presumed innocent and nobody shall be held guilty of a criminal offence until his or her guilt has been established in a final judgment of a court of law."

Article 29

"In the determination of his or her rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law."

Article 134

"International agreements in force which have been concluded and ratified in accordance with the Constitution and made public shall be part of the internal legal order of the Republic of Croatia and shall have precedence in terms of their legal effects over the [domestic] statutes. ..."

67. The relevant provisions of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu Republike Hrvatske*, Official Gazette of the Republic of Croatia no. 99/99, with subsequent amendments) read as follows:

Section 62

"(1) Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that a decision of a State authority or local or regional government, or a legal person vested with public authority, regarding his or her rights or obligations,

or regarding a suspicion or accusation in respect of a criminal offence, has violated his or her human rights or fundamental freedoms, or the right to local or regional government, as guaranteed by the Constitution ('constitutional rights') ...

(2) If another legal remedy is available in respect of the violation of the constitutional rights [complained of], a constitutional complaint may be lodged only after this remedy has been exhausted.

..."

Section 63(1)

"The Constitutional Court shall examine a constitutional complaint even before all legal remedies have been exhausted ... if the contested decision grossly violates constitutional rights and it is completely clear that the complainant may risk serious and irreparable consequences if Constitutional Court proceedings are not instituted."

Section 67

"(1) A constitutional complaint does not, as a rule, prevent the application of the contested decision.

(2) The Constitutional Court may, at the request of the complainant, postpone the enforcement [of the contested decision] until it has decided on the constitutional complaint, if the enforcement would cause the complainant harm that would be difficult to repair, and provided such postponement would not run counter to the public interest or cause greater harm to anyone."

68. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette no. 152/2008, with further amendments) provide:

Article 18

"(1) If the application of the criminal law depends on the preliminary resolution of a legal question which falls within the competence of a court or other body in other proceedings, the criminal court can itself resolve that question by the application of the rules of evidence in criminal proceedings. ...

...

(3) If the court conducting the proceedings considers that for the resolution of the question referred to in paragraph 1 of this Article a decision of the Court of Justice of the European Union is needed concerning the interpretation of Union law or the validity of an act adopted by [the EU] bodies, [the court conducting the proceedings] may make a request for a preliminary ruling before the Court of Justice of the European Union ...

(4) If the proceedings are conducted before a court against whose decision no appeal lies, and that court considers that for the resolution of the question referred to in paragraph 1 of this Article a decision of the Court of Justice of the European Union is needed concerning the interpretation of Union law or the validity of an act adopted by [the EU] bodies, [the court conducting the proceedings] shall make a request for a preliminary ruling before the Court of Justice of the European Union ...

(5) In cases referred to in paragraphs 3 and 4 of this Article, the court shall halt the proceedings pending the decision of the Court of Justice of the European Union. ..."

Article 123

"(1) Where a reasonable suspicion exists that a person has committed an offence, that person may be placed in pre-trial detention:

1. if he or she has absconded or there are special circumstances which show that there is a risk that [the defendant] will abscond (is in hiding or his or her identity cannot be established, and so on); ..."

Article 126

"The court which ordered or extended the pre-trial detention shall adopt a decision lifting the detention order if, after its adoption and before the apprehension of the defendant, it finds that there were no grounds for ordering the pre-trial detention or that the legal requirements for so ordering have not been met. If there is a search [and arrest] warrant issued in respect of the defendant, the court shall, when its decision on lifting [the detention order] becomes final, order the withdrawal [of the search and arrest warrant]."

69. The Act on Judicial Co-operation in Criminal Matters with member States of the European Union (*Zakon o pravosudnoj suradnji u kaznenim stvarima s državama članicama Europske unije*, Official Gazette no. 91/2010, with further amendments) implements in the Croatian legal order the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member States. It incorporates the principle of mutual recognition of decisions between the EU member States (section 3) and the principle of effective co-operation (section 4). Section 6 of the Act provides that the EAW is issued by the relevant body conducting the criminal proceedings. Section 17(2) of the Act provides that an EAW can be issued only if a detention order has been made with regard to the person concerned. Sub-paragraph 3 of the same section provides that the EAW must be set aside if the person has been surrendered, the proceedings have become time-barred or if the EAW is no longer needed for some other reason. Section 19 of the Act provides that the relevant EU communication channels shall be used for the distribution of the EAW. Pursuant to section 12(5), any disagreements in the co-operation with other EU member States shall be resolved through the European Union's Judicial Cooperation Unit EUROJUST.

70. The Act on Mutual Legal Assistance in Criminal Matters (*Zakon o međunarodnoj pravnoj pomoći u kaznenim stvarima*, Official Gazette, no. 178/2004) regulates the issues of mutual legal assistance in general. It provides that mutual legal assistance is normally ensured through the channels of the Ministry of Justice (section 6) and that it must be performed in accordance with the principles of the domestic legal order, the Convention and the International Covenant on Civil and Political Rights (section 5).

2. Relevant domestic practice

71. The Constitutional Court, in a number of its cases, has examined on the merits complaints related to the execution of EAWs submitted to the Croatian authorities by other EU member States (see, for instance, U-III-351/2014 of 24 January 2014; U-III-2684/2015 and U-III-3141/205, both of 29 July 2015; U-III-928/2016 of 9 March 2016).

72. Further relevant case-law of the Constitutional Court is set out in *Habulinec and Filipović v. Croatia* (dec.), no. 51166/10, § 11, 4 June 2013.

C. Relevant international law

73. The 1959 European Convention on Mutual Assistance in Criminal Matters (ETS No. 030) in the relevant parts provides as follows:

Article 1

"1. The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

..."

Article 2

"Assistance may be refused:

...

b. if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country."

D. Relevant European Union law

74. The Treaty on European Union (OJ C 326, 26.10.2012, p. 13-390) in the relevant part provides as follows:

Article 6

"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

...

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

Article 19

"1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

..."

75. The relevant provision of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47-390) related to preliminary rulings by the CJEU reads as follows:

Article 267

"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

76. The relevant parts of the Charter of Fundamental Rights of the European Union (OJ 2012 C 326/391) provide as follows:

Article 6

Right to liberty and security

"Everyone has the right to liberty and security of person."

Article 45

Freedom of movement and of residence

"1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State."

Article 47

Right to an effective remedy and to a fair trial

"Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

..."

77. The relevant parts of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member States provide as follows:

Article 1

Definition of the European arrest warrant and obligation to execute it

"1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

Article 3

Grounds for mandatory non-execution of the European arrest warrant

"The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:

...

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

..."

Article 4

Grounds for optional non-execution of the European arrest warrant

"The executing judicial authority may refuse to execute the European arrest warrant:

...

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

..."

Article 9

Transmission of a European arrest warrant

"1. When the location of the requested person is known, the issuing judicial authority may transmit the European arrest warrant directly to the executing judicial authority.

2. The issuing judicial authority may, in any event, decide to issue an alert for the requested person in the Schengen Information System (SIS).

..."

COMPLAINT

78. The applicant complained, under Article 2 of Protocol No. 4, of unlawful and unjustified restrictions on his freedom of movement, arguing that he was effectively prohibited from leaving Hungarian territory as a result of the detention order and the EAW issued by the Croatian authorities.

THE LAW

79. Complaining of unlawful and unjustified restrictions on his freedom of movement, the applicant relied on Article 2 of Protocol No. 4, which in the relevant part provides the following:

"...

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the

prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

..."

A. The parties' arguments

80. The Government argued that the applicant had failed effectively to exhaust the available and effective domestic remedies. They pointed out, citing *Gazibarić v. Croatia* (dec.), no. 17765/07, 25 March 2000, that the Court had already accepted that a constitutional complaint before the Constitutional Court was an available and effective remedy for complaints concerning restrictions on freedom of movement. Moreover, they stressed that the Constitutional Court's case-law showed that it dealt with issues related to EAWs (see paragraph 71 above). However, in the Government's view, in his two constitutional complaints the applicant had not, either expressly or in substance, relied on his right to freedom of movement, and had thus failed properly to exhaust the domestic remedies. In this connection, they stressed that the applicant's complaints had solely been directed to the detention order and his right to liberty under Article 5 of the Convention and that this could not be considered sufficient for his complaints under Article 2 of Protocol No. 4. The Government also contended that the applicant's complaints against Croatia were incompatible *ratione personae* as it was the conduct of the Hungarian authorities that had led to the impugned situation. They also argued that his complaint had already been examined in another international procedure of investigation and settlement, namely before the Interpol Commission CCF. In any event, the Government considered that the applicant had not suffered any significant disadvantage and that the interference with his freedom of movement had been lawful and justified.

81. The applicant pointed out that he had used all available remedies concerning the detention order before the criminal courts and had then lodged a constitutional complaint before the Constitutional Court. However, his appeal against the detention order had never been resolved and the Constitutional Court had declined to examine his constitutional complaint on the grounds that he had not been detained. In these circumstances, in the applicant's view, the constitutional complaint had not been an effective remedy for the complaints concerning the pre-trial detention order and other orders made consequent to that order, as its proper use was conditioned by his surrender to the Croatian authorities. At the same time, his surrender would entail his unjustified detention and thus a violation of Article 5 of the Convention. The applicant also argued that before the Constitutional Court, if not expressly, he had raised in substance his complaints about the restriction of his freedom of movement related to the issuing of the EAW. In particular, he had relied on and provided arguments concerning his Article 5

complaint which also encompassed his complaints related to the restriction on freedom of movement under Article 2 of Protocol No. 4. In the applicant's view, his case differed from *Gazibarić* and the Constitutional Court's case-law cited by the Government showed that the Constitutional Court would only deal with his complaint if he was available to the Croatian authorities. The applicant also argued that the impugned situation was attributable to the Croatian authorities which had issued the EAWs against him. In his view, the proceedings before the CCF did not amount to another international investigation and settlement as suggested by the Government. Moreover, contrary to the Government's position, the applicant contended that he had sustained serious breaches of his Convention rights and that the interference with his freedom of movement caused by the EAWs had been unlawful and unjustified.

82. The Hungarian Government provided details of the proceedings conducted in Hungary concerning the applicant and the issuance of the Croatian EAWs. They also argued that all legal actions taken by the Hungarian authorities in this respect had been lawful and justified.

B. The Court's assessment

83. The Court finds that it is not necessary to address all the parties' arguments, as the applicant's complaint is inadmissible for the following reasons.

84. The Court refers to the general principles on the exhaustion of domestic remedies set out in the cases of *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014), and *Gherghina v. Romania* ([GC] (dec.), no. 42219/07, §§ 83-88, 9 July 2015).

85. The Court reiterates in particular that Article 35 § 1 requires that the complaints intended to be made subsequently before it should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should be used. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see *Vučković and Others*, cited above, § 72).

86. With regard to the question of exhausting domestic remedies in Croatia, the Court has held that before bringing complaints against Croatia to the Court, in order to comply with the principle of subsidiarity, applicants should present their arguments before the national authorities, in particular the Constitutional Court as the highest Court in Croatia, and thus give them the opportunity of remedying the situation (see *Habulinec and Filipović*

v. Croatia (dec.), no. 51166/10, § 31, 4 June 2013, and *Pavlović and Others v. Croatia*, no. 13274/11, § 32, 2 April 2015, with further references).

87. In this connection, the Court notes that there is no reason to call into question the effectiveness of the constitutional complaint as a remedy for complaints related to a restriction of freedom of movement under Article 2 of Protocol No. 4, particularly since, as already noted in *Gazibarić* (cited above) and *Habulinec and Filipović* (cited above, § 30), the Convention is directly applicable in Croatia and forms an integral part of the Croatian legal system, where it takes precedence over every contrary statutory provision. Moreover, in *Habulinec and Filipović* the Court observed that according to the Constitutional Court's case-law, the rights guaranteed in the Convention and its Protocols were to be considered constitutional rights having a legal force equal to the provisions of the Constitution by which the Constitutional Court has recognised its competence to examine the alleged violations of such rights.

88. In these circumstances, also having regard to the Constitutional Court's case-law on challenges to EAWs (see paragraph 71 above), the Court finds that before bringing his complaint before it about the restriction on his freedom of movement and his inability to travel freely out of Hungary, under Article 2 of Protocol No. 4, the applicant was first required to raise that complaint properly before the Constitutional Court.

89. In the present case, the Court notes that the applicant lodged two constitutional complaints before the Constitutional Court; first on 9 January 2014, challenging the pre-trial detention order of 27 September 2013; and the second on 30 September 2014, challenging the criminal courts' decisions refusing to lift that detention order (see paragraphs 53 and 56 above). In both of these constitutional complaints the applicant's arguments were essentially directed at the decision to order his pre-trial detention. Although the Constitutional Court did not examine the first constitutional complaint on the merits, it did examine the second one and dismissed it as unfounded on the grounds that there was nothing arbitrary in the decision on the applicant's pre-trial detention (see paragraphs 58-59 above).

90. The Court notes that in none of his constitutional complaints did the applicant expressly rely on or raise an issue under Article 2 of Protocol No. 4. Moreover, the applicant did not submit any specific arguments about the violation of his freedom of movement related to his inability to travel freely out of Hungary and all the consequences of such a situation, even in substance, before the Constitutional Court (compare *Merot d.o.o. and Storitve Tir d.o.o. v. Croatia* (dec.), nos. 29426/08 and 29737/08, § 36, 10 December 2013). In particular, he never complained that the EAW should not be kept in place in any prolonged period given the effects it produced for his cross-border freedom of movement, which would also involve the application and interpretation of EU law, which forms an integral part of the domestic law of Croatia and under which the Croatian

authorities are required to provide effective judicial protection to the applicant (see paragraphs 74-77 above; see also, *Laurus Invest Hungary KFT and Others v. Hungary* (dec.), nos. 23265/13 and 5 others, §§ 34-44, ECHR 2015 (extracts)).

91. Instead, he confined himself to challenging the criminal courts' interpretation of the relevant domestic law on the question of when a detention order could be made for the purpose of preventing a defendant from evading justice and he only vaguely made reference to the fact that the EAW had been issued (see paragraphs 54 and 57 above). It was only in his request for the suspension of the impugned pre-trial detention order that the applicant made reference to the consequences of the issued EAW for his freedom of movement outside Hungary (see paragraph 55 above). However, in the absence of an actual complaint by the applicant in this respect in his constitutional complaints, and the fact that a request for suspension is not intended to resolve the dispute raised before the Constitutional Court (see paragraph 67 above), the Court does not consider that by asking the Constitutional Court to issue such an interim order the applicant properly raised his complaint before the Constitutional Court (compare ibid., § 36 *in fine*).

92. In this connection, the Court notes that it follows from its case-law that the mere fact that an applicant has submitted his or her case to the relevant court does not of itself constitute compliance with the requirements of Article 35 § 1 of the Convention, as even in those jurisdictions where the domestic courts are able, or even obliged, to examine the case of their own motion, applicants are not dispensed from the obligation to raise before them the complaint subsequently made to the Court. Thus, in order properly to exhaust domestic remedies it is not sufficient for a violation of the Convention to be "evident" from the facts of the case or the applicant's submissions. Rather, the applicant must actually have complained (expressly or in substance) about it in a manner which leaves no doubt that the same complaint that is subsequently submitted to the Court was indeed raised at the domestic level (ibid.; see also, *Peacock v. the United Kingdom* (dec.), no. 52335/12, § 38, 5 January 2016).

93. In the case at issue, for the reasons set out above, it cannot be accepted that the applicant put his complaint concerning the allegedly unjustified interference with his freedom of movement under Article 2 of Protocol No. 4, related to his inability to travel freely out of Hungary, properly to the Constitutional Court before bringing that complaint to the Court.

94. In these circumstances, the Court takes the view that the applicant did not properly exhaust domestic remedies and thus did not provide the national authorities with the opportunity, which is in principle intended to be afforded to Contracting States by Article 35 § 1 of the Convention, of addressing, and thereby preventing or putting right, the particular

Convention violation alleged against them (see, for example, *Association Les Témoins de Jéhovah* (dec.), no. 8916/05, 21 September 2010; *Habulinec and Filipović*, cited above, § 30; *Merot d.o.o. and Storitve Tir d.o.o.*, cited above, § 38; and *Peacock*, cited above, § 40).

95. The Court therefore finds that the applicant has failed to exhaust domestic remedies and that the application must be rejected as inadmissible under Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 26 September 2019.

Abel Campos Registrar	Krzysztof Wojtyczek President