THE AIRE CENTRE
Advice on Individual Rights in Europe

USTAVNI SUD BOSNE I HERCEGOVINE
УСТАВНИ СУД БОСНЕ И ХЕРЦЕГОВИНЕ
CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

The Case Law of Bosnia and Hercegovina's Courts on the Right to Liberty and Security of Person

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The Case Law of Bosnia and Hercegovina's Courts on the Right to Liberty and Security of Person

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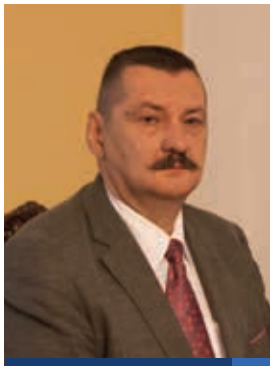

I have the great pleasure of presenting one of the many publications the Constitutional Court of Bosnia and Herzegovina has prepared in compliance with its transparency obligation and in cooperation with the AIRE Centre. This publication provides an in-depth overview of two major areas of the European Convention of Human Rights - protection of the rights enshrined in Articles 5 and 10.

There are many reasons why we concentrated on these two rights/freedoms, each of which can be qualified as decisive. One of them, however, stood out. Before elaborating it, we need to emphasise that the legal grounds for both of these rights/freedoms are identical in all of Bosnia and Herzegovina, both the Criminal Procedure Code provisions on the right to liberty, notably on pre-trial detention and deprivation of liberty (Article 5 ECHR) and the Anti-Defamation Law provisions, constituting legal grounds for the protection of the freedom of expression under Article 10 ECHR. It would therefore be reasonable to expect that there are no differences in the ordinary courts' interpretation and application of either the standards of the European Court of Human Rights or the standards of the Constitutional Court of Bosnia and Herzegovina, which the domestic experts are much more familiar with.

This is where we come to the main reason why we decided to provide an overview of the case law concerning these two rights/freedoms.

Unfortunately, the BiH ordinary courts interpret the same legal provisions differently; they do not do so frequently, but they do it often enough to give rise to **legal uncertainty**. It goes without saying that each specific case and its factual and legal ***differentia specifica*** **is a world of its own**, wherefore ordinary courts adopt different decisions. However, our focus is not on different decisions and judgments, but on different interpretations of the same legal norms.

The problem of aligning case law in this area is a problem of applying the ECHR, which is one of the constitutional obligations, but also a problem of the courts' familiarity with the standards of **interpreting** these rights and freedoms in the relevant case law of the ECtHR, as well as that of the Constitutional Court.

Hence the need to emphasise the involvement in this project of the superb judges of ordinary courts, who invested a lot of their free time and effort in providing us with an overview of the case law of their courts and courts in areas close to them. I am sure you will also appreciate the styles the judges of ordinary courts rightly use, the styles enriching this publication, as well as the style we in the Constitutional Court use whilst following ECtHR standards. It is our firm belief that we have shown that the **standard of interpretation** does not differ regardless of the different need to implement the norms, i.e. the implementation of the norms is the obligation to protect rights/freedoms and their **technical aspect** is the kind of court that implements them.

I would like to again express my gratitude to our colleagues in the ordinary courts who worked on this publication as authors, co-authors and associates, and whose work and highly professional level of presentation warrant deep respect, which I take this opportunity to express.

On behalf of the Constitutional Court, in my own name as editor, and, I am convinced, in the name of all of you, the professional public in the broadest sense of the word, I hereby thank all of them for their latest contribution to legal thought in Bosnia and Herzegovina, especially our colleague Biljana Braithwaite of the AIRE Centre, without whose commitment and support this publication would have not been prepared.

Sarajevo, March 2020

President of the Constitutional Court
of Bosnia and Herzegovina
Zlatko M. Knežević

FOREWORD

Dear Readers,

It is with great pleasure that I address you on behalf of the AIRE Centre (Advice on Individual Rights in Europe), which supported the development of this report "Case Law of Bosnia and Herzegovina Courts on the Right to Liberty and Security and the Right to Freedom of Expression". This publication is part of our extensive activities in Bosnia and Herzegovina aimed at strengthening the implementation of the European Convention on Human Rights and ECHR standards in BiH.

In its 2019 Opinion on Bosnia and Herzegovina, the European Commission clearly highlighted the topicality and relevance of aligning the case law of BiH courts, primarily with the decisions of the BiH Constitutional Court and the European Court of Human Rights. Ensuring consistency of case law across BiH's legal orders and achievement of a higher degree of legal certainty include the need to ensure the accessibility of national case law and the existence of a forum for exchanging views on addressing individual legal issues.

Given that the availability of the highest courts' final decisions is prerequisite for harmonising jurisprudence, the AIRE Centre has partnered with the High Judicial and Prosecutorial Council in the implementation of a project involving the development of a database of the final decisions and views of the Court of BiH, the Supreme Courts of the Federation of BiH and Republika Srpska and the Brčko District Appellate Court.

The development of this report is one of the many activities we have been implementing in our excellent cooperation with the BiH Constitutional Court. Together with the BiH Constitutional Court, we have launched the Judicial Forum for BiH, which is holding its Fourth Annual Conference this year. We have also jointly organised many conferences, seminars and trainings and published a number of reports. The Judicial Forum and our many other activities are geared at promoting judicial dialogue among the highest BiH courts and alignment of national case law. This publication will benefit judges because it provides a simple and user-friendly overview both of the relevant court decisions and of statutory interpretation principles.

I would like to express our gratitude to everyone who enabled the publication of this report, above all the working group comprising Mr. Zlatko M. Knežević, the President of the BiH Constitutional Court; Mr. Zvonko Mijan, the Registrar of the BiH Constitutional Court; Ms. Sevima Sali-Terzić, the Senior Legal Adviser of the BiH Constitutional Court; and Ms. Ermina Dumanjić, the Head of the Case Law Department of the BiH Constitutional Court. I would also like to express our thanks to all other professionals who contributed to its development, notably: Mr. Davorin Jukić and Ms. Emira Hodžić (Court of BiH), Mr. Senad Tica (Supreme Court of RS), Ms. Božidarka Dodik (Supreme Court of FBiH), Ms. Silvana Brković-Mujagić (Sarajevo Cantonal Court), Ms. Biljana Majkić-Marinković (Banjaluka District Court) and Mr. Zlatan Kavazović (Brčko District Appellate Court). I would also like to express our

gratitude to the British Government for recognising the importance of this project and for supporting it.

Biljana Braithwaite
Western Balkans Programme Manager
The AIRE Centre

METHODOLOGY

We applied various approaches in the development of this report. The Constitutional Court's first (usual) approach is to provide a digest of its case law and, to an extent, of the case law of the European Court of Human Rights (hereinafter: ECtHR) and, on the basis of **dismissed/upheld** appeals, qualify specific decisions as **good or bad practice** examples. Furthermore, like in some other publications, we supplemented such an approach with concluding observations on the key reasons for our qualifications of decisions as good or bad practice examples. The second approach would involve expanding the texts with overviews of the cases of the highest ordinary courts that were reviewed and ultimately ruled on by the Constitutional Court.

The Working Group deciding on the methodology needed to define the following three key issues at the outset: the goal of the report, the purpose of the report and the target group.

Goal of the Report

The initial goal was to provide an overview of the Constitutional Court's case law and subsequently an overview of case law in Bosnia and Herzegovina. The final decision was made in the light of the project, within which this report is published, which is implemented with a view to **aligning BiH case law** in these legal fields. That final decision gave rise to the need to apply a different approach in terms of the **source of the case law**. Namely, the Constitutional Court's records include only its decisions on appeals of first- and second- (and extremely rarely) third-instance courts, which does not ensure the breadth of the approach because, of course, not all decisions in these areas are challenged by appeals.

Another issue that arose regarded the case law of not only the Supreme Courts but of the District/Cantonal Courts as well, and its alignment by the Supreme Courts. The issue of alignment of the Supreme Courts' **interpretations of norms** was just as important. It transpired that some courts had abundant case law on Article 5 but no or hardly any case law on Article 10 of the European Convention on Human Rights (hereinafter: ECHR).

Therefore, we could have provided an overview of the case law of **all District/Cantonal** Courts in Bosnia and Herzegovina and, accordingly of the case law of the Supreme Courts, the Brčko District Appellate Court and the Appellate Division of the Court of Bosnia and Herzegovina (hereinafter: Court of BiH), including the relevant case law of the Constitutional Court of Bosnia and Herzegovina, as well as that of the ECtHR. But, what would have been the purpose of such an approach requiring such extensive and painstaking work? Such an approach would be acceptable if the purpose of the publication were to **merely take stock** of the situation.

The Working Group, however, concluded that the purpose of this publication and all the work put into it was not to **take stock** of the decisions as static categories and provide a mere **historic overview** of what has been done, how and where. Such an approach would be not only at odds with the publication's **purpose** defined by the Working Group, but with its **target group** as well.

Therefore, such a static approach would be at odds with the goal, purpose and target group of the publication.

Purpose of the Report

In the opinion of the Working Group, the purpose of the report will have been achieved by fulfilling the goal – **alignment of case law**, involving the introduction of **new tools** to facilitate the overview of case law. Therefore, in addition to the **static part**/case law overview, we introduced an **active part**/the approach to interpretations of norms involving the **fulfilment of tests**, e.g. the reasonable suspicion test or the bona fide test (for Articles 5 and 10). The word 'test' does not mean that we are 'prescribing' a list of questions that need to be answered with a 'yes' or 'no' and then added up to obtain a 'positive' or 'negative' sum. On the contrary, we are suggesting a **course of interpretation**, which all judges are to take independently in their full professional capacity in specific factual and legal situations in order to arrive at their conclusions. Rather than providing a **definitive answer**, the comparative overview of the Constitutional Court's case law and ECtHR standards *illuminates the road already taken*, which will considerably help the courts address issues arising in specific cases. It goes without saying that most members of the **target group** are familiar with both the 'road' and the method, but recalling them is always useful, both for those who rarely come across these issues and for those who are aware that norms are always analysed anew.

Target Group

This report is primarily intended for **judges** of all ordinary courts, as well as the prosecutors with regard to Article 5 ECHR. Of course, we hope that the part on Article 10 will also be read with interest by journalists who are definitely walking along the line between freedom of information and violation of personality rights.

This is why we have also highlighted all the important parts, the individual elements we wrote about, the standards we referred to and specified the case law we cited and commented. In addition to regular references to the case law of the Supreme Courts, the Court of Bosnia and Herzegovina and the Brčko District Appellate Court, we also included the case law of the Banjaluka District Court and the Sarajevo Cantonal Court.

We included the case law of these two courts not only because they are the two largest second-instance courts (trying also the gravest crimes in the first instance), but because they have the most abundant case law on Articles 5 and 10 as well and are fully positioned to discuss their work, as well as the dilemmas they have had in interpreting the norms. We thus achieved two goals: first, we have enriched our overview of case law with cases that have never made it to the Constitutional Court and, second, we have provided professionals with the opportunity to familiarise themselves with the work of these courts, whose abundant case law on Articles 5 and 10 requires of them to interpret the norms addressed in this publication the most often.

The readers' attention will undoubtedly be drawn also to the method we applied to cite the relevant provisions of the law and analyse their application in the specific cases covered by this overview of case law.

This report has been prepared based on a rerview of around 150 decisions of the Constitutional Court of Bosnia and Herzegovina and 120 decisions of ordinary courts delivered in the 2015-2019 period.

The report was developed from July 2019 to March 2020 by the Working Group, comprising: Zlatko M. Knežević, President of the Constitutional Court of Bosnia and Herzegovina; Zvonko Mijan, Constitutional Court of Bosnia and Herzegovina Registrar; Sevima Sali-Terzić, Constitutional Court of Bosnia and Herzegovina Senior Legal Adviser; and Ermina Dumanjić, Head of the Constitutional Court of Bosnia and Herzegovina Constitutional Case Law Department. The following professionals also greatly contributed to the development of this extremely useful report: Davorin Jukić, Court of Bosnia and Herzegovina judge; Emira Hodžić, Court of Bosnia and Herzegovina Registrar; Senad Tica, Republika Srpska Supreme Court judge; Božidarka Dodik, Federation of BiH Supreme Court judge; Silvana Brković-Mujagić, Sarajevo Cantonal Court judge; Biljana Majkić-Marinković, Banjaluka District Court judge; and Zlatan Kavazović, Brčko District Appellate Court professional associate. The Constitutional Court of Bosnia and Herzegovina plans on drawing up a similar report on 2020 decisions in 2021.

And, last but not the least, the methodology gave all the report authors the opportunity to contribute with their **own professional opinions**, providing the readers with the chance to compare their own work with the authors' views and to gain insight in the decision-making standards in other courts.

PROTECTION OF THE RIGHTS UNDER ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

RIGHT TO LIBERTY AND SECURITY OF PERSON

Relevant National Law

Criminal Procedure Code of Bosnia and Herzegovina[1]

CHAPTER X

MEASURES ENSURING THE PRESENCE OF SUSPECTS AND DEFENDANTS AND SUCCESSFUL CONDUCT OF CRIMINAL PROCEEDINGS

Section 1 – GENERAL PROVISIONS

Article 123
Types of Measures

(1) The following measures may be taken against defendants to ensure their presence and successful conduct of criminal proceedings: summons, apprehension, non-custodial measures, bail and pre-trial detention.
(2) The competent authorities deciding on the above measures shall comply with the requirements for their imposition, whilst ensuring that they do not impose a more severe measure if the same purpose can be achieved by a milder measure.
(3) These measures shall be revoked *ex officio* as soon as the reasons for them cease to exist, or they shall be replaced by milder measures when the requirements therefor are met.
(4) The provisions of this Chapter shall apply accordingly to suspects.

Section 4 - Non-Custodial Measures

Article 126
Ban on Leaving One's Place of Residence and Travel Ban

(1) Where circumstances indicate that a suspect or defendant might abscond, hide or go to an unknown location or abroad, the court may issue a reasoned ruling prohibiting them from leaving their place of residence.
(2) In circumstances referred to in paragraph (1) of this Article, the court may also order, either as an additional measure to the ban on leaving one's place of residence or as a separate measure, the seizure of the travel documents of the suspect or defendant and prohibit the issuance of new travel documents to them, as well as prohibit them from crossing the state border of Bosnia and Herzegovina with their identity cards (travel ban).

1 Official Gazette of BiH, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 49/17 – BiH CC decision and 42/18 – BiH CC Ruling, 65/18; the authors provided an unofficial consolidated text of the CPC for this publication.

Article 126a

Other Non-Custodial Measures

(1) Where so required by the circumstances of the case, the Court may order one or more of the following non-custodial measures:
   a) Ban on performing specific business or official activities,
   b) Ban on visiting specific places or areas,
   c) Ban on meeting with specific individuals,
   d) Order to report occasionally to a specific state authority, and
   e) Temporary suspension of the driver's licence.

(2) The non-custodial measures referred to in Paragraph (1) of this Article may be imposed in addition to the ban on leaving one's place of residence and the travel ban referred to in Article 126 of this Code, or as separate measures.

Article 126b

Imposition of Non-Custodial Measures

(1) On the proposal of a party or the defence counsel, the court may issue a reasoned ruling imposing a ban on leaving one's place of residence, a travel ban and other non-custodial measures.

(2) The court deciding on pre-trial detention may impose a ban on leaving one's place of residence, a travel ban and other non-custodial measures *ex officio*, instead of ordering or extending pre-trial detention.

(3) Rulings imposing non-custodial measures shall warn the suspects or defendants that pre-trial detention may be ordered against them if they violate the terms of the measures.

(4) Non-custodial measures shall be ordered and revoked by a preliminary proceedings judge during investigation; a preliminary hearing judge after the issuance of the indictment; and by the judge or presiding judge of the panel the case has been referred to for the purpose of scheduling the main hearing.

(5) Non-custodial measures may remain in place as long as necessary, but not later than the date on which the judgment becomes legally binding if the defendant has not been sentenced to prison, or, in case of defendants sentenced to prison, the date they are committed to prison to serve their sentence. The travel ban may also remain in place until the imposed fine is paid in full and/or the property claim is enforced in full and/or confiscation of proceeds of crime is effected in full.

(6) The preliminary proceedings judge, preliminary hearing judge, the judge, or the presiding judge must review whether the imposed non-custodial measure is still necessary every two months.

(7) Parties to the proceedings and defence counsel may appeal rulings ordering, extending or revoking non-custodial measures, while prosecutors may also appeal rulings rejecting their motions for non-custodial measures. The appeal shall be decided by the panel referred to in Article 24 (7) of this Code within three days of submission. The appeal shall not stay the enforcement of the ruling.

Article 126c

Content of Non-Custodial Measures

(1) In its rulings banning suspects or defendants from leaving their place of residence, the court shall specify the place where they shall stay for the duration of the measure

and the boundaries beyond which they may not go. The place may be restricted to the suspect's or the defendant's home.

(2) In its rulings imposing a travel ban, the court shall order the seizure of the suspects' or defendants' travel documents and prohibit the issuance of new travel documents to them, as well as their use of their identity cards to cross the state border of Bosnia and Herzegovina. The rulings shall specify the personal data of the suspects or the defendants, and may contain other information as necessary.

(3) In its rulings prohibiting suspects or defendants from visiting specific places or areas, the court shall specify the places and areas and the distance beyond which the suspects or defendants may not approach them.

(4) In its rulings prohibiting suspects or defendants from meeting with specific individuals, the court shall specify the distance beyond which the suspects or defendants may not approach them.

(5) In its rulings ordering suspects or defendants to report occasionally to a specific authority, the court shall designate the public official they must report to, specify the intervals at which they must report and the manner of keeping records of their reporting.

(6) In its rulings ordering the suspension of the suspects' or defendants' driver's licences, the court shall specify the categories for which the driver's licences shall be suspended. The rulings shall contain the suspects' or defendants' personal data, and may contain other information as necessary.

Article 126d

Limitations Regarding the Content of Non-Custodial Measures

(1) Non-custodial measures shall not restrict the right of the suspects or the defendants to communicate with their defence counsel in Bosnia and Herzegovina.

(2) Non-custodial measures shall not restrict the right of the suspects or the defendants to live in their home in Bosnia and Herzegovina, to see members of their family and close relatives freely either only in Bosnia and Herzegovina or at a place specified in the measure prohibiting them from leaving their place of residence, unless the proceedings regard a criminal offence committed to the detriment of their family member or close relative; nor shall such measures restrict the right of the suspects or the defendants to perform their professional activities unless the proceedings regard a criminal offence related to their performance of such activities.

Article 126e

Enforcement of Non-Custodial Measures

(1) Rulings prohibiting suspects/defendants from leaving their place of residence shall be forwarded to the authority enforcing the measure.

(2) Rulings banning travel shall be forwarded also to the border police, while the seizure of travel documents together with the ban on issuing new travel documents, as well as the enforcement of the ban on the use of the identity card to cross the state border, shall be entered into the Central Data Processing Centre.

(3) The police authorities shall enforce measures prohibiting suspects or defendants from leaving their place of residence, travelling, visiting specific places or areas and meeting with specific individuals and the measure temporarily suspending their driver's licences.

(4) The measure ordering a suspect or defendant to report occasionally to a specific

authority shall be enforced by a police authority or a designated body that the suspect or defendant must report to.

Article 126f
Verification of Compliance with Non-Custodial Measures and Reporting Obligation

(1) The court may at any time order the verification of compliance with non-custodial measures and request of the competent authority charged with their enforcement to submit a report. The authority shall submit the report to the court without delay.
(2) In the event the suspect or defendant is not complying with the terms set in the measure, the authority charged with its enforcement shall inform the court thereof and the court may pronounce an additional non-custodial measure or place the suspect or defendant in pre-trial detention.

Article 126g
Special Provision on Travel Ban

(1) Exceptionally, in emergencies, in particular in cases involving criminal offences warranting minimum ten years' imprisonment, the prosecutor may order the seizure of travel documents and the identity card and ban issuance of new documents that might be used for crossing the state border.
(2) The prosecutor may issue the order referred to in paragraph (1) of this Article when ordering the conduct of an investigation, questioning the suspects or ordering their apprehension under Article 125(2) of this Code, or whenever urgent action is needed to ensure the effective conduct of the proceeding until the beginning of the main hearing.
(3) The prosecutor shall immediately notify of the order the preliminary proceedings judge during the investigation stage, the preliminary hearing judge after the issuance of the indictment, or the judge or presiding judge of the panel the case has been referred to for the purpose of scheduling the main hearing. The judge shall decide on the order within 72 hours. In the event the judge fails to issue the said order, the travel documents and the identity card shall be returned.
(4) The order on the seizure of travel documents and the identity card and ban on issuance of new documents that might be used for crossing the state border shall be executed by a police authority, and may also be executed by the judicial police. If a suspect or defendant refuses to surrender the travel documents and/or the identity card, the order shall be executed by force.
(5) The suspect or defendant shall be issued a receipt for the seized documents. The suspect or defendant shall be issued a separate receipt for the identity card or a card that replaces the identity card in all respects but cannot be used for crossing the state border.

Section 6 - Pre-Trial Detention

Article 131
General Provisions

(1) Pre-trial detention may be ordered or extended only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure.

(2) The court shall issue a ruling ordering or extending pre-trial detention on the motion of the prosecutor after hearing the suspect or defendant about the reasons why pre-trial detention is proposed, except in cases prescribed by Article 132(1)(a) of this Code.
(3) The prosecutor shall submit to the court a reasoned motion to extend pre-trial detention at least five days before the expiry of the deadline specified in the ruling ordering pre-trial detention. The court shall forward the motion to the suspect or defendant and their defence counsel immediately.
(4) The duration of pre-trial detention must be kept to a minimum. All authorities participating in criminal proceedings and authorities extending them legal aid are under the duty to proceed with particular urgency if the suspect or defendant is in pre-trial detention.
(5) Pre-trial detention shall be terminated at any stage of the proceedings as soon as the reasons why it was ordered cease to exist and the detainee shall be released immediately. The court shall hold a hearing or a panel session on the motion of the defendant or defence counsel to terminate pre-trial detention that is based on new facts, and notify the parties and defence counsel thereof. The hearing or panel session shall be held notwithstanding the absence of the duly summoned parties or defence counsel. A ruling rejecting the motion to terminate pre-trial detention may be appealed. The court shall not issue a separate ruling in the event the motion is not based on new facts relevant to the termination of pre-trial detention.

Article 132
Grounds for Pre-Trial Detention

(1) Pre-trial detention may be ordered against individuals reasonably suspected of a criminal offence:
   a) if they are hiding or other circumstances indicate they may abscond;
   b) if there are reasonable fears that they will destroy, conceal, alter or falsify evidence or clues relevant to the criminal proceedings or particular circumstances indicate that they will obstruct criminal proceedings by influencing witnesses, accessories or accomplices;
   c) if particular circumstances justify fears that they will repeat or complete a criminal offence or commit a threatened criminal offence warranting minimum three years' imprisonment;
   d) in exceptional circumstances, in case of criminal offences warranting minimum ten years' imprisonment by reason of their particular gravity given the manner of perpetration or their consequences, where release would result in an actual threat to disturbance of public order.
(2) Pre-trial detention shall be terminated in cases under paragraph 1(b) of this Article as soon as the evidence for which the pre-trial detention was ordered has been secured.

Article 133
Citizen's Arrest

Everyone may arrest without warrant anyone who is in the act of committing a criminal offence. Such individuals must be handed over immediately to the court, prosecutor or the nearest police authority, or, if this is impossible, the court, prosecutor or the police must be notified thereof immediately.

Article 134

Authority to Order Pre-Trial Detention

(1) Pre-trial detention shall be ordered by a court ruling and on the motion of the prosecutor.
(2) A ruling on pre-trial detention shall contain: the first and last names of the individual ordered into pre-trial detention, the criminal offence they are charged with, the legal grounds for pre-trial detention, reasoning, instructions on the right to appeal, the official seal and the signature of the judge ordering pre-trial detention.
(3) The ruling on pre-trial detention shall be delivered to the individual it regards at the moment of detention. The files must indicate the hour of the deprivation of liberty and the hour of delivery of the ruling.
(4) A detainee may appeal the ruling on pre-trial detention with a panel (referred to in Article 24(7)) within 24 hours of receipt. A detainee interrogated for the first time upon the expiry of this period may file an appeal during the interrogation. The appeal, a copy of the minutes on interrogation, if the detainee has been interrogated, and evidence constituting grounds for the ruling on pre-trial detention, as well as the ruling on pre-trial detention, shall be forwarded immediately to the panel. The appeal shall not stay the enforcement of the ruling.
(5) The panel referred to in paragraph (4) of this Article must rule on the appeal within 48 hours.

Article 135

Duration of Pre-Trial Detention during Investigation

(1) Before issuing a ruling ordering pre-trial detention, the preliminary proceedings judge shall review the merits of the motion for pre-trial detention. Pre-trial detention ordered in the ruling of the preliminary proceedings judge may last a maximum of one month from the day of deprivation of liberty. The suspect may thereafter be kept in pre-trial detention only on the basis of a ruling extending pre-trial detention.
(2) On a reasoned motion of the prosecutor, the panel (referred to in Article 24(7)) may issue a ruling extending pre-trial detention for a maximum of two months. An appeal of the ruling of the panel shall be allowed and it shall be decided by the panel of the Appellate Division. The appeal shall not stay the enforcement of the ruling.
(3) Pre-trial detention may be extended on the reasoned motion of the prosecutor for another three months at most if the detainee is suspected of a criminal offence warranting minimum ten years' imprisonment, and for particularly important reasons. An appeal of the ruling of the panel shall be allowed and it shall be decided by the panel of the Appellate Division. The appeal shall not stay the enforcement of the ruling.
(4) Exceptionally and in extraordinarily complex cases concerning criminal offences warranting long-term imprisonment, pre-trial detention may again be extended for a maximum of three months after the extension referred to in paragraph (3) of this Article. Such extensions may be ordered twice consecutively on a reasoned motion of the prosecutor for each extension, which needs to contain the statement of the Collegium of the Prosecutor's Office about the measures that have to be undertaken in order to complete the investigation (Article 225(3)). An appeal of the ruling of the panel shall be allowed and it shall be decided by the panel of the Appellate Division. The appeal shall not stay the enforcement of the ruling.
(5) The suspect shall be released if the indictment has not been confirmed before the expiry of the periods referred to in paragraphs (1)-(4) of this Article.

Article 136

Termination of Pre-Trial Detention

(1) The preliminary proceedings judge may issue a ruling terminating pre-trial detention during the investigation and before the expiry of pre-trial detention after hearing the prosecutor. The prosecutor may appeal the ruling with the panel referred to in Article 24(7), which is to rule on it within 48 hours.

Article 137

Pre-Trial Detention after Confirmation of the Indictment

(1) Pre-trial detention may be ordered, extended or terminated after the confirmation of the indictment as well. Grounds for pre-trial detention shall be reviewed upon the expiry of two months from the day of issuance of the most recent ruling on pre-trial detention. The appeal of this ruling shall not stay its execution.
(2) After the confirmation of the indictment and before the delivery of the first-instance judgment, pre-trial detention may not exceed:
   a) One year in case of a criminal offence warranting up to five years' imprisonment;
   b) One year and six months in case of a criminal offence warranting up to ten years' imprisonment;
   c) Two years in case of a criminal offence warranting more than ten years' imprisonment but not long-term imprisonment; or
   d) Three years in case of a criminal offence warranting long-term imprisonment.
(3) Pre-trial detention shall be terminated and the defendant released if a first-instance judgment is not delivered during the period referred to in paragraph (2) of this Article.

Article 138

Pre-Trial Detention after the Delivery of the Judgment

(1) The court may order the pre-trial detention or extend the pre-trial detention of defendants sentenced to imprisonment, while taking into account all the circumstances related to the commission of the criminal offence and the personality of the perpetrator. The court shall issue a separate ruling in such cases. An appeal of the ruling shall not stay its enforcement.
(2) The court shall terminate the pre-trial detention of defendants and order their release upon their acquittal or dismissal of charges against them for reasons other than lack of jurisdiction of the court or in the event they have been found guilty but released from penalty, have only been fined or given a suspended sentence, or have already served their time whilst in pre-trial detention.
(3) Pre-trial detention may not extend beyond nine months following the delivery of the first-instance judgment. Exceptionally, the appellate panel may extend pre-trial detention another six months at most in complex cases and for important reasons. Pre-trial detention shall be terminated and the defendant released if a second-instance judgment modifying or upholding the first-instance judgment is not delivered within that period. Pre-trial detention may be extended one more year at most after the delivery of a second-instance judgment reversing the first-instance judgment within the prescribed deadlines.
(4) On the request of a convicted defendant in pre-trial detention, the judge or presiding

judge may issue a ruling committing them to an institution to serve their prison sentence before the judgment becomes legally binding.
(5) Pre-trial detention shall always be terminated upon the expiry of the imposed sentence.
(6) Defendants in pre-trial detention, whose sentences of imprisonment have become legally binding, shall remain in pre-trial detention until they are committed to prison to serve their sentences, but not after the expiry of their prison term.

Article 139
Deprivation of Liberty and Custody

(1) The police may deprive a person of liberty if there is reasonable suspicion that they committed a criminal offence and on any grounds under Article 132 of this Code and they must bring that person before the prosecutor immediately, within 24 hours at most, whom they shall notify of the reasons for and time of deprivation of liberty. The police may use force to apprehend the person in accordance with the law.
(2) As an exception to paragraph (1) of this Article, persons suspected of crimes of terrorism must be brought before the prosecutor within 72 hours at most.
(3) Persons deprived of liberty must be instructed in accordance with Article 5 of this Code.
(4) Persons deprived of liberty shall be released in the event they are not brought before the prosecutor by the deadlines specified in paragraphs (1) and (2).
(5) The prosecutor shall be obliged to question the person in custody without delay and no later than 24 hours and decide within that time whether to release them or file a reasoned motion for their pre-trial detention with the preliminary proceeding judge, whilst ensuring that the person is brought before the judge.
(6) The preliminary proceedings judge shall issue a ruling on the motion for pre-trial detention immediately, and no later than 24 hours.
(7) The preliminary proceedings judge who rejects the motion for pre-trial detention shall issue a ruling rejecting the motion and ordering the immediate release of the person. The prosecutor may appeal the ruling of the preliminary proceeding judge, but the appeal shall not stay the enforcement of the ruling.
(8) The person ordered into pre-trial detention may appeal the ruling on pre-trial detention, which shall not stay the enforcement of the ruling.
(9) The appeals referred to in paragraphs (7) and (8) of this Article shall be ruled on by the panel referred to in Article 24(7) of this Code, within 48 hours of receipt of the appeal by the court.

There are no major differences between the provisions on types of measures, non-custodial measures and pre-trial detention in the BiH Criminal Procedure Code and the corresponding provisions of the Criminal Procedure Codes of Republika Srpska (RS), the Federation of Bosnia and Herzegovina (FBiH) and the Brčko District of Bosnia and Herzegovina (BD BiH).

The relevant provisions in the RS Criminal Procedure Code are laid down in Article 181 – Types of Measures, Articles 184-191 - Non-Custodial Measures and Articles 196-204 - Pre-Trial Detention.

The relevant provisions in the FBiH Criminal Procedure Code are laid down in Article 137 – Types of Measures, Articles 140-140g - Non-Custodial Measures and Articles 145-153 - Pre-Trial Detention.

The relevant provisions in the BD BiH Criminal Procedure Code are laid down in Article 123 – Types of Measures, Articles 126-126g - Non-Custodial Measures and Articles 131-139 - Pre-Trial Detention.

Article 5 of the European Convention on Human Rights

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
   a) the lawful detention of a person after conviction by a competent court;
   b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
   f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

I. Pre-Trial Detention

I.1. Reasonable Suspicion

I.1.a Standards

The existence of "reasonable suspicion" on which deprivation of liberty is based is the crucial element of guarantees against arbitrary arrest and the condition *sine qua non* for ordering and extending pre-trial detention.

A "reasonable suspicion" that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.[2]

The exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5(1) is impaired. The respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence.[3]

Article 5(1)(c) speaks of a "reasonable suspicion" rather than a genuine and bona fide suspicion.[4]

I.1.b Examples of Case Law of Ordinary Courts

Example 1

Court of Bosnia and Herzegovina Ruling No. S1 1 K 016706 14 Krl of 16 September 2015

The panel first noted that the preliminary proceedings judge ordered and extended the defendant's pre-trial detention because of the reasonable suspicion that he had committed a war crime against the civilian population under Article 142 in conjunction with Article 22 of the SFRY Criminal Code. The Court based the existence of a reasonable suspicion primarily on the statements of witnesses, who unequivocally described the defendant and his conduct and actions during the events at issue; the fact that they knew him well was decisive. The Court's conclusion on the existence of a reasonable suspicion as the main reason for the defendant's pre-trial detention was also based on its inspection of the material evidence submitted together with the indictment.

During its review of the grounds to extend the defendant's pre-trial detention, the panel found that there was reasonable suspicion that he had committed a crime based on the fact that the preliminary proceedings judge had established the existence of such a suspicion after reviewing the indictment and accompanying evidence and that his conclusion had not been brought into question by the evidence presented at the main hearing by that time.

2 See ECtHR, *Monnell and Morris v. The United Kingdom*, 2 March 1987.

3 See ECtHR, *Fox, Campbell and Hartley*, 30 August 1990.

4 *Ibid.*

However, the third co-defendant's defence counsel presented their evidence, which involved witness testimony and material documentation corroborating the defendant's alibi. The panel examined the evidence presented by the defence, primarily the material documentation, and found that the degree of reasonable suspicion regarding that defendant significantly differed from the one established by the preliminary proceedings judge, who had assessed only the evidence submitted together with the indictment at the time he reviewed the indictment. Therefore, this evidence, which the Prosecution Office did not challenge and the content of which was not brought into equation by any evidence material in character, shows that the defendant had not even been in BIH at the time of the crime. These circumstances did not prevent the prosecutor from continuing to present evidence refuting the claims of the defence, but the prosecutor did not propose such evidence at the time, except statements by some witnesses about the circumstances of the event at issue and the potential perpetrators. At the time, the prosecutor obviously did not have specific evidence that would refute the material documentation about the defendant's alibi presented by his defence.

Comment

When deciding on extending the defendant's pre-trial detention, the Court was guided by its obligation to review the continued existence of grounds for pre-trial detention *ex officio* and at any time. The panel found that reasonable suspicion as the general requirement for ordering the defendant's pre-trial detention did not exist, i.e. that it did not exist in the degree requisite for restricting his liberty.

Example 2

Court of BiH Ruling No. S1 1 K 029228 19 Krž 8 of 10 September 2019

Given that the defendant's lawyers filed an appeal challenging the existence of a reasonable suspicion as the condition *sine qua non* for extending his pre-trial detention, the appellate panel reviewed the merits of the complaint and found that the panel had properly concluded in the impugned ruling that reasonable suspicion clearly stemmed from the evidence submitted together with the indictment and that the panel's conclusion had not been brought into question by the evidence presented at the main hearing by then. Namely, the appellate panel noted that the requisite degree of reasonableness of suspicion during the review of pre-trial detention could undoubtedly be found in the fact that the indictment was confirmed, and on the basis of the evidence submitted together with it, and that the evidence presented by then had not reduced the degree of suspicion. It said that the degree of suspicion would next be assessed within the decision on the merits and the guilt of the defendant beyond reasonable doubt after the completion of the main hearing. The panel recalled that the court had also taken into account the principle of presumption of innocence when it reviewed the existence of a reasonable suspicion before ruling on the merits of a criminal case. However, its existence does not suffice to release the suspects/defendants; in that sense, lawful extension of pre-trial detention based on the determination of reasonable suspicion and other grounds for pre-trial detention, like in this case, definitely does amount to a violation of the principle.

Comment

Although the indictment was confirmed, the Court assessed the degree of reasonableness of suspicion during its review of the pre-trial detention measure.

Example 3

Brčko District Appellate Court Ruling No. 96 0 K 108834 18 Kž of 20 February 2018

The Prosecution Office filed a motion with the preliminary proceedings judge of the Basic Court to order the issuance of an international arrest warrant and the pre-trial detention of the suspect, who was at large, because there was reasonable suspicion that he and his accomplices had committed the crime of grand larceny under Article 281(1)(2) in conjunction with Article 31 of the Brčko District Criminal Code (hereinafter: BD CC), that they were at large and hiding to avoid criminal prosecution, i.e. the prosecutor sought their pre-trial detention under Article 132(1)(a) of the Brčko District Criminal Procedure Code (hereinafter: BD CPC).

The Basic Court upheld the Prosecution Office's pre-trial detention motion and issued a ruling under Article 132(1)(a) of the BD CPC ordering the 30-day pre-trial detention of the suspects as of the moment they are deprived of liberty.

In its reasoning, the Court explained that it had reached its decision based on the report, the supplement to the report, witness statements, the Border Police report on the licence plates of the vehicle the suspects drove to the gas station they robbed, the official police report and the video recording on the CD. The Court, however, did not specify the content of the evidence or whether it corroborated the facts described in the Prosecution Office's motion for the suspects' pre-trial detention and issuance of an international arrest warrant against them, facts allegedly giving rise to reasonable suspicion that the suspect was one of the perpetrators of the grand larceny under Article 281(1)(2) in conjunction with Article 31 of the BD CC.

The Appellate Court is of the view that the first-instance court had violated criminal law as regards the qualification of the act committed by the suspect as an act of crime in the first place, wherefore it erred when it found that the general requirement for ordering pre-trial detention under Article 132(1) of BD CC had been fulfilled i.e. that there was reasonable suspicion that the suspect had committed the crime. The facts described in the Prosecution Office's pre-trial detention motion do not have any elements of a criminal offence this individual can be suspected of and the evidence the court referred to in its reasoning of the impugned ruling does not show the existence of a reasonable suspicion that the suspect had committed any crime. Therefore, the first-instance court should have dismissed the Prosecution Office's pre-trial detention motion because the general requirement – existence of a reasonable suspicion that the suspect had committed a crime – had not been fulfilled.

Comment

The Appellate Court examined all the facts that the Prosecution Office specified in its pre-trial detention motion and concluded that there was no reasonable suspicion that any crime had been committed.

I.1.c Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Court of BiH Ruling No. S1 2 K 012709 13 Krn3 of 27 April 2013

Court of BiH Ruling NO. S1 2 K 012709 13 Kv of 3 May 2013

The appellant had been charged with grave organised crime offences involving abuse of office and corruption, wherefore the Court of BiH issued rulings ordering his pre-trial detention. The panel and appellate panel of the Court of BiH concluded that the evidence submitted by the Prosecution Office showed reasonable suspicion that the appellant had committed the crimes at issue.

The Court of BiH said that its conclusion on the existence of a reasonable suspicion was based on the following arguments, which it qualified as crucial: 1) in a short period of time, the appellant adopted 142 (or 147) decisions pardoning individuals found guilty of various crimes by final judgments; 2) in that same period, only one pardon was granted at the BiH level and one pardon was granted at the RS level; 3) the appellant had not consulted with FBiH Vice-Presidents as prescribed by Article 2 of the Pardons Law; 4) one witness said that in his "efforts to obtain a pardon for his brother [...] he tried to reach the appellant" and that he "heard [that the appellant] had helped people obtain pardon in some cases" and that "one of the pardoned [...] told him he had paid 48,000 KM for his pardon" and that this witness "submitted a request to the [appellant]"; 5) that the suspect said that "on 29 March 2013, he talked with one of the suspects [...] who told him that [A.] was dealt with and that the '[appellant] was to do it for [A.]"; 6) that witnesses testified that the "suspect [...] was the [appellant's] contact person" and 7) that 5,900 KM were found during the search of the appellant.

Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits AP 1885/13 of 24 May 2013

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Existence of „reasonable doubt", on which deprivation of liberty is based, constitutes an essential part of the guarantees against arbitrary arrest and is a *conditio sine qua non* for ordering or extending detention.

The Constitutional Court said that the Court of BiH had provided neither an explanation nor any arguments why the alleged lack of consultations with the FBiH Vice-Presidents was even the key reason that led it believe that there was reasonable suspicion that the appellant had committed organised crime offences involving abuse of office and corruption. Furthermore, in its reasoning of the impugned rulings, the Court of

BiH also failed to give any arguments that would satisfy an "objective observer" that the appellant could have committed the specific crimes based on the alleged lack of consultations with the FBiH Vice-Presidents, although it was under the obligation to give such arguments under Article 5(1)(c) ECHR. The Constitutional Court said that the statements the Court of BiH had referred to fell in the category of hearsay evidence. Such witness statements were not corroborated by other objective evidence, as required by reasonable suspicion standards. Furthermore, such statements did not in any way indicate why the Court of BiH concluded that these statements, together with other evidence, "show that the crime was committed in the following manner: the suspects formed a network of middlemen who established contact with the convicts or members of their families who applied for pardon" and that "the individual members of the organised crime group had clearly defined and assigned roles and agreed on the division of proceeds, as evidenced by the statements of the heard witnesses and transcripts of the intercepted telephone conversations". The Constitutional Court qualified this allegation by the Court of BiH as arbitrary, as such a conclusion could not be drawn from the facts on which the Court of BiH based its conclusion on the existence of a reasonable suspicion. As per the sum of money found on the appellant, one of the reasons the Court of BiH gave for its conclusion that there was reasonable suspicion requisite for ordering the appellant's pre-trial detention, the Constitutional Court underlined that the Court of BiH had failed to explain this reason or associate it with the commission of crimes the appellant was charged with. The same applied to the argument concerning the appellant's adoption of 142 (or 147) pardon decisions during a period in which only one such decision was adopted at the BiH level and another one was adopted at the RS level. The Constitutional Court concluded, that, according to the definition in the BiH CPC and the requirement in Article 132(1) of the BiH CPC, such explanations in the impugned rulings did not satisfy the condition for the existence of a reasonable suspicion, or the minimum standards under Article 5(1)(c) ECHR regarding that condition, in the absence of which pre-trial detention cannot be considered lawful.

Comment

The ordinary court did not genuinely and persuasively verify all the facts and information on which it based its conclusion that there was reasonable suspicion that the appellant had committed the crimes he was charged with. The reasons the Court of BiH referred to in its statements justifying the impugned rulings did not suffice per se to reach a conclusion on the existence of a reasonable suspicion in the meaning of the BiH CPC and Article 5(1)(c) ECHR.

As opposed to this case, in its decision in case No. **AP 4446/16**, the Constitutional Court found that the conclusion of the Sarajevo Cantonal Court on the existence of a reasonable suspicion that the appellant had committed organised crime offences involving abuse of office did not leave the impression of arbitrariness and that it had given arguments in its decisions explaining why it concluded that there was reasonable suspicion that the appellant had committed the crimes he was suspected of (**Sarajevo Cantonal Court Ruling No. 09 0 K 026508 16 Kpp 91 of 17 November 2016** and **Sarajevo Cantonal Court Ruling No. 09 0 K 026508 16 Kv 3 of 23 November 2016**).

Example 2

Sarajevo Cantonal Court Ruling No. 65 0 K 619376 17 Kž 7 of 5 September 2017

The Cantonal Court issued a ruling declaring inadmissible the appeal of the first-instance ruling ordering pre-trial detention. The appellant challenged, *inter alia*, the existence of a reasonable suspicion prerequisite for ordering pre-trial detention. The Cantonal Court said that the appellant had failed to elaborate or provide arguments for his claim on the non-existence of a reasonable suspicion, wherefore it decided not to review the appeal on the merits.

Bosnia and Herzegovina Constitutional Court, Decision on Admissibility and Merits No. AP 3321/17 of 11 October 2017

The Constitutional Court found that the Cantonal Court had totally ignored the appellant's claims challenging the existence of a reasonable suspicion, i.e. that it had failed to review the main requirement for ordering or extending pre-trial detention. The Constitutional Court said that the very examination of the lawfulness of pre-trial detention was illusory in a situation where no reasons were given on this key issue – the existence of a reasonable suspicion. Therefore, without going into the existence of a reasonable suspicion in this case, the Constitutional Court found violations of the appellant's rights under Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and (3) and (4) of Article 5 ECHR.

Comment

Article 5 ECHR will have been violated in the event the court that rendered a final decision on pre-trial detention failed to explain the reasons that led it to conclude that there was reasonable suspicion, i.e. failed to respond to the appellant's complaints challenging the existence of a reasonable suspicion as the condition *sine qua non* for ordering or extending pre-trial detention.

The Constitutional Court dealt with one more case (No. **AP 5511/17**) in which the second-instance court failed to respond to the appellant's question about the existence of a reasonable suspicion: the Zenica Cantonal Court issued a ruling (No. **43 0 K 142914 17 Kž of 13 December 2017**) in which it totally ignored the appellant's claims challenging the existence of a reasonable suspicion.

Example 3

Banjaluka Basic Court Ruling No. 71 0 K 292290 18 Krr of 20 September 2018

Banjaluka Basic Court Ruling No. 71 0 K 292290 18 Kv of 25 September 2018

The Basic Court ordered the appellant's pre-trial detention on the reasonable suspicion that he had aided and abetted a perpetrator of a crime after the fact. The rulings stated that the Prosecution Office had investigated unidentified individuals suspected of killing

a person and that the appellant had allegedly deleted the footage recorded on the MK car-shop video cameras, which might have helped shed light on the murder. Apart from establishing that the appellant had "deleted" something, the ordinary court gave no other specific reasons indicating the existence of a reasonable suspicion that he had committed the crime at issue. The first ruling listed as evidence the minutes of witness questioning (that led to the reasonable suspicion), but the content of minutes remained totally unknown.

Bosnia and Herzegovina Constitutional Court, Decision on Admissibility and Merits No AP 5509/18 of 27 February 2019

The Constitutional Court said that several issues of relevance to the existence of a reasonable suspicion that the appellant had committed the crime remained unclarified by the impugned rulings or contradicted such a conclusion. The Constitutional Court noted, *inter alia*, that the lower court had not given clear reasons that led it to the conclusion that the appellant had deleted the video footage at issue and that he had been aware that he would thus manipulate evidence that may be of relevance to solving the murder investigated by the Prosecution Office. Furthermore, the Constitutional Court noted that it was absolutely unclear when the appellant had allegedly deleted the video footage because the impugned rulings failed to specify the date of commission of that act or the date when the investigation of the murder was initiated. The Constitutional Court also said that the appellant had claimed that he had undertaken specific actions (qualified as deletion by the Court) to help shed light on another crime investigated by the police and in response to an official request by the police.

Having analysed the reasons the Basic Court specified in the impugned rulings and on the basis of which it had concluded that there was reasonable suspicion warranting the appellant's pre-trial detention, the Constitutional Court concluded that there was no clear connection between the specified reasons and the conclusion on the existence of a reasonable suspicion that the appellant had committed the crime he was charged with.

Comment

The Basic Court's explanations of its decisions could not lead to the conclusion that the reasonable suspicion standard has been fulfilled in the manner defined by the CPC or that there were facts or information which would satisfy an objective observer that the person concerned may have committed the offence he is charged with, as required by Article 5(1)(c) ECHR standards.

I.2. Review of Alternatives to Pre-Trial Detention as the First Step

I.2.a Standards

ECHR Contracting States should first review the possibility of ordering measures milder than pre-trial detention.[5] Courts must be aware that deprivation of liberty is the ultima ratio vis-à-vis the right to security as a fundamental human right and that alternatives have to be applied if they can serve the purpose.[6]

Before issuing a ruling ordering pre-trial detention on any of the admissible grounds, the court must establish whether it can order any milder measures to prevent the danger of the defendant absconding, re-offending, obstructing the criminal proceedings or disturbing public order.[7]

All decisions ordering alternatives to pre-trial detention or pre-trial detention must be reasoned.[8]

I.2.b Examples of Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 029228 19 Krž 8 of 10 September 2019

The impugned ruling restricts the defendant's rights and freedoms in accordance with the law. Bearing in mind the interests of the proceedings, the Court shall review the need to extend the strictest measure ensuring the successful conduct of the proceedings. Therefore, legal and legitimate restrictions, which are proportionate to the specific risks to be eliminated by pre-trial detention, are at issue. The panel recalls that strictly individual assessments of the defendant's circumstances are at issue, wherefore it is not bound by decisions in other cases. Therefore, the court dismisses as ill-founded the defence's motion for the application of milder measures and reference to their adequacy in other cases.

Comment

The Court extensively explained the possibility of imposing a non-custodial measure and emphasised that it performed individual assessments of the relevant circumstances.

5 See ECtHR, *Smirnova v. Russia*, 24 July 2003

6 See, *mutatis mutandis*, ECtHR, *Stögmuller v. Austria*, 10 November 1969

7 See ECtHR, *Ilijkov v. Bulgaria*, 26 July 2001

8 See ECtHR, *Punzelt v. The Czech Republic*, 25 April 2000

Example 2

Court of BiH Ruling No. S1 1 K 023626 17 Krn 9 of 21 December 2017

Although the legislator did not enumerate the circumstances to be assessed as decisive during assessments of the existence of the risk at issue, case law indicates that, in each individual case, the court needs to assess specific circumstances and facts concerning the suspects' conduct before and after the commission of the crime or after the initiation of criminal proceedings, as well as their personal features, based on which it can conclude whether there is a risk of the suspect absconding or going into hiding.

Having reviewed all the circumstances of the case at hand, the Court concludes that circumstances indicated a specific degree of risk of the suspect absconding, going into hiding, moving to an unknown location or abroad, and thus precluding the continuation of criminal proceedings. Among other things, the Court took into account the fact that the suspect was not only a citizen of BiH, but of the Republic of Serbia as well and that he faced charges for a grave crime warranting long imprisonment, and that these circumstances indicated that there was a risk of him absconding. However, the Court held that the risk was not of the degree or intensity justifying pre-trial detention as the strictest measure to secure his presence during the proceedings and that the risk could also be eliminated by imposing upon him the ban on leaving his place of residence and a travel ban under Article 126 (1) and (2) of the BiH CPC, as it stated in the operational part of the ruling.

The Court also notes that the relevant case law of international courts defines the fear of obstruction of criminal proceedings as clear indications or particular factual circumstances rendering such fear well-founded. Such indications and factual circumstances may include pressures on and intimidation of witnesses, attempts to contact accomplices, and destruction or attempts to destroy evidence or documents. In any case, circumstances justifying pre-trial detention on these grounds must be sufficiently obvious. In that connection, having analysed the Prosecution Office's reasons for the suspects' pre-trial detention, the Court finds that there is well-founded fear that the suspect, if not detained on remand, would obstruct the criminal proceedings by influencing the witnesses and other suspects in the case, especially in view of the fact that most of the witnesses are members of the same military unit, that they live in the same area as the suspects, wherefore the latter could easily contact them, which would definitely reflect on the ongoing criminal proceedings and impinge on the course of the investigation.

Given that the investigation is still ongoing and that the suspects became aware of their situation at a specific point of the proceedings, after they were told that they were suspected of a grave crime warranting a long prison sentence, all the above considerations indicate that they may be motivated to influence the witnesses and co-suspects in order to improve their legal status and diminish or avoid criminal liability.

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Courts must be aware that deprivation of liberty is the *ultima ratio* vis-à-vis the right to security as a fundamental human right and that alternatives have to be applied if they can serve the purpose.

However, the Court holds that the fear is not of the degree or intensity justifying pre-trial detention as the strictest measure to ensure the unobstructed conduct of the proceedings and that the same purpose can be achieved by applying the measure prohibiting them from contacting specific individuals under Article 126a (1)(c) of the BiH CPC, and, as regards the second suspect, the measures prohibiting him from leaving his place of residence and from travelling under Article 126(1) and (2) of the BiH CPC, as specified in the operational part of the judgment; these measures were proposed also by the suspects' defence counsel. In that respect, the Court in particular has regard of the fact - which was correctly noted by the suspects' defence counsel - that the suspects have been aware of the investigation against them for quite some time and have not tried to influence the witnesses.

Furthermore, the Court took into consideration the fact that the Prosecution Office had insufficiently elaborated the reasons why the suspects should be placed in pre-trial detention to ensure the unobstructed conduct of proceedings. It, however, finds that these reasons suffice to impose the above non-custodial measures against them.

Comment

Given that the suspect had dual citizenship and was suspected of a grave crime warranting long imprisonment, the Court concluded that there was a risk of him absconding. However, rather than upholding the prosecutor's pre-trial detention motion, it imposed measures prohibiting the suspect from leaving his place of residence and from traveling.

Furthermore, given that most of the witnesses were members of the same army unit and were living in the same area as the suspects, and that the suspects were suspected of a grave crime warranting long imprisonment, the Court concluded that there was a risk of them influencing the witnesses. Rather than upholding the prosecutor's pre-trial detention motion, it imposed a measure prohibiting them from meeting with specific individuals.

Example 3

Brčko District Appellate Court Ruling No. 96 0 K 105341 17 Kž of 15 August 2017

The Brčko District Basic Court dismissed the Prosecution Office's motion to order the pre-trial detention of the suspect suspected of committing the crime under Article 29 of the BiH Gender Equality Law and the crime of unauthorised optical recording under Article 186(3) of the Brčko District Criminal Code and ordered the suspect's release pursuant to Article 139(7) of the Brčko District Criminal Procedure Code.

The first-instance court imposed non-custodial measures against the suspect, prohibiting him from visiting and accessing specific areas and from meeting or coming within a specific distance from a specific individual. In that ruling, the court also ordered the police to check whether the suspect complied with the measures on a daily basis and at all hours.

In its decision on the prosecutor's motion, the first-instance court applied Article 123(2) of the Brčko District Criminal Procedure Code, under which it is under the obligation to ensure that it does not impose a more severe measure if the purpose of securing the successful conduct of proceedings can be achieved by a milder measure. As per the prosecutor's reason for requesting pre-trial detention – the existence of particular circumstances justifying fears that the suspect would again commit the crime warranting minimum three years' imprisonment, the court noted that the imposed (milder) non-custodial measures would achieve the same purpose – prevent the suspect from reoffending.

The prosecutor promptly appealed the Brčko District Basic Court's ruling. The Appellate Court rejected the appeal as ill-founded.

The Appellate Court said that the mere possibility of the suspect buying other technical long-range observation and photographing equipment did not suffice to order his pre-trial detention due to the fear that he would reoffend, given that, in terms of Article 132(1)(c) of the Brčko District Criminal Procedure Code, such fear must be justified by particular (specific) circumstances, not by the abstract possibility of him buying the means for committing the crime.

Given the reasonable suspicion that the crime was committed against a minor, i.e. that the suspect had observed, followed and photographed a minor, and that the minor was living in her family home in the immediate vicinity of the suspect's house, the first-instance court was correct to impose the measures prohibiting the suspect from visiting or accessing the house and its yard, thereby achieving the purpose that prompted the prosecutor to request pre-trial detention, to prevent the suspect from reoffending.

Furthermore, the submitted material evidence and photo documentation indicate that the suspect is living in a residential facility comprising the ground floor, the first floor and the cellar (second floor). Therefore, bearing in mind the manner and circumstances in which the crime was committed and the reason why the prosecutor was requesting pre-trial detention, the first-instance court was correct to prohibit the suspect from going to the cellar of the house, which is separated from the first floor by a staircase.

Finally, the first-instance court did not limit the suspect's right to live in his home by prohibiting him from going to and accessing the cellar, given that the house he lives in comprises the ground floor and a residential unit on the first floor, wherefore the court correctly applied also Article 126d(2) of the Brčko District Criminal Procedure Code.

Therefore, the Court also found that the imposed measures, milder than pre-trial detention requested by the prosecutor, were adequate and sufficient to prevent the suspect from reoffending. It concluded that the first-instance court was correct to apply Article 123(2) of the CPC and impose a milder measure than the one requested by the prosecutor and that its enforcement would ensure the successful conduct of criminal proceedings.

Comment

The court made sure that a stricter measure was not imposed against the suspect to ensure the successful conduct of criminal proceedings where the same purpose could be achieved by a milder measure; it properly reasoned its decision ordering measures alternative to pre-trial detention.

Example 4

Brčko District Appellate Court Ruling No. 96 0 Km 101869 17 Kmž 2 of 21 March 2017

The Basic Court issued a ruling replacing the suspect's pre-trial detention by the following non-custodial measures under Article 95 of the Brčko District Juvenile Justice Law: the suspect was prohibited from leaving his family home and meeting with his alleged accomplices and other individuals potentially associated with the commission of the crimes at issue.

The appeal filed by the Prosecution Office was upheld, the Basic Court ruling was voided and the cases was remitted for reconsideration.

In his appeal, the prosecutor was correct to state that the first-instance court erred in findings of fact on which it based its assessment that the circumstances have changed since the court ordered and extended A.H.'s pre-trial detention and that the requirements for replacing pre-trial detention by non-custodial measures have been fulfilled.

During its review of the lawfulness of pre-trial detention, the first-instance court considered all the facts and circumstances that existed at the time pre-trial detention was ordered and, since the criminal proceedings were under way, it concluded that the facts and circumstances had changed, that it was unnecessary to keep the suspect in pre-trial detention, and that this measure could be replaced by non-custodial measures. As the prosecutor also noted in the appeal, the first-instance court found that the suspect was a young man without a record, that his parents were willing to take him in and support him, that he had confessed to the crimes, that he had actively contributed to the determination of all the facts about the commission of the crimes, that

The Council of Europe Committee of Ministers recommends that the courts review the possibility of imposing a milder measure before considering pre-trial detention. In its view, the determination of any risk shall be based on the individual circumstances of the case, but particular consideration shall be given to:

a) the nature and seriousness of the alleged offence;
b) the penalty likely to be incurred in the event of conviction;
c) the age, health, character, antecedents and personal and social circumstances of the person concerned, and in particular his or her community ties; and,
d) the conduct of the person concerned, especially how he or she has fulfilled any obligations that may have been imposed on him or her in the course of previous criminal proceedings.

CoE Council of Ministers Recommendation Rec (2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse

he had expressed remorse for committing them and promised he would not reoffend. These facts had existed at the time the suspect was ordered into pre-trial detention and they did not eliminate the danger of the suspect reoffending if released. As the prosecutor also noted in the appeal, these circumstances will become relevant as mitigating circumstances at the time the court decides on the criminal penalty if, of course, it is proven that the suspect had committed the crimes. Furthermore, the circumstances cited by the first-instance court (that the suspect's parents partly compensated the damage he had incurred), which have not been corroborated by any evidence, may be relevant as mitigating circumstances at the time the court decides on the criminal penalty, but that they can by no means be associated with the reasons for imposing a measure in lieu of pre-trial detention. In that respect, the circumstances referred to by the first-instance court in its ruling have absolutely none of the relevance it ascribed to them when it assessed that there was no reason to keep the suspect in pre-trial detention.

If the first-instance court was of the opinion that the requirements for replacing pre-trial detention with non-custodial measures had been fulfilled, it should have cited more persuasive reasons and more relevant facts that would have fully justified its belief that the non-custodial measures would be an adequate replacement for pre-trial detention, i.e. that there was realistically no longer any fear that the suspect would reoffend if he were set free. The ruling was thus deficient also in terms of the reasons on decisive facts, as the prosecutor also argued compellingly in the appeal.

Comment

During its review of the lawfulness of pre-trial detention, the first-instance court considered all the facts and circumstances that existed at the time pre-trial detention was ordered and, since the criminal proceedings were under way, it concluded that the facts and circumstances had changed, that it was unnecessary to keep the suspect in pre-trial detention, and that this measure could be replaced by non-custodial measures. However, the circumstances that the court might take into account as mitigating when deciding on the criminal penalty can by no means be associated with the reasons for imposing a measure in lieu of pre-trial detention.

I.2.c Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Visoko Municipal Court Ruling No. 41 0 K 069471 18 Kpp of 15 January 2018

Visoko Municipal Court Ruling No. 41 0 K 069471 18 Kv of 18 January 2018

The Cantonal Prosecution Office of the Zenica-Doboj Canton initiated an investigation against the appellant for abuse of office and powers under Article 383(1) of the FBIH Criminal Code. The first-instance court issued a ruling ordering the appellant's one-month pre-trial detention under Article 146(1)(b) and (c) of the FBiH Criminal Procedure Code (risks of influencing

witnesses and of absconding). The second-instance panel issued a ruling dismissing the appeal as ill-founded and upholding the first-instance ruling.

The Municipal Court dismissed as ill-founded the appellant's motion to replace his pre-trial detention by the ban on leaving his place of residence, because the appellant's defence counsel had not given clear and substantiated reasons that would persuade the Court that the same purpose could be achieved by this non-custodial measure. The second-instance panel failed to specify in its ruling why it had qualified as ill-founded the appellant's claims challenging the first-instance ruling in his motion requesting the imposition of milder non-custodial measures.

Bosnia and Herzegovina Constitutional Court Decision on Admissibility and Merits No. AP 394/18 of 13 March 2018

Given that the first-instance court had merely noted that the appellant's defence counsel had not given clear reasons substantiating the motion to place the appellant under so-called house arrest that would have persuaded the court that the same purpose could be achieved by this measure, and that the second-instance panel made no mention of whether and why it considered as ill-founded the appellant's claims challenging the impugned first-instance ruling in his motion requesting the imposition of milder non-custodial measures, the Constitutional Court concluded, *inter alia*, that this part of the ruling violated the appellant's rights under paragraphs (1)(c) and 3 of Article 5 ECHR.

Comment

Lack of a clear and substantiated explanation why the non-custodial measures could not secure the unobstructed conduct of criminal proceedings and the second-instance panel's failure to rule on the appellant's claims in that respect resulted in the violation of the appellant's right to liberty and security of person.

Example 2

RS Supreme Court Rulings No. 11 0 K 019581 18 Kž 9 of 23 October 2018 and No. 11 0 K 019581 18 Kž 8 of 20 September 2018

The appellant was found guilty of first degree murder under Article 149(2), car theft under Article 237(1), illegal manufacture of and trade in weapons or explosive substances under Article 399(1) and general endangerment under Article 402(1) of the RS Criminal Code and convicted to a prison sentence. The RS Supreme Court issued a ruling upholding the appellant's appeal, voiding the first-instance judgment and remitting the case for retrial. The Supreme Court simultaneously issued a ruling extending the appellant's pre-trial detention under Article 197(1)(g) of the RS Criminal Procedure Code (RS CPC, disturbance of public order). The Supreme Court ruling indicated that the Court had not considered the imposition of measures milder than pre-trial detention.

Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits No. AP 6559/18 of 10 January 2019

The Constitutional Court said that the explanations of the impugned rulings did not indicate that the ordinary court had even considered the possibility of imposing measures milder than pre-trial detention although it was under the duty to do so under Article 196(1) of the RS CPC, which lays down that "pre-trial detention may be ordered or extended only under the conditions laid down in this Code and only in the event the same purpose cannot be achieved by another measure".

Comment

Although, in this case, the Constitutional Court primarily dealt with the issue of the explanation of the grounds for the imposition of pre-trial detention (disturbance of public order), it noted with particular concern that the ordinary court had failed to review the possibility of imposing other measures instead of pre-trial detention.

Example 3

Sarajevo Municipal Court Ruling No. 65 0 K 508851 15 KV 2 of 10 July 2015

Sarajevo Cantonal Court Ruling No. 65 0 K 508851 15 Kž of 15 July 2015

The appellant had been ordered into pre-trial detention under the reasonable suspicion of abusing his position to have sexual intercourse with a child under Article 207(3) in conjunction with paragraph (1) of the FBiH Criminal Code. After the one-month pre-trial detention expired, the first-instance panel extended his pre-trial detention pursuant to Article 146(1)(c) and (d) of the FBiH CPC (risks of reoffending and disturbance of public order). The second-instance panel reviewed the appeal of the ruling and upheld the first-instance ruling. As per the possibility of replacing pre-trial detention with milder measures, the first-instance panel noted that, in this specific case, the purpose could not be achieved by any measure milder that pre-trial detention, wherefore pre-trial detention was the adequate and necessary measure at this stage of the proceedings. The second-instance court arrived at the identical conclusion: "This Court also concludes that the legal requirements for imposing a measure alternative to pre-trial detention have not been fulfilled in view of all of the above-listed circumstances justifying the grounds for extending pre-trial detention under the law."

Constitutional Court of Bosnia and Herzegovina, Decision on Admissibility and Merits No. AP 3210/15 of 27 October 2015

The Constitutional Court found that the appellant's rights under Article II/3(d) of the BiH Constitution and Article 5(1)(c) ECHR were violated since the ordinary courts had not given sufficient and specific reasons for ordering and extending his pre-trial detention under Article 146(1(c) and (d) of the BiH CPC in accordance with the ECHR standards. As per alternative measures, the Constitutional Court stressed that the ordinary courts had in this case

concluded that the requirements for their imposition had not been fulfilled primarily, as noted by the Cantonal Court, in view of the circumstances justifying the existence of legal grounds for extending pre-trial detention. As per the legal grounds for extending pre-trial detention, the Constitutional Court concluded that they did not correspond to ECHR standards set out in the preceding paragraphs of the decision, wherefore it held that the explanation given by the ordinary courts on the imposition of alternative measures was essentially unreasoned and arbitrary.

Comment

The ordinary courts' explanation that they decided against imposing measures alternative to pre-trial detention due to the existence of grounds for pre-trial detention, which the Constitutional Court found did not correspond to ECHR standards, was unreasoned and arbitrary.

As opposed to this case, in case No. **AP 2017/18**, the Constitutional Court held that the Sarajevo Cantonal Court had given clear and sufficient reasons for ordering pre-trial detention, wherefore it concluded that the imposition of milder measures would have been inadequate. Therefore, in the opinion of the Constitutional Court, the ordinary courts had clearly reviewed the possibility but concluded that milder measures could not be imposed (**Sarajevo Cantonal Court Ruling No. 65 0 K 689818 18 Kž 2 of 15 March 2018**).

I.3. Imposition of Pre-Trial Detention

I.3.a. Standards

Arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. They should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.[9]

While Article 5(4) of the Convention does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty.[10]

9 See ECtHR, *Brogan v. The United Kingdom*, 30 May 1989

10 See ECtHR, *Nikolova v. Bulgaria*, 25 March 1999

I.3.1. Grounds for Pre-Trial Detention

I.3.1.a Standards

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether there are relevant and sufficient grounds justifying the deprivation of liberty.[11]

Under Article 5(1) ECHR, the lawfulness of detention is assessed under domestic law, i.e. there must be legal grounds for pre-trial detention in domestic law and the deprivation of liberty must be in accordance with the purpose of Article 5 ECHR, i.e. the individual at issue must be protected from arbitrariness.[12]

I.3.1.b Risk of Absconding

I.3.1.b.1. Standards

Risk of absconding must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial. The risk of absconding also has to be assessed in light of the factors relating to the person's character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted.[13]

The fact that the appellant has dual citizenship and property in a neighbouring state cannot in itself be a valid and justified reason for the courts to conclude that there is a risk of him absconding; neither can every suspect with citizenship of a neighbouring state and property in it automatically be considered a flight risk.[14]

The mere absence of a fixed residence does not give rise to a danger of flight.[15]

It should also be borne in mind that the danger of flight necessarily decreases as the time spent in detention passes by for the probability that the length of detention on remand will be deducted from the period of imprisonment which the person concerned may expect if convicted, is likely to make the prospect seem less awesome to him and reduce his temptation to flee.[16]

11 See ECtHR, *Trzaska v, Poland*, 11 July 2000

12 See Constitutional Court, Decision on Admissibility and Merits No. AP 5842/10 of 20 April 2011

13 See ECtHR, *Becciev v. Moldova*, 4 October 2005

14 See Constitutional Court, Decision on Admissibility and Merits No. AP 1150/10 of 14 September 2010

15 See ECtHR, *Sulaoja v. Estonia*, 15 February 2005

16 See ECtHR, *Neumeister v. Austria*, 27 June 1968

I.3.1.b.2. Examples of the Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 023242 19 Krž 16 of 10 April 2019

The first-instance panel correctly concluded that the fact that the defendant was a national of the Republic of Serbia, with habitual residence in that state in which his wife lived, could facilitate his residence in his native country. In addition to these facts, the first-instance court correctly assessed the fact that the defendant had been found guilty of war crimes against the civilian population under Article 142(1) of the SFRY Criminal Code by the first-instance court and sentenced to 12 years' imprisonment, and that this circumstance definitely presented a strong motive for the defendant to try and preclude his further prosecution in case of release, wherefore the panel found the imposition of pre-trial detention on such grounds justified. Therefore, in view of the fact that the defendant has the citizenship of another country and the severity of the prison sentence faced, coupled with all the other facts, including the way he was deprived of liberty (the BiH Border Police applied force to deprive him of liberty at the border crossing when he tried to leave BiH and enter Serbia), it is justified to conclude that the defendant had motive to flee, which, in the view of this panel, could have obstructed the completion of the proceedings by a final decision.

Comment

The decision on the pre-trial detention was not based merely on the fact that the defendant had the citizenship of another country and habitual residence in it; this fact was assessed in the light of a number of other circumstances as well.

Example 2

Brčko District Appellate Court Ruling No. 96 0 K 102063 17 Kž of 24 February 2017

The Court partly upheld the suspect's appeal and modified the Basic Court's ruling ordering his one-month pre-trial detention under Article 132(1)(a) and (c) of the Brčko District Criminal Procedure Code.

As per grounds for pre-trial detention under Article 132(1)(a) of the Brčko District CPC, the Court dismissed the suspect's complaint that he did not pose a flight risk because he did not have the citizenship or travel documents of another country and he had not undertaken any actions indicating he wanted or intended to abscond, and that the event of 19 February 2017 could not be considered an attempt to abscond, but merely ordinary stupidity, as the suspect's defence counsel said at the hearing on the prosecutor's motion to place the suspect in pre-trial detention.

The defence counsel's view is unacceptable because it departs from the premise that the ground for ordering pre-trial detention under Article 132(1)(a) of the Brčko District CPC requires the existence of dual citizenship and travel documents enabling the suspect to leave the territory of Bosnia and Herzegovina, i.e. the suspect's unauthorised exit from the official vehicle and

attempt to abscond during the execution of the order to search his family home on 19 February 2017 cannot be considered a manifestation of the suspect's intention to obstruct the criminal proceedings against him. On the contrary, in the view of this Court, the fact that the suspect does not have the citizenship of another state is no guarantee that, if released, he would not use the relatively permeable borders of Bosnia and Herzegovina to leave its territory in view of the fact that BiH nationals can enter the neighbouring states with just their identity cards. Furthermore, regardless of the fact that his attempt to escape from the official vehicle did not seem to stand a chance of success, that act clearly indicated his intention to flee and hide from the prosecution authorities and thus preclude or seriously obstruct the conduct of criminal proceedings against him. Therefore, the first-instance court was right to conclude that all the requirements for ordering his pre-trial detention under Article 132(1)(a) of the Brčko District CPC were fulfilled.

Note should also be taken that when assessing the danger of the suspect reoffending, the suspect need not have necessarily been convicted of the same or similar crime; what is relevant is that there is continuity between his prior record and the criminal activity he is reasonably suspected of. The fact that the described circumstances are relevant factual grounds that led the first-instance court to rightly conclude that the requirements for ordering his pre-trial detention under Article 132(1)(c) of the Brčko District CPC have been fulfilled is clearly corroborated by the official minutes of the authorised Brčko District police officers drawn up after his arrest and quoting a number of local residents who expressed serious concern that the suspect could again commit the crime he was reasonably suspected of or commit another crime.

On the other hand, the suspect's defence counsel was correct to claim in the appeal that there were no legal grounds to order the suspect's pre-trial detention under Article 132(1)(d) of the Brčko District CPC, because the crimes he was reasonably suspected of did not warrant more than 10 years' imprisonment, given that the amount of damage caused by the fires set to the family homes had not been established and there was no reliable evidence that such damage exceeded 100,000 KM, which was an objective prerequisite for incrimination, wherefore there were no grounds to qualify his actions as arson under Article 295(2) of the Brčko District Criminal Code.

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The fact that the applicant has dual citizenship and owns assets in a neighbouring country cannot *per se* be a valid and justified reason for the courts to identify the existence of circumstances indicating the danger that the applicant might escape, nor can these facts automatically lead to the conclusion that any suspect with citizenship of a neighbouring country, and assets in such country, might escape justice.

Namely, although the legal qualifications of the criminal actions the suspect is reasonably suspected of cannot be reviewed on the merits during the hearing on his pre-trial detention, it needs to be borne in mind that when the pre-trial detention motion qualifies the criminal actions the suspect is suspected of as aggravated forms of the crimes due to the amount of damages incurred, which is simultaneously the formal prerequisite for ordering pre-trial detention under Article 132(1)(d) of the Brčko District CPC, there must be relevant evidence of the amount of damages in order to establish the existence of that element of the crimes the suspect is reasonably suspected of (damages exceeding 100,000 KM) before such a motion is submitted.

Comment

The suspect need not have dual citizenship and travel documents enabling him to leave the territory of Bosnia and Herzegovina for the court to conclude that grounds exist to order his pre-trial detention because of the risk that he may abscond.

When assessing the danger of the suspect reoffending, the suspect need not have necessarily been convicted of the same or similar crime; what is relevant is that there is continuity between his prior record and the criminal activity he is reasonably suspected of.

When the pre-trial detention motion qualifies the criminal actions the suspect is suspected of as aggravated forms of the crimes due to the amount of damages incurred, which is simultaneously the formal prerequisite for ordering pre-trial detention, there must be relevant evidence of the amount of damages in order to establish the existence of that element of the crimes the suspect is reasonably suspected of.

I.3.1.b.3. Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Court of BiH Ruling No. S1 1 K 019086 16 Krn 18 of 2 November 2016

Court of BiH Ruling No. S1 1 K 019086 16 Kv 5 of 8 November 2016

The Court of BiH issued a ruling ordering the pre-trial detention of the appellant and nine other suspects under Article 132(1)(a) and (b) of the BiH CPC (risks of absconding and obstructing criminal proceedings). The suspects were reasonably suspected of committing crimes against humanity under Article 172(1) of the BiH CC and war crimes against prisoners of war under Article 175 of the BiH CC. The Court of BiH essentially concluded that there was a risk of the appellant absconding because he had dual nationality and was suspected of grave crimes.

Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Merits No. AP 4407/16 of 22 December 2016

As per the risk of absconding, the Constitutional Court said that the Court of BiH had not given relevant and sufficient reasons about the appellant constituting a flight risk, i.e. it had insufficiently individualised the reasons for invoking this ground for pre-trial detention.

Comment

The court found a violation of the rights under Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and (3) of Article 5 ECHR with respect to grounds for pre-trial detention under Article 132(1)(a) of the BiH CPC (risk of absconding) because the decision ordering pre-trial detention did not include relevant and sufficient reasons to conclude that the appellant's pre-trial detention was justified on those grounds.

Example 2

Court of BiH Ruling No. S1 2 K 018538 15 Krn 17 of 16 July 2015

Court of BiH Ruling No. S1 2 K 018538 15 Kv of 24 July 2015

The Court of BiH issued rulings ordering the pre-trial detention of the appellant and another three suspects under Article 132(1)(a) and (b) of the BiH CPC (risk of absconding and obstructing criminal proceedings). The suspects were reasonably suspected of organised crime under Article 250 of the BiH CC and illicit trade in excise goods under Article 210a of the BiH CC. The Court of BiH took into account in particular that the suspects were investigated for grave crimes warranting long prison sentences, that they were also nationals of the Republic of Croatia and that they could exercise the constitutional right guaranteed by the Republic of Croatia, flee Bosnia and Herzegovina and thus avoid criminal prosecution in BiH. The Court of BiH also said that they were reasonably suspected of acquiring substantial proceeds of crime allowing them to live outside BiH. Despite the appellant's claims in the appeal that there was no such risk because of his specific personal circumstances and that the same purpose could be achieved by milder measures provided by law, the Court of BiH held that the appellant's pre-trial detention was justified also under Article 132(1)(a) of the BiH CPC.

Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Merits No. AP 3850/15 of 3 February 2016

As per the risk of the appellant absconding, the Constitutional Court concluded that, in the circumstances of the case, the Court of BiH had failed to give relevant and sufficient reasons for its conclusion that there was a genuine risk of the appellant absconding and that his pre-trial detention had to be ordered on those legal grounds as well, and that it had merely explained in the impugned rulings that he was investigated for grave crimes, possessed dual citizenship and that there was reasonable suspicion that he and his accomplices had acquired substantial proceeds of crime allowing them to live outside BiH.

Comment

The very fact that an individual has dual citizenship does not a priori indicate the risk of his flight; that fact does not suffice per se to keep the individual in

pre-trial detention, without an additional explanation and examination of his relevant circumstances (except for the fact that he possesses dual citizenship). The same applies to situations where the individual has close relatives abroad, given that the number of such individuals is large, which definitely cannot in itself be grounds for ordering pre-trial detention, i.e. does not indicate the risk that they may abscond.

The Constitutional Court's decision No. **AP 4176/16** of 6 December 2016 is another case in which the Constitutional Court found that pre-trial detention was not ordered exclusively because the appellants had dual citizenship. In that decision, the Constitutional Court found that the ordinary courts had given detailed and specific reasons that in their entirety justified their conclusion on the fulfilment of the legal requirements to order the pre-trial detention of the appellants (who were suspected of organised crime in conjunction with tax evasion and money laundering) under Article 146(1)(a) of the FBiH CPC. In the view of the Constitutional Court, the ordinary courts took into account the specific facts that led to the extension of the appellants' pre-trial detention and did not use stereotypical formulations. The ordinary courts had stated that the collected evidence on the whole substantiated reasonable suspicion that the appellants had acquired huge financial proceeds from the crimes they had committed over the past few years and had the opportunity to find shelter in one of the other countries they often visited, wherefore there was a risk of both of them being out of reach of the national prosecution authorities. Furthermore, the courts said that the appellants owned real estate in the Russian Federation and Dubai. Therefore, the Supreme and Cantonal Courts held that it was realistic to expect of the appellants to have a strong motive to shirk liability in this criminal matter and that the fear could not be eliminated by terminating their pre-trial detention because they were "not persuaded that the appellants would not risk losing the property at issue by going to a neighbouring or another country." (**FBiH Supreme Court Ruling No. 09 0K 026779 16 Kž 6 of 13 October 2016 and Sarajevo Cantonal Court Ruling No. 09 0 K 026779 16 Kv 3 of 5 October 2016**).

I.3.1.c Influence on Witnesses

I.3.1.c.1. Standards

The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*, it has to be supported by factual evidence.[17] The mere existence of the presumption that such conduct by the appellant is possible does not suffice, because the court cannot merely presume such a possibility; rather, the court must provide arguments corroborating the existence of specific objective circumstances or specific acts and actions constituting valid legal grounds for ordering pre-trial detention in a specific case.[18]

17 See ECtHR, *Becciev v. Moldova*, 4 October 2005

18 See Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Merits No. AP 6/08 of 13 May 2008

The risk of pressure being brought to bear on witnesses and/or other defendants over a longer period of time does not suffice to justify the detention of a suspect in the long term; in the normal course of events the risks alleged diminish with the passing of time as the inquiries are conducted, statements taken and verifications carried out.[19]

I.3.1.c.2. Examples of the Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 029228 19 Krž 8 of 10 September 2019

Having reviewed the claims in the appeal regarding the grounds for pre-trial detention, the appellate panel found that the first-instance panel had properly established the existence of the grounds for pre-trial detention under Article 132(1)(b) of the BiH CPC, and had properly substantiated its decision with respect to the decisive facts, and that none of the violations complained of in the appeal had occurred. In its assessment, the appellate panel found that the first-instance court had given valid reasons for extending pre-trial detention in the impugned ruling due to the risk of collusion and had set forth abundant evidence and circumstances continuously existing in the same degree since the investigation stage and demonstrating the necessity of ensuring the successful conduct of criminal proceedings by imposing the pre-trial detention measure. Specifically, the impugned ruling noted the existence of a number of official reports corroborating not only the particular risk that the suspect would influence the witnesses, but also gave concrete illustrations of it, which the defence failed to challenge successfully in its appeal; rather, the latter based its complaints on legally invalid claims that such statements had been commissioned, implying that they had been fabricated to the detriment of the defendant. Such allegations are evidently unjustified. The appellate panel qualified as indicative the obvious persistence, gravity and continuity of the defendant's intention to intimidate the witnesses in connection with their statements, and the first-instance court also properly based this conclusion on the requests for protection measures by multiple witnesses, prompted precisely by their fear for their own safety and that of their families, which, in the light of the official reports at issue, demonstrates the entire course of the defendant's direct and indirect actions, all with the goal of obstructing the criminal proceedings. It is precisely because of these indisputably established facts, which continue to give rise to the risk of collusion and require of the court to ensure the successful conduct of proceedings, that a different conclusion cannot be drawn either from the defence's claims about the statements of specific witnesses, who had allegedly denied pressure was being brought to bear on them, or from its conclusions aiming to put specific pressures out of the context of the criminal proceedings and the parties to the proceedings.

Comment

The Court assessed ample evidence of the risk of the defendant bringing pressure to bear on the witnesses, notably the official reports indicating not only the existence of such risk but also providing concrete illustrations of it, as well the requests for protection measures by multiple witnesses prompted by their fear for their safety.

19 See ECtHR, *Getoš-Magdić v. Croatia*, 2 December 2010

Example 2

Court of BiH Ruling No. S1 1 K 026747 17 Krn 5 of 24 November 2017

Grounds for pre-trial detention under Article 132(1)(b) of the BiH CPC

Having analysed the Prosecution Office's pre-trial detention motion, the Court found that it was well-founded, primarily because the investigation was still under way and around 30 witnesses were yet to be questioned. After perusing the case file, the Court found that these witnesses included a large number of the suspects' former fellow combatants, i.e. insiders who had relevant knowledge of the suspects' involvement and role at the time of the crime. Furthermore, the Court established that some of them had directly witnessed the suspects' actions and that some of them had sustained damages as a result of the crime the suspects are reasonably suspected of committing. In such a situation, the Court found it necessary to enable the unimpeded interrogation of all the witnesses, especially the former fellow combatants who, as the Prosecution Office claimed, were present at the scene of the the murders the suspects are suspected of *tempore criminis*, wherefore the fact that these witnesses have relevant knowledge of the event itself may motivate the suspects to establish contact with them and thus influence their statements.

Furthermore, it needs to be borne in mind that the investigation in this case is still under way and that there is no doubt that there are numerous witnesses of the events at issue, as well as potential suspects, not all of whom have been identified, wherefore all contacts between the suspects and them must be prevented, with a view to avoiding the risk of them colluding and coordinating their defence to eliminate or diminish their liability.

In addition, having examined the witness statements, the Court established that nine witnesses sought protection measures because they feared for their own or the safety of their families, that they were returnees to the communities where the suspects lived, which is why they expressed fear for their own safety and that of their families because of their testimonies. The witnesses seeking protection clearly specified in their statements the reasons substantiating their fear of the suspects and persons close to them if they found out that they had testified in the case.

Comment

The Court analysed in detail the Prosecution Office's motion and list of witnesses yet to be questioned, especially the fact that many of them were at the scene of the crime, that they had fought in the war together with the suspects, that some of them were victims as well, and that some of them sought protection of their safety.

As per the possibility of applying non-custodial measures, the Court said that the investigation could be successfully conducted only if the suspects were in pre-trial detention and that no other, milder measures would serve the purpose.

I.3.1.c.3. Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Visoko Municipal Court Ruling No. 41 0 K 069471 18 Kpp of 15 January 2018

Visoko Municipal Court Ruling No. 41 0 K 069471 18 Kv of 18 January 2018

The Cantonal Prosecution Office of the Zenica-Doboj Canton initiated an investigation against the appellant suspected of abuse of office and powers under Article 383(1) of the FBiH CC. The first-instance ruling ordered the one-month pre-trial detention of the appellant under Article 146(2)(b) and (c) of the FBiH CPC (risk of influencing witnesses and risk of absconding). The second-instance panel issued a ruling dismissing the appellant's appeal as ill-founded and confirmed the first-instance ruling. As per the risk of absconding, the second-instance panel fully upheld the first-instance court's ruling stating that the interrogation of a large number of witnesses employed in the Vareš Post Office and others was yet to be conducted, wherefore the motion to order pre-trial detention on these legal grounds was justified because there were well-founded fears that the appellant would try to pressure the witnesses into changing their statements.

Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Merits No. AP 394/18 of 13 March 2018

The Constitutional Court said, *inter alia*, that the reasoning of the first-instance ruling showed that the interrogation of a number of witnesses, including witnesses employed in the Vareš Post Office, was to be conducted in the forthcoming period. However, the first-instance court had failed to specify which particular circumstances in this case indicated that the appellant could actually obstruct the criminal proceedings by influencing the witnesses. Furthermore, the Constitutional Court said that the appellant had alerted to these shortcomings of the first-instance ruling in his appeal, but that the second-instance panel, which upheld the conclusions of the first-instance court, failed to review the merits of the complaint. In the view of the Constitutional Court, the reasons and explanations given by the ordinary courts in the specific circumstances of the appellant's case could not be deemed "relevant" and "sufficient" for the conclusion on the existence of grounds for pre-trial detention under Article 146(1)(b) of the FBiH CPC.

Comment

The Court must substantiate the particular circumstances indicating that the appellant may actually obstruct the criminal proceedings by bringing pressure to bear on the witnesses.

The Constitutional Court noted this obligation in its decision on an appeal filed by the same appellant against **Zenica Cantonal Court Ruling No. 41 0 K 069471 18 Kž of 16 February 2018 and the Visoko Municipal Court Ruling No. 41 0 K**

069471 18Kv 2 of 8 February 2018 (Decision No. AP 1279/18). In that decision, the Constitutional Court found a violation of Article 5 ECHR for the same reasons as in the above decision. The explanations of the impugned rulings did not specify the particular circumstances indicating that the appellant could actually obstruct the criminal proceedings by influencing the witnesses in this specific case, and the Cantonal Court failed to review the merits of the appellant's complaint regarding this issue.

As opposed to the above two examples, the Constitutional Court concluded in its Decision No. **AP 5190/17** that, in its rulings ordering the pre-trial detention of the appellant (suspected of crimes against humanity), the Court of BiH had not only referred to abstract reasons, but had also given sufficient and relevant reasons for ordering pre-trial detention under Article 132(1)(b) of the CPC, substantiating its conclusion that there was a real risk that, if released, the suspects would impede the proceedings (which were in the investigation stage) and bring the investigation into question. In the view of the Constitutional Court, these reasons did not leave the impression of arbitrariness (**Court of BiH Rulings Nos. S1 1K 026507 17 Kv 2 of 10 December 2017 and S1 1 K 026507 17 Krn 2 of 6 December 2017**).

Example 2

Sarajevo Cantonal Court Ruling No. 09 0 K 023702 16 Kv 29 of 2 December 2016

FBiH Supreme Court Ruling No. 09 0 K 023702 16 Kž 19 of 5 December 2016

The Cantonal Court specified in its ruling that the appellant was criminally prosecuted for organised crime under Article 342(3) in conjunction with tax evasion under Article 273(3), general endangerment under Article 183(2), malicious mischief under Article 293(1), grand larceny under Article 287(2)(a), organisation of resistance under Article 361(1) et al of the FBiH Criminal Code.

The reasoning of the ruling shows that the Supreme Court considered ill-founded the appellant's claims in the appeal that the requirements for ordering pre-trial detention under Article 146(1)(b) of the FBiH CPC had not been fulfilled. The Supreme Court did not accept the appellant's reasons that he was not employing any former workers or co-defendants, that the businesses had ceased to exist, that none of the employees of the companies he owned were associated with the crime he was accused of, that none of his companies were making money while he was in pre-trial detention, wherefore the conclusion that he could influence his co-defendants and witnesses because they were still employed by him was arbitrary. The Court also dismissed the appellant's claim that the Cantonal Prosecution Office had heard 134 witnesses during the investigation and that the indictment was based on evidence taking up nearly 200 pages, that many of the defendants had in the meantime entered into plea bargains, wherefore the first-instance court's conclusion that the defendant could influence the other defendants to coordinate their defence was ill-founded.

The Supreme Court said that, in addition to the enumerated reasons, the first-instance court also specified a number of other circumstances on which it had based its conclusions on the existence of the pre-trial detention grounds at issue. It said that the first-instance court had found that the appellant had abused his post of company procurator and issued orders to the other defendants, members of the group, who fully carried those orders out and that it had referred to the content of communication between the appellant and a witness employed with the BiH Indirect Taxation Administration through whom the appellant tried to establish contact with responsible officials in that body, an issue the appeal did not bring into question. The Court thus qualified as irrelevant the appellant's claim that the circumstances regarding his property had changed in the meantime, i.e. that, now that he did not have money, there was no justified risk of him influencing other members of the group, as well as his claim that criminal proceedings against some of the defendants had already been completed, which ruled out the possibility of him influencing those defendants. The Supreme Court said that the possibility of the defendant influencing the defendants and witnesses, including those who have already been questioned, existed throughout the criminal proceedings and "not only at the outset of his pre-trial detention," as the appellant had claimed, given that the first-instance court specified in the impugned ruling other specific circumstances on which it based its conclusion that there was a risk of the appellant obstructing the criminal proceedings by influencing other defendants and witnesses.

Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Merits No. AP 316/17 of 7 March 2017

The Constitutional Court concluded that, in the view of the ordinary courts, the particular consequences in the meaning of Article 146(1)(b) of the FBiH CPC boiled down to the conclusion that the appellant, reasonably suspected of masterminding an organised crime group, held a dominant position over the other defendants and witnesses thanks to his money and power and that they obeyed his orders without question. They corroborated their conclusion by noting that the appellant was the employer of some of the defendants and witnesses.

The Constitutional Court recalled that the risk of pressure being brought to bear on witnesses and/or other defendants over a longer period of time did not suffice to justify pre-trial detention in the long term since, in the normal course of events, the risks alleged diminished with the passing of time as the inquiries were conducted, statements taken and verifications carried out (see ECtHR, *mutatis mutandis*, *Clooth v. Belgium*, 12 December 1991, paragraph 43).

The Constitutional Court noted that the investigation in this case had been completed, that the indictment against the appellant had been confirmed and that the main hearing was under way. The defendant alerted to this fact both during the hearings before the ordinary courts that issued the rulings ordering his pre-trial detention and ruled on his appeals of the impugned first-instance rulings, specifying that the Prosecution Office had heard 134 witnesses during the investigation and submitted 200 pages of evidentiary material. Furthermore, the appellant submitted proof that the companies associated with him did not employ anyone implicated in the criminal proceedings at hand (either in the capacity of witness or in the capacity of defendant), i.e. evidence that one of the companies was under liquidation and that its workers were deregistered four months ago. Furthermore, the appellant claimed that the Cantonal Prosecution Office said at the main hearing that it had concluded plea bargains with a number of defendants and that they expressed the readiness to testify in the case. Finally, the appellant

alleged that he could not hold a dominant position since his property, as well as the property of the companies associated with him, was blocked and that he could not use it to exert any influence.

The Constitutional Court observed that, according to the impugned rulings, the members of the criminal group had been identified and criminal proceedings against them were under way, and that plea bargains were concluded with most of them (five out of eight) back in September 2016. Therefore, the fact that there is reasonable suspicion that the appellant had organised the group and that the other defendants carried his orders out without question cannot have the relevance of a particular circumstance in assessing the appellant's influence on the other defendants at this stage of the proceedings. Furthermore, the appellant submitted evidence - which was not brought into question during the proceedings before the ordinary courts - that he was not the employer of any individuals implicated in the criminal proceedings; the explanations of the impugned rulings do not indicate that the appellant otherwise provided sustenance for the other defendants or witnesses that would provide him with a dominant position he could use to influence them, all the more since the appellant's property and the property of the companies associated with him are were frozen.

Furthermore, as per the conclusion that the appellant used his money and government connections to try and influence public officials conducting proceedings against him in the FBiH Tax Administration and Indirect Taxation Administration, the Constitutional Court recalled that these public officials were under the obligation to perform the duties conferred upon them in accordance with the law and the powers vested in them. The mere presumption that the appellant might influence such officials thanks to his money (which, as he notes, he has restricted access to now) cannot be deemed a particular circumstance justifying the extension of pre-trial detention under Article 146(1)(b) of the FBiH CPC. The Constitutional Court also noted that an individual working in the Indirect Taxation Administration, who was related to the appellant, testified about the appellant's unsuccessful attempt to exert influence on the relevant officials in these institutions. Consequently, the Court could not accept the fact that the proceedings before the competent tax administration authorities associated with the criminal proceedings were still under way as a particular circumstance warranting the extension of the appellant's pre-trial detention.

Finally, the Constitutional Court did not bring into question the Supreme Court's conclusion that influence on the witnesses and other defendants can be exerted at any stage of the criminal proceedings. However, the reasons and explanations offered in the specific circumstances of the appellant's case by both the Supreme and the Cantonal Courts cannot be accepted as "relevant" and "sufficient" to conclude that there are particular circumstances in the meaning of Article 146(1)(b) of the FBiH CPC indicating well-founded fear that the appellant will obstruct the criminal proceedings by influencing the witnesses and defendants.

Comment

The possibility of influencing the defendants and witnesses exists throughout criminal proceedings, "not only at the outset of pre-trial detention".

The risk of pressure being brought to bear on witnesses and/or other defendants over a longer period of time does not suffice to justify the detention of a suspect in the long term; in the normal course of events the risks alleged diminish with the passing of time as the inquiries are conducted, statements taken and verifications carried out.

The reasons and explanations offered in the specific circumstances of each case must be "relevant" and "sufficient" to conclude that there are particular circumstances indicating well-founded fear that the appellant will obstruct the criminal proceedings by influencing the witnesses and defendants.

I.3.1.d Risk of Reoffending/Commission of the Crime Threatened

I.3.1.d.1. Standards

The risk of a suspect reoffending, if convincingly confirmed, may lead the judicial authorities to place and leave the suspect in detention on remand in order to prevent any attempts to commit further offences. It is however necessary that the danger be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned.[20]

Domestic authorities relying on the prior criminal prosecution of the individual at issue must assess the relevant risk, including whether the earlier charges were comparable, either in nature or in the degree of seriousness, to the charges in the pending proceedings.[21]

The Court finds it proper that the national authorities attach importance to circumstances, such as the very prolonged continuation of reprehensible activities, the huge extent of the loss sustained by the victims and the wickedness of the person charged.[22]

The ordering and extension of pre-trial detention thus requires stronger grounds to prove not only that there is genuine "reasonable suspicion" but also the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty.[23] Arguments for and against release must not be "general and abstract" but contain references to the specific facts and the applicant's personal circumstances justifying his detention.[24]

Reliance on this reason for pre-trial detention is justified where there is a real risk of repetition of a grave crime. The criminal past and the character of the suspect or defendant are relevant. So are the number and character of their crimes and any investigations of other

20 See ECtHR, *Clooth v. Belgium*, 12 December 1991, and *Paradysz v. France*, 29 October 2009

21 See ECtHR, *Popkov v. Russia*, 15 May 2008 and *Shteyn (Stein) v. Russia*, 18 June 2009

22 See ECtHR, *Matznetter v. Austria*, 10 November 1969

23 See ECtHR, *I. A. v. France*, 23 September 1998

24 See ECtHR, *Aleksanyan v. Russia*, 5 June 2009

offences. In the view of the ECtHR, the requirements regarding the severity of the sentence, objective assessment of the severity and permanence of the threat must be fulfilled and the prosecutor and judge must have access to records of prior crimes.[25]

I.3.1.d.2. Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Visoko Municipal Court Ruling No. 41 0 K 069471 18 Kpp of 15 January 2018

Visoko Municipal Court Ruling No. 41 0 K 069471 18 Kv of 18 January 2018

> The risk of a suspect reoffending, if convincingly confirmed, may lead the judicial authorities to place and leave the suspect in detention on remand in order to prevent any attempts to commit further offences. It is however necessary that the danger be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned.
>
> ECtHR, *Clooth v. Belgium*

The Cantonal Prosecution Office of the Zenica-Doboj Canton launched an investigation against the appellant on the reasonable suspicion that he had abused his office and powers under Article 383(1) of the FBiH Criminal Code to illegally acquire proceeds in the amount to 15,000 KM. The Visoko Municipal Court ordered the one-month pre-trial detention of the applicant under Article 146(1)(b) and (c) of the FBiH CPC (influence on witnesses and risk of absconding). The second-instance panel dismissed the appellant's appeal as ill-founded and confirmed the first-instance ruling. The second-instance panel upheld the first-instance court's conclusion that there was a risk of the appellant repeating the criminal offence under Article 146(1)(c) of the FBiH CPC, which it based on the fact that the appellant showed his resolve to commit the crime he was suspected of because, although on sick leave, he came to work to replace a colleague he had given a day off. The first-instance court also took into account the appellant's expunged prior criminal record and that he was under investigation for other crimes i.e. that criminal reports had been filed against him, and concluded that the appellant would reoffend or try to complete the crime attempted.

Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Merits No. AP 394/18 of 13 March 2018

The Constitutional Court said, *inter alia*, that, given the provision under which the perpetrator of a crime shall be deemed not to be convicted in the event his criminal record is expunged, the first-instance court totally arbitrarily assessed the fact that the appellant had already been convicted twice when it established the risk of him reoffending. The Constitutional Court said that, if it was considered that the objective requirement (severity of the penalty faced) has been fulfilled, the only "particular circumstance" that remained was the existence of the reasonable suspicion that, by coming to work although he was on sick leave to replace a colleague he had given a day

25 See Constitutional Court of Bosnia and Herzegovina, Decision No. AP 2441/15 of 26 May 2016, paragraph 51.

off, the appellant showed resolve to commit the crime he was suspected of. In addition, although an action the appellant was suspected of was at issue in this specific case, the reasoning of the first-instance ruling did not indicate why this circumstance, which gave rise merely to reasonable suspicion, could represent a particular circumstance indicating that there was a risk of him reoffending. On the other hand, the second-instance panel failed to comment in its ruling the appellant's explicit claims refuting the existence of these grounds for pre-trial detention.

Comment

The Constitutional Court concluded that the appellant's right to liberty and security of person under Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and 3 of Article 5 ECHR were violated because the reasons the first-instance court gave could not be accepted as "relevant" and "sufficient" for the conclusion on the existence of grounds for ordering pre-trial detention under Article 146(1)(b) and (c) of the FBiH CC and because, in its ruling upholding the first-instance ruling, the second-instance court had not commented at all the merits of the appellant's complaints, reiterated in the appeal to the Constitutional Court.

Example 2

Zenica Municipal Court Ruling No. 43 0 K 143868 17 Kpp 16 of 14 July 2017

Zenica Municipal Court Ruling No. 43 0 K 143868 17 Kv of 18 July 2017

The Zenica Municipal Court ordered the pre-trial detention of the appellant, who was suspected of continuous acceptance of gifts and other benefits, under Article 146(1)(b) and (c) of the FBiH CPC (influencing witnesses and risk of reoffending). The Court said the following about the risk that the appellant might repeat the offence: "Given that the appellant is suspected of a continuous crime of accepting gifts and other benefits under Article 380(1) of the FBiH CC, because he had taken money on a number of occasions from the individuals specified in the findings of fact during the period at issue, this circumstance amounts to a particular circumstance justifying the fear that he might repeat the offence, and, given that the crime warrants a term of imprisonment of minimum three years, the court upholds the pre-trial detention motion on the grounds laid down in Article 146(1)(c) of the CPC." The second-instance court did not comment Article 146(1)(c) of the CPC in its ruling on the appeal.

Constitutional Court of Bosnia and Herzegovina Decision on Admissibility and Merits No. AP 3134/17 of 11 October 2017

The Constitutional Court said, *inter alia*, that nothing in the first-instance ruling determined or characterised the "particular circumstances" required for ordering pre-trial detention under Article 146(1)(c) of the CPC. The ruling did not mention any specific evidence or circumstances leading to the conclusion that the appellant would reoffend if released; this possibility was only linked to the fact that he was suspected of continuous acceptance of gifts and other benefits. In

the view of the Constitutional Court, this circumstance could not justify the evidently *in abstracto* conclusion in the first-instance ruling that there was well-founded fear that, if released, the appellant might again commit the crime warranting minimum three years' imprisonment. The Constitutional Court concluded that the first instance court had not given any reasons substantiating such a conclusion, i.e. that it had not proven the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty. Furthermore, the Constitutional Court found that the second-instance court had not reviewed the "lawfulness" of pre-trial detention under Article 146(1)(c) of the FBiH CPC, because it did not refer to or comment the appellant's explicit claims on the non-existence of this ground for pre-trial detention.

Comment

The court has to substantiate its reasonable fear that the individual will repeat a criminal offence warranting minimum three years' imprisonment in the meaning of Article 146(1)(c) of the CPC with particular and specific rather than arbitrary statements based solely on the fact that the appellant is suspected of a specific crime.

Example 3

FBiH Supreme Court Ruling No. 07 0 K 011525 15 Kž 2 of 15 April 2015

Mostar Cantonal Court Ruling No. 07 0 K 011525 15 Kv 2 of 8 April 2015

The applicant was suspected of war crimes against the civilian population. The court ordered his pre-trial detention and then extended it due to the risk that he would carry out the threat he made against a witness immediately after the crime at issue occurred. The protected witness said that he still took seriously the appellant's threat: "[...] If you ever tell anyone about this, I'll kill you the same way [...]", although 23 years had passed since the crime. In its decision extending the appellant's pre-trial detention, the Cantonal Court came to the conclusion that there was still a risk that he would commit the threatened crime and based on it its decision on the existence of grounds for extending pre-trial detention under Article 146(1)(c) of the FBiH CPC. The FBiH Supreme Court upheld the reasoning of the Cantonal Court.

Constitutional Court of Bosnia and Herzegovina Decision No. AP 2441/15 of 26 May 2016

The Constitutional Court concluded that the courts had not provided persuasive explanations of the existence of the impugned grounds for pre-trial detention that would be relevant and sufficient to justify extending the appellant's pre-trial detention. The Constitutional Court emphasised that the protected witness' subjective feelings of fear was not objectivised by any other evidence and that mere presumptions of the court were at issue. The Constitutional Court also bore in mind the fact that the indictment against the appellant had been confirmed at the time of adoption of the impugned rulings on the appellant's pre-trial detention, that the protected witness, who had been threatened, had been questioned in the meantime and that

even a first-instance judgment against the appellant had been delivered. The Constitutional Court thus concluded that the courts had not proven the existence of particular circumstances justifying the fear that he would commit the threatened crime and found a violation of the appellant's rights under paragraphs (1)(c) and (3) of Article 5 ECHR.

Comment

Reliance on this reason for pre-trial detention is justified where there is a real risk of repetition of a grave crime. The criminal past and the character of the suspect or defendant are relevant. So are the number and character of their crimes and any investigations of other offences. In the view of the ECtHR Court, the requirements regarding the severity of the sentence, objective assessment of the severity and permanence of the threat must be fulfilled and the prosecutor and judge must have access to records of prior crimes.

Whereas the Constitutional Court found in the above cases violations of the right to liberty and security of person because the ordinary courts had not given convincing explanations of the existence of risk of reoffending as grounds for pre-trial detention, it arrived at the opposite conclusion in case No. **AP 3217/16**. In that decision, the Constitutional Court found that the Zenica Municipal and Cantonal Courts (**Zenica Cantonal Court Ruling No. 43 0 K 135584 16 Kž of 20 July 2016 and Zenica Municipal Court Ruling No. 43 0K 135584 16 Kv2 of 14 July 2016**) sufficiently clearly explained the reasons for their conclusion that there was a risk of reoffending. The Constitutional Court underlined that the ordinary courts had reviewed these grounds for pre-trial detention in the case of the suspects in the context of the existence of a reasonable suspicion that they had together continuously and over a longer period of time engaged in the illegal production and sale of narcotics incriminated in Article 238(1) of the FBiH CC in conjunction with Articles 31 and 55 of the FBiH CC and that they were interconnected, which justified the fear that the appellant, who was one of the suspects, might again commit the crime warranting minimum three years' imprisonment if she were released from pre-trial detention. The Constitutional Court concluded that, during their review of this reason for pre-trial detention, the ordinary courts had provided sufficiently clear explanations which did not seem arbitrary and that the circumstances of the specific case indicated the existence of a substantial and important general interest justifying a departure from the rule of respect for individual liberty.

I.3.1.e Disturbance of Public Order

I.3.1.e.1. Standards

This ground for pre-trial detention has caused the greatest dilemmas among ordinary courts.

Mere existence of a presumption and reliance on the alleged danger to public order from a purely abstract point of view, that the applicant's release could have posed an actual danger

to public order does not suffice; the authorities must provide evidence or indicate any instance which could show that this would materialise.[26]

Threat to public order may be used as justification for pre-trial detention only in case there is substantial evidence of a response to a grave crime, such as murder. Only the continuation of an exceptional situation may render pre-trial detention necessary.[27]

The severity of the sentence risked is not evidence; nor can it justify claims of threats to the safety and property of citizens[28] in the absence of other specific evidence or indications justifying the conclusion that riots, protests, retaliation or threats to public order will ensue.[29]

I.3.1.e.2. Examples of the Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 023626 17 Krn 9 of 21 December 2017

As per the grounds for pre-trial detention under Article 132(1)(d) of the BiH CPC, the Prosecution Office said that the investigation encompassed several dozens of individuals and that a number of Bosniaks were exhumed from the mass grave. The Prosecution Office said that releasing the suspects from pre-trial detention would give rise to an actual threat to public order and safety due to negative public response. The Prosecution Office went on to say that the suspects were suspected of a crime warranting at least ten years' imprisonment by reason of its particular gravity given the manner of perpetration and its consequences. The fact that over 20 years have passed since its commission cannot be reason to rule out the existence of exceptional circumstances.

The Prosecution Office went on to say that the suspect and his son had tried to prevent the search of the facilities they were using in any way they could, that his son had physically assaulted an expert associate of the Prosecution Office and that the authorities found weapons during the search and seized them.

However, in the absence of valid arguments indicating the existence of exceptional circumstances, the Court dismissed the Prosecution Office's motion for pre-trial detention on this ground as ill-founded.

The Court did not find that the facts amounted to exceptional circumstances justifying the ordering of pre-trial detention on this ground. The Court first stated that the risk of disturbance of public order was one of the most sensitive grounds for assessing whether or not the refusal to release a person was well-founded. When assessing whether pre-trial detention is justified, the ECtHR has held that this ground be taken into account only in "exceptional circumstances" when the facts indicated that the detainee's release would actually disturb public order. In

26 See ECtHR, *Makarov v. Russia*, 14 September 2009

27 See Council of Europe Committee of Ministers Recommendation (2006)13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (C/M Rec (2006) 13).

28 See ECtHR, *Tomasi v. France*, 27 August 1992

29 See ECtHR, *Kemmache v. France*, 27 November 1991

its decision in case No. **AP 3512/15**, the Constitutional Court recalled the ECtHR's view in its judgment in the case of *Makarov v. Russia*, that the mere existence of a presumption and reliance on the alleged danger to public order from a purely abstract point of view, that the applicant's release could have posed an actual danger to public order, did not suffice and that the authorities had to provide evidence or indicate any instance which could show that this would materialise.

The Court underlined that the circumstances the Prosecution Office relied on to justify this ground for pre-trial detention regarded solely the nature of the crime, i.e. circumstances that are regular in war crime cases and cannot, as such, constitute exceptional circumstances leading to reasonable suspicion that the suspects' release would actually result in disturbance of public order. It is precisely in that sense that the Constitutional Court concluded that specific crimes, owing to their particular severity and public response to them, may cause social disturbance and that this may justify ordering pre-trial detention, but that this ground may be considered relevant and sufficient only on condition that it is based on facts clearly showing that the suspects' release would actually threaten public order.

The Court also recalled that the gravity of the crime could not per se justify pre-trial detention under Article 132(2)(d) of the BiH CPC. The Court again noted the view of the ECtHR that the severity of the sentence risked was not evidence and could not justify claims that the citizens' safety was endangered without other specific evidence or indications justifying the conclusion that riots, protests, retaliation or threats to public order may ensue.

Comment

The Court underlined that the circumstances the Prosecution Office relied on to justify this ground for pre-trial detention regarded solely the nature of the crime, i.e. circumstances that are regular in war crime cases and cannot, as such, constitute exceptional circumstances leading to reasonable suspicion that the suspects' release would actually result in the disturbance of public order.

Example 2

Court of BiH Ruling No. S1 2 K 002596 14 Kžk of 21 April 2015

The defendant was charged with the crime of terrorism warranting up to 45 years' imprisonment. Therefore, all of the above led to the conclusion that the first objective requirement, the one regarding the severity of the sentence, was fulfilled. The Court also took into account the other requirements under the law, the manner of commission and consequences of the crime at issue and that it was up to the court to assess the facts and decisive circumstances in each individual case. In that sense, the appellate panel found that a crime of particular gravity given the manner of perpetration and its consequences had occurred. The indictment said that the crime was committed in an extremely cruel and ruthless manner, that it targeted a police station, and resulted in the death of a police officer and

grave injuries of a number of people. Public fear and insecurity were all the greater and more real and understandable in view of the fact that this terrorist attack with tragic consequences targeted a police station and police officers directly charged with enforcing law and order and protecting the safety of the citizens and their property. Consequently, the panel held that, at this stage of the proceedings, the defendant's release would result in the feelings of anxiety, fear and insecurity both among the residents of the town where the attack had occurred and among the residents of other towns in Bosnia and Herzegovina, as the prosecutor correctly noted.

Finding that the commission of the crime at issue fell in the category of crimes directed against values protected under international law and bearing in mind the target of the crime, the panel found that the extension of the defendant's pre-trial detention for this reason was justified, also with a view to preventing actual disturbance of public order.

The appellate panel also reviewed the possibility of imposing milder measures, but concluded that none of them were adequate and capable of achieving the purpose of pre-trial detention.

Comment

The Court referred to the manner of perpetration of the crime and its consequences in its explanation of the existence of exceptional circumstances for ordering pre-trial detention. Namely, as stated in the indictment, the crime was committed in a cruel and ruthless manner, it targeted a police station and resulted in the death of a policeman and grave injuries of a number of people.

The Court reviewed the possibility of imposing milder measures, but concluded that none of them were capable of achieving the purpose of pre-trial detention.

I.3.1.e.3 Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Banjaluka District Court Rulings Nos. 11 0 K 024603 19 K995-p of 25 April 2019 and 11 0 K 024603 19 Kv-p of 30 April 2019

The District Court preliminary proceedings judge issued a ruling ordering the pre-trial detention of the appellant reasonably suspected of first-degree murder under Article 125(2) of the RS Criminal Code and due to the fulfilment of the requirements for pre-trial detention under Article 197(1)(a), (b) and (g) of the RS Criminal Procedure Code (to avert the risks of absconding, obstruction of the investigation and protect public order). During its review of the threat to public order, the District Court referred to the severity of the sentence

risked (the objective requirement for the existence of this ground for pre-trial detention) and the manner in which the crime was committed. The judge noted that the crime had been committed in an urban settlement, on a public road, where the perpetrators waited for the victim, a well-known figure and businessman, and fired shots at him from automatic weapons, killing him near his cottage, where his wife, children and guests were waiting for him, and brutally killing his co-passenger and seriously wounding his driver. The District Court also said that the crime had been committed in the town where the appellant and his family, relatives and friends, as well as the families, friends and relatives of the victims, were living, and that the victims' deaths and the way in which they were deprived of their lives had undoubtedly caused not only huge anxiety among the latter, but resentment as well. The District Court said that it would be realistic to expect that the appellant's release would lead them to express their dissatisfaction by publicly rallying and protesting, and, perhaps, result in clashes. The District Court concluded that these circumstances amounted to exceptional circumstances that might objectively result in an actual threat to public order if the appellant were released.

The appellant's appeal of the first-instance ruling was dismissed.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 2435/19 of 10 September 2019

The Constitutional Court said that the ordinary courts had not provided any arguments showing an actual threat to public order and that they concentrated in the impugned rulings ordering pre-trial detention on the severity of the sentence risked and the manner in which the crime had allegedly been committed rather than on the potential consequence of not remanding the appellant in detention and that they had failed to specify the concrete circumstances justifying the conclusion that the appellant's release would result in an actual threat to public order. The Constitutional Court said that the ordinary courts had merely voiced the presumption that the appellant's release would result in an actual threat to public order, whilst failing to establish the existence of such circumstances in the period relevant to the ordering of pre-trial detention or the actions and events that would result in disturbance of public order. In the view of the Constitutional Court, the ordinary courts had not analysed the circumstances relevant to the specific situation in terms of the existence of an actual threat to public order given that a presumption that public order will be disturbed does not suffice in itself to order pre-trial detention on this ground.

Comment

The Constitutional Court found a violation of Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and (3) of Article 5 ECHR because the ordinary courts had failed to specify the concrete circumstances justifying the conclusion that the appellant's release would result in exceptional circumstances due to an actual (and not an abstract) threat to public order in terms of Article 197(1)(g) of the RS CPC.

Example 2

Tuzla Cantonal Court Rulings Nos. 03 0 K 018138 18 Kpp 2 of 11 September 2018 and 03 0 K 018251 18 Kv of 13 September 2018

The Tuzla Cantonal Court issued the first-instance ruling ordering the appellant's one-month pre-trial detention under Article 146(1)(c) and (d) of the FBiH CPC (risks of repetition of the offence and disturbance of public order). The appellant was detained under the reasonable suspicion of attempted murder under Article 166(1) in conjunction with Article 28 of the FBiH Criminal Code. His appeal of the first-instance ruling was dismissed as ill-founded.

During its review of the ground for pre-trial detention under Article 146(1)(d) of the CPC, the Cantonal Court noted the length of imprisonment the crime warranted (as the objective requirement for the existence of this ground for pre-trial detention). It also took into account the manner in which the crime was committed, the time and place where it was attempted, the fact that a large number of people, young people returning from a disco were at the scene at the time, that the street was full of traffic and people, and that the eyewitnesses were shocked and alarmed. The Court said in the ruling that, these circumstances were "not ordinary" circumstances in which such crimes were committed and that they were considered exceptional. The Court therefore concluded that there was reasonable suspicion that the appellant's release would result in another clash between the injured party and the appellant since they have known each other for some time and evidently had unresolved issues, that a particularly grave crime was at issue, especially in view of its consequences, the fear the injured party and the eyewitnesses felt, as well as the manner of its commission. In addition, the Cantonal Court said that it had taken into consideration that an incident like this one left a major mark on the community, wherefore the appellant's release would cause anxiety and revolt among the public, primarily of the injured party, and result in an actual threat to public order.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 5316/18 of 6 November 2018

The Constitutional Court emphasised that the Cantonal Court had not provided any arguments indicating the existence of a real threat to public order and had adopted the impugned rulings by focusing on the severity of the sentence risked and the manner in which the alleged offence was committed rather than on its potential consequences in the event the appellant was not remanded in detention. The Constitutional Court concluded that the Tuzla Cantonal Court's arbitrary conclusion that the appellant's release would elicit a public response that might result in the disturbance of public order in terms of the existence of exceptional circumstances as grounds for ordering pre-trial detention under Article 157(1)(d) of the CPC amounted merely to a presumption that the appellant's release would result in a real threat to public order, but that it had failed to establish the existence of the specific circumstances at the time relevant to the ordering of pre-trial detention, whilst failing to specify which actions and developments would result in the disruption of public law and order. Therefore, in the view of the Constitutional Court, the ordinary courts had not performed an analysis of the circumstances relevant to the specific situation in terms of the existence of an actual threat to public order.

Comment

The presumption of a threat to public order does not suffice per se for ordering pre-trial detention on this ground.

As opposed to the prior examples in which the Constitutional Court found a violation of the right to liberty and security of person because the ordinary courts had not analysed the relevant circumstances when they ordered pre-trial detention due to the risk of disturbance of public order, the Constitutional Court found that the courts had performed such an analysis in case No. **AP 1117/16. (Tuzla Cantonal Court Ruling No. 03 0 K 014551 16 Kv6 of 15 February 2016 and FBiH Supreme Court Ruling No. 03 0 K 014551 16 Kž 5 of 22 February 2016**).

Example 3

Banjaluka District Court Ruling No. 11 0 K 017324 18 K 3-p of 22 July 2019

RS Supreme Court Ruling No. 11 0K 017324 19 Kž 11 of 29 July 2019

After the first-instance judgment was delivered against the appellant, the ordinary courts again extended his pre-trial detention under Article 197(2)(g) of the RS CPC (disturbance of public order). They concluded that the requirements under that Article were fulfilled because of the severity of the crime and of the penalty risked, the manner of commission and consequences of the crime, and the media coverage of the incident at issue. The impugned rulings explained that the very manner in which the crime had been committed had disturbed public order since it occurred during the day and on the highway, which was indisputably a public space. Furthermore, the appellant has been convicted by a non-final judgment for using automatic weapons and robbing an armoured vehicle transporting money of the specified bank together with his co-defendants, leaving one individual wounded. The actions the appellant and his co-defendants were reasonably suspected resulted in the theft of a substantial amount of money that has not been found yet. The appellant and two other co-defendants were members of the RS police at the time they committed the offences they were found guilty of by the non-final judgment, i.e. they were authorised officers charged precisely with preventing the commission of crimes, not with committing them themselves. The ordinary courts had also said that the appellant had been found guilty of a crime "of exceptional gravity" by the non-final judgment, wherefore it was not unreasonable to conclude that his release might result in a disturbance of public order and that the release of the appellant, who had been entrusted with the protection of the lives and property of others, and who had violated his obligation, was an exceptional circumstance and gave rise to the feelings of insecurity and dissatisfaction among the citizens, which would result in a disturbance of public order. Finally, the ordinary courts explained in the impugned rulings that the footage recorded by the armoured vehicle's camera had been broadcast prime time by TV stations during the search for the appellant and the other defendants and rebroadcast after their arrest, as well as in reports on the criminal proceedings against them.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 3755/19 of 17 December 2019

The Constitutional Court recalled that courts assessing the risks of disturbance of public order could not be expected to predict future developments, i.e. establish with certainty that an incident would actually occur in the future. In that sense, the Constitutional Court concluded that the conclusion in the impugned rulings – that the release of the appellant would result in an actual threat to public order due to the above circumstances – was not arbitrary.

See, e.g. Constitutional Court of Bosnia and Herzegovina Decision No. AP 2457/18 of 6 June 2018, paragraphs 41 and 42.

Comment

There is no violation of the right to liberty and security of person in the event the relevant court thoroughly examined the appellant's claims and found them ill-founded, having correlated the specific circumstances substantiating the fulfilment of the legally prescribed requirement based on which the appellant's pre-trial detention was extended.

Courts assessing the risk of disturbance of public order cannot be expected to predict future developments, i.e. establish with certainty that an event will actually occur in the future. However, the mere existence of the presumption that the suspects' release may result in an actual threat to public order does not suffice. There must be specific facts and circumstances justifying the conclusion on its existence.

The difficulty of fulfilling this standard in practice may discourage prosecutors from requesting of the courts to order or extend pre-trial detention on this ground or the courts from upholding their motions. In the absence of specific facts and circumstances justifying pre-trial detention on this ground, a better approach would be to consider the existence of other grounds for pre-trial detention.

I.4. Extension of Pre-Trial Detention

I.4.a Standards

Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.[30]

Arguments for and against release must not be "general and abstract" but contain references to the specific facts and the applicant's personal circumstances justifying his detention.[31]

30 See ECtHR, *Buzadji v. Moldova*, 5 July 2016

31 See ECtHR, *Aleksanyan v. Russia*, 5 June 2009

Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.[32]

The second limb of Article 5(3) does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until his conviction, the accused must be presumed innocent, and the purpose of the provision under consideration is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable.[33]

The gravity of the charges cannot by itself serve to justify extension of pre-trial detention.[34]

Continuation of detention cannot be used to anticipate a custodial sentence.[35]

The gravity of the charges cannot by itself serve to justify long periods of detention on remand.[36]

The existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings.[37] According to well-established ECtHR case law on Article 5(3), when deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial.[38]

I.4.b Examples of the Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 024608 19 Krž 3 of 3 May 2019

The first-instance panel concluded that the degree of risk that the defendant would influence the witnesses diminished after six months and that the very fact that the Prosecution Office was not requesting their questioning at the very beginning of the hearing indicated that the risk was no longer real or specific. The first-instance court thus concluded that pre-trial detention, as the most restrictive measure, was no longer necessary and that the purpose could be achieved by a milder measure, by prohibiting the defendant from meeting with the witnesses specified in the BiH Prosecution Office's indictment.

32 See ECtHR, *Ilijkov v. Bulgaria*, 26 July 2001

33 See ECtHR, *Vlasov v. Russia*, 6 June 2008

34 See ECtHR, *Ilijkov v. Bulgaria*, 26 July 2001

35 See ECtHR, *Letellier v. France*, 26 June 1991

36 See ECtHR, *Gultyayeva v. Russia*, 1 April 2010

37 See ECtHR, *Idalov v. Russia* [GC], 22 May 2012

38 *Ibid.*

In the view of this panel, the first-instance court prematurely concluded that the purpose for which pre-trial detention had been ordered could be achieved by prohibiting the defendant from meeting with the witnesses and that the fear of the defendants influencing the witnesses could successfully be dispelled by the imposed non-custodial measures.

The panel primarily relies on the fact that the defendants in this case had already directly threatened the witnesses with the aim of persuading them to change their statements, i.e. diminish or deny the defendants' involvement in the crime. The first-instance panel had itself clearly documented all the specified threats and attempts to influence the witnesses in the impugned ruling. In the view of this panel, all this indicates that the threats against and influence on the witnesses in this case were real, serious and specific and that they were effected by the defendants, with a view to pressuring them into changing their statements or not implicating them in the crime that is the subject of these proceedings.

The seriousness of the defendants' intentions to influence the witnesses in this case is sufficiently substantiated when all of the above considerations are correlated with the fact that the main hearing has just begun and that the witnesses are yet to testify before this Court, along with the fact that the witnesses live in the same place as the defendants, that the defendants were made aware in advance of summons served on the witnesses, *inter alia* through middlemen.

The panel agrees with the first-instance court that the court is under the duty to bear in mind the passing of time in the context of the necessity of extending pre-trial detention, but it is of the view that the first-instance court erred when it concluded that the risk ceased to exist after six months, especially in view of all the steps undertaken vis-à-vis the witnesses and their statements. In that sense, the panel finds that the appeal correctly noted that the risk of collusion has not passed or abated significantly and underlines that the non-custodial measures ordered by the first-instance court in the impugned ruling alone do not suffice to ensure the successful conduct and completion of the proceedings, i.e. that the purpose why pre-trial detention was ordered in this case cannot be achieved just by these measures and ensure the continued efficient conduct of the proceedings in terms of preventing the defendants from influencing the witnesses given that they have obviously already pressured them.

Finally, as per the argument in the impugned ruling that the very order of questioning of the specified witnesses proposed by the Prosecution Office corroborated that there was no longer any risk of collusion, the panel underlines that the court is not bound by the proposed order of questioning and that Articles 261 and 262 of the BiH CPC provide it with the possibility of controlling the manner and order of questioning of the witnesses and presentation of evidence.

In view of all of the above considerations, the panel decided to uphold the Prosecution Office's appeal, void the Court ruling and remit the case for reconsideration.

Comment

The second-instance panel held that the first-instance panel prematurely concluded that pre-trial detention could be replaced by non-custodial measures and that it erred when it uncritically assessed that the risk of the defendant influencing the witnesses ceased to exist after he spent six months in pre-trial detention.

Example 2

Court of BiH Ruling No. S1 1 K 026633 18 Kri of 3 April 2018

Pre-Trial Detention under Article 132(1)(a) of the BiH CPC

The Court found that there were still reasons indicating that there was a risk of the defendant going into hiding or absconding. When assessing flight risk, it needs to be borne in mind that, although the legislator did not enumerate the circumstances to be assessed as decisive during reviews of the existence of the risk at issue, case law indicates that, in each individual case, the court needs to assess specific circumstances and facts concerning the suspects' conduct before and after the commission of a crime or after the initiation of criminal proceedings, based on which it can conclude whether there is a risk of the suspect absconding or going into hiding. The defendant's character, objective circumstances or the defendant's conduct, according to general life experience, can indicate whether the danger of the defendant absconding exists; they include, e.g. the fact that the defendant has actually absconded, does not have fixed residence, is moving all the time, is a foreign national, the conduct of the suspect/defendant after the commission of the crime they are suspected/accused of, and the severity of the sentence faced. These circumstances are usually accepted as evidence that there is a risk of the defendant absconding.

The Court first took into consideration the fact that the defendant was a national of BiH, as well as of the Republic of Serbia, the Constitution of which prohibits the extradition of its nationals. Although this fact cannot in itself constitute grounds for pre-trial detention, the Court also took into account the other previously established circumstances, that he occasionally lived and worked in the Republic of Serbia, as both he and his defence counsel confirmed during the proceedings; the above is also corroborated by an official memo of the State Investigation and Protection Agency, confirming that he possesses the personal documents of the Republic of Serbia and has registered habitual residence in that state. Furthermore, the Court bore in mind the fact that although he had crossed the border on multiple occasions in the past five years, the defendant, living in the Rudo area, was only once officially registered as having entered BiH from Montenegro, but that there were no data on his departure from BiH, which indicates that a border area with a very weak passenger control procedure is at issue. This conclusion is substantiated by the official memo of the State Investigation and Protection Agency, which states the following: "[...] police officers living the Rudo area work at this rural border crossing [...], most of the crossings from Montenegro to BiH and vice versa are effected by the local population [...] which may be the reason why a number of the suspect's entries into and exits from BiH have not been registered."

In the context of this ground for pre-trial detention, the Court also bore in mind the fact that the defendant was now fully aware of the gravity of the crime he was charged with, the sentence it warranted and the fact that the case was in the main hearing stage, and that these circumstances may motivate him to abscond if released, and thus undermine or preclude the conduct of the pending proceedings.

Finally, all the listed circumstances viewed in their entirety clearly indicate that there is a risk of the defendant absconding, wherefore the Court concluded that the circumstances

indicated that there was a risk of the defendant absconding, as prescribed by Article 132(1)(a) of the BiH CPC.

Comment

The Court took the following facts into consideration when it ordered the defendant's pre-trial detention on the ground that he may abscond: he is a national of another state and, although he habitually resides in BiH, he often lives and works in the state he is a national of; the State Border Service has not been registering his entries into and exits from BiH because he has been using a border crossing with a very weak passenger control procedure. Furthermore, the defendant is now aware of the gravity of the crime he is charged with and the severity of the sentence he risks.

Pre-Trial Detention under Article 132(1)(b) of the BiH CPC

Contrary to the above, the panel held that the circumstances indicating that the defendant would obstruct criminal proceedings by influencing the witnesses in the meaning of Article 132(1)(b) of the BiH CPC no longer existed. The panel thus upheld the claims of the defence and, having assessed that the Prosecution Office had questioned all the witnesses proposed in the indictment, found that the continuation of pre-trial detention on this ground was meaningless, wherefore it upheld the defence counsel's arguments and terminated the defendant's pre-trial detention on this legal ground.

Comment

The fact that the Prosecution Office had questioned all the witnesses sufficed to terminate pre-trial detention ordered because of the risk of the defendant influencing the witnesses.

As per the possibility of imposing non-custodial measures, the Court merely stated that prevention of the defendant's flight could be achieved only by pre-trial detention and that no other milder measure would serve the purpose.

Example 3

Court of BiH Ruling No. S1 1 K 028984 19 Krž of 11 March 2019

The panel agreed with the Prosecution Office's claim in the appeal noting the fact that Vlasenica was near the border with the Republic of Serbia and that the suspect realistically had the opportunity to easily cross the border undetected. The fact that a number of BiH nationals suspected of war crimes live in the territory of the Republic of Serbia and that the appeal correctly notes that two of the defendants fled to the Republic of Serbia in the past six months and thus avoided criminal proceedings against them are not negligible either. Given

that the suspect was aware of the charges against him, the panel concluded that he may be motivated to abscond and go into hiding. Contrary to the view of the pre-trial panel, it thus upheld the Prosecution Office's claim that there was a very likely risk of the defendant absconding, wherefore it found that the pre-trial detention of the defendant was still necessary on the grounds laid down in Article 132(1)(a) of the BiH CPC.

Comment

The Court ordered the suspect's pre-trial detention because he lived near the state border with the Republic of Serbia, because two defendants fled to that country in the past six months, as well as because he has become aware of the charges levelled against him.

Example 4

Court of BiH Ruling No. S1 1 K 018557 16 Kro of 28 December 2016

On the one hand, the Court took into account that the defendant had dual citizenship, of BiH and the Republic of Croatia, and that she had lived in the United States of America until she was extradited to BiH under an international arrest warrant in order to stand trial in BiH. Furthermore, the Court bore in mind the fact that the defendant did not have registered temporary or habitual residence in BiH, any property in BiH or any close relatives in BiH and that her daughter lived in the USA. The Court examined these facts together with the fact that the next step in the proceeding was the main hearing, at which the evidence would be presented, and that the defendant's presence was prerequisite at this stage of the proceeding more than at any other if it were to be successful. In view of all these considerations, the Court concluded that they on the whole showed that the defendant had no real ties or had merely weak ties with the state of BiH, which indicated that there was a risk of her absconding, wherefore it found it necessary to extend her pre-trial detention. .

The Court took into account the fact that the prosecutor proposed to hear a large number of witnesses in this case, nearly all of whom were injured parties who could provide information about the defendant's role and actions at the time of the crime, that they had first-hand knowledge of the multiple instances of her ill-treatment of imprisoned civilians because they were the direct victims of the defendant's actions and now suffered grave psychological and physical consequences. The above considerations also indicate that there is a greater risk of the defendant influencing the witnesses, bearing in mind the circumstances they are to testify about at the main hearing. Although all the evidence in this criminal case has been secured, i.e. all the witnesses have been heard during the investigation stage, their testimony in court must also be ensured, wherefore any influence on them to change their statements to diminish the defendant's criminal liability must be precluded.

Consequently, the Court found that all the circumstances regarding the defendant on the whole demonstrated that there was a grave risk that she would interfere with the course of justice, wherefore all the requirements for extending her pre-trial detention under Article 132(1)(b) of the BiH CPC have definitely been fulfilled.

The Court reviewed *ex officio* the possibility of imposing milder measures to ensure the defendant's presence at the trial, in accordance with Article 123(2) and 131(1) of the BiH CPC, as well as under Article 5(3) ECHR, and concluded that all the above-described circumstances and facts indicated that the defendant's presence at the trial could be secured only by pre-trial detention, i.e. that no other milder measure would be adequate to achieve the purpose of successfully conducting the criminal proceedings.

Comment

Whilst reviewing the risk of the defendant absconding, the Court not only took into account the fact that she had dual citizenship, but other circumstances as well, notably that she had lived in a third country which had extradited her to be tried in BiH and that she did not have any strong ties in BiH.

As per the risk of the defendant influencing the witnesses, the Court noted the fact that they had all been questioned during the investigation, but that they were yet to be heard at the main hearing, given that they were victims of the crimes the defendant was accused of, wherefore there was a greater risk of her pressuring them to change the statements they had made during the investigation.

As per the possibility of imposing milder measures, the Court merely stated that it had examined this possibility *ex officio* and concluded that they would be inadequate in this case.

Example 5

Court of BiH Ruling No. S1 1 K 015068 17 Kv 3 of 24 November 2017

Apart from the fact that the suspect has dual citizenship, it is obvious that he does not habitually reside in BiH and has no property in it, i.e. that he has been occasionally residing at various addresses in various states (BiH, Croatia, Germany). When these facts are assessed together with the fact that he, as a national of Croatia, can move easily across Schengen countries, the panel finds that the further conduct of these criminal proceedings, requiring the suspect's presence, would essentially be brought into question if his pre-trial detention were replaced by another milder measure, as the defence is proposing.

The panel bore in mind the fact that reasonable suspicion [that the suspect committed the crimes] is for the most part based on the statements of witnesses – the eyewitnesses and victims of the crimes, whose identity is undoubtedly known to the suspect, given the small geographic area where the events occurred, wherefore it is necessary to prevent the suspect from influencing those witnesses. Furthermore, the panel bore in mind the fact that the Prosecution Office was planning on hearing the victims of the crimes the suspect is suspected of and that his release would instil in them feelings of fear and threat and impede their questioning.

Finally, the panel reviewed the defence's motion to impose milder measures to ensure the unobstructed conduct of criminal proceedings in accordance with Articles 123(2) and 131(2) of the BiH CPC, and Article 5(3) ECHR. In view of all of the above considerations, it found that, at the moment, only pre-trial detention could ensure the suspect's presence and prevent him from absconding and meeting with the witnesses and accomplices and that no other milder measure would be serve the purpose at this stage of the proceeding.

Comment

When it ordered the suspect's pre-trial detention due to the risk of him absconding, the Court bore in mind that he had dual citizenship and no property in BiH and that his movement across Schengen countries was easier because he was a national of the Republic of Croatia.

When it ordered the suspect's pre-trial detention due to the risk of him influencing the witnesses, the Court took into account that the Prosecution Office planned to question the witnesses who were simultaneously the victims of the crimes at issue, wherefore it concluded that the suspect's release would instil in them feelings of fear and threat.

As per the possibility of imposing milder measures, the Court merely said that they would not serve the purpose in this case.

Example 6

Brčko District Appellate Court Ruling No. 96 0 K 102063 17 Kž 7 of 5 December 2017

Having re-examined the Prosecution Office's motion to extend the defendant's pre-trial detention after the delivery of the judgment for the same reason it had been ordered before the judgment (under Article 132(1)(a) and (c) of the BD CPC) and the defence's opposition to continued pre-trial detention and its subsequent request to replace the defendant's pre-trial detention by non-custodial measures, the Basic Court issued a ruling after the hearing in which it explained that circumstances indicated that there was still a risk that the defendant would abscond if he were released, wherefore the ground for pre-trial detention under Article 132(1)(a) of the BD CPC still existed; it however, concluded that it was unnecessary to order the extension of the defendant's pre-trial detention to prevent him from absconding and to ensure his presence at the trial and successful conduct of criminal proceedings, as that could also be achieved by milder measures, such as non-custodial measures, which it imposed on the defendant instead of pre-trial detention. Notably, the Court prohibited the defendant from leaving his place of residence until the proceedings were concluded by a final decision and his committal to prison to serve his sentence if he was found guilty; it ordered the seizure of the defendant's passport and banned the issuance of new travel documents to him and prohibited him from using his identity card to cross the BiH state border.

> Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty
>
> ECtHR, *Buzadji v. Moldova*

In all its (five) rulings, the first-instance court established facts that led it to conclude that there was reasonable suspicion that the suspect had committed the crimes, circumstances indicating that there was a risk of him absconding if released and that particular circumstances indicated that there were reasonable fears that, if released, he would commit a crime warranting minimum three years' imprisonment. Since it concluded that the grounds for ordering pre-trial detention under Article 132(1)(a) and (c) of the BD CPC existed, the first instance court upheld the Prosecution Office's motions and ordered the suspect's/defendant's pre-trial detention to ensure his presence at the criminal proceedings and the successful conduct of criminal proceedings.

However, when it was deciding whether to order the pre-trial detention of the defendant or impose non-custodial measures against him, the first-instance court ignored the Appellate Court's criticisms of its errors of fact and the arbitrary reasons it gave to justify its decision to terminate pre-trial detention, i.e. it ignored all the instructions of that Court. It also failed to consider all the circumstances related to the commission of the crime, i.e. the character of the defendant, which the Prosecution Office rightly complained of in the appeal. All of this led the first-instance court to wrongly conclude that pre-trial detention was unnecessary in this case to ensure the unobstructed conduct of criminal proceedings and that the purpose of pre-trial detention could also be achieved by non-custodial measures imposed by the impugned ruling.

The Prosecution Office was correct to emphasise in its appeal that the defendant had tried to flee the police at the scene of the crime (which the first-instance court also established in its prior pre-trial detention rulings), that he had intended to flee from the penitentiary he was detained in (as evidenced by the report of the penitentiary director), that there was no doubt that he had no strong professional or family ties or property in the Brčko District, that his very character – the fact that he is the kind of person who is consistently irresponsible and uncritical in all interpersonal relationships, lacks empathy, disrespects social norms and bans and that he needs institutional help (as confirmed by the findings and opinions of court experts in neuropsychiatry and psychology) corroborates that there is a pronounced risk of the defendant absconding in the event he is released from pre-trial detention. The Prosecution Office was right to conclude that the risk of the defendant absconding now that the first-instance judgment has been delivered is much greater, because he has been found guilty of arson, one of the crimes he has been charged with, and sentenced to two years' imprisonment and, since the proceedings are still pending, it is unclear what the final judgment will be. It is realistic to conclude that there is quite a pronounced risk of the defendant absconding if he were released from pre-trial detention; the first-instance court did not examine the degree of that risk at the time it was deciding whether to extend/order anew the defendant's pre-trial detention. This is why the Court qualified as logical the Prosecution Office's claim in the appeal – that non-custodial measures imposed by the first-instance court in the impugned ruling were inadequate to eliminate the risk of the defendant absconding and to ensure his presence at the criminal proceedings and successful conduct and completion of the proceedings.

All the above facts lead to the conclusion that the high risk of the defendant absconding cannot be eliminated by non-custodial measures ordered in the impugned ruling but by pre-trial detention ordered under Article 132(1)(a) of the BD CPC.

In the view of this Court, all the facts and circumstances established in the first-instance court's ruling extending the defendant's pre-trial detention, which had led it to conclude that there were particular circumstances corroborating fears that the defendant would reoffend if released and which had prompted that court to extend his pre-trial detention under Article 132(1)(c) of the BD CPC, continued to exist after the delivery of the first-instance judgment, as correctly noted by the Prosecution Office, wherefore no new relevant facts emerged after the delivery of the first-instance judgment that would lead the first-instance court to conclude that there were no longer grounds for pre-trial detention under Article 132(1)(c) of the BD CPC. The first-instance court's conclusion is thus wrong and its errors of fact in this criminal case reflected on the validity and lawfulness of its decision.

Comment

When it was deciding whether to order the pre-trial detention of the defendant or impose non-custodial measures against him, the first-instance court ignored the Appellate Court's criticisms of its errors of fact and the arbitrary reasons it gave to justify its decision to terminate pre-trial detention, i.e. it ignored all the instructions of that Court. It also failed to consider all the circumstances related to the commission of the crime, i.e. the character of the defendant.

Example 7

Brčko District Appellate Court Ruling No. 96 0 K 105477 17 Kž 3 of 29 November 2017

The Court upheld the defendant's appeal and modified the Basic Court's ruling, terminating his pre-trial detention extended under that ruling and ordering his immediate release.

Pursuant to Article 126a(1)(a) of the Brčko District Criminal Procedure Code (BD CPC), the Court imposed a measure against the defendant prohibiting him from engaging in the hospitality industry in the "K".

The Court agrees with the appellant's claim that the first-instance court had insufficiently explained in the impugned ruling why it had extended the defendant's pre-trial detention by another two months under Article 132(2)(c) of the BD CPC after the indictment was confirmed, i.e. why it considered that the risk of him reoffending could not have been eliminated by a non-custodial measure under Article 126a of the BD CPC.

Namely, in the view of this Court, there is no question on whether the reasons why the defendant's pre-trial detention had been ordered and extended under of Article 132(1)(c) of the BD CPC still exist. However, this Court holds that the first-instance court had insufficiently taken into consideration the fact that pre-trial detention was the most restrictive measure applied under Article 131(1) of the BD CPC only if the same purpose could not be achieved by

another measure. It emphasises, in that context, that whenever the first-instance court was contemplating whether to order or extend pre-trial detention under Article 123(2) of the BD CPC, it was under the obligation to ensure that it did not impose a harsher measure (pre-trial detention) if the same purpose could be achieved by a milder measure (a non-custodial measure).

In the view of the Court, in such circumstances, in view of the duration of the defendant's pre-trial detention, his health and family circumstances, including the health of his common law partner, extension of the defendant's pre-trial detention by another two months after the confirmation of the indictment was unnecessary because, in this specific case, the reason why his pre-trial detention was extended under Article 132(1)(c) of the BD CPC (risk of reoffending) could be eliminated by imposing a non-custodial measure under Article 126a(1)(a) of the BD CPC. The Court based this view on the fact that the defendant had committed all the actions amounting to the continued crime of grand larceny under Article 281(1)(2) of the BD Criminal Code, which he was indicted for, while he was engaged in the hospitality industry in facility "K", which he owns, although the facility is formally registered in the name of his employee. In such circumstances, prohibition of engagement in the hospitality industry, including in facility "K", would successfully eliminate the risk of the defendant repeating the crime warranting minimum three years' imprisonment, because of which the court extended his pre-trial detention under Article 132(1)(c) of the BD CPC in the impugned ruling.

Comment

Whenever the first-instance court is contemplating whether to order or extend pre-trial detention, it is under the obligation to ensure that it does not impose a harsher measure (pre-trial detention) if the same purpose can be achieved by a milder (non-custodial) measure. In such circumstances, in such circumstances, in view of the duration of the defendant's pre-trial detention, his health and family circumstances, including the health of his common law partner, the second-instance court found that the extension of the defendant's pre-trial detention by another two months after the confirmation of the indictment, was unnecessary because, in this specific case, the purpose for extending his pre-trial detention could also be achieved by the imposition of a non-custodial measure.

Example 8

Brčko District Appellate Court Ruling No. 96 0 K 098102 16 Kž 3 of 12 August 2016

The Basic Court issued a ruling terminating the suspect's pre-trial detention and setting bail in the amount of 20,000 KM to be paid deposited with the Basic Court. The suspect's pre-trial detention had been ordered and extended due to the risk of him absconding since he was prosecuted for inflicting grave physical injuries. The second-instance court held that the first-instance court had properly established that the suspect's pre-trial detention should be replaced by a milder measure that would suffice to ensure the successful conduct of criminal proceedings.

Bail is indisputably not a measure that has to be imposed in lieu of pre-trial detention; it is a legal possibility, which depends on the court's assessment in each particular case. The first-instance court performed such an assessment in this case.

The second-instance court agreed that the 20,000 KM bail was sufficient guarantee allowing the replacement of pre-trial detention by bail and that the criminal proceedings would be successfully conducted.

Comment

The suspect's pre-trial detention was ordered and extended because he was a flight risk. During its review of the suspect's motion, the court examined all the relevant circumstances and concluded that the requirements were fulfilled to replace pre-trial detention by bail, which was sufficient guarantee that the criminal proceedings would continue without hindrance.

Example 9

Brčko District Appellate Court Ruling No. 96 0 K 089079 15 Kž 2 of 1 July 2015

The Court dismissed the appellant's claim that the lower court had failed to adequately explain the fulfilment of the requirements for ordering and extending his pre-trial detention under Article 132(1)(a), (b) and (c) of the BD CPC.

The first-instance court had correctly found that circumstances indicated that the suspect was a flight risk because, as soon as the incident occurred, he drove away from the scene in an unknown direction, as the witnesses confirmed. The suspect went home, where he hid his vehicle, as one witness confirmed, and stayed there until the afternoon, when he reported to the police. The first-instance court had examined these facts together with the facts established during the search of the suspect's home, during which the police found his ID and travel document on the table, which may be indication of his intention to abscond. The court correctly associated this with the gravity of the crime he was suspected of, which may have led him to decide to abscond to avoid criminal liability. Of course, the first-instance court had not treated the severity of the crime and of the sentence faced separately, as grounds for pre-trial detention; rather, it reviewed them in the context of other facts indicating that there was an actual risk of the suspect absconding. The suspect has been living in the apartment he is registered in and has two other apartments at different locations, where the police had not found him during the search, as the first-instance court also established. All the findings of fact provide sufficient grounds to conclude that the suspect would abscond if released and thus obstruct the criminal proceedings.

The first-instance court established with certainty the facts corroborating the justified fear that the suspect would destroy, hide or tamper with evidence or traces of relevance to the criminal proceedings if released, as well as particular circumstances indicating that he would obstruct the criminal proceedings by influencing the accomplices and aiders and abettors. The first-instance court correctly emphasised that the instrumentalities of the crime, the suspect's knives, had not been found.

The suspect might bring pressure to bear on his accomplice, who is still at large, and his father, who had helped him flee Bosnia and Herzegovina, as indicated by the official BD police reports. The first-instance court was correct to conclude on the basis of the established facts that the suspect, if released, would take steps to destroy, hide or tamper with evidence and traces and influence his accomplices and aiders and abettors and thus obstruct criminal proceedings.

The first-instance court found that the suspect's prior convictions for crimes against life and limb, the category in which the crime under investigation also fell, and his conviction for violent conduct amounted to particular circumstances substantiating the risk of the suspect reoffending.

Based on the findings of facts, the first-instance court was correct to conclude that the suspect had a propensity to commit crimes with elements of violence, usually in a group and by use of instrumentalities capable of inflicting physical injuries. The suspect's destructive behaviour, as well as his demonstration of force at public venues, has practically become commonplace.

The suspect's prior records and obvious propensity to violent conduct and to crimes with elements of violence sufficiently justify the Court's decision to extend the suspect's pre-trial detention on these grounds as well.

When it reviewed the measures to be imposed against the suspect, i.e. whether to extend his pre-trial detention to ensure the unobstructed conduct of criminal proceedings, the first-instance court endeavoured not to apply a more severe measure if the same purpose could be achieved by a milder measure. When it reviewed the extension of the suspect's pre-trial detention, the first-instance court did not neglect the fact that pre-trial detention was the most severe measure as it affected the persons it was imposed against the most. The Court also reviewed the possibility of ordering another measure that would be milder and ensure the unobstructed conduct of criminal proceedings, as the suspect's defence counsel requested. Having taken into consideration all the facts and circumstances, the first-instance court correctly concluded that no milder measure against the suspect would ensure the successful conduct of criminal proceedings, notably his presence at the trial and prevent his destruction of or tampering with evidence, his pressures on his accomplices and aiders and abettors, or prevent him from reoffending, wherefore it was necessary to extend the suspect's pre-trial detention. Although pre-trial detention is the most severe measure, it is the most adequate one at this stage of the criminal proceedings, wherefore the suspect's pre-trial detention had to be extended to ensure the unobstructed conduct of criminal proceedings

The Court dismissed the defence counsel's complaint about the violation of the suspect's presumption of innocence and the *in dubio pro reo* principle under Article 3 of the BD CPC, finding that the first-instance court had not brought into question the presumption of innocence, as the appeal groundlessly claimed. In its ruling, the first-instance court addressed reasonable suspicion as the required degree of likelihood that a specific individual committed a crime; at no time did it discuss the suspect's guilt, it solely discussed reasonable suspicion.

The appellant also complained that the prosecution authorities were unable to secure evidence of relevance to the criminal proceedings, an issue this Court is definitely not called upon to address. The court also found that the defence counsel had not given arguments for

its complaint that the first-instance court had imposed the suspect's pre-trial detention as a penalty not as a measure. Neither this Court nor the first-instance court neglected the fact that pre-trial detention was the most severe measure and that it should be ordered as a measure of last resort. However, all the collected evidence on the manner of commission of the crime needs to be analysed realistically and objectively, whilst taking into account the gravity of the crime, and especially the time the suspect has already spent in pre-trial detention, slightly over 30 days. None of this constitutes grounds for the claim that pre-trial detention was applied as a penalty rather than as a measure.

Comment

The Court reviewed the possibility of imposing milder measures rather than extending the suspect's pre-trial detention and reasoned its decision. It also reviewed the circumstances regarding a number of grounds for pre-trial detention, such as the risks of the suspect absconding, influencing the witnesses, tampering with evidence, and of reoffending. However, as per the suspect's complaint that his pre-trial detention was being extended because of the prosecution authorities' inability to secure evidence for the criminal proceedings, the Court said it was not called upon to, and would not, address this issue. The Court also reviewed the complaint about the violation of the suspect's presumption of innocence and concluded that the first-instance court had referred in the ruling to reasonable suspicion as the required degree of likelihood that the suspect had committed the crime and had at no time discussed his guilt.

I.4.c Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Sarajevo Cantonal Court Ruling No. 09 0 K 026508 18 Kv 89 of 23 November 2018

FBiH Supreme Court Ruling No. 09 0 K 026508 18 Kž 44 of 12 December 2018

The Sarajevo Cantonal Court issued a ruling extending the appellant's pre-trial detention after the indictment against him was confirmed. The appellant's pre-trial detention was initially ordered on 14 November 2015. The indictment against the applicant - charging him with abuse of office or authority under Article 383 of the FBiH CC, forgery of documents under Article 373 of the FBiH CC, fraud under Article 294 of the FBiH CC, money laundering under Article 272 of the FBiH CC, perjury under Article 348 of the FBiH CC, and accessoryship after the fact under Article 346 of the FBiH CC - was confirmed on 11 October 2017, but the main hearing had not begun yet. In addition to the existence of reasonable suspicion as the general requirement for ordering the appellant's pre-trial detention, the ordinary courts found that the other requirements for ordering his pre-trial detention were also fulfilled: that there was a risk of him absconding and of reoffending under Article 146(1)(a) and (c). As per the risk of reoffending, the Cantonal Court based its decision primarily on the fact that the appellant was indicted for crimes warranting minimum three years' imprisonment and on the manner

in which they were committed, concluding that they had been committed continuously and that the appellant had demonstrated resolve, persistence and tenacity in perpetrating them. The Cantonal Court emphasised that the appellant had committed the crimes at issue over a long period of time, that he had committed a large number of crimes requiring a high degree of planning and preparation, including a number of actions aimed at exerting influence on various institutions and their staff (judges, prosecutors, etc.), all with the aim of achieving criminal goals, and concluded that the legal requirements for extending the appellant's pre-trial detention under Article 146(1)(c) of the FBiH CC were fulfilled. It also concluded that the passage of time the appellant had spent in pre-trial detention had not affected the extension of pre-trial detention on those grounds. The first-instance court's conclusion was upheld by the Supreme Court, which held that the above-mentioned circumstances amounted to particular circumstances corroborating the fear that the appellant would reoffend if released.

The ordinary courts explained that the appellant's pre-trial detention was extended and that his trial had not yet begin by the fact that the hearings were regularly scheduled but could not be held for procedural reasons, because at least one of the many indictees failed to appear at them.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 124/19 of 11 June 2019

The Constitutional Court underlined that it was impossible to conclude on the basis of the explanations of the impugned rulings how the circumstances specified by the ordinary courts affected the likelihood that the appellant would reoffend. The Constitutional Court was unable to conclude from these explanations that there was any specific evidence or circumstances leading to the conclusion that, if released, the appellant would continue committing crimes, especially since he was charged with masterminding an organised crime group and the indictment covered all the members of the group, the public was aware of the fact that the appellant has been indicted and already detained in remand for two years and eight months, which definitely brought into question the ordinary courts' argument that "the appellant, as the organiser and head of the organised crime group, used his social influence, especially in the police and judicial circles, as the former Minister of Internal Affairs of the Republic of Bosnia and Herzegovina and a long-standing businessman, as well as the legal representative and owner of a number of companies" committed the crimes he was accused of. The Constitutional Court concluded that these circumstances could not justify the obviously *in abstracto* conclusion in the impugned rulings that there was reasonable fear that, if released, he might commit a crime warranting minimum three years' imprisonment and that these parts of the rulings amounted to a violation of the appellant's right under Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and 3 of Article 5 ECHR.

The Constitutional Court also underlined that the ordinary courts' explanations regarding the duration of pre-trial detention were neither adequate nor sufficient, especially due to the large number of possibilities the FBiH CPC gave courts to effectively control the conduct of proceedings. The Constitutional Court was unable to establish from the explanations of the impugned rulings that the court had availed itself of these possibilities to keep the appellant's pre-trial detention to a minimum as required by the Article 5(3) ECHR standard, and concluded that these parts of the rulings were in violation of the appellant's right to liberty and security of person under Article II/3(d) of the BiH Constitution and Article 5(3) ECHR.

Comment

The appellant's right to liberty and security of person under Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and 3 of Article 5 ECHR was violated because the ordinary courts had failed to give relevant and sufficient reasons for the extension of his pre-trial detention under Article 146(1)(c) of the FBiH CPC. Furthermore, they reiterated the same reasons, i.e. stereotypical formulations, without taking into account the specific circumstances of the individual case, and did not conduct the criminal proceedings in a manner ensuring that the duration of pre-trial detention be kept to a minimum.

Example 2

Sarajevo Cantonal Court Ruling No. 09 0 K023702 16 Kv of 2 December 2016

FBiH Supreme Court Ruling No. 09 0 K 023702 16 Kž 19 of 15 December 2016

The Cantonal and Supreme Courts issued rulings extending the appellants' pre-trial detention under Article 146(1)(c) of the FBiH CPC (risk of reoffending). The existence of reasonable fears that the appellants would reoffend although they were charged with a number of crimes in the confirmed indictment was primarily assessed in relation to the reasonable suspicion that they had committed organised crime warranting minimum ten years' imprisonment. The ordinary courts assessed that the appellants and other indictees were members of an organised crime group that had continuously engaged in criminal activities (over a period exceeding one year), acquiring proceeds exceeding 500,000 KM. They particularly took into account the fact that they had they engaged in an organised crime group continuously and for a long period of time and demonstrated resolve and persistence in acquiring proceeds of crime, which these courts qualified as particular circumstances justifying fears that the appellants might again commit crimes warranting minimum three years' imprisonment, not as a risk that they would commit the same crimes.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 394/17 of 7 March 2017

The Constitutional Court said that it was unable to conclude on the basis of the explanations of the impugned rulings how the above-mentioned circumstances affected the likelihood that the appellants would commit the same crime, the conclusion on which the ordinary courts based their finding that the requirements under Article 146(1)(c) of the FBiH CPC were fulfilled, and thus, how they affected the course of the criminal proceedings. The Constitutional Court also underlined that the organised crime group was uncovered and its members prosecuted, wherefore it was impossible to conclude from the reasoning of the impugned rulings that there was any specific evidence or circumstances leading to the conclusion that the appellants, if released, would continue committing crimes. The Constitutional Court concluded that the reasoning of the impugned rulings in this case did not offer reasons and explanations indicating the existence of particular and concrete circumstances, rather than abstract and theoretically possible circumstances justifying the fear that the criminal offence warranting minimum three years' imprisonment would be

committed. Furthermore, the Constitutional Court stressed that it had twice ruled on the appellants' appeals of rulings extending their pre-trial detention and that the reasons set forth in all the rulings were practically identical.

Comment

Reliance on the same reasoning, i.e. stereotypical formulations in rulings extending pre-trial detention, without taking into account the specific circumstances of the case at hand requiring continued pre-trial detention, is in breach of Article 5(3) ECHR. The Constitutional Court found that the courts had issued a number of rulings extending the appellant's pre-trial detention and reiterating essentially the same, nearly identical reasons, *inter alia* in the following cases reviewed by the Constitutional Court: No. **AP 4663/15** (rulings issued by the Tuzla Cantonal and Municipal Courts extending pre-trial detention because of the threat to public order), and No. **AP 807/17** (ruling issued by the FBiH Supreme Court extending pre-trial detention because of the risk of reoffending and of influencing witnesses), etc.

Example 3

RS Supreme Court Rulings No. 110 K 019581 18 Kž 8 of 20 September 2018 and 11 0 K 019581 18 Kž 9 of 23 October 2018

The RS Supreme Court issued a ruling on 20 September 2018 quashing the first-instance judgment finding the appellant guilty of first degree murder under Article 149(2), car theft under Article 237(1), illegal manufacture of and trade in weapons or explosive substances under Article 399(1) and general endangerment under Article 402(1) of the RS Criminal Code and remitting the case for retrial to the Banjaluka District Court. The Supreme Court simultaneously extended the appellant's pre-trial decision under Article 197(1)(g) of the RS CPC (disturbance of public order). During its examination of the grounds for extending pre-trial detention, the Supreme Court relied on the prison sentence the crime warranted (as the objective requirement for the existence of this reason), and the "manner and circumstances" in which the crimes the appellant was charged with had been committed, the high degree of organisation, long preparations and the appellant's demonstrated persistence, use of automatic firearms, and the consequences of the crimes (killing the victim by firing 24 bullets from an automatic rifle in his direction), and the subsequent removal of traces and evidence, all this without any regard to the threat to the life and property of a large number of people in an urban settlement, circumstances which rendered the specific crime particularly grave. Based on the above, the Supreme Court also noted the "unabating interest of the public, especially the victims in the community in which the crime was committed, and more broadly". In the view of the Supreme Court, all these circumstances amounted to exceptional circumstances in the period relevant to the extension of pre-trial detention wherefore the release of the defendants would elicit a public response and result in an actual threat to public order. The Supreme Court dismissed the appeal in its ruling of 23 October 2018, in which it noted, *inter alia*, that the appellant's arguments did not refute the correct findings of fact in the impugned ruling and the conclusion on the necessity of extending pre-trial detention under Article 197(1)(g) of the RS CPC after the quashing of the first-instance judgment.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 6559/18 of 10 January 2019

The Constitutional Court said that the Supreme Court's reference to the fact that the above-mentioned circumstances were exceptional circumstances which would elicit a public response if the appellant were released and might result in disturbance of public order was arbitrary in terms of the existence of exceptional circumstances as grounds for ordering pre-trial detention under Article 197(1)(g) of the RS CPC. The Constitutional Court underlined that the Supreme Court had merely voiced its presumption that the appellant's release would actually pose a threat to public order, but that it had failed to establish the existence of these circumstances in the period relevant to the extension of pre-trial detention or to specify which actions and developments would lead to the disruption of public law and order. Therefore, in the view of the Constitutional Court, the Supreme Court had not analysed the circumstances relevant to the specific situation with respect to the existence of a real threat to public order since the presumption that public order would be disturbed because of the appellant's status was per se insufficient to order pre-trial detention on this ground. Furthermore, the Constitutional Court expressed particular concern that the reasoning of the impugned rulings did not lead to the conclusion that the ordinary court even considered the possibility of ordering milder measures instead of pre-trial detention, although it was obliged to do so under in the meaning of Article 196(1) of the RS CPC, under which pre-trial detention "may be ordered or extended only under the conditions prescribed by this Code and only if the same purpose cannot be achieved by another measure".

Comment

This is one of the many decisions in which the Constitutional Court found a violation of the right to liberty and security because the ordinary court had failed to specify the concrete circumstances justifying the conclusion that the appellant's release would result in exceptional circumstances due to a real (not abstract) threat to public order. The Constitutional Court qualified as arbitrary the RS Supreme Court rulings extending pre-trial detention due to a threat to public order also in its decisions in cases Nos. **AP 1484/18, AP 1631/18, AP 1484/18, AP 1016/18, AP 3808/17, AP 2886/17, AP 2053/17, AP 1305/17, AP 810/17,** etc. It arrived at the same conclusion [that the ordinary courts had failed to specify the concrete circumstances justifying the conclusion that the appellants' release would result in exceptional circumstances due to a real (not abstract) threat to public order] also in cases Nos. **AP 4387/16** – appeal of Sarajevo Cantonal Court rulings 09 0 K 026508 16 Kv of 18 November 2016 and 09 0 K 026508 16 Kpp 75 of 14 November 2016; **AP 5765/15** – appeal of Tuzla Cantonal Court ruling 32 0 K 252604 15 Kž 3 of 22 December 2015 and the Tuzla Municipal Court ruling 32 0 K252604 15 Kv of 29 October 2015; **AP 4761/15** – appeal of FBiH Supreme Court rulings 03 0 K 01437815 Kž 2 of 4 December 2015 and 03 0 K 014378 15 Kž 4 of 23 December 2015 and Tuzla Cantonal Court rulings 03 0 K 014378 15 Kv 4 of 19 November 2015, 03 0K 014378 15 Kv of 8 October 2015, 03 0 K 014378 15 Kpp of 30 September 2015 and 03 0 K014378 15 Kv 6 of 16. December 2015, etc.

I.5. Re-Examination of Pre-Trial Detention

I.5.a Standards

According to the Article 5 standards, fulfilment of the requirement for speedy court re-examination of the lawfulness of pre-trial detention is one of the vital safeguards against arbitrariness. The courts are under the obligation to review the lawfulness of extended pre-trial detention at regular intervals not exceeding the deadlines provided by law.[39]

Under Article 5(4), "[E]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful." While Article 5(4) of the Convention does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions, its guarantees would be deprived of their substance if the judge, relying on domestic law and practice, could treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting in doubt the existence of the conditions essential for the "lawfulness", in the sense of the Convention, of the deprivation of liberty.[40]

I.5.b. Examples of Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 020200 15 Kro of 29 December 2015

The defendant's pre-trial detention was terminated and the following non-custodial measures were imposed against him: ban on leaving his place of residence under Article 126(1) of the BiH CPC; travel ban under Article 126(2) of the BiH CPC, ban on issuance of new travel documents and use of his identity card to cross BiH state borders: ban on meeting with specific individuals under Article 126a(1)(c) of the BiH CPC; and obligation to report to the relevant authority under Article 126a(1)(d) of the BiH CPC.

The Court found that the existence of a reasonable suspicion was the general requirement for ordering/extending pre-trial detention and, analogously, non-custodial measures, and that the previously established reasonable suspicion had not changed or been brought into question. Therefore, relying primarily on witness statements and other statements, the Court drew the conclusion that there was reasonable suspicion that the defendant had committed the crime he was charged with.

However, the Court said that the claim that the defendant would bring pressure to bear on witnesses who had testified before the ICTY was not corroborated, i.e. that the Prosecution Office repeatedly claimed during the hearing that the defendant had pressured the witnesses who had testified before The Hague Tribunal, but that no evidence of such pressures has been submitted to court and that the names of the witnesses whom the appellant had allegedly pressured re their testimonies before the ICTY were not disclosed. Bearing in mind that the

39 See Constitutional Court of Bosnia and Herzegovina Decision No. AP 7588/18 of 10 April 2019, para 28.

40 See ECtHR, *Nikolova v. Bulgaria* [GC], 25 March 1999.

Prosecution Office obviously became aware of the defendant's attempts to contact a witness more than a year ago, the Court noted that the Prosecution Office had not obtained evidence from the ICTY of such pressures, i.e. that, in response to a question by the preliminary proceedings judge, the prosecutor clarified that he did not have any evidence thereof; nor have any transcripts of that witness' testimony or other evidence showing that the defendant had contacted the witness about his testimony in The Hague been submitted to the Court.

Notwithstanding, the Court found that there were particular circumstances indicating that the defendant would obstruct the criminal proceedings by bringing pressure to bear on witnesses and his accomplices, but that they could be eliminated by imposing non-custodial measures against him. Namely, bearing in mind the grave crime the defendant was indicted for by the BiH Prosecution Office and the severity of the sentence he faced, the grave consequences of the crime, the nature of the crime, the manner in which it was committed and the fact that the defendant was aware of his legal status now that the indictment has been confirmed and of the witness statements incriminating him, the Court found that the defendant may have motive to bring pressure to bear on the witnesses to diminish his criminal liability. The Court also bore in mind the fact that some witnesses in this case had been granted protection, as well as the fact that the Court was under the obligation to ensure that all the proposed witnesses testified at the main hearing freely and without any fear.

However, none of these circumstances, either by their quality or their quantity, require the extension of pre-trial detention as the harshest measure, wherefore the Court finds that any attempts to influence the witness can successfully be prevented also by imposing upon the defendant a ban on leaving his place of residence and a travel ban, all the more if one bears in mind the defendant's conduct, e.g. the fact that he has greatly contributed to war crime trials to date by testifying on a number of occasions before this Court or The Hague Tribunal and that he is aware of the fact that criminal proceedings in the same area are already conducted before this Court and that these proceedings concern offences he is, *inter alia*, charged with, which ultimately demonstrates that he must have been aware of his position and status in respect of these crimes for some time now.

Furthermore, with a view to precluding the defendant from obstructing the proceedings by influencing the witnesses, the Court also determined that an additional measure to eliminate that risk was necessary, i.e. given the danger of the defendant establishing contact with the witnesses, the Court prohibited him from contacting any of the witnesses named in the indictment. Bearing in mind the fact that the commission of this crime in itself requires the involvement of a large number of persons and the Prosecution Office's claim that an investigation against the former members of the same military unit, suspected of complicity in the commission of the crime, was under way, the Court found that, in this specific case, there was also a risk of the defendant influencing his accomplices, whose identity he was definitely aware of, and that these individuals were undoubtedly well interconnected, all with the aim of avoiding or diminishing his criminal liability. Therefore, the Court prohibited the defendant from contacting potential suspects.

Finally, in order to control the defendant's movements, i.e. ensure that he complied with all the non-custodial measures, the Court ordered him to report to the relevant authority, in order to facilitate the achievement of the purpose for which the non-custodial measures were imposed.

Comment

The Court established that there were particular circumstances indicating that the defendant would obstruct the criminal proceedings by bringing pressure to bear on the witnesses and accomplices. However, it found that none of these circumstances, either by their quality or their quantity, required the extension of pre-trial detention, wherefore the risk could be eliminated by non-custodial measures.

I.5.c Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Doboj District Court Ruling No. 13 0 K 004876 Kv 5 of 28 August 2018

The Doboj District Court issued a ruling on 15 November 2018 extending the appellant's pre-trial detention under Article 197(1)(g) of the RS CPC after the indictment against him was confirmed. In this ruling, the Doboj District Court said that it had issued the previous ruling, No. 13 0 K 004876 Kv 5, on 28 August 2018 "*ex officio*, after the two-month review of the lawfulness of the defendants' pre-trial detention under Article 202(1) of the CPC". The District Court failed to fulfil its obligation to again re-examine the lawfulness of the defendants' pre-trial detention after two months. Instead, it issued its new ruling with an 18-day delay, on 15 November 2018, after the court delivered a first-instance judgment against the appellant.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 7588/18 of 10 April 2019

The Constitutional Court emphasised that Article 202(1) of the RS CPC provided for the re-examination of the lawfulness of pre-trial detention every two months. It also said that "lawfulness" should in this case be construed in the framework of national law and strictly formally. In its view, only something that is fully in compliance with the text of the law is lawful. In this case, the law provides for the review of the lawfulness of pre-trial detention every two months. The Constitutional Court held that the District Court had not acted "lawfully" or "speedily" in the meaning of Article 5 given that it performed the mandatory re-examination of the appellant's pre-trial detention with an 18-day delay, whereby it simultaneously violated the principle of "lawfulness" of detention under Article 5(1)(c) ECHR. The Constitutional Court found a violation of the appellant's rights under Article 5 in conjunction with paragraph (1)(c) of that Article of the ECHR in this specific case.

Comment

The Constitutional Court found a violation of Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and (3) of Article 5 of the ECHR because the ordinary court had not re-examined the lawfulness of the appellant's pre-trial detention within the deadline prescribed by Article 202(1) of the RS CPC.

Example 2

Failure of the Banjaluka District Court to issue a ruling extending the appellant's pre-trial detention

In its Decision No. AP 6559/18 of 10 January 2019, the Constitutional Court found that the appellant's right to liberty and security of person was violated by the part of the RS Supreme Court Rulings Nos. 11 0 K 019581 18 Kž 8 of 20 September and 23 October 2018 extending the appellant's pre-trial detention under Article 197(1)(g) of the RS CPC. According to these rulings, the appellant remained in pre-trial detention after the Constitutional Court rendered its decision, while the ordinary courts failed to adopt a new decision, i.e. to re-examine the lawfulness of his pre-trial detention. On 3 April 2019, the appellant filed a fresh appeal with the Constitutional Court, No. AP 878/19, complaining that the ordinary courts had not adopted a new decision on his pre-trial detention after the Constitutional Court rendered its Decision No. AP 6559/18.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 878/19 of 27 November 2019

The Constitutional Court said that the appellant forwarded its Decision No. AP 6559/18 to the Supreme and District Courts but that neither responded to the appellant's requests. The Constitutional Court emphasised that the Supreme Court said in its response to the appeal that its rulings had not been revoked (by Constitutional Court Decision No. AP 6559/18) and that it had not been ordered to issue a new decision, wherefore it remitted the re-examination of the lawfulness of pre-trial detention after the expiry of two months (under Article 202(1) of the RS CPC) to the first-instance court. In response to the appeal, the District Court said that it was not under the obligation to review the lawfulness of pre-trial detention every two months after the second-instance court delivered its judgment, an obligation it had after the confirmation of the indictment, that pre-trial detention in accordance with a Supreme Court ruling could last one year at most and that a retrial was under way. The Constitutional Court found in this case a violation of the principles of the right to liberty and security of person enshrined in Article II/3(d) of the BiH Constitution and Article 5 ECHR by this utter disregard of its Decision No. 6559/18 and the reasons it gave in its reasoning, as well as of the appellant's motion to terminate his pre-trial detention, i.e. by the non-adoption of a (written) ruling on the continued lawfulness of the appellant's extended pre-trial detention.

Comment

The District Court's failure to review the appellant's motion to terminate his pre-trial detention as prescribed by Article 196(6) and (7) of the CPC and its utter disregard of the Constitutional Court's final and binding decision and the reasons it gave in its reasoning, i.e. its failure to issue a (written) ruling on the continued lawfulness of the appellant's extended pre-trial detention and its denial of his right to appeal were in violation of the principles of the right to liberty and security of person enshrined in Article II/3(d) of the BiH Constitution and Article 5 ECHR.

II. Non-Custodial Measures

II.1. Non-Custodial Measures and Respect for Human Rights

II.1.a Standards

Any measure restricting the right to liberty of movement should be "in accordance with law", pursue one or more of the legitimate aims contemplated in Article 2(3) of Protocol 4 to the ECHR and "be necessary in a democratic society".[41]

Example 1 – Right to Property

Sarajevo Cantonal Court Ruling No. 09 0 K 026508 18 Kps 21 of 3 July 2018

Sarajevo Cantonal Court Ruling No. 09 0 K 026508 18 Kv 79 of 19 September 2018

In response to the motion by the Prosecution Office in its indictment in the case of *D. and Others*, charging the appellant with organised crime under Article 342(3) of the FBiH CC in conjunction with abuse of office or authority under Article 383(3) of the FBiH CC in conjunction with paragraph 1 of that Article, the preliminary proceedings judge of the Sarajevo Cantonal Court issued Ruling No. 09 0 K 026508 18 Kps 21 of 3 July 2018 extending the validity of the non-custodial measures prohibiting the defendant from practicing law, visiting K.E.'s law office in Sarajevo and meeting with other co-defendants. The judge revoked or voided the non-custodial measures prohibiting the defendant from leaving his place of residence and travelling imposed in a ruling of the preliminary proceedings judge, ordered the return of the seized travel document to the appellant and dismissed the motion to extend the non-custodial measure ordering the appellant to report to the relevant police authority in his place of residence. The appellant's appeal was dismissed by the Cantonal Court's ruling of 19 September 2018. The Cantonal Court said that it was necessary to prohibit the appellant from practicing law and visiting the law office because the collected evidence gave rise to reasonable suspicion that the appellant had played an important role in the organised crime group as the right-hand man and lawyer of the organiser of the group (A.D.); that he had regularly notified A.D. of all the activities the group members conducted with a view to committing the crimes they were indicted for; that he had demonstrated persistence and resolve in unscrupulously implementing all the planned activities involving illegal civil proceedings and illegal registration of real estate; and, that he had committed these crimes by practicing law, as corroborated by the excerpts of the intercepted conversations between the defendant and D., proving the appellant's resolve, persistence and tenacity in committing the crimes he was indicted for. The Cantonal Court concluded that the appellant demonstrated his resolve and perseverance in undertaking all the criminal activities as a member of the group and on the instructions of the organiser of the group, wherefore there was a risk that he would reoffend or commit the crimes he was indicted for in the event he was not prohibited from practicing law and visiting the law office.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 6728/18 of 10 April 2019

The Constitutional Court said that the reasons the Cantonal Court had given in its ruling imposing non-custodial measures against the appellant did not clearly specify how

41 See ECtHR, *Khlyustov v. Russia*, 11 July 2013

the organiser of the group (A.D.), who was still in pre-trial detention, could bring pressure to bear on the appellant as a member of the group at the time the ruling prohibiting the appellant from practicing law and visiting the law office was issued, wherefore they were insufficiently persuasive and clear in the circumstances of the case. The Constitutional Court said that the appellant's resolve and persistence had been assessed on the basis of the illegal civil proceedings and illegal registration of real estate at the order of the group organiser, indicating his role in specific, but not in all business (professional) law practice activities. The Constitutional Court underlined that the ordinary court's view on the necessity of the above-mentioned measure had mostly been based on evidence that existed at the time of commission of the crimes the appellant was indicted for, i.e. at the time of the offences covered by the indictment, as indicated by the impugned ruling, while the measures were imposed against the appellant in November 2016, and have continuously been in place for over two years now. The Constitutional Court held that reliance on the reasons specified in the impugned ruling in these specific circumstances did not justify the purpose of the measures declared in the Cantonal Court's rulings, i.e. to ensure the appellant's presence and efficient conduct of criminal proceedings. The Constitutional Court concluded that the bans on practicing law and visiting the law office were a disproportionate burden on the appellant, wherefore the interference in the appellant's property was also disproportionate, resulting in the appellant bearing disproportionate burden disrupting the fair balance between public interests and the appellant's interests, which is in contravention of the standards of protection of the right to property under Article 1 of Protocol No. 1 to the ECHR.

Comment

The Constitutional Court found a violation of Article II/3(k) of the BiH Constitution and Article 1 of Protocol No. 1 to the ECHR since the non-custodial measures imposed against the appellant in accordance with the law and pursuing a legitimate aim did not strike a fair balance between the aim pursued and the appellant's constitutional rights.

The Constitutional Court found violations of the right to property in the context of non-custodial measures in a number of cases, some of which are presented in the following chapter "**Review of the Lawfulness of Extended Non-Custodial Measures**".

II.2. Review of the Lawfulness of Extended Non-Custodial Measures

Standards

Where there is an arguable claim that a measure taken by the authorities might infringe an applicant's freedom of movement, Article 13 of the Convention requires the national legal system to afford the individual concerned the opportunity to challenge the measure in adversarial proceedings before the courts.[42]

42 See ECtHR, *De Tommaso v. Italy*, 27 February 2017

II.2.a Examples of the Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 020064 17 Kv 6 of 1 February 2017

The Court of BiH upheld the suspect's appeal and modified that court's ruling, abolishing the following non-custodial measures imposed against him: travel ban under Article 126(2) of the BiH CPC and the obligation to occasionally report to the state authority under Article 126a(1)(d) of the BiH CPC.

In this context, the panel deemed necessary to state that reasonable suspicion, requisite for maintaining the non-custodial measures against the suspect at this stage of the proceedings, nevertheless required a lower degree of certainty that the crime had been committed and that a specific individual had committed it than the degree of certainty required during the deliberation of the indictment and the merits of the case after the main hearing. Therefore, the preliminary proceedings judge had properly relied on the BiH CPC, the ECHR and the case law of the Court of BiH, the ECHR, the Constitutional Court of Bosnia and Herzegovina and the ECtHR on this issue in its explanation of reasonable suspicion.

The panel dismissed as arbitrary and ill-founded the Prosecution Office's reason for continuing the non-custodial measures imposed on the suspect: that it needed more time to implement specific investigative actions and question specific witnesses.

The panel found that the investigation in the case against the suspect had been pending for over a year since he was deprived of liberty. Given the large number of offences he was suspected of and the duration of the investigation, the panel dismissed as ill-founded the prosecutor's reasons in view of the fact that the investigation had not been completed since the case was referred to him on 18 November 2016. The panel, in particular, emphasised that the two-month period since the referral of the case to the prosecutor sufficed to undertake the remaining investigating actions that would result in a lawful prosecutorial decision. Given that the BiH Prosecution Office already had some evidence at the time the suspect was ordered into pre-trial detention, the panel found that this indicated that no action had been undertaken in the case during the one-year period.

The panel disagreed with the first-instance ruling stating that the imposed non-custodial measures did not place an excessive burden on the suspect, that they were proportionate to the aim pursued, and found that the restriction of the suspect's rights had to be proportionate to the purpose in order to achieve a legitimate aim. In this specific case, the panel took into account the complexity of the case, the way the Prosecution Office handled it, i.e. the duration of the investigation, the fact that the delays in investigative actions could not be attributed to the suspect's conduct, concluding that there were no reasons justifying the continuation of the non-custodial measures against the suspect since a year has passed and the investigation has not been completed.

Comment

The panel dismissed as arbitrary and ill-founded the Prosecution Office's reason for continuing the non-custodial measures imposed on the suspect: that it needed more time to implement specific investigative actions and question specific witnesses.

II.2.b Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Sarajevo Cantonal Court Ruling No. 09 0 K 02650816 Kpp 76 of 14 November 2016

Sarajevo Cantonal Court Ruling No. 09 0 K 026508 17 Kv 13 of 11 January 2017

The Cantonal Court issued a ruling imposing upon the appellant a number of non-custodial measures, including the ban on practicing law and visiting his law office. The Cantonal Court explained that its decision was based on the conclusion it drew from the Prosecution Office's motion and collected evidence indicating that the appellant had abused his office or powers under Article 383(3) of the FBiH CC and violation of the law by a judge under Article 357 of the FBiH CC in conjunction with Articles 31, 54 and 55 of the FBiH CC. Furthermore, the Cantonal Court justified the non-custodial measures by stating that the appellant was charged with a crime he reportedly committed whilst performing his regular professional activities. It said that, during the performance of these activities, he was in the position to abuse his law practice and commit the crimes he was charged with and that continued performance of these activities would provide him with the opportunity to be in contact with the witnesses the Prosecution Office was yet to question during the investigation, and to again commit the crimes he was charged with and destroy, hide and tamper with the evidence and traces relevant to the criminal proceedings at hand. The Cantonal Court also said that it bore in mind that the investigation at issue was at a stage when it was necessary to ensure the collection of evidence to identify the accomplices before they became aware they were under investigation and had the chance to get in touch with each other, wherefore the Prosecution Office was conducting intensive investigative actions to identify these individuals. The Cantonal Court failed to re-examine the necessity of extending the non-custodial measures upon the expiry of two months from the day of adoption of the ruling imposing them. The Cantonal Court ruled on the appeal of the ruling imposing the non-custodial measures 51 days after the expiry of the three-day deadline within which such appeals must be reviewed. The second-instance court dismissed the appellant's appeal of the first-instance ruling.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 302/17 of 7 March 2017

The Constitutional Court emphasised that Article 140b(6) clearly imposed upon the relevant judge/panel the obligation to re-examine whether the imposed measures needed to be extended every two months. Consequently, the Constitutional Court stated that the imposed non-custodial measures ordered on 14 November 2016 should have been re-examined on 14

January 2017 at the latest and that, in the circumstances of the case, the Cantonal Court had failed to re-examine the necessity of extending the imposed non-custodial measures after the expiry of the two-month period and render a ruling thereof pursuant to Article 140b(6) of the CPC. It consequently found that the interference in the appellant's property was not in keeping with the law in procedural terms because the Cantonal Court had not complied with Article 140b(6) of the CPC.

The Constitutional Court also concluded that the Cantonal Court had failed to rule on the appellant's appeal within the three-day deadline prescribed by law, given that the appellant filed his appeal on 18 November 2016, the three-day deadline expired on 21 November 2016, but that another 51 days passed since the expiry of the deadline (54 days since the appeal was lodged) before the Cantonal Court ruled on the appeal. The Constitutional Court said that the Cantonal Court could not be exculpated by the provision of this Article specifying the appeal shall not stay the enforcement of the ruling because the Cantonal Court was under the obligation to rule on appeals within three days from the day they were filed, especially since the imposed non-custodial measures brought into question the appellant's livelihood.

Comment

The Constitutional Court found a violation of Article II/3(k) of the BiH Constitution and Article 1 of Protocol No. 1 to the ECHR because the Cantonal Court had failed to review the necessity of extending the non-custodial measures imposed against the appellant within two months from the day the first-instance ruling was issued, as prescribed by Article 140b(6) of the CPC and because it failed to rule on the appellant's appeal within three days as provided for in Article 140b(7) of the CPC (and ruled on it 51 days after the three-day deadline had expired). The Cantonal Court thus violated the appellant's right to an effective legal remedy under Article 13 ECHR since the appellant's appeal in this specific case was not "effective" in terms of preventing the alleged violation of his right to property and the duration of the violation.

The Constitutional Court found a violation of the appellants' right to an effective legal remedy because the courts had failed to re-examine the necessity of extending the non-custodial measures after two months in a number of cases. In case No. **AP 3260/19**, the Constitutional Court found a violation of Article 13 ECHR regarding the right to freedom of movement under Article II/3(m) of the BiH Constitution and Article 2 of Protocol No. 4 to the ECHR because the **Sarajevo Municipal Court** had failed to review the necessity of extending the non-custodial measures against the appellant (duty to report to the police station in his place of residence every week and the ban on meeting with the other suspects and injured parties in the case). It found a violation of these rights also in case No. **AP 3622/18** (re the Sarajevo Cantonal Court's ruling also ordering the appellant to report to the police station in his place of residence and prohibiting him from meeting with other suspects and injured parties in the criminal case). In case No. **AP 3840/17**, in which the appellant challenged the **Sarajevo Cantonal Court ruling imposing a number of non-custodial**

measures against him (ban on leaving his place of residence, travel ban, duty to report to the police station in his place of residence every week, ban on meeting with other suspects and witnesses in the criminal case), the Constitutional Court found a violation of the appellant's rights under Article II/3(k) and (m) of the BiH Constitution, Article 1 of Protocol No. 1 to the ECHR (right to property), and Article 2 of Protocol No. 4 to the ECHR (freedom of movement) because the non-custodial measures, although imposed in accordance with the law and with a legitimate aim, did not strike a fair balance between the aim pursued and the appellant's constitutional rights.

Example 2

Sarajevo Cantonal Court Ruling No. 09 09 0 K 026508 16 Kpp 100 of 24 November 2016

The Sarajevo Cantonal Court ruling imposed upon the appellant the measures banning her from leaving his place of residence and from travelling. The ruling also specified that the preliminary proceedings judge would re-examine the necessity of these non-custodial measures every two months. The Cantonal Court failed to re-examine the lawfulness of these measures after two months and to issue a ruling either abolishing or extending them.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 715/17 of 22 March 2017

> Mere existence of a presumption and reliance on the alleged danger to public order from a purely abstract point of view, that the applicant's release could have posed an actual danger to public order does not suffice; the authorities must provide evidence or indicate any instance which could show that this would materialise.
>
> ECtHR, *Makarov v. Russia*

The Constitutional Court said that Article 140b of the FBiH CPC clearly indicated that non-custodial measures may be extended as long as necessary (until the delivery of a judgment) but that the law did not rule out or limit the possibility of their abolition when the grounds for them ceased to exist. In that sense, the law lays down the courts' obligations to re-examine the necessity of extending the non-custodial measures every two months. The FBIH CPC provisions on the ordering, extension and termination of pre-trial detention apply accordingly to the ordering, extension and abolition of non-custodial measures, i.e. it provides for adversarial proceedings in which both the prosecutor and the suspect/defendant are given the opportunity to comment the ordering, extension and abolition of the non-custodial measures; the law obligates the judges to issue rulings every time they order non-custodial measures and every time they extend them after re-examining them every two months and when they lift them; these rulings may be appealed with three-member judicial panels. The Constitutional Court qualified as unacceptable the Cantonal Court's interpretation of clear legal provisions, notably its views that "non-custodial measures are not subject to extension but to occasional re-examination by the preliminary proceedings judge; the law does not lay down the procedure by which the court re-examines whether an imposed non-custodial measure is still necessary or obligates the court to issue rulings after reviewing them; and, the law does not obligate

the court to hear the suspect during the re-examination of the lawfulness of non-custodial measures". Consequently, the Constitutional Court concluded that the Cantonal Court's failure to re-examine the continued lawfulness of the imposed non-custodial measures after two months and issue a ruling either abolishing or extending them amounted to unjustified interference rendering ineffective the appellant's right to an effective legal remedy.

Comment

The Constitutional Court found a violation of the right to an effective legal remedy under Article 13 ECHR in conjunction with the right to liberty of movement under Article II/3(m) of the BiH Constitution and Article 2 of Protocol No. 4 to the ECHR because, due to the ordinary court's failure to review the necessity of extending the non-custodial measures restricting the appellant's freedom of movement after two months, because the applicant was denied her right to challenge the measures in adversarial proceedings and, in the absence of the court's decision, use the effective legal remedy prescribed by law.

Example 3

Sarajevo Cantonal Court Rulings Nos. 09 0 K 026343 17 K of 30 August 2019 and 09 0 K 026343 19 Kv 43 of 10 September 2019

In the case of defendants *I.H. and Others*, in which the appellant was charged with organised crime under Article 342(3) in conjunction with abuse of office or authority under Article 383(3) in conjunction with paragraph 1 of that Article and forgery of official documents under Article 389(1) of the FBiH CPC, the Sarajevo Cantonal Court reviewed the non-custodial measures imposed against her under Article 140(6) of the FBiH CPC and issued Ruling No. 09 0 K 026343 17 K on 30 August 2019. In its ruling, the Cantonal Court found, *inter alia,* that there was a continuing need to extend the non-custodial measures imposed against the appellant (ban on practicing law, specifically representation of parties and preparation of various submissions in property disputes before BiH civil courts in the field of property law, especially real law; resolution of legal property relations and extension of legal aid in real estate transactions, especially the enforcement of the relevant legal regulations in this field). The Cantonal Court said that the measure needed to be extended because the evidence submitted together with the indictment indicated reasonable suspicion that the defendants, including the appellant, had committed the crimes they were charged with "as explained in detail in the Cantonal Court's rulings ordering the non-custodial measures". The Court emphasised that the circumstances under which the non-custodial measures had been imposed and extended had not changed with the progress of the criminal proceedings and presentation of evidence by the Prosecution Office before the court, given the reasonable suspicion that the defendants had committed the crimes they were charged with. The Cantonal Court thus concluded that the non-custodial measures, the scope of which was specified in paragraph 1 of the operational part of the Ruling, were still necessary and expedient in this case. As per the ban under Article 140a(1)(a) of the FBiH CPC, the Cantonal Court bore in mind that the defendants were charged with grave crimes and that there was reasonable suspicion that the defendants committed them whilst performing their jobs; it also took into account the large number of criminal actions and crimes they were charged with and that the

commission of these crimes by a large number of defendants continued for years. Consequently, the Cantonal Court concluded that the circumstances based on which the Court imposed the measures prohibiting the defendants from pursuing their professional activities under Article 140a(1)(a) of the FBiH CPC had not changed "with a view to protecting the legal order, in order to prevent the defendants from reoffending or otherwise affecting the outcome of the proceedings." The Cantonal Court held that the reasons why the applicant had been prohibited from practicing the law at all (from February 2017 to July 2018) and to a lesser extent as of July 2018 had not changed. The Court issued a ruling on 10 September 2019 dismissing the appellant's appeal of the first-instance ruling as ill-founded.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 4313/19 of 15 January 2020

The Constitutional Court said that it could not be concluded from the Cantonal Court's reasoning how the appellant would reoffend or otherwise affect the outcome of the proceedings. Namely, it found that the Cantonal Court had in this case formally concluded that there was a risk that the appellant would reoffend or commit similar crimes as the ones she was indicted for or otherwise affect the outcome of the proceedings if she were not prohibited from practicing law to the extent described in the first-instance ruling. The Constitutional Court emphasised that the Cantonal Court's view that it was necessary to extend the measure appeared to be mainly based on the evidence that existed at the time the crimes the appellant was indicted for were committed, i.e. the time covered by the indictment, while the non-custodial measures were imposed on the appellant in February 2017 and have been in place for over two years now.

The Constitutional Court qualified as insufficiently persuasive and vague the reasons the Cantonal Court gave in its ruling on the re-examination of the necessity to extend the measures, given that it had failed to clearly specify the risk of the appellant reoffending or committing the same or similar crimes as the ones she was indicted for at the time the ruling was issued if she were not prohibited from practicing law to a lesser extent. The Constitutional Court said that the ordinary court apparently had not substantially reviewed the reasons for extending the non-custodial measures against the appellant, and that it had arbitrarily applied Article 140b(6) of the FBiH CPC, given that it had listed the general reasons for the extension of the measures in the impugned rulings, which could apply to all the defendants re whom the Court reviewed the justification for extending the non-custodial measures. In that respect, the Constitutional Court also referred to Article II/2 of the BiH Constitution, under which the rights and freedoms enshrined in the ECHR and Protocols thereto shall apply directly in Bosnia and Herzegovina and have priority over all other law. Therefore, this Article imposes upon all the courts a constitutional obligation to apply the standards of human rights and fundamental freedoms in the proceedings they conduct and the decisions they adopt. The Constitutional Court concluded that the Cantonal Court had in this case interfered in the appellant's right to property in a way that was not "in accordance with the law" and that it had thus violated her right to property under Article II/3(k) of the BiH Constitution and Article 1 of Protocol No. 1 to the ECHR.

Comment

The Constitutional Court found a violation of Article II/3(k) of the BiH Constitution and Article 1 of Protocol No. 1 to the ECHR because the ordinary court reviewing

the justification for extending the non-custodial measures imposed against the appellant failed to perform a substantial review and specify concrete reasons indicating that the appellant would reoffend or otherwise affect the outcome of the proceedings if these measures were lifted, wherefore it interfered in her right to property, which was not "in accordance with the law".

II.3. Non-Compliance with Non-Custodial Measures

II.3.a Examples of the Case Law of Ordinary Courts

Example 1

Court of BiH Ruling No. S1 1 K 024175 17 Kri of 17 May 2017

The defendant's pre-trial detention was replaced by the following non-custodial measures: ban on leaving his place of residence, restricting his movement solely to the city he lived in; ban on travelling outside Bosnia and Herzegovina; ban on meeting with specific individuals, notably indirect or direct contacts listed in the confirmed indictment of the BiH Prosecution Office and his co-defendants, including a ban ordering him to maintain a distance of at least 100 meters from them; the obligation to occasionally report to the relevant authority, notably the police station twice a week, on Mondays and Thursdays, from 8 am to 11 am.

The defendant violated the terms of the non-custodial measures and the Court issued a ruling ordering his pre-trial detention under Article 132(1)(b) of the BiH CPC.

During its review of the defendant's motion to terminate the pre-trial detention ordered because he had violated the pre-custodial measures, the Court held that there was still a risk of the defendant bringing pressure to bear on the witnesses and accomplices given that he was indicted for a grave crime against humanity and values protected under international law warranting a long-term sentence of imprisonment; it also took into account the nature and manner of commission of the crime the defendant was charged with and the gravity of the consequences of the JCE, as well as the fact that, once the indictment was confirmed, the defendant became aware of his procedural legal status and the witnesses' statements incriminating him, wherefore the Court concluded that the defendant had motive to influence the witnesses in order to diminish his liability.

The Court also bore in mind that reasonable suspicion was for the most part based on the statements of the witnesses - the eyewitnesses and simultaneously the direct victims of the defendant's actions, and the witnesses who had fought in the same unit as the defendant, wherefore it found that there was still a real risk that they would be subjected to the condemnation and pressures of the defendant and his friends and relatives and of the defendant bringing pressure to bear on them, which would undermine the goals of the proceedings at issue.

The panel was primarily guided in its decision by Article 13(3) of the BiH CPC, under which pre-trial detention must be kept to a minimum, and Article 131(5) of the BiH CPC, under

which pre-trial detention shall be terminated at any stage of the proceedings, as soon as the reasons for which it was initially ordered cease to exist. The panel also analysed in detail all the defendant's allegations in the motion to terminate his pre-trial detention, especially that he had had enough time to comprehend the gravity and consequences of his non-compliance with the non-custodial measures, and found that enough time (around two months) has passed since his pre-trial detention was ordered for achieving the purpose of the court decision ordering his pre-trial detention because he violated the non-custodial measures.

Comment

The Court reviewed the appellant's compliance with the non-custodial measures and ordered his pre-trial detention when it established that he had violated them. Throughout the proceedings, the Court took into account all the relevant circumstances in the light of the standard on the minimum duration of pre-trial detention and its termination as soon as the reasons for ordering it cease to exist.

Example 2

Court of BiH Ruling No. S1 1 K 018693 16 Kri of 7 December 2016

Pre-Trial Detention under Article 132(1)(b) of the BiH CPC

The panel took into account the grounds relied on by the BiH Prosecution Office in its pre-trial detention motion and found that the requirements under Article 132(1)(b) of the BiH CPC were fulfilled, i.e. that the Office provided specific arguments substantiating the risk that the defendant would obstruct criminal proceedings if released by influencing the witnesses and his accomplices in the crime they were charged with, wherefore the panel found it necessary to order the defendant's pre-trial detention on these grounds.

Having analysed the evidence the Prosecution Office submitted with its pre-trial detention motion, the panel concluded that the defendants had violated the non-custodial measures (ban on contacting or associating either directly or indirectly with the BiH Prosecution Office's witnesses in this case).

Consequently, the panel found that the defendants had intentionally violated the terms of the non-custodial measures although the court's rulings duly warned them that they would be ordered into pre-trial detention in case of non-compliance. The panel found that the defendants' pressure on the witnesses at this stage of the proceedings was inadmissible and that it aimed at intimidating them and preventing them from giving objective and impartial statements to this panel, without fear of any pressures or threats, because it was only on the basis of such statements that a court decision could ultimately be based.

Comment

Based on the Prosecution Office's evidence, the Court found that the defendants had intentionally violated the terms of their non-custodial measures in order to influence the witnesses and therefore replaced the measures with pre-trial detention.

Example 3

Court of BiH Ruling No. S1 2 K 019129 15 K of 20 November 2015

The Court revoked the ruling ordering bail and ordered the return of 10,000 KM to the defendant.

The Court revoked the ruling on the non-custodial measure prohibiting the defendant from meeting with and contacting other co-defendants and witnesses in the criminal case at all.

Since the defendant is charged with a crime warranting minimum five years' imprisonment, the formal legal requirement for ordering pre-trial detention regarding the severity of the sentence prescribed by law has been fulfilled. The Court found that particular circumstances justified the fear that the defendant would reoffend or complete the commission of the crime, wherefore the second, cumulative requirement prescribed by law has also been fulfilled.

The Court said that reasonable fear that the defendant would complete the crime or reoffend depended, above all, on the character of the defendant, i.e. his propensity for crime. During its review of the existence of these circumstances, the Court took into account all the circumstances of the case at hand, above all the nature and manner of commission of the crimes the defendant was charged with, as well as the fact that these crimes had been committed by a well-organised crime group, which is in compliance with the ECtHR's view in *Brannigan and McBride v. The United Kingdom* that the suspect's involvement in organised crime indicates the existence of circumstances justifying pre-trial detention based on the risk of him reoffending, wherefore the number and character of the committed crimes become relevant as they may indicate the risk of commission of new similar crimes during the court proceedings. The Court drew a connection between this fact and the fact that the defendant had already been convicted for same or similar crimes in the Republic of Serbia and the Republic of Croatia and that the relevant Austrian authorities were also looking for him in order to prosecute him for crimes, as the Prosecution Office claimed, which definitely pointed to the conclusion that the defendant had a propensity for crime. The Court particularly bore in mind the fact that, during the proceedings before the Court of BiH in this case, the defendant had committed a crime in the Republic of Croatia, which he was convicted for by the Zagreb County Court, which additionally substantiated the Court's conclusion that the defendant would continue committing crimes if released. In the view of this Court, all these circumstances demonstrated the defendant's resolve and persistence in committing crimes and justified fears that he would continue committing crimes unless he was placed in pre-trial detention, wherefore it was necessary to order his pre-trial detention under Article 132(1)(c) BiH CPC.

Comment

The Court abolished bail and non-custodial measures because it found that there was a risk that the defendant would reoffend, especially in the light of the fact that the defendant was found guilty of committing a crime in the Republic of Croatia during his criminal prosecution in BiH.

II.3.b Examples of BiH Constitutional Court's Decisions on Appeals of Ordinary Courts' Decisions

Example 1

Court of BiH Rulings Nos. S1 2 K 028774 18 Ko of 3 July 2018 and S1 2K 028774 18 Kv of 9 July 2018

The first-instance court abolished the following non-custodial measures imposed against the appellant: ban on leaving his place of residence, travel ban (involving the seizure of his travel document, prohibition of the issuance of a new travel document and use of his identity card to cross the state borders) and the ban on meeting with specific individuals; and ordered the appellant's pre-trial detention under Article 132(1)(b) and (c) of the BiH CPC (risks of influencing witnesses and reoffending). The Court of BiH emphasised, *inter alia*, that the appellant had violated the non-custodial measure banning him from leaving his place of residence although he had been warned that non-compliance with the measures might result in his pre-trial detention. In this specific case, the Court of BiH concluded, *inter alia,* that the grounds under sub-paragraph (b) for ordering the appellant's pre-trial detention (risk of influencing the witnesses) was fulfilled since the appellant had access to the statements of witnesses he had not known about after the confirmation of the indictment (charging him with organised crime under Article 250(2) of the BiH CC in conjunction with grand larceny under Article 287(1)(a) of the FBiH CC). The Court found that the defendant could be expected to bring pressure to bear on the witnesses to change their statements if released, now that he knew that these witnesses implicated him in the incriminated events, given his non-compliance with the non-custodial measures. The second-instance court agreed with this view, underlining that there was no need to prove concrete influence on the witnesses and that it sufficed that all the circumstances gave rise to reasonable and clear suspicion that the defendant might bring pressure to bear on them and that he might benefit from such influence, whether or not there was evidence that the suspect had directly engaged in attempts to exert influence on the witnesses and obstruct the criminal proceedings. The second-instance court also held that the assessment of this reason for pre-trial detention should start by assessing the known facts and the degree of likelihood that the events to be prevented would actually occur.

Constitutional Court of Bosnia and Herzegovina, Decision No. AP 4872/18 of 11 October 2018

The Constitutional Court emphasised that, in this specific case, the mere likelihood that the appellant might try to exert influence on the witnesses he only found out about after the indictment was confirmed could not be considered particular circumstances in terms of the grounds relevant to the extension of the appellant's pre-trial detention under Article 132(1)(b) of

the BiH CPC, because he had not complied with the non-custodial measures imposed against him, given the fact that these witnesses had been heard and had given their statements (the evidence has been secured) and that it had not been established that the appellant obstructed the criminal proceedings by trying to influence or by influencing the witnesses he had already known about at the time and, perhaps, the other suspects at the time. The Constitutional Court further concluded that the Court of BiH failed to specify in its rulings the reasons or explanations demonstrating the existence of particular circumstances in the context of the risk of reoffending as grounds for pre-trial detention.

Comment

The Constitutional Court found a violation of Article II/3(d) of the BiH Constitution and paragraphs (1)(c) and 3 of Article 5 ECHR because the ordinary courts had failed to provide in their rulings ordering the appellants' pre-trial detention relevant and sufficient reasons regarding the existence of particular grounds for ordering pre-trial detention.

The Court of BiH rulings prompted the Constitutional Court to find a violation also in its **Decision No. AP 4873/18** of 10 January 2019.

Observations about the Case Law of Ordinary Courts and Fulfilment of Standards under Article 5 ECHR

Since the Constitutional Court is the ultimate court extending subsidiary protection of fundamental human rights and freedoms within its jurisdiction to hear constitutional appeals, some statistical data on its case law on the right to liberty and security may prove useful in illustrating the adequate case law of the ordinary courts. As far as the application of Article 5 standards is concerned, the key issue regards the different interpretations of the same norms by the ordinary courts at different levels and/or ordinary courts at the same level in the BiH judicial systems. This also poses a task for the Constitutional Court: to ensure that the views it expresses in its decisions always provide a consistent and clear answer to questions about the application of these standards. In its decisions on appeals of ordinary courts' rulings on pre-trial detention and non-custodial measures over the past five years, the Constitutional Court found violations of the right to liberty and security in around 30% of the cases, whereas, in all other constitutional appeal cases, it found violations of constitutional rights in 5% of the cases. Therefore, the number of cases in which the Constitutional Court found that the ordinary courts' decisions had violated the right to liberty and security of person was much higher than the number of cases in which it found violations of other rights. True, recent statistical data show that the number of violations of the right to liberty and security has been falling, while the number of appeals filed with the Constitutional Court has remained constant. This indicates that the ordinary courts have been harmonising their case law with the standards of the right to liberty and security but that there is still a lot of room for and an obligation to harmonise it further.

The analysis of the Constitutional Court's case law on appeals of ordinary courts' decisions on pre-trial detention and non-custodial measures points to cases in which ordinary courts adopted decisions in accordance with the standards of the right to liberty and security.

As per the existence of a reasonable suspicion, a typical decision includes a reasoned explanation that the suspect has committed the crime. The decision lists all the evidence and explains how it corroborates the existence of a reasonable suspicion. The court also gave clear and sufficient reasons for ordering pre-trial detention, wherefore the conclusion that the **application of milder measures** would be inadequate is not arbitrary. The decision clearly shows that the possibility has been examined but that the court concluded that it would be inappropriate to order milder measures. The ordinary court gave detailed and specific reasons, which in their entirety justify the conclusion that the legal requirements have been fulfilled to order the pre-trial detention of the suspect because of the **risk of absconding**. In the ruling ordering pre-trial detention of the suspect, the court did not only refer to abstract reasons, but gave sufficient and relevant reasons for its conclusion that the suspects, if released, might **influence the proceedings** (which is in the investigation stage) and bring the investigation into question. The court was right to order pre-trial detention where there was an actual **risk of reoffending**. The court took into account the relevant criminal past and the personality of the suspect/defendant. It also took into account the number and character of the crimes and that an investigation into other crimes has been opened. The court ensures that the requirement regarding the severity of the sentence faced has been fulfilled, objectively assesses the gravity and continuity of the threat, the prosecutor and judge had access to prior criminal records. When reviewing this ground for pre-trial detention, the ordinary courts gave sufficiently clear explanations that do not appear arbitrary, and the circumstances of the specific crime indicate the existence of a relevant and important general interest that outweighs the principle of respect for an individual's right to liberty. During its **review of the lawfulness of pre-trial detention and its extension**, the relevant court thoroughly examined the appellant's allegations and found them ill-founded, in the context of specific circumstances corroborating that the legal requirement for extending the appellant's pre-trial detention has been fulfilled.

There are, however, also cases where the ordinary courts have not adopted decisions in accordance with the standards of the right to liberty and security.

The ordinary court typically failed to genuinely and persuasively verify all the facts and information on which it based its conclusion that there was **reasonable suspicion** that the suspect had committed the crime he is suspected of. The grounds the court referred to in its reasoning did not suffice per se for the conclusion on reasonable suspicion. The court that rendered the final decision ordering pre-trial detention did not explain what had led it to conclude that there was reasonable suspicion, i.e. did not respond to the appellant's claims in the appeal regarding the existence of a reasonable suspicion as the condition *sine qua non* for ordering or extending pre-trial detention. The second-instance court utterly ignored the suspect's claims in the appeal refuting the existence of a reasonable suspicion. It cannot be concluded from the reasoning of the ordinary courts' decisions ordering pre-trial detention that the standard of existence of a reasonable suspicion, as defined by law, has been fulfilled or that there are facts or information that would satisfy an objective observer that the person concerned may have committed the crime he is charged with. The reasoning does not indicate that the ordinary court had even considered the possibility of imposing measures alternative to pre-trial detention. The ordinary courts' reasoning regarding the imposition of measures alternative to pre-trial detention, based on the explanation of the existence of grounds for pre-trial detention, was arbitrary. The court's decision to order pre-trial detention to prevent the defendant from **absconding** does not include sufficient and relevant reasons for the conclusion that it is justified to order the appellant's pre-trial attention on this ground. The

very fact that the defendant has dual citizenship does not a priori indicate that there is a risk of him absconding and does not suffice per se to keep the individual in pre-trial detention without a further examination and explanation of the relevant circumstances. The same applies to the fact that the individual has close relatives abroad because it is a fact that only a very few people in Bosnia and Herzegovina do not have relatives abroad, wherefore this in itself definitely cannot be grounds for ordering pre-trial detention, i.e. it does not indicate per se that the individual is a flight risk. The court failed to specify the particular circumstances indicating that the suspect could actually obstruct the criminal proceedings by influencing the witnesses. The reasoning of the ruling did not specify the particular circumstances in the case at hand indicating that the suspect could actually obstruct the criminal proceedings by influencing the witnesses and the second-instance court failed to review the merits of the complaint about this issue. The conclusion on the risk of **repetition of the offence** was corroborated by blanket statements relying solely on the fact that the appellant was suspected of a specific crime, rather than on particular and specific statements. The mere presumption that the release of the suspect from pre-trial detention would result in **disturbance of public order** is not in itself sufficient to order pre-trial detention on this ground. The ordinary courts failed to specify the specific circumstances justifying the conclusion that the suspect's release would result in exceptional circumstances due to a real (rather than an abstract) threat to public order. The court reiterated the same reasons, i.e. stereotypical formulations in rulings extending pre-trial detention, without taking into account the specific circumstances the case at hand, i.e. without concretisation and individualisation vis-à-vis the suspect. The ordinary court failed to **re-examine the lawfulness of pre-trial detention** within the legal timeframe.

Finally, throughout the proceedings, the court deciding on pre-trial detention should bear in mind the purpose of pre-trial detention, whilst respecting the principles of presumption of innocence and the exceptionality and proportionality of pre-trial detention. Pre-trial detention must always be an exception and should not become an advance penalty.

The court must review the possibility of applying alternative measures to ensure the defendant's presence throughout the proceedings, especially in cases of long criminal proceedings.

Statistical Data on 2015-2019 BiH Constitutional Court Decisions

Article 5 ECHR

Year	Violation	No Violation	Total Number of Decisions
2015	7-21,88%	25	32
2016	17- 21,52%	62	79
2017	16-18,82%	69	85
2018	16-24,24%	50	66
2019	10-15,38%	55	65