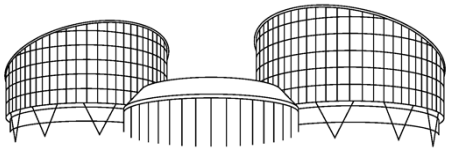

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF HODŽIĆ v. CROATIA

(Application no. 28932/14)

JUDGMENT

STRASBOURG

4 April 2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hodžić v. Croatia,

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

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Aleš Pejchal,
Krzysztof Wojtyczek,
Armen Harutyunyan,
Tim Eicke,
Jovan Ilievski, *judges,*

and Abel Campos, *Section Registrar,*

Having deliberated in private on 5 March 2019,

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

PROCEDURE

1. The case originated in an application (no. 28932/14) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a national of Bosnia and Herzegovina and Croatia, Mr Šemso Hodžić ("the applicant"), on 8 April 2014.

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

3. The applicant alleged a lack of fairness in the procedure and decisions for his internment in a psychiatric hospital. He relied on Article 5 §§ 1 (e) and 4 and Article 6 § 1 of the Convention.

4. On 30 June 2014 the application was communicated to the Government. The President of the Section to which the case was allocated decided, under Rule 54 § 2 (c) of the Rules of Court, to invite the parties to submit further observations in respect of the issues raised under Article 6 § 1 of the Convention.

5. The Government of Bosnia and Herzegovina did not make use of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1952.

A. Proceedings before the criminal courts

7. On 30 May 2012 the applicant was arrested and detained in connection with a suspicion of making two threats by telephone against certain M.S. and Š.O.

8. In the course of the investigation, the Zagreb Municipal State Attorney's Office (*Općinsko državni odvjetništvo u Zagrebu*) commissioned a psychiatric expert report on the applicant's mental health at the time of the offence, including, if appropriate, the existence of a need for his psychiatric internment.

9. On 28 June 2012 the psychiatric expert, E.S., submitted her report, which stated that the applicant suffered from paranoid schizophrenia. She found that he was incapable of understanding and controlling his actions and that he posed a danger to others, which warranted his psychiatric internment. The expert noted that she had not inspected any medical documents concerning the applicant's previous psychiatric treatment, but she had interviewed him, examined the criminal case file and a medical report from the prison administration.

10. On 10 July 2012 the Zagreb Municipal State Attorney's Office indicted the applicant in the Zagreb Municipal Criminal Court (*Općinski kazneni sud u Zagrebu*) on charges of making serious threats. It asked that the measure of involuntary psychiatric internment be ordered in respect of the applicant, as provided under the Protection of Individuals with Mental Disorders Act.

11. On 27 July 2012 a three-judge panel of the Zagreb Municipal Criminal Court found that the indictment was flawed as it had been based on an incomplete expert report, which had not taken into account all the medical documentation concerning the applicant's previous psychiatric treatment. The indictment was thus returned to the Zagreb Municipal State Attorney's Office with an instruction to commission an additional expert report.

12. On 24 August 2012 E.S. produced a supplement to her report, which she prepared with a psychologist. She explained that she had obtained the applicant's medical record from his general practitioner, V.P., but had not obtained anything from his psychiatrist, V.G. (a university professor), who had in the meantime retired and could not be reached. The expert also stated that, in her view, the applicant's diagnosis had already been clear after the first examination and that she did not need further documents to provide a diagnosis. She thus reiterated her previous opinion on the basis of the new records she had obtained.

13. On 28 August 2012 the Zagreb Municipal State Attorney's Office submitted a new indictment against the applicant in the Zagreb Municipal Criminal Court. This indictment was confirmed and accepted on 3 October 2012 and the case was sent to trial.

14. Meanwhile, on 30 August 2012, the applicant was released from pre-trial detention because the maximum period had expired (see paragraph 31 below).

15. At a hearing before the Zagreb Municipal Criminal Court on 4 December 2012, the applicant asked that his psychiatrist V.G., his general practitioner V.P. and several other witnesses, including his neighbours, be heard. He said they could all give evidence as to his mental state. He also argued that he had had previous conflicts with the victims and asked that the police be requested to submit relevant information about those incidents.

16. At the same hearing, several prosecution witnesses and the expert witness E.S. were questioned. E.S. reiterated the findings and opinion she had previously given. She also argued that the evidence concerning the applicant's mental state at the moment of the commission of the offence could not be given by his general practitioner or his psychiatrist.

17. In the meantime, on 11 September and 13 December 2012 the applicant submitted medical reports by his psychiatrist V.G. according to which he suffered from chronic stress and maladaptation to the environment. This was a behavioural disorder which needed further psychological treatment. V.G. also stressed that the applicant's psychiatric internment could create adverse effects for his treatment. He pointed out that the applicant participated in an outpatient psychiatric treatment for years and that there were positive developments in his behaviour, in particular related to the abstinence from alcohol.

18. At a hearing on 18 December 2012, the Zagreb Municipal Criminal Court heard further witnesses for the prosecution. It dismissed all the applicant's requests for the taking of evidence on the grounds that they were irrelevant. In particular, the trial court held that the general practitioner V.P. did not have sufficient expertise to give evidence on the applicant's mental capacity and that her documents had been taken into account by E.S. The trial court considered that the same arguments applied to V.G.

19. At a hearing on 23 January 2013 the parties gave their closing arguments. The applicant argued that E.S.'s expert opinion was flawed and incomplete as it had not taken into account the existing medical documentation related to his treatment but only the medical record held by his general practitioner. At the same time, her opinion was contrary to the findings of his psychiatrist V.G.

20. On the same day the Zagreb Municipal Criminal Court found that the applicant had committed the offence of making serious threats while lacking mental capacity. Relying on E.S.'s report, it decided that he should be placed in a psychiatric hospital for a period of six months. The Zagreb Municipal Criminal Court found the medical reports produced by V.G. (see paragraph 17 above) unreliable on the grounds that they contradicted the findings of the expert witness E.S. and that they had been produced by a doctor whom the applicant had paid privately.

21. The applicant appealed against the judgment to Zagreb County Court (*Županijski sud u Zagrebu*), alleging numerous substantive and procedural flaws. He pointed out that his psychiatrist V.G., who had treated him for six years, had not been consulted in the course of the proceedings. He also referred to a report by V.G., which found that there were no grounds for his being placed in a psychiatric institution and that any such decision could have severe consequences for his health.

22. On 9 July 2013 the Zagreb County Court dismissed the applicant's appeal on the grounds that all the relevant facts had been correctly established. It stressed that the expert witness E.S. had taken into account the applicant's medical record held by his general practitioner V.P., which also included the findings of his psychiatrist V.G. The Zagreb County Court therefore considered that it had not been necessary to question V.P. and V.G., particularly since they were not certified court experts as was the case with E.S. The Zagreb Municipal Criminal Court judgment thereby became final.

23. On 23 October 2013 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*), complaining that the proceedings had been unfair.

24. On 27 November 2013 the Constitutional Court declared the applicant's constitutional complaint inadmissible as manifestly ill-founded. It considered that the applicant was simply repeating his arguments from the proceedings before the lower courts challenging their decisions although those decisions did not disclose any arbitrariness or unfairness.

B. Proceedings for the applicant's placement in a psychiatric hospital

25. After the Zagreb Municipal Criminal Court's judgment became final (see paragraph 22 above) it was sent for implementation to a single judge of the Zagreb County Court, as provided for under the Protection of Individuals with Mental Disorders Act (see paragraph 32 below).

26. In the meantime, the applicant went to Sarajevo, Bosnia and Herzegovina, where he was examined by two experts in forensic psychiatry, A.K. and A.B.M., and a psychologist, S.P. In a report of 10 August 2013 the experts stated that the applicant had various mental disorders of a histrionic type, but did not have paranoid schizophrenia. They also stated that he was fully conscious of his acts and could adopt a critical attitude towards his own conduct.

27. On 21 October 2013 a judge of the Zagreb County Court ordered that the applicant be sent to the psychiatric hospital.

28. The applicant appealed against that decision to a three-judge panel of the Zagreb County Court, referring, *inter alia*, to the expert report drafted on 10 August 2013 (see paragraph 26 above).

29. On 7 November 2013 a three-judge panel of the Zagreb County Court dismissed the applicant's appeal on the grounds that there had been nothing in his arguments to raise any doubts about the necessity for his committal to the hospital as established by the Zagreb Municipal Criminal Court.

30. According to the available information, the applicant is still at large as he could not be located by the relevant authorities in order to execute the psychiatric internment order.

II. RELEVANT DOMESTIC LAW

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

Duration of pre-trial detention
Article 133

"(1) Until the adoption of a first-instance judgment, pre-trial detention may last for a maximum of:

...

2. three months for offences carrying a sentence of up to three years' imprisonment;

..."

Witnesses
Article 283

"(1) Persons for whom it is probable that they could give information on the criminal offence, perpetrator or other important circumstances are heard as witnesses."

Article 285

"(1) The following persons enjoy testimonial privilege:

...

5) ... doctors, ... psychologists, ... with regard to the information they had learned from the defendant in the performance of their duties ..."

Expert evidence
Article 308

"Expert report shall be commissioned when, in order to determine or assess the relevant facts, it is necessary to obtain findings and the opinion of a person who has the necessary expert knowledge."

Article 309

"(2) If a specialised institution exists for a certain type of expertise, or the expert evidence may be given from a state authority, such expert report, particularly a

complex one, shall as a rule be assigned to such an institution or such an authority. The institution or the authority shall appoint one or more experts who shall produce the expert report.

...

(4) If for certain expert report, permanent expert witnesses are appointed, other expert witnesses may be appointed only when there is a danger of delay, or when permanent expert witnesses are not available or if other circumstances so require."

Article 311

"(1) Any person who ... enjoys the testimonial privilege ... may not be appointed as an expert witness, and if such a person was appointed, his or her findings and opinion may not be used as evidence in the proceedings."

Article 317

"If the findings of the expert witness are unclear, incomplete or contradictory in themselves or contrary to other examined circumstances, and these omissions cannot be removed by a re-examination of the expert witness, the same or other expert witness shall provide new expert report."

Article 318

"If the opinion of the expert witness contains contradictions or other omissions, or if grounds for suspicion arise that the opinion is inaccurate, and these omissions or suspicion cannot be removed by a re-examination of the expert witness, the opinion of another expert witness shall be requested."

Article 325

"...

(3) If an expert report has been commissioned in order to establish the mental capacity of the accused [at the moment of the commission of the offence], the expert shall establish whether at the moment of the commission of the offence the accused suffered from a mental illness, temporary mental disturbance, insufficient mental development or some other mental derangement and shall determine the nature, type and degree of any such mental derangement and shall give his or her opinion on the effects of that condition on the accused's capacity to understand the meaning of his or her actions and to control his or her will.

(4) If the expert finds that at the moment of the commission of the offence the accused was unable to understand the meaning of his or her actions and to control his or her will, [the expert] shall give his or her opinion on the degree of possibility that [the accused], due to the mental derangement in question, could commit a serious offence ..."

Proceedings concerning mentally ill defendants
Article 549

"(1) The provisions of this Code ... shall also apply in proceedings against persons lacking mental capacity at the time of the commission of the unlawful act, unless otherwise provided in this Chapter."

Article 550

"(1) If a defendant lacked mental capacity when committing the unlawful act, the State Attorney shall request in the indictment that the court establish that the defendant has committed an unlawful act while lacking mental capacity and that he or she be interned [in a psychiatric hospital] under the Protection of Individuals with Mental Disorders Act."

Article 551

"(1) Save for the grounds on which the pre-trial detention may be ordered against an accused, such detention shall be ordered in respect of the accused against whom the indictment under Article 550 § 1 has been lodged if there is a possibility that due to the serious mental derangement that person might commit a serious offence. Before ordering the per-trial detention, an expert opinion on the existence of the danger referred to shall be obtained. If the pre-trial detention has been ordered [under this provision] the prison administration shall be informed in order to transfer that person to [an adequate institution].

(2) The pre-trial detention under paragraph 1 of this Article can last as long as there is need for it but not longer than provided under Article 133 of this Code."

Article 554

"(1) If the State Attorney has made a request in accordance with Article 550 paragraph 1 of this Code, and the court, upon completion of the trial, establishes that the defendant has committed the unlawful act while lacking mental capacity and that the conditions exist for ordering his or her internment in a psychiatric hospital in accordance with the Protection of Individuals with Mental Disorders Act, it shall adopt a judgment determining that the defendant has committed the unlawful act while lacking mental capacity and shall order [his or her] involuntary internment in a psychiatric hospital for a period of six months.

(2) The court shall, when adopting the judgment under paragraph1 of this Article, order or extend the pre-trial detention under Article 551 § 1 of this Code.

..."

Article 555

"(5) The president of the [trial] panel shall, immediately upon the decision ordering internment [in the psychiatric hospital] becoming enforceable, forward all the necessary documents to the relevant court for the procedure under the Protection of Individuals with Mental Disorders Act."

32. The relevant provisions of the Protection of Individuals with Mental Disorders Act (*Zakon o zaštiti osoba s duševnim smetnjama*, Official Gazette no. 11/1997, with further amendments) provide:

General provisions
Section 1

"This Act regulates the basic principles, organisation and enforcement of the protection of individuals with mental disorders, as well as the conditions for the application of measures and treatment."

Involuntary admission and involuntary retention in a psychiatric institution
Section 29

"(1) The proceedings for the involuntary admission of a mentally ill person to a psychiatric institution shall be in the competence of a single judge of the [relevant] County Court.

(2) The proceedings for the involuntary placement in a psychiatric institution are non-contentious [civil] proceedings.

..."

Procedure for the internment [in a psychiatric hospital] of persons lacking mental capacity [when committing an unlawful act] and convicted persons
Section 44

"(1) The court shall order involuntary psychiatric internment of a mentally ill offender if, on the basis of an expert report, it finds that the person in question has serious mental disorder and that he or she is dangerous for his or her environment.

(2) A mentally ill offender shall be considered dangerous for his or her environment if there is a high probability that due to his or her mental disorder leading to his lack of mental capacity [at the moment of the commission of the offence] could again commit a criminal offence punishable by at least three years' imprisonment."

Section 44.a

"(1) The procedure for internment [in a psychiatric hospital] in accordance with sections 44-50.a of this Act shall be conducted in respect of persons whose internment has been ordered by a court in criminal proceedings.

(2) In the proceedings for involuntary psychiatric internment of mentally ill offenders sections 44-50a of this Act shall apply and, if something is not provided in those provisions, other provisions of this Act shall apply.

(3) The involuntary psychiatric internment starts by the finality of the decision on psychiatric internment adopted in the criminal proceedings ...

(4) After the expiry of the period for the maximum possible sentence for the offence for which the mentally ill offender was found to be responsible, his or her release from the hospital shall be governed by the provisions of this Act [applicable to mentally ill non-offenders]."

Section 45

"(1) The first-instance court which conducted the criminal proceedings where internment was ordered for a person lacking mental capacity shall forward copies of the [relevant documents] to the court competent for the procedure of internment (hereinafter: the court).

...

(3) The court shall without delay forward to the Ministry of Health a copy of the [criminal court's] judgment, including the report of the expert witness, and other information necessary for the selection of the institution where the individual is to be interned. Within three days of receipt of the [criminal court's judgment], the Ministry of Health shall designate the psychiatric hospital ...

> (4) After the receipt of the decision of the Ministry of Health referred to in paragraph 3 of this section, the court shall, within three days, order the committal of the person to the psychiatric hospital for the enforcement of the decision on his or her internment.
>
> ...
>
> (7) Appeal against the decision on the committal of the person to the hospital does not have suspensive effect."

33. In the context of the proceedings concerning mentally ill offenders, after the first part of the proceedings has been concluded before the criminal court, the Protection of Individuals with Mental Disorders Act envisages that the single judge of the County Court assumes further responsibility to ensure that the mentally ill offender is kept in the psychiatric hospital only if, and as long as, he or she is dangerous within the meaning of section 44 of that Act, but no longer than the maximum penalty for the relevant offence as provided under section 44a of that Act. Further relevant provisions of the Protection of Individuals with Mental Disorders Act related to the involuntary admission and involuntary retention in a psychiatric institution of persons with a mental illness are set out in the case of *M.S. v. Croatia (no. 2),* (no. 75450/12, § 36, 19 February 2015).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

34. The applicant complained of a lack of fairness in the proceedings leading to the decisions on his internment in a psychiatric hospital. He relied on Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ..."

35. For the same reasons, the applicant invoked Article 5 §§ 1 (e) and 4 of the Convention.

A. Admissibility

1. Article 5 §§ 1 (e) and 4 of the Convention

36. The Court notes that the applicant was not detained following the adoption of the decisions on his internment in the psychiatric hospital as the relevant authorities could not reach him in order to execute the psychiatric internment order. That being so, the Court does not find that Article 5 of the Convention is applicable to his complaints (see, for instance, *Guliyev v. Azerbaijan* (dec.), no. 35584/02, 27 May 2004, and *Lazoroski*

v. the former Yugoslav Republic of Macedonia, no. 4922/04, §§ 65-66, 8 October 2009). Accordingly, the applicant's complaint under Article 5 §§ 1 (e) and 4 of the Convention is incompatible *ratione materiae* with the provisions of the Convention and should be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

2. Article 6 of the Convention

37. The fact that Article 5 is inapplicable does not present an obstacle to the applicability of Article 6 of the Convention to the proceedings concerning issues of personal liberty in the present case (see *Reinprecht v. Austria*, no. 67175/01, §§ 51-52, ECHR 2005-XII, and *Lazoroski*, cited above, § 66). Thus, the Court will next examine the question of whether in the circumstances of the present case Article 6 is applicable in its criminal or civil limb.

38. The applicant's complaints in the present case concern the entirety of the domestic proceedings leading to the adoption of the decisions on his internment to the psychiatric hospital. The Court notes that in accordance with the relevant domestic law, the procedure for internment of a mentally ill offender in a psychiatric hospital is a two-tier procedure. First, the criminal proceedings are conducted before a criminal court in order to determine whether the accused has committed an act constituting a criminal offence while lacking mental capacity and, if that proves to be the case, whether there is a high degree of probability that due to the reasons leading to his or her lack of mental capacity that person could commit a serious offence in the future. If all this is proven, the criminal court then imposes a psychiatric internment order which may last at most as long as the maximum possible sentence for the relevant offence. In the second stage of the procedure, on the basis of the internment order issued by the criminal court, a special procedure is instituted and conducted before a single judge of the relevant County Court for the adoption of the decision on the person's actual placement in the appropriate institution (see paragraphs 31-32 above).

39. In these circumstances, in order to determine the issue of applicability of Article 6 to the applicant's complaints, the Court considers it appropriate, first, to review its case-law concerning the proceedings conducted against mentally ill offenders and their internment, and then its case-law concerning the internment of persons of unsound mind in general (non-offenders) in the psychiatric hospital.

(a) Case-law relevant to the proceedings against mentally ill offenders

40. In some cases concerning the proceedings for involuntary placement of mentally ill offenders in the psychiatric hospital, the Court did not consider that Article 6 § 1 of the Convention applied under its criminal head (see *Antoine v. the United Kingdom* (dec.), no. 62960/00, ECHR 2003, and *Kerr v. the United Kingdom* ((dec.), no. 63356/00, 23 September 2003).

41. These cases concerned first a finding by a court that the applicants were unfit to plead and stand trial. This led to the discontinuation of the criminal trial against them, and the opening of a new set of proceedings before a fresh jury whose essential purpose was to consider whether the applicant had committed an act the dangerousness of which would require a hospital order in the interests of the protection of the public. In these circumstances, in view of the fact that following the finding of unfitness to plead no conviction or punitive sanction was possible and that the decision on the placement in a psychiatric hospital pursued preventive purposes, the Court considered that these proceedings did not concern the determination of a criminal charge within the meaning of Article 6 § 1 of the Convention (see *Juncal v. the United Kingdom* (dec.), no. 32357/09, § 34, 17 September 2013).

42. By contrast, in cases where the internment of mentally ill offenders in the psychiatric hospital was ordered by the criminal courts in the proceedings whose task was, in substance, to establish whether the applicant had committed a wrongful act and whether at that time he could be held criminally liable for his act, the Court considered that Article 6 § 1 applied under its criminal limb (see *Valeriy Lopata v. Russia*, no. 19936/04, 30 October 2012, and *Vasenin v. Russia*, no. 48023/06, 21 June 2016).

43. In these cases, the Court noted the differences in practical operation of the proceedings in question as opposed to those in *Antoine* and *Kerr* (both cited above). The Court was mindful of the fact that in accordance with the relevant domestic law the practical situation of the applicants as persons who had committed a wrongful act in a state of mental incapacity was essentially similar to a suspect or accused in criminal proceedings. In particular it laid emphasis on the fact that the applicants had been remanded in custody and awaited the conclusion of the proceedings against them as any other defendant in an ordinary criminal case (see *Valeriy Lopata*, cited above, § 120, and *Vasenin*, cited above, § 130). Furthermore, in *Vasenin* (cited above, § 130), the Court was mindful of the position in the domestic law according to which a person in the applicant's situation should benefit fully from the guarantees afforded to an accused or defendant in the criminal proceedings.

(b) Case-law relevant to the internment of persons of unsound mind (non-offenders) in the psychiatric hospital

44. In several cases concerning the internment of persons of unsound mind (non-offenders) in the psychiatric hospital, the Court found that Article 6 § 1 of the Convention applied under its civil limb.

45. In *Aerts v. Belgium* (30 July 1998, § 59, *Reports of Judgments and Decisions* 1998 V) the applicant had been detained under Article 5 § 1 (e) as a person of unsound mind. Following his release, he instituted proceedings to review the lawfulness of his detention and sought compensation. The

Court found that Article 6 § 1 applied under its civil head to the proceedings because "the right to liberty is a civil right".

46. In two subsequent cases which also concerned proceedings relating to the lawfulness of detention in psychiatric institutions, the Court found Article 6 to be applicable under its civil head with reference to *Aerts*. It explicitly dismissed the Government's objection of incompatibility *ratione materiae*, despite the fact that some of the proceedings in issue concerned only the lawfulness of the detention without involving any related pecuniary claims (see *Vermeersch v. France* (dec.), no. 39277/98, 30 January 2001, and *Laidin v. France* (no. 2), no. 39282/98, §§ 73-76, 7 January 2003).

47. While these cases concerned instances in which the applicants challenged their placement in psychiatric institutions after they had been released, the Court is of the view that, as a matter of principle, there is no reason to consider that Article 6 should not apply in the context of the proceedings where an applicant who is at liberty challenges the decisions that should lead to his or her placement in a psychiatric institution. Should it be otherwise, an applicant would be required to offer up his or her physical liberty in order to trigger applicability and thus exercise of his or her Article 6 rights (see, *mutatis mutandis*, *Sanader v. Croatia*, no. 66408/12, § 70, 12 February 2015), which would be difficult to reconcile with the principle of practical and effective nature of rights guaranteed under the Convention (see, amongst many others, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 127, 21 June 2016).

(c) Application of the above case-law in the present case

48. In the present case, having regard to the specific features of the domestic proceedings and the manner of their operation in practice and the above case-law, the Court is of the view that there is little doubt as to the applicability of Article 6 § 1 in its criminal limb to the first set of proceedings conducted before the criminal courts.

49. The essential aim of those proceedings, which were regulated in the relevant criminal law legislation (see paragraph 31 above, Article 554 of the Code of Criminal Procedure), was to establish whether the applicant had committed the acts constituting a criminal offence of making serious threats while lacking mental capacity and if so to assess whether his present mental condition required the application of a measure of psychiatric internment.

50. Thus, the criminal court was not called upon to decide exclusively on the matters related to the applicant's "right to liberty", but it was called to decide on whether the applicant had committed the acts constituting a criminal offence and upon his criminal responsibility, which both are elements of the determination of the criminal charge (see paragraph 31 above). Furthermore, the assessment of the need for application of this measure was regulated by special provisions distinct from those that applied to mentally ill in general and the execution of the measure was separately

regulated. Moreover, its maximum is limited to maximum possible imprisonment for the offence in question (see paragraphs 31-32 above). Indeed, throughout the domestic proceedings, including in the proceedings before the Constitutional Court (see paragraph 24 above), the "criminal" nature of the proceedings before the criminal courts was never put to doubt.

51. In view of the above, the Court finds that Article 6 § 1 of the Convention is applicable under its criminal limb to the proceedings conducted before the criminal courts.

52. As to the subsequent set of proceedings for the applicant's actual placement in a psychiatric institution conducted before the relevant County Court, the Court notes that at this stage there was no longer a criminal case pending against the applicant and the County Court was not concerned with establishing the nature and scope of his criminal responsibility but, in essence, with finding the modalities for his placement in a psychiatric institution and assuming further responsibility to ensure that he is kept in the psychiatric institution only if, and as long as, he is dangerous within the meaning of section 44 of that Act, but no longer than the maximum penalty for the relevant offence as provided under section 44a of that Act (see paragraph 33 above). Before the applicant as a person of unsound mind could actually be placed in a psychiatric institution, the County Court needed to make the relevant order to that effect. It thus follows that the County Court was called upon to decide exclusively on the matters related to the applicant's "right to liberty", which, as already stressed above, falls under the civil head of Article 6 § 1 of the Convention (see paragraphs 44-47 above).

53. The Court therefore finds that Article 6 § 1 applies in its civil limb to the proceedings for the applicant's actual placement in a psychiatric institution conducted before the relevant County Court.

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

B. Merits

1. The parties' arguments

55. The applicant contended that all his arguments and proposals to examine evidence had been dismissed in the course of the relevant proceedings. In particular, the courts in question had failed to take into account his proposal for the examination of his psychiatrist V.G. and for the admission into evidence of the expert report produced by a team of experts in Sarajevo. They had thereby prevented him from effectively challenging the findings of the prosecution expert E.S. in order to show that his

internment in a psychiatric hospital would be damaging to his health. The applicant also pointed out that his case had not concerned the application of criminal sanctions but rather specific measures applied with regard to individuals with mental disorders. In his view, such measures could not be applied automatically. Moreover, the applicant stressed that the relevant courts ordering his internment in a psychiatric hospital had failed to reassess his condition in the light of new findings, in particular those of the team of experts from Sarajevo. Instead, they had ordered his internment on the basis of an expert report that was out of date.

56. The Government pointed out that the order for the applicant's internment in a psychiatric hospital had been a special form of "sanction" applied in criminal proceedings against a person lacking mental capacity when committing an unlawful act. The further order on his actual committal had been adopted in a special non-contentious procedure. In the Government's view, the internment order had been adopted on the basis of a report by the relevant experts (a psychiatrist and a psychologist) and the decisions of the relevant courts in that regard had not been arbitrary or unreasonable. The expert report had been prepared on the basis of all the available information concerning the applicant's mental health and there had been no need to examine further evidence. Moreover, the applicant had had all the relevant procedural guarantees in the proceedings leading to the adoption of the internment order and the committal order, including the possibility to propose and examine the relevant evidence. The fact that the Zagreb County Court had not taken into account the report of the team of doctors from Sarajevo was irrelevant. That was because it had no longer been possible to adduce evidence and challenge the findings on the applicant's metal capacity at that stage of the proceedings. The applicant should have adduced that evidence in the criminal proceedings before the Zagreb Municipal Criminal Court. The Government also stressed that the expert report obtained in the criminal proceedings could not be considered as being out of date for the determination of the need for the applicant's internment in a psychiatric hospital.

2. The Court's assessment

(a) General principles

57. The Court reiterates that the key principle governing the application of Article 6 is fairness. The right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting the guarantees of Article 6 § 1 of the Convention restrictively (see *Moreira de Azevedo v. Portugal*, 23 October 1990, § 66, Series A no. 189; *Gregačević v. Croatia*, no. 58331/09, § 49, 10 July 2012, and *Avagyan v. Armenia*, no. 1837/10, § 38, 22 November 2018). In this connection, the Court would stress that in cases related to mentally ill defendants their very

weakness should enhance the need for supporting their rights. The domestic authorities must show requisite diligence in ensuring their effective participation in the proceedings and must act particularly carefully when limiting that right, so as not to place the mentally ill at a disadvantage when compared with other defendants who do enjoy such a right (see *Valeriy Lopata*, cited above, § 125).

58. It is not the function of the Court to deal with alleged errors of law or fact committed by the national courts unless and in so far as they may have infringed rights and freedoms protected by the Convention, for instance where, in exceptional cases, such errors may be said to constitute "unfairness" incompatible with Article 6 of the Convention. Article 6 § 1 of the Convention does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, ECHR 2017 (extracts), with further references).

59. Nevertheless, according to the Court's established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case. Without requiring a detailed answer to every argument advanced by the complainant, this obligation presupposes that parties to judicial proceedings can expect to receive a specific and explicit reply to the arguments which are decisive for the outcome of those proceedings (Ibid., § 84).

60. Article 6 § 1 of the Convention also comprises, amongst other, the right of the parties to the proceedings to present the observations which they regard as pertinent to their case. As the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, this right can be regarded as effective only if the applicant is in fact "heard", that is, his or her observations are properly examined by the courts. Article 6 § 1 of the Convention places the courts under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see, for instance, *Kari-Pekka Pietiläinen v. Finland*, no. 13566/06, § 33, 22 September 2009, and cases cited therein). It thereby embodies the principle of equality of arms which, as one of the

elements of the broader concept of fair trial, requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his or her opponent (see *G.B. v. France*, no. 44069/98, § 58, ECHR 2001-X).

61. In connection with the expert evidence, the Court would stress that the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial. The domestic court is free, subject to compliance with the terms of the Convention, to refuse to call witnesses proposed by the defence, if their evidence is not relevant to the subject matter of the accusation (see *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, no. 26711/07 and 2 others, § 95, 12 May 2016; see also, in the context of the questioning of witnesses, *Murtazaliyeva v. Russia* [GC], no. 36658/05, §§ 158-161, 18 December 2018).

62. However, the rules on taking evidence and producing it at the trial should not make it overly difficult or impossible for the defence to exercise the rights guaranteed by Article 6 of the Convention. In certain circumstances, it may be hard to challenge a report by an expert without the assistance of another expert in the relevant field. Thus, in such instances, the mere right of the defence to ask the court to commission another expert examination does not suffice. To realise that right effectively the defence must have the opportunity to introduce their own "expert evidence" (see *Matytsina v. Russia*, no. 58428/10, § 187, 27 March 2014, referring to *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 731, 25 July 2013). That right is not absolute and the forms in which the defence may seek the assistance of experts may vary (ibid., § 732).

63. In the context of the decisions leading to an applicant's internment in a psychiatric hospital, and in view of the similarity of procedural guarantees under Article 6 § 1 and those under Article 5 §§ 1 and 4 of the Convention (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 232, ECHR 2012, and *Shtukaturov v. Russia*, no. 44009/05, § 66, ECHR 2008), the Court finds it salutary to refer to its case-law under Article 5 according to which it is primarily for the domestic courts to assess the scientific quality of different psychiatric opinion and in that respect they have a certain margin of appreciation. When the national courts have examined all aspects of different expert reports on the necessity of an individual's psychiatric internment, the Court will not intervene unless their findings are arbitrary or unscientific (see *Ruiz Rivera v. Switzerland*, no. 8300/06, § 62, 18 February 2014).

64. Moreover, as a rule, a measure leading to a deprivation of liberty should be determined on the basis of a sufficiently recent medical expertise (see *Aurnhammer v. Germany* (dec.), no. 36356/10, §§ 35-37, 21 October 2014). In particular, the objectivity of the medical expertise entails a requirement that it was sufficiently recent. The question whether medical expertise was sufficiently recent is not answered by the Court in a static way but depends on the specific circumstances of the case before it (see *Aurnhammer*, cited above, and *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 131, 4 December 2018). Accordingly, in some instances, failure by the domestic authorities to consider whether a person's mental disorder has persisted and whether his or her involuntary hospitalisation is necessary when committing him or her to a psychiatric hospital could raise an issue of arbitrariness (see, for instance, *Trutko v. Russia*, no. 40979/04, § 55, 6 December 2016, with further references).

65. The Court would also reiterate that as regards the degree of mental disorder that may warrant compulsory confinement, it must be found that the confinement of the person concerned is necessary because the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him from, for example, causing harm to himself or other persons (see *Ilnseher*, cited above, § 133).

66. The relevant time at which a person must be reliably established to be of unsound mind is the date of the adoption of the measure depriving that person of his liberty as a result of that condition. However, as according to the Court's case-law the validity of continued confinement must depend on the persistence of the mental disorder, changes, if any, to the mental condition of a person following the adoption of the detention order must be taken into account (see, *mutatis mutandis*, *Ilnseher*, cited above, § 134).

67. Lastly, the Court would stress that the requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 applying to cases of the former category. Thus, although these provisions have certain relevance outside the strict confines of criminal law, the Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases. However, the Court considers it necessary, when examining proceedings that fall within the civil-law aspect of Article 6, to draw inspiration from its approach to criminal-law matters (see, amongst many others, *Carmel Saliba v. Malta*, no. 24221/13, § 67, 29 November 2016, with further references).

(b) Application of these principles to the present case

(i) Concerning the proceedings before the criminal courts

68. The Court notes that the order to place the applicant in a psychiatric institution was adopted by the Zagreb Municipal Criminal Court after relying on the findings of the expert report produced by E.S. (see paragraph 20 above). This report was initially produced without an examination of medical documentation related to the applicant's previous psychiatric treatment (see paragraph 9 above). At a later stage of the proceedings, the expert was ordered by the relevant court to update her report by consulting the applicant's medical documentation. E.S. eventually obtained the medical record from the applicant's general practitioner but she failed to get in touch with the applicant's psychiatrist, the university professor V.G., who had treated him continuously for six years. The reason cited for E.S.'s inability to contact V.G. was that he had retired and could not be reached (see paragraphs 11-12 above).

69. The report thus obtained was accepted by the Zagreb Municipal Criminal Court and served as the basis for ordering the applicant's psychiatric internment (see paragraph 20 above). The same court refused the applicant's proposal to obtain evidence from V.G. The reasons given for that decision were the same as the reasons cited for the refusal to hear oral evidence from the applicant's general practitioner, namely lack of expertise in psychiatry and the fact that the relevant medical record had been taken into account by E.S. (see paragraphs 17 above). These findings were accepted and upheld by the Zagreb County Court, acting as the court of appeal in the case. That court also considered that there was no reason to hear evidence from V.G. as he was not a certified court expert (see paragraphs 22 above).

70. For its part, the Court notes that E.S. did not explain what measures she had taken to contact V.G. The domestic courts, however, accepted the reasons cited by E.S. in an uncritical fashion without looking into the reliability of her submission. Moreover, it should also be noted that V.G. had never been asked to produce the relevant medical documentation concerning the applicant's treatment. The domestic courts' reliance on the fact that E.S. had obtained the medical record held by the applicant's general practitioner, in a matter as important as an individual's internment in the psychiatric hospital, does not avert the risk that the medical record held by the general practitioner, without the supporting medical documentation, was incomplete to understand the reality of the applicant's situation. Indeed, it should also be noted that E.S. never explicitly dealt with, challenged or refuted any of V.G.'s findings in relation to the applicant's treatment.

71. What is more, the Court notes that during the proceedings the applicant presented two medical reports produced by V.G. according to

which he suffered from chronic stress and maladaptation to the environment and not paranoid schizophrenia, as found by E.S. In addition, V.G. found, citing specific examples from the course of the applicant's previous treatment, that his psychiatric internment could create adverse effects for his treatment (see paragraph 17 above). However, the reliability of these reports was rejected by the Zagreb Municipal Criminal Court citing the fact that they contradicted E.S.' findings and were produced by a doctor privately paid by the applicant (see paragraph 20 above).

72. The Court notes that, as a matter of principle, the decision of the domestic courts to refuse accepting certain "expert evidence" produced by the defence may not be contrary to Article 6 § 1 of the Convention (see *Matytsina*, cited above, § 193). It also notes that under the relevant domestic law, V.G. could not have been examined as a "court expert" (see paragraphs 22 and 31 above, Articles 285 and 311 of the Code of Criminal Procedure).

73. However, the defence must be able effectively to exercise the rights guaranteed by Article 6 of the Convention. As already explained, in certain circumstances, this means that the defence must have the opportunity effectively to challenge a report by an expert with assistance of another expert. The Court reiterates that the forms in which the defence may seek the assistance of experts may vary (see paragraph 62 above).

74. In this case, by unconditionally relying on E.S. expert evidence and refusing the evidence on behalf of the defence the domestic courts created an unfair disadvantage for the applicant. Indeed, without obtaining another expert report addressing the applicant's objections concerning E.S.'s findings or giving the applicant an opportunity to examine an "expert" on his behalf, the applicant's possibility to challenge E.S.'s conclusions was significantly hampered. In a field as complex as an individual's mental condition and the prediction of his or her dangerousness it can be hard to challenge a report by an expert without the assistance of another expert in the relevant field (compare *Matytsina*, cited above, §§ 193-194).

75. It follows from the above that, in so far as the handling of expert evidence by the criminal courts concerning the applicant's mental condition was concerned, the defence was in a such a disadvantageous position *vis-à-vis* the prosecution that it cannot be reconciled with the requirements of the principle of equality of arms under the criminal limb of Article 6 § 1 of the Convention.

(ii) Concerning the proceedings for the applicant's placement in a psychiatric hospital

76. The Court further notes that the criminal court's judgment served as the grounds for the decision on the applicant's committal to a psychiatric hospital in the subsequent proceedings before a judge of the Zagreb County Court. The applicant's attempt to adduce further expert evidence concerning

his mental condition was dismissed by that court, without taking into account relevant further findings submitted by the applicant concerning his condition and the necessity for his psychiatric internment (see paragraph 27 above). According to the Government, the reason for this was the fact that it was no longer possible to adduce evidence and challenge the findings of the criminal court at the stage of the applicant being committed to the hospital. They also argued that the criminal court's judgment had been based on E.S.'s report, which was sufficiently recent (see paragraph 56 above).

77. In this connection, the Court has already stressed that the question whether medical expertise was sufficiently recent is not answered in a static way but depends on the specific circumstances of the case before it. Thus, a failure to consider whether a person's mental disorder has persisted and whether his or her involuntary hospitalisation is necessary when committing him or her to a psychiatric hospital could raise an issue of arbitrariness (see paragraph 64 above).

78. The principal issue is therefore the fact that according to the Government it was impossible for the applicant to adduce any evidence at the committal stage of the proceedings concerning the necessity for his placement in the hospital. This applied irrespective of the time that has elapsed after the last expert report on the matter was adopted and how cogent and relevant the evidence was. It therefore follows that, irrespective of the possible changes in the applicant's mental condition and to the degree of the danger posed by him over time, the committal order would be adopted without him having a possibility to point to the relevant circumstances warranting further assessments and possibly different conclusion.

79. Indeed, despite the fact that almost thirteen months had passed following the production of E.S.'s report (see paragraphs 12 and 29 above) and irrespective of V.G.'s subsequent opinion and the expert report by a group of psychiatrists from Sarajevo, which raised questions about E.S.'s findings and the need to place the applicant in a psychiatric institution, the applicant was unable in the committal stage of the procedure before the Zagreb County Court to adduce any evidence in his favour challenging the necessity and grounds for his placement in the psychiatric institution. What is more, the Zagreb County Court failed to consider the fact that following the applicant's release from the pre-trial detention in August 2012 (see paragraph 14 above) there was no indication that he was involved in any incident whereby he posed a threat to himself or others. In this context, it should also be noted that following the applicant's release from the pre-trial detention, the domestic authorities did not try to institute in respect of him proceedings such as those applicable in general to the involuntary admission to the psychiatric hospital of persons with mental illnesses who are dangerous for themselves or others, as provided under the relevant domestic law (see paragraph 33 above).

80. In these circumstances, the Court finds that the placing of such a general restriction on the applicant's ability to adduce any evidence at the committal stage of the proceedings concerning the necessity for his placement in the hospital, even when considerable time has passed since the initial committal order, cannot be reconciled with the requirements of a fair trial and the duty of courts to conduct a proper examination of the submissions, arguments and evidence adduced by the parties (see paragraphs 62 and 67 above, and *Carmel Saliba*, cited above, § 64). This is particularly true in an area as sensitive as proceedings of the kind which would lead to the applicant's internment in a psychiatric hospital.

81. The Court therefore finds that the proceedings for the applicant's placement in a psychiatric hospital were in breach of the requirements of Article 6 § 1 of the Convention in its civil limb.

(iii) Conclusion

82. In the light of the above considerations, taking into account the deficiencies which have been identified in the proceedings before the domestic courts and the restrictions placed upon the applicant, the Court finds that the relevant domestic procedure, taken as a whole, fell short of the requirements of a fair trial as required under Article 6 § 1 of the Convention.

83. There has accordingly been a violation of Article 6 § 1 of the Convention in its criminal limb concerning the proceedings before the criminal courts (see paragraphs 68-75 above) and in its civil limb concerning the proceedings for the applicant's placement in a psychiatric hospital (see paragraphs 76-81 above).

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

85. The applicant claimed 15,000 euros (EUR) in respect of non-pecuniary damage.

86. The Government considered that claim excessive and unsubstantiated.

87. The Court considers that the applicant must have sustained non-pecuniary damage which is not sufficiently compensated for by the finding of a violation. Ruling on an equitable basis, it awards the applicant

EUR 4,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

B. Costs and expenses

88. The applicant also claimed EUR 3,732.43 for the costs and expenses incurred before the Court.

89. The Government contested this claim.

90. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum claimed, plus any tax that may be chargeable on this amount.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning the alleged lack of fairness of the proceedings leading to the decisions on the applicant's internment in the psychiatric hospital, under Article 6 § 1 of the Convention, admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention in its criminal limb concerning the proceedings before the criminal courts;

3. *Holds* that there has been a violation of Article 6 § 1 of the Convention in its civil limb concerning the proceedings for the applicant's placement in a psychiatric hospital;

4. *Holds*

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

(i) EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 3,732.43 (three thousand seven hundred and thirty-two euros and forty-three cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 4 April 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President