13 The Case of *X.Y. v. Hungary* – A Judgment of the European Court of Human Rights on Pre-Trial Detention

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13.1 Facts of the Case[1]

The applicant was arrested on charges of a series of car thefts on 15 November 2007. His pre-trial detention was ordered on 17 November 2007 due to the danger of absconding, collusion, and repetition of crime. The applicant's pre-trial detention continued until 29 May 2008 when the strictest coercive measure was replaced by house arrest. Therefore, his pre-trial detention was upheld for six and a half months. Meanwhile, the applicant's requests for release were rejected and pre-trial detention was repeatedly prolonged at the statutory intervals. He was not granted access to the evidence supporting his detention, and his relevant complaints were rejected by the decision-making authorities. Due to the circumstances of detention and the sexual assault suffered from fellow inmates, the psychological condition of the applicant deteriorated gradually as confirmed by official psychiatric expert opinions. The applicant's house arrest was lifted on 26 June 2008 and was replaced with a restriction on leaving Budapest. On 15 November 2009, all restrictions on the applicant's personal liberty were lifted.

13.2 Procedure at the Domestic and International Courts

On 17 November 2007, the Pest Central District Court ordered the applicant's detention on remand, reiterating in essence the reasons in the prosecution's motion, namely, the

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1 *X.Y. v. Hungary*, No. 43888/08, 19 June 2013.

dangers of absconding, collusion, and repetition of crime. In the course of making its decision, the Court failed to take into account the particular circumstances of the applicant, i.e. that he was the father of a minor child and had a regular income out of which he was paying a mortgage. There was also reason to presume his willingness to cooperate with the authorities, since he had attended all court hearings in another criminal case conducted against him. At the same time, his alleged accomplice – who was accused with many more accounts of car theft than the applicant – was released on bail in October 2007 in spite of the facts that he had previously absconded, had no lawful income or any relative who depended on his support. The main difference between the two accused was that the alleged accomplice, unlike the applicant, had confessed to the crime.

On 29 November 2007 the Budapest Regional Court rejected the applicant's appeal reasoning that the preparations made by the applicant to buy property abroad substantiated the presumption of the danger of absconding and that the applicant might have a criminal lifestyle, a predisposition to repetition of crime, since there was another prosecution under way. The subsequent judicial decisions prolonging pre-trial detention and rejecting the applicant's requests for release did not refer to any additional argument.

Since the applicant was not granted access to evidence underlying his detention, he filed a complaint with the competent authorities on 18 December 2007, on 8 and 28 February, and on 28 March 2008. These complaints were also rejected.

A decision issued on 14 February 2008 prolonged pre-trial detention only until 17 February, due to a typo. When the applicant asked to be released on 18 February, the detention facility rejected his request and turned to the Pest Central District Court which then corrected its own decision aiming to prolong pre-trial detention until 17 May 2008. On 11 March 2008, the Regional Court – the court of second instance – concluded that the District Court should not have corrected the decision on the prolongation of pre-trial detention since the correction amounted to a substantive amendment of the decision, and making such amendments went beyond the competence of the District Court. Nevertheless, the Regional Court upheld pre-trial detention.

The applicant suffered from a personality disorder including fear of crowds and of being locked up. His psychological condition deteriorated even further as he was sexually assaulted by fellow inmates. These facts were confirmed by expert opinions and were indicated in the request for release filed on 3 April 2008. Again, this motion was rejected by the District Court – as well as the appeal by the Regional Court – based on the reasoning that the applicant could be provided with the necessary medical treatment within the health-care system of the detention facility.

In its decision issued on 29 May 2008, the Regional Court held that the danger of absconding had lessened and the prolongation of pre-trial detention was not necessary any longer. The Regional Court also added that, taking into account the deteriorating health condition of the applicant and the incident of sexual assault, house arrest was the

appropriate coercive measure. On 26 June 2008, the house arrest was lifted and replaced with a restriction on leaving Budapest. The lack of need for any coercive measure was declared on 15 November 2009 by the competent courts and all restrictions on the applicant's personal liberty were lifted.

The applicant turned to the European Court of Human Rights (ECtHR) on 2 September 2008, and his case was communicated to the Hungarian Government on 10 October 2011.

The applicant argued that his detention between 18 February and 11 March 2008 violated Article 5 § 1 of the European Convention on Human Rights (hereinafter, ECHR).[2] He presented his views as regards Article 5 § 3 and 4 of the ECHR based on the following grounds:

1. He debated that the precondition of pre-trial detention – i.e. a 'reasonable suspicion' of his having committed a crime – existed. Even the court of second instance ordering pre-trial detention found the evidence underlying such reasonable suspicion to be controversial.
2. The judicial orders prolonging his detention were not individualized, his personal circumstances were not taken into consideration, the risk of his absconding, collusion, and repetition of crimes were not convincingly demonstrated, and the decision-making judicial bodies failed to assess the possibility of applying less stringent, alternative coercive measures. The Hungarian Government argued that the Regional Court had not found the evidence against the applicant to be controversial and the personal circumstances of the applicant were taken into account by the courts, resulting in the termination of his pre-trial detention.[3]
3. The applicant argued that he was not granted access to the investigation files that are relevant to his pre-trial detention and, consequently, the authorities violated the principle of equality of arms. The Government, as a response, emphasized that the selection of the pieces of evidence relevant to pre-trial detention falls under the discretionary power of the prosecutor, and the decision-making judge received all such pieces of evidence.[4]

The applicant found the entire period of pre-trial detention unjustified and argued that there had been a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 5 of the ECHR since his alleged accomplice having a 'more serious' criminal record was released on bail. The applicant argued that he had been discriminated against on account of the fact that he had not confessed to the crime.[5]

The Second Section of the ECtHR delivered its unanimous judgment on 19 June 2013.

2 *X.Y. v. Hungary*, No. 43888/08, 19 June 2013, 26.
3 Id., 30-35.
4 Id., 43-48.
5 Id., 53.

13.3 The Reasoning of the ECtHR Judgment

13.3.1 Violation of Article 5 § 1 of the ECHR

For the purpose of evaluating the legality of detention, the ECtHR relies on Article 5 of the ECHR, as well as the compliance of domestic substantive and procedural laws with the very purpose of Article 5, i.e. the protection of individuals against arbitrariness. Accordingly, in the case of X. Y., it took into account that – according to the second-instance Budapest Regional Court – the Pest Central District Court exceeded its competence when it prolonged the applicant's detention on 18 February 2008. Hence the applicant's detention between 18 February and 11 March 2008 was unlawful. Consequently, the ECtHR found that the detention during that specific period had no domestic legal basis and the principle of legality was violated together with Article 5 § 1 of the ECHR.[6]

13.3.2 Violation of Article 5 § 3 of the ECHR

The ECtHR maintained, in accordance with its previous case law, that the issue of whether any period of detention is lawful must be assessed in each case based on the thorough analysis of personal circumstances of the detainee. It is not sufficient to refer to the abstract notion of public interest, and the specific pieces of evidence must indicate the existence of a genuine public interest that outweighs the presumption of innocence and the rule of respect for individual liberty. The decisions of the relevant authorities made on the request for release must be based on specific facts and evidence underlying the need of detention.

Reasonable suspicion of a crime is not a sufficient reason in itself to prolong detention. After a certain lapse of time, growing attention must be paid to the personal circumstances of the detainee and to the issue of whether the given circumstances justify the prolonged deprivation of liberty. In the course of deciding upon the issue of sufficient justification of detention, the ECtHR pays special attention to the question whether not the domestic authorities acted with 'special diligence.'[7] In the present case, the Court did not find that the authorities acted arbitrarily when establishing that there was a reasonable suspicion.[8]

Nevertheless, the ECtHR found the proceeding of the domestic authorities to be in violation of the ECHR because the authorities failed to give careful consideration to the personal circumstances – such as the gradually deteriorating psychological condition – of the applicant. According to the Court, even though the Hungarian authorities were not obliged to release the applicant or to order his medical treatment in a civil hospital, they

6 Id., 27-29.
7 Id., 36.
8 Id., 37-39.

were obliged to consider alternative measures ensuring the applicant's appearance at the trial, being aware of his psychological problems and the atrocity that he had suffered. The decision-making authorities failed to comply with this obligation and failed to consider alternative measures such as release on bail or house arrest throughout the 6 months and 11 days period of pre-trial detention. The ECtHR found that pre-trial detention was not a necessary coercive measure for the interests of criminal justice and therefore regarded it as a violation of Article 5 § 3 of the ECHR.[9]

13.3.3 Violation of Article 5 § 4 of the ECHR

The ECtHR pointed out in its judgment that courts deciding upon the legality of detention must provide due process guarantees. The proceeding must be contradictory and the equality of arms must be ensured. Accordingly, the accused must be granted access to the materials of the case. The access to the files must be granted also as regards the materials of investigation which include significant information in relation to the necessity of pre-trial detention of the accused. The disclosure of evidence must take place in good time, prior to the applicant's first appearance before the judicial authorities. In the present case, the authorities rejected the applicant's complaints as regards the access to the case files, but did not deny his statements on the denial of access. The burden of proof was shifted to the Hungarian Government. The Government was unable to prove that the applicant was granted access to the documents. Therefore, the ECtHR held that there was a violation of the principle of equality of arms and Article 5 § 4 of the ECHR.[10]

As regards the prohibition of discrimination and Article 14 of the ECHR, the ECtHR found the complaint as manifestly ill-founded and rejected it.[11]

13.4 Ratio decidendi

The Second Section of the ECtHR held unanimously that the Hungarian State is responsible for the violation of Article 5 of the ECHR. It held that the respondent State was to pay EUR 18,000 as compensation for pecuniary and non-pecuniary damages and EUR 4,500 for costs and expenses.

In accordance with its previous case law, the ECtHR pointed out that – with regard to the respect of right to liberty and the presumption of innocence – the prolongation of pre-trial detention is not justified if the decision-making authority refers solely to the reasonable

9 Id., 40-42.
10 Id., 50-52.
11 Id., 53.

suspicion of a crime and other abstract reasons. With the lapse of time, growing attention must be paid to the personal circumstances of the accused and to the issue of whether the interests of criminal justice can be served also by alternative coercive measures such as release on bail or house arrest.

The procedure regarding the necessity of the prolongation of detention must be adversarial and must be conducted with respect to the principle of equality of arms and to the right of the accused to access the case files.

13.5 Comments on the Reasoning of the Judgment

13.5.1 Article 5 § 1 of the ECHR

The judgment (in our view and apart from the conclusions to be discussed later in the present paper) applies the legal standards developed by the case law of several decades correctly. This paper does not aim for providing an overall assessment of those legal standards, but does point out some essential principles.

It is uncommon for the ECtHR to establish in cases concerning Hungary that there was a violation of the principle of legality in cases of pre-trial detention.[12] However, such a violation was established by the Court in this case. The principle is composed of the following two elements:

1. The arrest must be based on domestic law and it must be conducted in full compliance with the relevant domestic legal regulations.[13]
2. The provisions of domestic law must comply with the ECHR, hence, they must meet the following 'qualitative criteria' deriving from the general requirement of the rule of law: a) the relevant provision must be codified by valid domestic laws, b) must be properly accessible, c) its enforcement must be foreseeable, d) it cannot imply the unlimited or unreviewable power of the executive authorities, e) and it must provide efficient guarantee against potential arbitrariness.[14]

The Hungarian legal regulation clearly meets requirement (2), while the violation of the principle of 'in accordance with the law' was committed in this case through the District

12 The single case where the Court held that there had been a violation of the principle of legality in the case of pre-trial detention: *Kovács Ferencné v. Hungary*, Appl. No. 19325/09, 20 December 2011.

13 See *Kovács Ferencné v. Hungary*, Appl. No. 19325/09, 20 December 2011, 18-19; Czine Ágnes – Szabó Sándor – Villányi József, *Strasbourgi ítéletek a magyar büntetőeljárásban* (Strasbourg Judgments in the Hungarian Criminal Procedure, HVG Orac, Budapest, 2008), p. 257.

14 *Malone v. the United Kingdom*, No. 8691/79, 2 August 1984, 67.

Court's violation of the domestic laws and the unlawful detention of the applicant between 18 February and 11 March 2008.[15]

13.5.2 Article 5 § 3 of the ECHR

13.5.2.1 The Length of Pre-Trial Detention

The Strasbourg case law is less consistent regarding the length of pre-trial detention, but the fundamental principles have been established. In the course of assessing the issue of whether the length of pre-trial detention was reasonable, the ECtHR takes into consideration a number of factors, such as: (1) the complexity of the case,[16] (2) the attitude of the applicant,[17] and (3) the attitude of the authorities.[18]

According to the interpretation of Article 5 § 3, special diligence of authorities may be expected if the accused is in detention.[19] A general rule cannot be set with regard to the reasonable length of pre-trial detention, but usually no acceptable reason can be demonstrated that would justify any pre-trial detention to be prolonged for over four years.[20] In addition, considering the case law of the ECtHR, we can maintain that the Court may easily hold that there was a violation of Article 5 § 3 of the ECHR, if the pre-trial detention had been prolonged for over 2 years.[21] Shorter length of pre-trial detention might also qualify as a violation of Article 5 § 3, if the detention cannot be justified by any reason. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.[22] It is remarkable that in the present case the ECtHR qualified even 6 months as being unjustified.

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15 Some cases where the quality of legal regulation did not comply with the ECtHR standards: *Nasrulloyev v. Russia*, No. 656/06, 11 October 2007, *Gillan and Quinton v. the United Kingdom*, No. 4158/05, 12 January 2010, *Makaratzis v. Greece*, No. 50385/99, 20 December 2004.

16 *Zaprianov v. Bulgaria*, No. 41171/98, 30 September 2004, 55-65, *Bogdanowicz v. Poland*, No. 38872/03, 16 January 2007, 47-53.

17 *Assenov et al. v. Bulgaria*, No. 24760/94, 28 October 1998, *Koşti and others v. Turkey*, No. 74321/01, 3 May 2007.

18 *Toth v. Austria*, No. 11894/85, 12 December 1991, *Assenov and others v. Bulgaria*, No. 24760/94, 28 October 1998, 157, *Debboub alias Husseini Ali v. France*, No. 37786/97, 11 September 1999, 46, *Kalashnikov v. Russia*, No. 47095/99, 15 July 2002 120, *Vaccaro v. Italy*, No. 41852/98, 16 November 2000, 43. Czine Ágnes – Szabó Sándor – Villányi József (2008), pp. 264-271.

19 Grád András, *A strasbourgi emberi jogi bíráskodás kézikönyve* (Handbook on Human Rights Jurisdiction of Strasbourg, Strasbourg Bt, Budapest, 2005), p. 182.

20 *Tomasi v. France*, No. 12850/87, 27 August 1992, 85-99.

21 David Harris – Michael O'Boyle – Colin Warbrick, *Law of the European Convention on Human Rights*. 2nd edition (OUP, Oxford, 2009), p. 181.

22 *Rokhlina v. Russia*, No. 54071/00, 12 October 2005, 67.

13.5.2.2 The Ordering of Pre-Trial Detention: The Notion of Reasonable Suspicion

In the present case, the ECtHR, after considering the issue of due diligence of the decision-making authorities, found

> nothing in the case file demonstrating that the domestic authorities acted arbitrarily when they established that there was a reasonable suspicion that the applicant had been implicated in a series of car thefts.[23]

This is a debatable statement since even the judgment itself refers to the fact that the Budapest Regional Court held that, when ordering pre-trial detention, the courts are not in a position to assess the evidence underlying the reasonable suspicion against the accused.[24] This means that the Budapest Regional Court did not even assess the facts establishing reasonable suspicion. In our opinion, this itself resulted in the violation of Article 5 of the ECHR as regards the pre-trial detention ordered in the present case due to the following reasons.

The ECtHR earlier provided the following definition on reasonable suspicion: 'a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence.'[25] The wording of this definition clearly refers to the requirement that the issue of whether reasonable suspicion was given in a specific case must be assessed by a judge. Accordingly, the investigative judge is entitled and obliged to assess the evidence presented by the parties. Otherwise, it would make no sense to require the submission of evidence underlying reasonable suspicion, and pre-trial detention should be ordered even if the evidence presented did not prove the existence of reasonable suspicion or other statutory preconditions of ordering pre-trial detention in view of the investigative judge. This is the only interpretation that complies with the international standards of restriction of the right to liberty.

Therefore, violation of the ECHR should have been established in the present case due to the fact that the decision-making court failed to assess the evidence concerning reasonable suspicion. This failure does not meet the requirement that the authorities of States Parties must proceed with 'special diligence' in the course of ruling on pre-trial detention.[26] This conclusion reflects the view of the authors of the present paper and may be subject to debate. However, it is an unquestionable fact that the ECtHR failed to consider and qualify the acts of domestic authorities as to the question of whether the assessment of evidence had complied with the requirement of due diligence.

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23 *X.Y. v. Hungary*, No. 43888/08, 19 June 2013, 37.

24 Id., 9, 11.

25 *Fox, Campbell and Hartley v. United Kingdom*, No. 12244/86, 12245/86 and 12383/86, 30 August 1990, 32.

26 *Jabłoński v. Poland*, No. 33492/96, 21 December 2000, 80; *Imre v. Hungary*, No. 53129/99, 2 December 2003, 43.

13.5.2.3 Prolongation of Pre-Trial Detention

Out of the possible reasons of prolongation of pre-trial detention, the danger of absconding, gravity of charges, or potential sanctions in the abstract are clearly not sufficient arguments. The ECtHR pointed out in the case of *Letellier v. France* that

> such a danger cannot be gauged solely on the basis of the severity of the sentence risked. It 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.[27]

According to the findings drawn in the case of *Neumeister v. France*, the possibility of absconding and the necessity of pre-trial detention must be assessed considering the personality, residence, income, occupation, and family and other ties of the accused.[28] This principle may be described as the requirement of individualized decision-making.

According to the judgment delivered in *Svipsta v. Latvia*, the judicial decision must specify the specific details taken into account by the judge, and the lack of such detailed reasoning in itself renders the detention unlawful, even if otherwise sufficient reasons were given for the justification of pre-trial detention. In the above case, the pre-trial detention of the applicant was prolonged on six occasions by the Latvian courts that issued decisions which included only brief, stereotypical formulae enumerating the statutory criteria. The Latvian Government argued during the Strasbourg procedure that this was not a significant issue since the decision-making courts listened to and read the parties' submissions and delivered their decisions by carefully weighing all such submissions. The ECtHR rejected this argument, stating that:

> it is the wording of a judicial decision which most clearly reveals the precise intentions and reasoning of the court. In the instant case, not one of the six orders in question contained any indication that the judge who issued it had taken into consideration the arguments and specific facts submitted to the court.[29]

As regards the deliberation on the application of alternative measures, according to the findings drawn in the case of *Ilowiecki v. Poland*,[30] under Article 5 § 3 of the ECHR, the

27 *Letellier v. France*, No. 12369/86, 26 June 1991, 43.
28 *Neumeister v. Austria*, No. 1936/63, 27 June 1968, 3-15.
Francis G. Jacobs – Robin C. A. White, *The European Convention on Human Rights* (Clarendon, Oxford, 1996), pp. 90-98.
29 *Svipsta v. Latvia*, No. 66820/01, 9 March 2006, 130.
30 *Iłowiecki v. Poland*, No. 27504/95, 4 October 2001, 76.

authorities are obliged to consider alternative measures of ensuring the appearance of the accused at the trial when deciding whether a person should be detained.[31] The ECHR provides not only the right of the accused to be brought promptly before a judge or to be released pending trial, but also prescribes that the order to release may depend on such conditions that ensure the appearance of the accused at the trial. The ECtHR considers the health of the applicant in this respect. Having the relevant case law in mind, Article 5 § 3 of the ECHR cannot be interpreted so that it would oblige the authorities of States Parties to release the detained person due to his or her medical condition. However, a serious health problem the detainee may have must be given careful consideration in the course of deciding on the issue of whether detention can be replaced by alternative measures, since poor health condition may reduce the risk of both absconding and evading justice.[32]

Weighing the above features of the case, the ECtHR could not come to any conclusion other than holding that the failure to consider the possibility of alternative measures due to the deterioration of health resulted in pre-trial detention in violation of the Convention.

13.5.3 The Ignored Article 14

The failure of the ECtHR to evaluate the issue of the prohibition of discrimination is one of the weaknesses of the judgment. We share the applicant's view that the fact that his alleged accomplice – who had more serious criminal record and was accused of more crimes even in the relevant case – was released on bail while he was detained should be qualified as a violation of Article 14 (prohibition of discrimination) read in conjunction with Article 5 of the ECHR.

According to the legal standard set by the ECtHR in the case of *Rasmussen v. Denmark*,[33] a violation of Article 14 shall be established if the following four criteria are met:

The case falls within the ambit of one or more of the other substantive provisions of the Convention.

There was a difference in treatment of the affected individuals. The Court pointed out that there is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive.

The affected individuals were placed in an analogous situation.

No objective and reasonable justification exists for the different treatment. Under the case law of the ECtHR, a difference of treatment is discriminatory for the purposes of

31 Mándi Veronika, 'Alkotmányossági aggályok a szabálysértési őrizetbe vétel gyakorlata kapcsán' (Constitutional Concerns with regard to the Practice of Petty Offence Arrest) – *Büntetőjogi Szemle* 2013/1-2, pp. 46-47.

32 See *Jabłoński v. Poland*, No. 33492/96, 21 December 2000, 84-85.

33 *Rasmussen v. Denmark*, No. 8777/79, 28 November 1984, 29-42.

Article 14 if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realized.'

If the present case is assessed under the foregoing legal standard, the above conclusion would stand, i.e. that there was a violation of Article 14.

The case falls within the ambit of Article 5 of the Convention since both individuals were detained, and the ECtHR found Article 5 to be applicable to the assessment of the case.

The alleged accomplice of the applicant was released, while the pre-trial detention of the applicant was prolonged. According to the presented legal standard, the ground of differential treatment is irrelevant as any differentiation in terms of the conventional rights requires justification. In this regard, one probable reason can be pointed to: the accomplice confessed to the crime as opposed to the applicant. We discuss this issue under Point (4) of the present assessment.

The situations the two affected individuals were in were analogous. Both of them were arrested on charges of a series of car thefts. They were subjected to prosecution for the same criminal offences in which they were allegedly accomplices.

A reasonable justification for the different treatment – i.e. that the accomplice was released as opposed to the applicant – could have been that the danger of absconding or of the repetition of the crime was higher regarding the applicant. However, the particular circumstances of the applicant would have supported a different conclusion. He was the father of a minor child and had regular income out of which he was paying a mortgage. His intent to cooperate with the authorities could have been presumed since he had attended all the hearings in another criminal case conducted against him. By contrast, the alleged accomplice of the applicant was accused with even more accounts of car theft than the applicant and he had the record of previous absconding, and he had no legal income or any relative who depended on his support. Only one feature could be taken into account for the benefit of the accomplice, namely that he had confessed to the crime, which was the sole reason of his release. Bearing in mind all the personal circumstances indicating a lack of risk of absconding on the side of the applicant, it would be difficult to come to a different conclusion that his pre-trial detention was ordered due to the denial of confession. This is far from being a reasonable and acceptable ground for justification. No one can be obliged to confess to a crime because of the right to remain silent and the prohibition of required self-incrimination. Hence, the decision-making authority held the use of a fundamental procedural right against the applicant. Any distinction made on the basis of this ground cannot be regarded as justified and, consequently, the measure violated the prohibition of discrimination and Article 14 of the ECHR.

Certain facts of the case[34] are particularly telling, namely, that the accomplice who had been released later absconded, contrary to the applicant who appeared at each and every procedural act even after his release.

13.6 Article 5 § 4 of the ECHR: Access to Case Files

The ECtHR held Hungary to be responsible for the violation of Article 5 of the ECHR in a number of cases. The conclusions drawn in the present case reveal that there are systemic problems in the application of pre-trial detention in Hungary as regards the compliance with the ECHR.

The legal reasoning of the analyzed judgment has not been addressed with regard to the right of the accused to access the case files. The following paragraphs offer critical remarks on the earlier and current legislation, and this paper is concluded with a *de lege ferenda* proposal.

The ECtHR held Hungary accountable for the violation of Article 5 § 4 of the ECHR on four occasions within the period of approximately one month. This was possible due to the fact that the affected accused persons had not been granted access to the case files and, therefore, were not able to challenge the legality of their detention.[35] The reasons for that can be summarized as follows:

In the course of criminal procedures in Hungary, the right of the accused to access the case files was *de jure* restricted, since it could not be exercised during the investigation, unless the investigative authority believed that exercising the right to access the case files did not endanger the interests of investigation. The relevant statutory provisions did not provide for any guarantee for preventing the investigative authorities from arbitrary concealment of the materials of the criminal case from the accused. This resulted in the practice that files were almost never disclosed to the accused during the investigation of particularly serious crimes. However, decision No. 166/2011 (XII. 20.) of the Constitutional Court pointed out, with reference to the case law of the ECtHR, that the

34 Information about the facts of the case were provided by the attorney of the applicant.

35 In each case, the ECtHR pointed out that procedural guarantees generally ensured in a judicial proceeding shall be enforced during the judicial procedure concerning detention. The proceeding shall be adversarial and the equality of arms shall be guaranteed. The principle of equality of arms is not respected if the defence lawyer is not granted access to the investigative files that are essential for the arguments on the legality of detention. The access to files shall be granted promptly so that the affected parties can get familiar with them before the judicial hearing. *X.Y. v. Hungary*, No. 43888/08, 19 June 2013, 50; *A.B. v. Hungary*, No. 33292/09, 16 April 2013, 36; *Hagyó v. Hungary*, No. 52624/10, 23 April 2013, 68; *Baksza v. Hungary*, No. 59196/08, 23 April 2013, 47.

> equality of arms is not respected if the defense lawyer is not granted access to the files of the investigation which are essential to be reviewed for efficient defense on the legality of the detention of the client.[36]

Therefore, as a principle, the right to access the files may be restricted only with regard to documents that are not needed for the justification of detention. The pool of these documents can be particularly small since most of the documents on file are relevant to the general (reasonable suspicion) and special conditions (those provided by Article 129 of the Code on Criminal Procedure) of pre-trial detention.

Article 44 of Act CLXXXVI of 2013 on the amendment of certain acts on criminal matters amended the legal rules pertaining to the right to access the case files as stipulated in Article 211(1) of the Code on Criminal Procedure. The amendment entered into force on 2 January 2014. According to the current regulation

> in case of filing a motion for pre-trial detention, the investigative documents serving as basis for the motion shall be attached to the motion notice sent to the accused and the defense.[37]

The amendment was necessary because the previous provisions of the Code on Criminal Procedure were inconsistent with the provisions of Directive 2012/13/EU of the European Parliament and the European Council on the right to information in criminal proceedings, in addition to the Strasbourg standards. The Directive provides for unrestricted right of the accused and the defense to access those files which are essential for challenging the lawfulness of detention effectively. The right to access the documents of the criminal case can be restricted only if the accused is not detained and such access would lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard an important public interest, such as in cases where access could prejudice an ongoing investigation or seriously harm the national security. [Articles 7(1) to (4)] According to the relevant provisions of the Directive, 'access to the materials referred to in paragraph 2 shall be granted in due time to allow the effective exercise of the rights of the defence.' [Article 7(3)].

It seems clear that the regulation introduced by the amendment of the Code on Criminal Procedure was a step forward, but some risk have remained and, in our view, the amendment has not yet achieved full compliance with the obligations deriving from the EU Directive that should have been fully implemented by 2 June 2014. Under the grammatical interpretation of the new rule, the prosecutor remained entitled to select from the

36 166/2011. (XII. 20.) AB hat. ABH, Vol. XX/12, 1314-1342. III/1.

37 Art. 211(1) of Act XIX of 1998 on the Code of Criminal Procedure.

investigative documents and to attach to the disclosed motion for pre-trial detention only those documents that support the general and special conditions of pre-trial detention without attaching those that may be used to challenge the existence of the general or special conditions. This regulation should be replaced with a rule requiring the prosecutor to attach all investigation files to the motion for the order or prolongation of pre-trial detention, and the power to impose any limitation on the right to access should be conferred onto the investigative judge instead of the prosecutor. Accordingly, the accused in pre-trial detention or house arrest would be granted full access to the documents of the investigation, except where the investigatory judge imposes any limitation onto that right upon the motion of the prosecutor, provided that certain files are irrelevant to the review of the legality of detention and the disclosure of the file would endanger the interests of investigation.

Furthermore, the current regulation fails to provide *expressis verbis* that the accused and his attorney shall be granted access to the files promptly so that they can review the documents thoroughly before the hearing on the coercive measure. This norm also follows from relevant international standards.

Moreover, adequate provisions should also be adopted to ensure that the relevant provisions of the Code on Criminal Procedure are also applied in cases where the arrested person[38] files a complaint on the legality of the arrest. The need for such provisions is supported by the fact that arrest is also a type of detention where the access to files should be granted according to international standards, so that the legality of arrest can be efficiently challenged in a corresponding procedure. Considering that the complaint filed with regard to the legality of arrest does not need to be decided upon[39] in cases where pre-trial detention of the arrested person was requested by the prosecutor, this rule would be relevant only to cases where no such prosecutorial motion was filed. If a motion for pre-trial detention is filed, the main rule would apply and sufficient time should be allowed to the accused before the hearing on pre-trial detention to exercise his right of access the files.

38 Id., Art. 126.

39 Id., Art. 195(6a).