14 The Right to Liberty and Security in Practice – Focusing on Application No. 43888/08 and the Latest Case Law of the ECHR

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14.1 The Convention and the Court in General

The Convention for the Protection of Human Rights and Fundamental Freedoms (better known as the European Convention on Human Rights, hereinafter the 'Convention') was set up in 1950, based upon the concept of an unique system, in which the essential human rights are to be declared in such manner that European citizens may apply directly to an international court in case these fundamental rights and freedoms have not been respected by one of the member states. Due to the permanent and ever rising will of the Parties to develop the practical implementation of human rights, nowadays 47 states participate in the Convention, the members also agreed to submit to international legal supervison of their obligation to secure the benefits defined in the Convention to everyone within their jurisdiction. Apparently it means that more than 800 million Europeans[1] can exercise and if neccessary vindicate to themselves their fundamental rights directly via the protection machinery established in 1959 in Strasbourg, known as the European Court of Human Rights (hereinafter the 'Court'). The main purpoese of the Court is to examine alleged violations and ensure that member States comply with their obligations under the Convention. Over the past 50 years of its existence the Court has dealt with more than 267,000

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1 Moreover the nationals of third countries living there or in transit and the legal entities located within the jurisdiction of a State Party, not to mention those persons who fall within their jurisdiction due to the extraterritorial acts committed by the member states to the Convention outside their respective territories. European Court of Human Rights, *Bringing a Case to the European Court of Human Rights – A practical guide on admissibility criteria* (with a foreword by Sir Nicolas Bratza), Wolf Legal Publishes, Strasbourg, 2011, p. 1. (hereinafter: 'Bringing a Case to the ECHR').

applications and has delivered approximately 12,000 judgements. In regard of this overwhelming work load a number of reforms have had to be implemented in order to decrease the massive influx of individual applications ensuring the effectiveness of the supervisory system of the Convention. However despite of the innovations the Court may be described as a victim of its own success[2] as on 1 January 2010 – compared to the previous years[3] a multiplied measure of – 119.300 applications were pending before the Court.

The main reason of the Court's great succes is that it delivers legally binding decisions. On one hand it means that those States found to have breached the Convention are under an obligation to excecute the Court's judements by taking the adequate – individual as well as general – measures to redress the violation, furthermore prevent any further infringement of the Convention from the same issue. Consequently on the other hand its the elementary interest of the Parties to ensure the compability of their own legislation with the Convention, which results in the trend that the Court through its judgements strives to harmonize the Contracting States' legislation. Moreover one of the most important characteristics of the Court's case law is its evolutive nature as 'the Convention is a living instrument which […] must be interpreted in the light of present-day conditions'[4] therefore 'the impact of the Court's judgements has repercussions for people's everyday lives.'[5] According to the aforementioned features, the judicial forum and the Convention together have clearly become an essential and powerful istrument for adressing new challenges and consolidating the rule of law and democracy in Europe.

Naturally as part of its complex mechanism the Court has not only shed light on problems related to civil law issues but substantive and procedural criminal law as well. The most relevant provisions of the Convention in regard of criminal law are Articles 5-7, declaring the right to liberty and security, furthermore the right to a fair trial and the fundamental principel of *nullum crimen sine lege*. As Article 5 is one of the regulations bearing utmost importance from a criminal law aspect, the main purpose of the present study is to reveal its operation both in practice via submitting the related case law of the ECHR with special emphasis on one of the latest Hungarian cases, the Application No. 43888/08.

On the contrary – as it was above mentioned – to ensure the effectiveness of the Court's functioning and to avoid the controversy of *regressum ad infinitum*, procedural limitations

2 Council of Europe, *The European Court of Human Rights in Facts and Figures*, Council of Europe Publishing, Strasbourg, 2010, p. 7 (hereinafter: The ECHR in Facts and Figures, 2010).

3 According to the statics in 1995 the Court had to deal with only 709 applications, the vast majority of them issued by the prior Committee. V. Berger, *The case-law of the European Court of Human Rights (Az Emberi Jogok Európai Bíróságának joggyakorlata)*, HVG-Orac, Budapest, 1999, p. 3.

4 Judgement of 25 April 1978 in *Tyrer v. UK*, Series A No. 26, pp. 15-16, Para. 31; Judgement of 7 July 1989 in *Soering v. the UK*, Series A No. 161, p. 40, Para. 102; Judgement of 23 March 1995, *Loizidou v. Turkey*, Series A No. 310, pp. 26-27, Para. 71.

5 The ECHR in Facts and Figures, 2010, id., p. 8.

had to be introduced concerning indivual applications. Clearly, it would exceed the formal frame and direct scope of this study to expose the admissibility criteria in details, however, prior to the review of the provisions of Article 5, a bald statement of the facts seems to be neccessary in order to clarify the substance of this legal instrument.

14.2 Individual Applications – Admissibility Criteria

The vast majority – approximately 90%[6] – of the individual applications are rejected without examined on the merits of the case due to lack of one of the admissibility criteria laid down by the Convention. These criteria are determined by the revised principels declared in Interlaken in Switzerland[7] which manifested in the adoption of Protocol No. 14 to the Convention – which came into force on 1 June 2010 – introducing the new criterion of *significant disadvantage*. These requirements stipulated in Articles 34-35 of the Convention can be divided into 3 main groups, as procedural grounds for rejection, those related to the jurisdiction of the Court, and the others concerning the merits of the case.[8]

Prior to analysing these groups of inadmissibility reasons, it has to be emphasized that the right to apply to the Court guaranteed in Article 34 is absolute and admits of no hindrace,[9] giving Europeans the genuine right to take effective legal action at international level. However it has been already recognized in the *Mamatkulov and Askarov* case[10] that effectivity is one of the key components of the machinery for the protection of human

6 According to the statics submitted in the official guide of the ECHR 95% of the individual claims fail to satisfy one of the admissibility criteria, while Hungarian experts Kristóf András Kádár and Dániel Karsai reckon this proportion 80-90%. Bringing a Case to the ECHR, 2011, id., p. 3. A. K. Kádár & D. Karsai: *Az Emberi Jogok Európai Bíróságának esetjoga a gyakorlat számára*, Novissima Kiadó, Budapest, 2013, p. 10 (hereinafter: Kádár-Karsai, 2013).

7 On 19 February 2010 representatives of the State Parties met there to discuss the future of the Court.

8 This is official standpoint of the ECHR, while Kristóf András Kádár and Dániel Karsai define only 2 major groups as the criterion of the Court's jurisdiction and the – both formal and substantive – requirements raised against the application itself.

9 For correspondence with the freedom to communicate with the Convention institutions in case of detention (also related to Art. 5) see *Peers v. Greece*, No. 28524/95, ECHR-2001-III, Para. 84, and *Kornakovs v. Latvia* of 15 June 2006, No. 61005/00, Para. 157.

10 *Mamamtkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, ECHR 2005-I, Paras. 100, 122.

rights,[11] therefore complaints *in abstracto* of a violation of the Convention are to be rejected as well as in case of[12] the abuse of this right.[13]

As for the state of the applicants it has to be clarified that under Article 34 exclusively those can complain to the Court, who consider themselves victims of a breach of the Convention.[14] Briefly, due to the fact that the *victim status* of the applicant is a fundamental element of the procedure, it has to be examined and ensured at all stages of the proceedings before the Court[15] that the applicant can claim to be a victim of on alleged violation.[16] It also has to be noted that the victim status is not permanent during the procedure, therefore several circumstances may lead to the loss of it.[17]

As the first step of submitting the causes resulting an application's rejection, it is worth listing the procedural grounds for inadmissibility defined in Article 35 as the following:

– non-exhaustion of domestic remedies[18]

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11 On the contrary the Court also found in this judegement that the domestic authorities must refrain from putting any form of pressure on applicants in order to have the application be withdrawn or modified, meaning that direct and indirect measures as well are prohibited. Moreover in the *Cotlet v. Romania* case it was declared that the vulnerability of the applicant and the risk of influcing him or her especially in case of a pre-trial detention shall be considered by the Court with intense awareness. *Mamamtkulov and Askarov v. Turkey* [GC], Nos. 46827/99 and 46951/99, ECHR 2005-I, Para. 102, *Cotlet v. Romania* of 3 June 2003, No. 38565/97, Para. 71.

12 Meaning that complaints against a provision of domestic law only appearing to contravene the Convention (*Monnat v. Switzerland*, No. 73604/01, ECHR 2006-X, 31-32. Para.), or the applications aiming an *actio popularis* (judgement of 6 September 1978 in *Klass and Others v. Germany*, Serie A No. 28, 33. Para.; *Burden v. the United Kingdom* [GC], No. 13378/05, ECHR 2009, 33. Para.), are to be rejected.

13 Art. 35 § 3 of the Convention: judgement of 15 September 2009 in *Mirolubovs and Others v. Latvia*, No. 798/05., Para. 62.

14 Approaching the provison from an other aspect, it rules that national regulations and procedure moreover their conformity with the Convention can only be examined in respect of the scope of the application, and exclusively in such measure as the applicant could be held as victim of the alleged violation. A. Grád: *A strasbourgi emberi jogi bíráskodás kézikönyve (Reference Book of Human Rights Jurisdiction in Strasbourg)*, Strasbourg Bt., Budapest, 2005, p. 64. (hereinafter: A. Grád, 2005.)

15 Judgement of 29 March 2006 in *Scordino v. Italy*, Appl. No. 36813/97, Para. 179.

16 The notion of *victim* is also interpreted by the Court in an unique way, without reference to the domestic provisons, resulting that 2 types of victims can be distinguished from the Court's case-law such as direct, and indirect victim. In the first case, the act or omission in issue must directly affect the applicant, while in the second variant an individual application may be accepted also from a person not being directly affected by the alleged violation of the Convention, though providing that there is a personal and specific link between the direct victim and the applicant, e.g. the Court accepted the application of a wife concerning her husband's compulsory detention in a psychiatric hospital under the breach of Art. 5. V. Judgement of 17 March 2009 in *Houtman and Meeus v. Belgium*, No. 22945/07, Para. 30.

17 The main pricipels of ceasing the victim status during the proceedings are laid down in the Burdov case (judgement of 7 May 2002 in *Burdov v. Russia*, No. 59498/00, Paras. 27-32), however for instance the death of the direct victim (*Fairfield v. the UK* (dec), No. 24790/04, ECHR 2005-VI), or in case of criminal proceedings the domestic acquittal of the applicant – as it compensates almost any breach of the relating Art. 6 of the Convention – may lead to the loss of victim status (judgement of 29 April 2008 in *Aupek v. Hungary*, No. 15482/05; *Kulcsár v. Hungary* of 24 January 2008, No. 37778/04, Para. 16). n. Kádár-Karsai, 2013, id., p. 27.

18 Interestingly the criterion of the exhaustion of domestic remedies seems to be one of the most disputed questions in the Hungarian applications concerning criminal procceedings, especially related to the institutions

- non-compliance with the six-month time-limit
- anonymous application
- redundant application (identical applicants, complaints or facts)
- application already submitted to another international body
- abuse of the right of application

The second group of the admissibility reasons are related to the jurisdiction of the Court and are also known as incompatibility based upon *ratione personae*, *loci*, *temporis* or *materiae*. From these provisons, in regard of the frame of the study, only the problems concerning criminal law, especially Article 5 are to be mentioned.

The first issue worthy of analysing from a criminal law aspect occurs related to the temporal limitation of the Court's jurisdiction in connection with pending proceedings or detention. Although the ECHR's jurisdiction is limited to the period subsequent to the ratification of the Convention,[19] the Court has frequently taken into account the state of the judicial procedure for guidance prior to the ratification.[20] This manner of the Court is also applicable for cases concerning breach of Article 5. III pre-trial detention[21] or even the conditions of detention under Article 3.[22] However on one hand the temporal jurisdiction of the Court could not be established in a case regarding a procedural complaint pursuant to Article 5. V, where the deprivation of liberty occured before the Convention's entry into force.[23] On the other hand related to a case in which a person was convicted prior to the ratification date but the conviction was quashed after that date, the Court declared its jurisdiction to examine the complaint under Article 3 of Protocol No. 7.[24]

The second topic which is worth dealing with from the sphere of the Court's jurisdiction is the question of *ratione materiae* as defined in Art. 35 III a) and Article 32 mainly in regard of the applicability of Article 6 (right to a fair trial) which results in the autonomous concept of *civil rights and obligations* and *criminal charges*. As for the civil head of the Article it has to be highlighted that generally it can be characterized with a pecuniary

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of judicial review, appeal for new trial (both considered in general ineffective in the Bartos case), appearance of private party or substitute private accuser (found effective in both the Barta and Réti cases) and objection to the unreasonable continuance of the proceedings. See in: Judgement of 6 July 2006 in *Árpádné Bartos v. Hungary*, No. 9300/04. Judgement of of 10 April 2007 in *Barta v. Hungary* No. 26137/04.

19 This principle was clearly declared in the *Blecic v. Croatia* case. Apparently however this date evidently differs in case of each State Parties, e.g. in Hungary the Convention came into force on 5 November 1992. Judgement of 8 March 2006 in *Blecic v. Croatia*, No. 59532/00, Para. 70, n. Kádár-Karsai, 2013, id., p. 31.

20 Judgement of of 15 October 1999 in *Humen v. Poland* [CG], No. 26614/95., Para. 59, judgement of 10 December 1982 in *Foti and Others v. Italy*, Series A No. 56., Para. 53.

21 Judgement of 30 November 2004 in *Klyakhin v. Russia*, No. 46082/99, Paras. 58-59.

22 Judgement of 15 July 2002 in *Kalashnikov v. Russia*, No. 47095/99, ECHR 2002-VI, Para. 36.

23 Judgement of 28 September 2006 in *Korizno v. Latvia* case (dec), No. 68163/01, n. *Bringing a Case to the ECHR*, 2011, id., p. 55.

24 Judgement of 3 July 2008 in *Matveyev v. Russia*, No. 26601/02, Para. 38.

dimension and with a special, broader notion of civil issues compared to the domestic jurisprudence. Upon this exceeeding interpretation of the provisions the Court found the civil head of Article 6. I applicable also to a civil-party complaint in criminal proceedings,[25] or even to other not strictly pecuniary measures such as the right to liberty[26] or prisoners' detention arrangements.[27] The concept of *criminal charge* has also an autonomous meaning, independent of the standardization adopted by the domestic legal systems.[28] The notion of *charge* acccording to the Court's related judgements can be defined as "the official notification given to an individual by the competent authority of an allegation that he/she has committed a criminal offence' which can also be applied during the test whether "the situation of the suspect has been substantially affected.'[29] The applicability criteria of the criminal head of Article 6 were clarified in the *Engel and Others v. the Netherlands case*[30] as:

- classification in the national law
- nature of the offence
- severity of the penalty that the person concerned risks incurring.

The reason of the submission of the above mentioned facts is that – as a result of the extended interpretation of the Court's practice – some requirements of Article 6, such as the *reasonable–time provision* or *the right of defence* also bear relevance at a pre-trial stage (inquiry, investigation), their applicability always depending on the special features of the proceedings and the circumstances of the case.[31] It may seem therefore that there is a contrast manifested in the question of whether to apply Article 6. I with its extended content or Article 5 to a case at a pre-trial stage? The sub-paragraph c) of Article 5. I clearly allows the deprivation of liberty exclusively in case of criminal proceedings, moreover this provision is to be read in conjunction with sub-paragraph a) and with paragraph 3, forming a closed regulation in whole as it was stated in the *Ciulla* case.[32] Consequently the autonomous notion of *criminal charge* can be considered relevant for the applicability of the provisions of Article 5 I a) and c) and III.[33] On the other hand this results in the fact that detentions solely related to one of the grounds listed in the other sub-paraparagraphs of Article 5. I

25 Judgement of 12 February 2004 in *Perez v. France* [GC], No. 47287/99, ECHR 2004-I, Paras. 70-71.
26 Judgement of 7 January 2003 in *Laidin v. France* (No. 2.), No. 39282/98.
27 Judgement of 17 September 2009 in *Enea v. Italy* [GC] No. 74912/01, ECHR 2009, Paras. 97-107; Judgement of 6 April 2010 in *Stegarescu and Bahrin v. Portugal*, No. 46194/06.
28 Judgement of 26 March 1982 in *Adolf v. Austria*, Series A No. 49, Para. 30.
29 Judgement of 27 February1980 in *Deweer v. Belgium*, Paras. 42, 46; *Eckle v. Germany*, Para. 73. n. *Bringing a Case to The ECHR*, 2011, id., p. 67.
30 Judgement of 8 June 1976 in *Engel and Others v. the Netherlands*, Series A No. 22., Paras. 82-83.
31 Judgement of 28 October 1994 in *John Murray v. the UK*, Series A No. 300-A, Para. 62.
32 Judgement of 22 February 1989 in *Ciulla v. Italy*, Series A No. 148, Para. 38.
33 Judgement of 23 September 1998 in *Steel and Others v. the UK*, Reports 1998-VII, Para. 49.

do not fall within the ambit of the criminal head of Article 6.[34] The relation between Articles 6 and 5 IV is also worthy of clarification due to the close link between them in the sphere of criminal proceedings. These provisions pursue different purposes: Article 6 is not applicable in case of reviewing the lawfullness of a detention because it falls within the scope of Article 5, which can be therefore appreciated as *lex specialis* in relation with Article 6.[35]

At last the grounds for inadmissibility based on the merits of the case are to be mentioned such as the applications manifestly ill-founded and those cases lacking significant disadvantage. The term *manifestly ill-founded* may apply to the applications as a whole or to a particular complaint within the broader context of the case.[36] The concept of the notion of *manifestly ill-founded* applications origins from the requirement of subsidiarity as one of the most relevant fundamental principles of the Convention. Briefly, it means that the Court may intervene only where the domestic authorities fail in their obligations.[37]

As for the notion of *significant disadvantage* which came into force with Protocol No. 14. on 1 June 2010,[38] it is composed of three distinct elements: the strict requirement of significant disadvantage, and two so-called safeguard clauses. In the *Korolev v. Russia* case it was stated by the Court that despite of a real breach of the Convention from a solely legal point of view, the infringement should attain a minimum level of severity to warrant consideration by the Court generally – but not exclusively[39] – measured from a pecuniary

34 Judgement of 30 July 1998 in *Aerts v. Belgium*, Reports 1998-V, Para. 59.

35 Judgement of 15 November 2005 in *Reinsprecht v. Austria*, No. 67175/01, ECHR 2005-XII, Paras. 36, 39, 48, 55.

36 *Bringing a Case to the ECHR*, 2011, id., p. 92.

37 In the broad category of *manifestly ill-founded* applications 4 main reasons can be recognized causing inadmissibility. The case-law of the Convention revealed the cause of *fourth instance* applications, emphasising that that the Convention's protection machinery cannot serve as a court of appeal or in the same way as a Supreme Court. The explanation of this limitation is defined in Art. 19, declaring that the Court cannot exceed the boundaries of the general powers delegated to it, futhermore that the autonomy of the national legal systems are to be respected by the Court as well. Therefore the Court is exclusively qualified to deal with errors of facts or law allegedly commited by a national court, only in case that it may reach the level of infringement of the rights and freedoms declared in the Convention. The second type of *manifestly ill-founded* applications are those clearly lacking any kind of violation of the Convention, also the cases in which *no appereance of arbitrariness or unfairness* can be revealed, or when it is obvious that the interference complained of was proportionate, at last those cases in which a legal standpoint of refusing the Convention's violation can be established relying on the former case-law of the Court (*identical cases*). The last two groups formed from manifestly ill-founded applications, are the *unsubstantiated complaints* lacking evidence, and the *applications clearly confused* or far-fetched.

38 It is worth mentioning that the Court started to apply the new requirement rapidly, as the first rejection based upon this provision was delivered exactly on 1 June 2010, the day of Protocol No. 14. coming to effect. A. Grád & M. Weller: *Reference Book of Human Rights Jurisdiction in Strasbourg (A strasbourgi emberi jogi bíráskodás kézikönyve)*, 4th edn, HVG-Orac, Budapest, 2011, 79. (hereinafter: A. Grád & M. Weller, 2011).

39 Judgement of 19 January 2010 in *Bock v. Germany*, No. 22051/07.

aspect.[40] The safeguard clauses on one hand are meant to ensure that an applicaion will not be declared inadmmisible if respect for human rights as declared in the Convention or the Protocols thereto requires an examination on the merits of the case. Apparently this provision can only be applied in case questions of a general character would arise, e.g.: clarifying a State Party's obligations or to induce the respondent State to resolve a fundamental deficiency affecting people in the same position as the applicant.[41] On the other hand the second safeguard clause's function can be defined as to have it examined by the Court whether the complained case has been duly considered by a domestic tribunal. This provision can be considered as an other manifestation of the principel of subsidiarity requiring that an effective remedy against violations be available at national level.[42]

14.3 The Right to Liberty and Security in General

As the main scope of this study is to submit the considerations and consequences of the judegement in No. 43888/08 application of 19 March 2013, it seems to be vital to review the provisions of Article 5 in a general manner as well.

Article 5. I implements specially the notion of *deprivation of liberty* detailly defined by the following a-f) sub-paras.[43] As a first step of analysing these provisions the Guzzardi case has to be highlighted in which the Court distinguished between restriction and deprivation of liberty, stating that only the latter one falls within the scope of Article 5. The starting point in the examination of a given measure shall be the victim's concrete situation, though account must be taken of a whole range of criteria such as type, duration, effects and manner of implementation also.[44] Moreover the main purposes of the provision were also laid down in this judegement declaring that Article 5 I is contemplating the physical liberty of the person, its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion.[45] In a Belgian case it was also emphasized by the Court

40 For the minimum level of financial loss which can be considered severe, see cases: Judgement of 24/05/2011 in *Ionescu v. Romania*, Appl. No. 24916/05, Judgement of 23/09/2010 in *Vasilchenko v. Russia*, Appl. No. 34784/02.

41 *Bringing a Case to the ECHR*, 2011, id., p. 103.

42 Judgement of 1 July 2010 in *Korolev v. Russia*, Appl. No. 25551/05.
It was also stated in the judgement of 14 December 2010 in *Holub v. Czech Republic* case that the *case* itself in the more general sense – and not the 'application' in its legally closed notion – needs to have been duly examined by the domestic court.

43 The Hungarian translation deals with the notions *letartóztatás* as equivalent of *arrest*, and *őrizetbe vétel* as synonym of *detention*. Lamentadly this is an unfortunate translation as the original meaning of *detention* is broader than the Hungarian expression. Grád, 2005, id., 148, A. Grád & M. Weller: 2011, id., p. 175.

44 However it was also noted that difference between deprivation of and restriction upon liberty is none the less merely one of a degree or intensity, and not one of nature or substance, which relativeness may lead in borderline cases to the fact that the distinction made is purely based upon the Court's opinion.

45 Judgement of 6 November 1980 in *Guzzardi v. Italy*, Series A No. 39, pp. 33-35, Paras. 92-95, 95.

that the fact of willing consent to incarceration does not indisputably mean lack of deprivation of liberty: the authorities measures shall always comply with Article 5, even in case of surrender or cooperative detainees.[46]

However it is obvious from the wording of Article 5 I that there are several cases when providing the specific requirements mentioned in the provisions, deprivation of liberty can be considered lawful. The legitimacy of all the cases listed in the a-f) sub-para.s is based upon the criterion of a *procedure prescribed by law*. The notion of this requirement origins from the Court's will to refer back to national law, laying down the obligation to ensure the conformity of both substantive and procedural domestic law with the Convention. Consequently it was stated by the Court that failure to comply with domestic law entails a breach of Article 5 and therefore it always must be ascertained whether national law was correctly applied.[47] Moreover it is also the task of the Court to distinguish cases of error from those of intentional infringement of procedure prescribed by law,[48] which especially bears utmost importance in cases in connection with such sensitive measures resulting deprivation of liberty. Due to these consequences it was noted in the *Betham case* that a period of detention will in principle be lawful if it is carried out pursuant to a court oder, on the contrary the error of the court under domestic law not neccessarily affect the validity of the detention.[49] Although is has to be truly emphasized that even exceeding the prescribed period of detention in custody entails itself a violation of Article 5. I c) as it was first clearly stated in the *K.-F. v. Germany* judgement.[50] Moreover in regard of detention the Court also pointed out in the *Kawka v. Poland* case that:

> the lawfulness of detention under domesic law is the primary, but not always a decesive element […] [however it has to be examined that the measure] was compatible with the purpose of Article 5, para. 1, of the Convention, which is to prevent persons from being deprived of their liberty in an abitrary manner.[51]

The Court summarized the criteria of a *procedure prescibed by law* in the *Dougoz v. Greece* judgement[52] as the requirement that any arrest or detention have a legal basis in domestic law, which shall be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.

Judgement of 28 May 1970 in *Chahal v. the UK* of 15 November 1996, Reports 1996-V, Para. 118.

46 Judgement of 18 June 1971 in *De Wilde, Ooms and Versyp v. Belgium*, Series A No. 12.

47 Judegement of 27 September 1990 in *Wassink v. the Netherlands*, Series A185-A, Para. 41.

48 Judgement of 18 December 1986 in *Bozano v. France*, Series A No. 111, p. 23, Para. 55.

49 Judgement of 10 June 1996 in *Betham v. the UK*, 1996-III, 765 p., Para. 42.

50 Judgement of 27 November 1997 in *K. – F. v. Germany*, No. 25629/94, Appl., Paras. 70-73.

51 Judgement of 9 January 2001 in *Kawka v. Poland*, No. 25874/94, Appl., Para. 48.

52 Judgement of 6 March 2001 in *Dougoz v. Greece*, No. 40907/98, Para. 55.

The cases of deprivation of liberty provided for in Aricle 5 I a-f) are listed exhaustively, therefore they must be given a strict interpretation as it was stated in the *Ciulla v. Italy* case.[53] 'However, the applicability of one ground does not neccessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-para.'[54] In accordance with the study's quantitative limits, only the provisions related to the case submitted under the 4. subtitle are to be analysed in detail, focusing on the c) point of Article 5. I.

At first the notion of *reasonable suspicion* has to be clarified as key component of the whole regulation regarding the different types of detention. It is worth citing the considerations of the Court stated in the *Fox, Campbell and Hartley v. the UK* judgement:[55]

> the reasonableness of the suspicion on which an arrest [detention] must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5. I […] 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 (…) what may be regarded as ''reasonable' will however depend upon all the circumstances.

On the contrary the Court also lays emphasis on that the Convention should not be applied as a legal instrument for putting disproportionate difficulties in the way of the police authorities of the Member States in taking effective measures to counter criminality.

Another fundamental requirement for a detention allowed by the Convention is its *legality*. This criterion can be defined from two aspects: 1) the detention ordered shall be

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53 Judgement of 22 February 1989 in *Ciulla v. Italy*, Series A No. 148, p. 18, Para. 41.

54 The justifying reasons for detention as appraised in a-f) sub-paras. can be listed in the following:
   a. Detention possible after conviction by a court
   b. To secure the fulfilment of an obligation prescribed by law
   c. For the purpose of bringing a person before the competent legal authority when he/she has or on reasonable suspicion of having comitted an offence
   d. A minor detainee in the context of supervised education or for the purpose of being brought before a court
   e. Preventative detention of persons of unsound mind, alcoholics, persons suffering from infectious diseases or vagrants
   f. Arrest and detention of a person in order to prevent him/her from unlawfully entering the territory, or against whom expulsion or extradition proceedings are pending.

   G. Dutertre: *Key case-law extracts European Court of Human Rights*, Council of Eurpe Publishing, Strasbourg Cedex, 2003, pp. 98-124. A. K. Kádár & E. Kirs & A. Lukovics et al.: *Az emberi jogok európai bíróságának előzetes letartoztatással kapcsolatos gyakorlata*, Helsinki Committee, Budapest, 2014. (hereinafter: A. K. Kádár & E. Kirs & A. Lukovics et al., 2014) p. 8.

55 Judgement of 30 August 1990 in *Fox, Campbell and Hartley v. the UK*, Series A No. 182, p. 16, Paras. 32-34. As one of the latest cases related to the lack of this criterion see: *Stepuleac v. Moldova*, Appl. No. 8207/06.

based upon and without exceptions comply with domestic law[56] 2) moreover the national regulation shall comply with the provisions of the Convention, meaning that it shall fulfil some essential quality criteria.[57]

However the Court found in the *Zirovnicky v. Czech Republic* case[58] that a detention ordered in compliance with the domestic law solely based upon reasonable suspicion may also be considered as violation of the Convention. Namely for the adequacy of a detention it is also required to prove legitimate purpose of the measure as the detention itself shall be reasonably substantiated.[59]

In the following the considerations of the Court in connection with Article 5. I c) – as one of the most relevant provisions concerning the aim of the study – are to be mentioned. Naturally detention shall form part of a criminal context, meaning that the sub-pragrapgh only

> permits deprivation of liberty only in connnection with criminal proceedings […] [and] must be read in conjunction both with sub-paragraph a) and with paragraph III, which forms a whole with it,[60]

manifested in the requirement of the facts invoked to be reasonably considered as falling under one of the sections describing criminal behaviour in the national Criminal Code.[61] Consequently there could clearly not be proven a reasonable suspicion if the acts or facts invoked against a detained person did not constitute a crime at the time when they occured. In case of this type of detention the *reasonablenes* of the suspicion is measured from two aspects by the Court. The first acceptable reason for detention – as it was stated in the *Fox, Campbell, and Hartley v. the UK* case – is that the person concerned has committed an offence.[62] The other cause for the acceptance of deprivation of liberty is when there are reasonable grounds to believe that it is neccessary to prevent the detainee from commiting an offence or abscending.[63] Moreover to prove legitimate purpose of the measure, the

56 Stated also in the judgement of 20 December 2011in *Ferencné Kovács v. Hungary*, Appl. No. 19325/09.

57 Apparently this requirement does not concern those states governed by a constant rule of law, however it is still an actual challenge in case of Eastern-European countries, mainly in regard of Russia. See its actuality in the judgement of 11 October 2007 in *Nasrulloyev v. Russia*, ECHR-2007, Appl. No. 656/06.

58 Judgement of 21 February 2011 in *Zirovnicky v. Czech Republic*, Appl. No. 23661/03.

59 A. K. Kádár & E. Kirs & A. Lukovics et al., 2014, id., p. 10.

60 Judgement of 22 February 1989 in *Ciulla v. Italy*, Series A No. 148, Para. 38.

61 Judgement of 19 October 2000 in *Wloch v. Poland*, Appl. No. 27785/95, Para. 109.

62 See: the judgement of 16 October 2001 in *O'Hara v. the UK*, Appl. No. 37555/97, the judgement of 1 March 2001 in *Bekrtay v. Turkey*, Appl. No. 22493/93.

63 As it was found in the *Eriksen v. Norway* case: 'in view of the nature and extent of the applicant's previous convinctions for threatening behaviour and physical assault and his mental state at the relevant time, there were substantial grounds for believing that he would commit further similar offences […] sufficiently concrete an specific to meet the standard enunciated by the Court in the Guzzardi judgement.' Judgement of 27 May 1997 in *Eriksen v. Norway*, Reports 1997-III, Paras. 86-87.

detention shall be effected in order to bring the person concerned before the competent legal authority.[64] In conjunction with this it has to be highlighted that an arrest followed by custody, and then by release without charge or without being brought before the competent legal authority, in lack of suficient grounds, does not entail an infringement of Article 5.[65]

As regards the quality criterion the domestic law regulation – on which the detetion is based upon – shall satisfy, the Court held that the national provisions shall be sufficiently clear.[66]

Article 5. § II declares the right of the detainee to be properly informed of the charges, meaning that the mere reference to the legal basis for the arrest or detention is ineffective,[67] pieces of information given to persons who have beeen arrested shall relate to both factual and legal matters,[68] however a particular form of the coverage is not required.[69]

Article 5. III shall be read in conjunction with paragraph I as the mere purpose of this provison one hand is to constitute the legal basis of release from detention, on the other hand to ensure an additional way to legitimate the measures taken. The Court developed the practical concept of this provision in the *Aquilina v. Malta* judgement[70] in which it was stated that "provisional release once detention ceases to be reasonable' is requiered and it was also found that the right to "be brought promptly before judge and to be tried within a reasonable time' is of high importance, however detention shall be assessed in each case according to its special features. The operation of the para. was summarized in the *Labita v. Italy* case[71] as the Court held that continued detention can be justified 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.[72] It was stated that it is the obligation of the national judicial authorities to ensure that the pre-trial detention of a suspect does not exceed a reasonable time. After that can be the persistence of reasonable suspicion that the person arrested has committed an offence be examined as a condition sine qua non for the lawfulness of the measure, which may however cease to suffice after a certain lapse of time. In such cases, the Court must establish whether the other grounds provided by the judicial authorities continued to justify

64 Judgement of 27 November 1997 in *K. – F. v. Germany*, Appl. No. 25629/94, Reports 1997-VII, Paras. 59-60.
65 Judgement of 29 November 1998 in *Brogan and Others v. the UK*, Series A No. 145-B, Para. 53.
66 Judgement of 31 July 2000 in *Jecius v. Lithuania*, Appl. No. 34578/97, Para. 59.
67 Judgement of 28 October 1994 in *Murray v. the UK*, Appl. No. 14310/88, Series A No. 300-A, Para. 76.
68 Judgement of 30 August 1990 in *Fox, Campbell and Hartley v. the UK*, Series A No. 182, p. 19, Para. 40.
69 Judgement of 11 July 2000 in *Dikme v. Turkey*, Appl. No. 20869/92, Paras. 54-57.
70 Judgement of 29 April 1999 in *Aquilina v. Malta*, Appl. No. 25642/94, Reports 1999-III, Para. 47.
71 Judgement of 06 April 2000 in *Labita v. Italy*, Appl. No. 26772/95., Para. 152-153.
72 According to the judgment of 26 January in *W. v. Switzerland* 1993, Series A No. 254-A, p. 15, Para. 30; Judgement of 21 December 2000 in *Jablonski v. Poland*, Appl. No. 33492/96., Para. 79.

the deprivation of liberty.[73] In case of the grounds being '*relevant*' and '*sufficient*', the Court shall also ascertain whether the competent national authorities displayed 'special diligence'[74] in the conduct of the proceedings.[75] It also needs to be examined whether other measures than incarceration which would be sufficient in the given case are available in the domestic law[76] or whether the detainee could be released, especially accompanied with the setting of a bail.[77]

The right to take proceedings in respect of detention is declared in Article 5. IV which provision has an unique place and role within the examined regulation, therefore it seems to be relevant to clarify the interactions of paragraph IV with the other parts of Article 5. In case of the relation between paragraph I and IV the 'question arises: does IV require that every person detained for whatever reason be entitled to have the legality of his detention reviewed?'[78] The negative answer was given in the *De Wilde, Ooms and Versyp v. Belgium* judgement[79] constituting the theory that the control required by the provision is incorporated in the control under paragraph I particulary in connection with criminal convinctions.[80] This statement is quite controversial in the light of the Court's legal practice, the conclusion may be that the applicability of this provision depends on the special features of each cases, and domestic regulations. In the *Van den Brink v. Netherlands* case it was held by the Court that the cummulative application of paragraphs III and IV is acceptable. As for the content of the provision, the Convention clearly reqiures an effective and available remedy during which the lawfulness[81] of the detention shall be examined speedily[82] by a judicial body.

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73 Although according to the Court's case-law it seems that when the duration of detention exceeds 2 years, the violation of the Convention could be affirmed. A. K. Kádár & E. Kirs & A. Lukovics et al., 2014, id., p. 20.

74 Judgement of 21 December 2010 in *Szepesi v. Hungary*, Appl. No. 7983/06, Paras. 23-25.

75 Judgment of 24 August 1998 in *Contrada v. Italy*, Reports 1998-V, p. 2185, Para. 54. Judgment of 23 September 1998 in *I.A. v. France*, Reports 1998-VII, pp. 2978-79, Para. 102.

76 See: Judgement of 11 January 2011 in *Darvas v. Hungary*, Appl. No. 19547/07, Paras. 27-29. This priciple complies with the Hungarian legal practice as declared e.g. in Bkv No. 99, BH2007.216. See: the judgement of 26 July 2001 in *Kreps v. Poland*, Appl. No. 34097/96, Para. 43.

77 The related principles stated in the judgement of 15 November 2001 in *Iwanczuk v. Poland*, Appl. No. 25196/94, Paras. 66-70.

78 G. Dutertre: *Key case-law extracts European Court of Human Rights, Council of Europe Publishing*, Strasbourg Cedex, 2003, p. 149.

79 Judgement of 28 May 1970 in *De Wilde, Ooms and Versyp v. Belgium*, Series A No. 12, Para. 76.

80 On the contrary exclusively the fact that a decision was issued from a court does not cease the opportunity guaranteed in the Para. (4) as it would be contrary to the objec and purpose of it. Judgement of 24 June 1982 in *Van Droogenbroeck v. Belgium*, Appl. No. 7906/77, Series No. 50, Para. 45. V. Berger: *Az Emberi Jogok Európai Bíróságának joggyakorlata*, HVG-Orac, Budapest, 1999, pp. 126-131.

81 The notion of lawfulness under this para. has the same meaning as in case of Para. (1). Judgement of 29 November 1998 in *Brogan and Others v. the UK*, Series A No. 145-B, Para. 65.

82 Being in compliance with the Hungarian legal practice: BH2009.43.

The last paragraph of Article 5 declares the right to an enforceable claim for compensation[83] by the victims of a deprivation of liberty effected in conditions contrary to the Convetion before the domestic courts.

14.4 Hungary: Right to Liberty and Security Ensured?– Focusing on Application No. 43888/08

In the previous sub-titles of the present study the general principles and basics of the Court's procedure related to Article 5 have been submitted in order to make it understandable the following review of the case of *X.Y v. Hungary* (Application No. 43888/08) and its consequences.

14.4.1 Factual Background

The application was lodged on 2 September 2008 by a Hungarian citizen complaining under Article 5. I of the Convention stating that between 18 February and 11 March 2008 his detention had been unlawful. Moreover in his view this temporal duration of the detention realized breach of Article 5. III as it could be considered an unreasonably long time. Furthermore from his point of view the *equality of arms* had not been respected by the authorities when he had been challenging his detention, because the access to the relevant material of the investigation was not ensured, these circumstances together also realizing the violation of the Convention pursuant to Article 5. IV. In the application the breach of Article 14 read in conjunction with Article 5 was assigned as his alleged accomplice with a more severe criminal background, had been released on bail unlike the applicant, showing discrimination against him.[84] Due to the infringements of the Convention the applicant claimed EUR 10,344 in respect of pecuniary damage, and further EUR 20,000 in respect of non-pecuniary damage and EUR 5,800 for the costs and expenses incurred before the Court.

The background of the case is that the applicant was arrested on 15 November 2007 on charges of a series of car thefts, in the prosecution's ensuing motion to have him detained on remand, the dangers of absconding, collusion and repetition of crime were referred to. The defence argued even the existence of reasonable suspicion of commiting any criminal

83 However there can be no question of compensation where there is no pecuniary or non-pecuniary damage to compensate. Judgement of 27 September 1990 in *Wassink v. the Netherlands*, Series A No. 185-A, p. 14, Para. 38.

84 The applicant submitted that an alleged accomplice, although he had previously absconded, had no legal income or employment and had no minor children, had been released on bail in October 2007 – due to the fact that, unlike him, tha accomplice had confessed to the crime with which he was charged.

offence, and the neccessity of the detention since the applicant had a settled life in Hungary with a minor child and regular income these circumstances making the danger of absconding insignificant. Moreover as all evidence had already been seized, the inteference with witnesses or repetition of any crime was not plausible. Taking into account all these circumstances due to the defendant's legal standpoint the pre-trial detention was unsubstantiated and should have been substituated by a less coercive measure, if neccessary at all. This argument was rejected by both the first and second-instance court (concerning the appeal of the defence). The Regional Court pointed out in its decision about the appeal that the fact that the applicant had made preparations to buy property abroad was sufficient to substantiate the danger of absconding, moreover there was another prosecution under way impressing that the applicant might have a criminal lifestyle, a predisposition to repetition of crime. Therefore as the criterion of the reasonable suspicion could not be eliminated by the defence, the pre-trial detenion was repeteadly prolonged despite of the fact that the applicant complained three times to the authorities that he had not been granted access to the relevant pieces of evidence underlying his detention. These complaints were all refused lacking any statement or evidence that such an access had actually been ensured.

The continuation of the case is truly special and interesting: on 8 February 2008 a psychiatric opinion about the applicant was submitted, revealing personality disorder (including fear of being locked up) which as the opinion held was the result of the detention. A further expert opinion[85] even specified that the applicant had suffered sexual assault from fellow inmates, which had aggravated his psychological imbalance. Meanwhile an other prolongation order valid until 17 February 2008 was issued, however the release on 17 February failed due to a mistyped notification ordering the detention until 17 May rather than February. The first-instance court corrected the order on the following day, however the Regional Court on appeal reversed this decision due to obvious lack of competence as the first-instance court could not have corrected the operative part of its order because it is subject to a reversal within the jurisdiction of the Regional Court. On 3 April 2008 the applicant filed a request for release, which was rejected by the District Court. Consequently in his appeal, he stressed that his tolerance of detention had diminished on account of the psychological problems he had. The Regional Court also rejected the appeal, being satisfied that the applicant's condition could be properly treated within the penitentiary health system. Further complaints were issued by the applicant's legal representative emphasising that the resultant situation ran counter to both the applicant's rights and the interests of the investigation.

Despite of the above mentioned facts the applicant's pre-trial detention continued until 29 May 2008 while the defence repeatedly made references to the absence of concrete elements, underlying the fundamental criterion of reasonable suspicion against the applicant

85 Issued on 16 March 2008.

and to his personal circumstances not in the least warranting his continued detention. According to the opinion of the applicant the courts had rejected these arguments in rather stereotyped decisions.

At last on 29 May 2008 the Regional Court replaced the applicant's detention with house arrest. It held that the danger of absconding had lessened to an extent that house arrest was sufficient, especially in view of the indecent assault the applicant had suffered from fellow inmates, moreover the time that had elapsed, and the applicant's settled family and personal circumstances, and the fact that his health had seriously deteriorated. Then on 26 June 2008 the house arrest was lifted and replaced with a restriction on leaving Budapest. On 15 November 2009 all restrictions on the applicant's personal liberty were lifted. A bill of indictment against the applicant and ten co-defendants was filed with the Buda Central District Court on 11 December 2009, the trial of the case is pending.

14.4.2 Legal Standpoints of the Parties

The applicant first of all complained that his detention between 18 February and 11 March 2008 had been unlawful in breach of Article 5. I c). Furthermore the applicant stated also that his entire detention on remand apart from the mentioned date had been unjustified. The Hungarian Government did not contest the first statement, although argued that an official liability action should have been filed in order to exhaust domestic remedies.

The unjustified duration of the pre-trial detention realized from the applicant point of view the violation of Article 5. III, moreover the decisions prolonging his detention had not been individualized. The Government argued that the criterion of *reasonable suspicion* required as a general condition for the measure was satisfied as certainity in this regard was not requisite or even possible at such an early stage of the investigation and the applicant's personal circumstances had duly been considered, which had led finally to his release.

From the applicant's standpoint the pinciple of *equality of arms* declared in Article 5. IV had been infringed due to the fact that when he had been challenging the detention, he had no access to the relevant material of the investigation. The Government contested this argument.

Finally the applicant referred to the alleged breach of Article 14 in regard of the release of his accomplice being dicriminative in his view.

14.4.3 The Court's Statements

As it was submitted under the second sub-title of this study in case of an indivial application at first the Court has to decide in the matter of *admissibility* in regard of each alleged infringements of the Convention. Regarding the breach of Article 5. I the real question was whether the domestic remedies had been exhausted. The Court emphasized that the existence of such remedies shall be certain not only in theory but also in practice, and in the present case – due to the fact that any kind of tort action with a reasonable porspect of success would exclusively be available after the termination of the criminal proceedings – the remedies cannot be considered as available and sufficient. Therefore this complaint could not be rejected. In case of the violation of Article 5. III the Court stated that the complaint cannot be considered as manifestly ill-founded therefore it was admissible. In regard of the third complaint of the applicant based upon the breach of Article 5. IV the Government again argued that an action for compensation should have been filed. As the applicant having failed to do so he had not exhausted domestic remedies, resulting inadmissibility. On the contrary at the time of the case – which was prior to the Consitunial Court Decision No. 166/2011 endorsing the principles enounced by the Court in the case of *Nikolova v. Bulgaria*[86] – it was ambiguous under the domestic law whether or not a suspect in pre-trial detention had a right of access to the documents serving as the basis for his detention.[87] Therefore any tort action established on the infringement of this right, had little prospect of succes. Moreover the Government did not produce any evidence to show that such an action has proved effective in similar cases. Consequently, the Court held that this complaint could not be rejected as well. On the other hand in case of the alleged violations of Article 5. I c) regarding the whole duration of the detention and of Article 14, the Court found the complaints manifestly ill-founded and hence inadmissible.[88]

Regarding the merits of the complaints, in case of the detention between 18 February and 11 March 2008 the violation of the Convention's provisions was found to be evident as the first-instance court exceeded its competence – raising also the prohibited danger of arbitrariness – resulting that the detention during this period was devoid of a legal basis in the national law.

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86 Meaning that there shall be a virtually effective and sufficient form of remedy to challenge the legality of the detention, which shall be examined by court or independent judicial body. During this examination guarantees of a judicial procedure as its adversarial feature and the direct access to the material of the investigation relevant in scope of the detention's legality, shall be ensured. Judgement of 25 March 1999 in *Nikolova v. Bulgaria*, Appl. No. 31195/96, ECHR 1999-II., Para. 58.

87 Theoretically the access itself was ensured in the Code of Criminal Procedure, however it was also limited to those pieces of evidence considered relevant in regard of the basis of the detention. Moreover the selection of those pieces was int he public prosecutor's discretion.

88 The measure of detention in general, due to the satisfaction of the criterion of *reasonable suspicion* and given the fact that the applicant has already been prosecuted for several counts of car theft, was found to be justified. The complaint about discrimination was held to be simply unsubstantiated.

In case of the alleged breach of para. (3) the Court held that the main question is that whether the requisite criterion of *reasonable suspicion* existed, moreover whether the temporal duration of the pre-trial detention exceeded the criterion of *reasonableness.* Furthermore the Court examined whether the causes for the applicant's continued detention were virtually relevant and sufficient especially in light of the statements of the *Darvas* case,[89] namely the individualized assessment of the particular circumstances of the detainee and of the case. Regarding the reasonableness of the suspicion the Court confirmed its previously submitted case law, emphasising that suspicion based upon the probality of the applicant being involved in criminal behaviour cannot be equated with the certainity of this, subsequently required for conviction. Moreover in the question of individualization the Court highlighted that the Convention's provisions cannot be interpreted as obliging national authorities to release a detainee only on account of his state of health. However in view of the applicant's psychological problems and their aggrevation due to the sexual assault it would have been the obligation of the authorities to virtually examine the possibility of the application of less stringent measures. The domestic authorities paid no attention to the fact that with the passage of time and given the applicant's deteriorating health, keeping him in detention no longer could serve the main purpose of the measure as bringing him to trial within a reasonable time. Consequently, the measure cannot be considered neccesary from the point of view of ensuring the due course of the proceedings. Therefore the violation of Article 5. III can be ascertained.

Concerning the alleged violation of the principel of *equality of arms* in regard of the access to the material of the investigation, the Court examined the Hungarian regulation and found that theoretically the mentioned right was ensured in a manner complying with the Convention.[90] However the applicant had repeatedly complained about the lack of access to the pieces of information, all in vain; which means that there is no element in the case file or the parties' submissions indicating that this right could indeed be exercised.[91] The Court has already several times affirmed the principle that the provisions of the Convention shall be assessed and guaranteed *in concreto*, therefore in this case due to the above mentioned circumstances, it was held that an infringement of Article 5. IV is to be diagnosed.

In regard of the compensation claimed based upon Article 5.V in conjunction with Article 41, the Court confirmed its clear practice as one hand in case of a violation of the

89 Judgement of 11 January 2011 in *Darvas v. Hungary*, Appl. No. 19547/07, Paras. 27-29.

90 In case of an appeal against a detention falling in the ambit of Art. 5. § (1) c) guarantees of a judicial procedure shall be provided such as a hearing and the disclosure of evidence taking place in good time, providing access to the relevant elements of the file prior to the applicant's first appearance before the judicial authorities. Judgement of 25 March 1999 in *Nikolova v. Bulgaria*, Appl. No. 31195/96, ECHR 1999-II., Para. 58. Judgement of 30 March 1989 in *Lamy v. Belgium*, Series A No. 151, Para. 29.

91 See also in: Judgement of 13 February 2001 in *Lietzow v. Germany*, Appl. No. 24479/94, ECHR 2001-I, Para. 47, Decision of 09 March 2006 *Svipsta v. Latvia*, Appl. No. 66820/01, ECHR 2006-III, Para. 138.

Convention or the Protocols a just satisfaction to the injured party may be afforded when the domestic law allows only partial reparation to be made. On the other hand an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have ben actually and necessarily incurred and are reasonabe as to quantum. In light of these principles the Court found EUR 18,000 as compensation appropriate to award on an equitable basis, under all heads to the applicant, moreover the sum of EUR 4,500 was held reasonable covering all kind of costs occured in connection with the procedure.

It is worth to be noted that in the fairly similar recent case of *Miklós Hagyó*[92] the Court also emphasized that: 1) the applicant's severe state of health does not oblige the authorities to release him from detention, however this unfortunate circumstance has to be taken into account with due weight while considering the applicability of a less coercive measure 2) the rejection of access to the relevant pieces of evidence when the applicant challenges the justification of the pre-trial detention may lead to the violation of the principle of 'equality of arms' declared in Article 5. IV.

It also has to be higlighted that according to a recent ammendment of the Hungarian Code of Criminal Procedure[93] in compliance with the Convention and a new EU directive,[94] the access to the relevant pieces of information concerning the pre-trial detention is to be ensured in a broader sphere as copies of the relevant material of the investigation justifying the basis of the measure shall be enclosed to the motion – served to the suspect and the defendant as well – requiring pre-trial detention

14.5 Consequences

In general according to the Court's statics only 5% of the Hungarian cases are related to the right to liberty and security, however 94% of these cases ends with a violation judgement.[95] In addition it has to be taken into account that 84% of the cases are based upon the unreasonable length of proceedings realising the infringement of the closely related

92 In the mentioned case the detention of the applicant has been justified by the authorities mainly based upon the danger of absconding, on the contrary the statement failed to be substantiated with any kind of alleged evidence. Judgement of 23 April 2013 in *Miklós Hagyó v. Hungary*, Appl. No. 52624/10, Paras. 58-60.

93 Amendment of Art. 211. § (1) which came into force on 2 January 2014.

94 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1-10.

95 *The ECHR in Facts and Figures*, 2011, id., pp. 117, 122.

Article 6. Moreover the analyzation of the legal practice[96] and the datas[97] in regard may lead to the recognition of the controversial state of the Hungarian regulation.

Theoretically the related provisions of the Hungarian Code of Criminal Procedure guarantees even a higher level of liberty and security than requisite in the Convention. This phenomenon is mainly based upon our membership in the EU which obliges the Hungarian legislators to implement the latest achivements of the '*acquis communautaire*' aiming the broader harmonization of both substantive and procedural criminal law as well.[98] A certain approach of EU law and the Court's case law can be revealed, however the sensitive matter of the relation of EU law and the Convention has not been adequately clarified yet.[99]

Contrary to that in practice the measure of pre-trial detention in the vast majority of the cases is applied – underlined with the nurmbers cited above – by the authorities virtually as – for that matter, in breach of both international and domestic obligations as well – a preliminary penalty. However it has to be admitted that there are recent initiations and

96 Detailly submitted in the studies of the Helsinki Committee: *A gyanú árnyékában – Kritikai elemzés a hatékony védelemhez való jog érvényesüléséről*, Magyar Helsinki Bizottság, Budapest, 2009. *Előrehozott büntetés: rendőrségi fogdák – fogvatartottak a rendőrségen*, Alkotmány- és Jogpolitikai Intézet – Magyar Helsinki Bizottság, Budapest, 1997.

97 According to statics of the prosecution authority detention is the utmost favourable measure taken: in the period between 2009 and 2011 an impressive number of 7.840 suspects were subject to this form of deprivation of liberty compared to almost insignificant quantity of 685 persons remaining for the other forms. Büntetőbíróság előtti ügyészi tevékenység főbb adatai, 2012. év, Legfőbb Ügyészség, 2013, p. 43. See: http://mklu.hu/repository/mkudok8246.pdf. A. K. Kádár & E. Kirs & A. Lukovics et al., 2014, id., p. 29.

98 Generally declared in the resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ C 295, 4.12.2009, pp. 1-3). In relation with this document many directives have already been accepted int he sphere of procedural criminal law, among others for instance: 2010/64/EU on the right to interpretation and translation in criminal proceedings, the already cited 2012/13/EU on the right to information in criminal proceedings, 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, and the proposals COM(2013) 821. final on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 824. final on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, pp. 1-7. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, pp. 1-10. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, pp. 1-12.

99 The Lisbon Treaty made it an obligation for the EU itself to entry the Convention, on the contrary the CJEU Opinion 2/13 on EU accession to the Convention made it clear that at the present stage of legal development it seems to be almost impossible as it would endanger both the *sui generis* feature of EU law and the independent jurisdiction of the CJEU, resulting also the infringements of the priciples of subsidiarity and autonomy.

steps taken as e.g. the already mentioned ammendment of the Code of Criminal Procedure which very welcomed purpose is to change this unfortunate legal practice and properly guarantee the rights declared in the Convention.

To summarize the present stage of the application of Article 5 in Hungary demonstrated by the case analysed previously, it can be stated that the Hungarian regulation in therory is in compliance with the Convention's requirements, even reaching a higher level of procedural guarantees. Therefore one of the most urgent challenge of the legal practice is to raise the virtual implementation of the right to liberty and security to the sphere ensured in theory, with especially laying emphasis on to changing the attitude of the competent authorities in regard of the requisite individualization of meaures and acceess to pieces of evidence.