



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

## FIRST SECTION

Application no. 12301/12  
Tomislav MERČEP  
against Croatia  
lodged on 14 February 2012

### STATEMENT OF FACTS

The applicant, Mr Tomislav Merčep, is a Croatian national, who was born in 1952 and lives in Zagreb. He is represented before the Court by Mr M. Ujević, a lawyer practising in Zagreb.

#### **A. The circumstances of the case**

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

##### *1. Background to the case*

On 10 December 2010 the Zagreb Police Department (*Policajska Uprava Zagrebačka*) lodged a criminal complaint with the Zagreb County State Attorney's Office (*Županijsko državno odvjetništvo u Zagrebu*) against the applicant, on suspicion that, in 1991, he had committed war crimes against the civilian population. On the same day, the applicant was arrested and the Zagreb County State Attorney's Office requested the investigation judge of the Zagreb County Court (*istražni sudac Županijskog suda u Zagrebu*) to open an investigation against the applicant.

Also on the same day, the investigation judge of the Zagreb County Court heard evidence from the applicant. The applicant denied the charges and underlined his health problems. He submitted an extensive medical documentation from which it was visible that he had suffered a grave stroke in 2007.

On 13 December 2010 the applicant refused to give further evidence to the investigation judge, invoking silence. On the same day, the investigation judge opened the investigation against the applicant in connection with the above-mentioned allegations.

##### *2. Investigation*

On 12 January 2011 the investigation judge heard evidence from five witnesses, while one witness failed to appear.

On 13 January 2011 the investigation judge heard evidence from one witness, while one witness failed to appear.

On 8 February 2011 the investigation judge heard evidence from six witnesses.

On 15 February 2011 the investigation judge heard evidence from seven witnesses.

On 23 February 2011 the investigation judge requested the competent Serbian court to hear evidence from three witnesses.

On 3 March 2011 the investigation judge heard evidence from four witnesses.

On 4 March 2011 the investigation judge heard evidence from four witnesses.

On 15 March 2011 the investigation judge requested the competent Serbian court to hear evidence from one more witness.

On 15 April 2011 the investigation judge heard evidence from one witness.

On 13 May 2011 the Zagreb County State Attorney's Office informed the investigation judge about the results of DNA analysis performed on the victims' remains.

### *3. Criminal trial against the applicant*

On 9 June 2011 the applicant was indicted before the Zagreb County Court for war crimes against civilian population under Article 120 of the Croatian Criminal Code. The applicant was accused of ordering or not preventing the unauthorized arrests, torture and killings of civilians in Zagreb, Kutina, Ribnjak, Janja Lipa, Bujavica, Međuriče, Zbjegovača and Pakračka Poljana between 8 October 1991 and mid-December 1991, in his capacity as the counsel in the Ministry of Interior and the commander of the reserve forces of the Ministry of Interior.

On 28 June 2011 the applicant lodged an objection against the indictment. He argued that there had been insufficient evidence against him.

On 12 September 2011 the three-judge panel of the Zagreb County Court excluded certain evidence from the case-file and dismissed the applicant's objection as without merit.

On 4 October 2011 the Zagreb County Court ordered an expertise of the applicant's capability to follow the trial.

On 14 December 2011 the court expert in field of neurology found that the applicant is partially capable to follow the trial, namely if seated and for periods of 90 minutes, followed by half-an-hour break. She relied on the likelihood of mental fatigue of the applicant and increase of his blood pressure, that had caused brain hemorrhage and epilepsy attacks in the past. She also found that the applicant is capable of understanding and following criminal proceedings, but could have difficulties with instructing his defence counsel. In conclusion, the court expert recommended the presence of a doctor during hearings.

The criminal proceedings are still pending.

#### 4. Decisions concerning the applicant's detention

On 10 December 2010 the investigation judge of the Zagreb County Court remanded the applicant in custody for 48 hours on grounds of the danger of suborning witnesses and the seriousness of the offences allegedly committed. The applicant was placed in a prison hospital (*bolnica za osobe lišene slobode*).

On 12 December 2010 the investigation judge extended the applicant's remand in custody for another 32 hours.

On 13 December 2010 the investigation judge ordered the applicant's detention for one month on the same grounds as before.

On 15 December 2010 the applicant appealed against that decision, arguing that the impugned acts had happened 19 years ago and invoking his serious illness.

On 17 December 2010 the three-judge panel of the Zagreb County Court dismissed the applicant's appeal. It relied on the necessity to take evidence from a large number of victims and witnesses and the particularly grave circumstances of the offences allegedly committed. It did not comment the applicant's health condition.

On 5 January 2011 the investigation judge extended the applicant's detention for a further two months on the same grounds as before.

On 12 January 2011 the applicant appealed against that decision on the same grounds as before.

On 14 January 2011 the three-judge panel of the Zagreb County Court dismissed the applicant's appeal. As regards the applicant's health condition, it argued that he could be provided with adequate medical care in the prison hospital.

On 9 March 2011 the investigation judge extended the applicant's detention for a further two months on the same grounds as before.

On 16 March 2011 the applicant appealed against that decision on the same grounds as before.

On 18 March 2011 the three-judge panel of the Zagreb County Court dismissed the applicant's appeal. It did not comment the applicant's health condition.

On 9 May 2011 the investigation judge extended the applicant's detention for a further one month on the same grounds as before.

On 18 May 2011 the applicant appealed against that decision, arguing that the impugned acts had happened 19 years ago and invoking his serious illness. In addition, he argued that the Zagreb County Court had failed to establish particularly grave circumstance under which the alleged offences had been committed.

On 19 May 2011 the applicant requested the transfer to another, open-type medical facility, due to the serious deterioration of his health.

On 23 May 2011 the Zagreb Prison Hospital (*Zatvorska bolnica u Zagrebu*) recommended the applicant's transfer to a hospital specialized for physical therapy.

On 26 May 2011 the Ministry of Family, Homeland War Veterans and Intergenerational Solidarity (*Ministarstvo obitelji, branitelja i međugeneracijske solidarnosti*) informed the investigation judge about its willingness to bear the costs of the applicant's therapy.

On 27 May 2011 the investigation judge allowed the transfer of the applicant to a hospital outside of the prison system, subject to supervision.

On the same day, the three-judge panel of the Zagreb County Court dismissed the applicant's appeal. It argued, *inter alia*, that the six-month period of detention had not distorted the proportionality principle.

On 30 May 2011 the applicant was transferred to the Krapinske Toplice Special Recovery Hospital (*Specijalna bolnica za medicinsku rehabilitaciju Krapinske Toplice*).

On 10 June 2011 a three-judge panel of the Zagreb County Court extended the applicant's detention solely on account of the gravity of offences. The relevant part of the decision reads:

“When assessing the further extension of detention under Article 102 paragraph 1(4) of the Code of Criminal Procedure, the panel looked into the facts of the indictment and found that the accused Tomislav Merčep is reasonably suspicious that, in the period from 8 October 1991 until mid-December 1991, as the counsel and the commander of the reserved forces of the Ministry of Interior, authorized for giving orders, ordered unlawful deprivations of liberty, torture and killings of civilians and, when not present, even though he had known that his troops had been unlawfully arresting, robbing, torturing, causing physical harm and killing civilians, failed to undertake any measures for prevention and suppression of such actions, therefore accepting that his troops continue such actions and accepting their consequences....

Furthermore, the perpetrators – members of the accused's troops, took money and valuables from their victims (cars, jewelry, household appliances etc.) and subsequently exposed them to cruel torture, like electroshocks through an induction telephone, cutting open muscles and wiring open wounds, heavy beatings, torture, degrading treatment and locking into rooms without beds or toilets. In addition, the accused is suspicious of the event in which his troops killed a 12 year-old girl A.Z. with 6 bullets in the head together with her mother M., which were both taken away after her father, M.Z., had been killed on their doorway in Z.

Consequently, and having in mind the extent of the unlawful actions for which the accused is reasonably suspicious, and in particular the number of victims, which had been, according to the facts of the indictment, more than twenty, all of them civilians, brutally tortured, robbed and killed or missing, the panel detects extreme cruelty, brutality, persistence and an extraordinary degree of criminal intent in the perpetrator.

All of the above mentioned circumstances, in the opinion of this panel, represent particularly grave circumstances of offences that overcome the usually grave circumstances pertinent to such offences. Therefore, the detention is necessary under Article 102 § 1(4) of the Code of Criminal Procedure...”

On 6 July 2011 the Supreme Court (*Vrhovni sud Republike Hrvatske*), acting on the applicant's appeal, upheld the first-instance decision on detention of 10 June 2011. The relevant part of the decision reads:

“... the finding of the first-instance court that the ground for further detention of the accused under Article 102 paragraph 1(4) of the Code of Criminal Procedure still applies is correct.

The indictment shows a relevant degree of reasonable suspicion that the accused committed the criminal offence under Article 120 paragraph 1 of the Criminal Code, by which a general statutory condition under Article 102 paragraph 1 of the Code of Criminal Procedure has been fulfilled...

..the behaviour of the accused, in view of the second-instance court, significantly overcomes the ordinary circumstances and consequences of such offences, and represents an offence committed under particularly grave circumstances which surpasses by far the usual manner of committing such crimes and which necessitates

the accused's remaining in custody under Article 102 paragraph 1(4) of the Code of Criminal Procedure.

In his appeal, the accused relied on the serious breach of criminal procedure, without specifying his argument. In this regard, the second-instance court was unable to find breaches that should have been examined *ex officio*.

The appeal argument of errors in facts is also unfounded, since the first-instance court fully determined the facts and gave detailed, valid and clear reasons for its findings, accepted by the second-instance court.

The accused also relied on the position of the Constitutional Court in its decision U-III-1683/2008 of 7 May 2008 and Article 5 § 1 of the Council of Europe's European Convention on Human Rights, arguing that detention represents a particularly sensitive way of depriving one's liberty before a final judgment, and that it cannot turn into a sentence. Thus, it can be ordered only when there is a high probability of determining guilt and sentencing, in case of a reasonable suspicion that the accused committed a criminal offence and only for purposes of conducting criminal proceedings, which had not been met in the applicant's case.

Contrary to the appeal arguments, the extension of detention under Article 102 paragraph 1(4) of the Code of Criminal Procedure is not contrary to the Constitution or Article 5 of the European Convention on Human Rights. The detention under Article 102 paragraph 1(4) of the Code of Criminal Procedure serves preventive reasons, i.e. the deprivation of liberty of the perpetrators of such crimes that, if they would be free, it would diminish the reputation and faith of the public in the judiciary...

The difficult health condition of the accused does not call into question the reasonableness of his detention, since adequate medical care, having in mind that he suffers from a chronic disease, can be offered to him within detention, i.e. in the prison hospital."

On 30 August 2011 the Constitutional Court (*Ustavni sud Republike Hrvatske*) dismissed the applicant's constitutional complaint against the Supreme Court's decision. The relevant part of the decision reads:

"Having in mind the competence of the Supreme Court as the highest court ensuring the coherent application of law and equality of everyone in its application (section 116 § 1 of the Constitution), the existing possibility of a prison sentence within the given time and the particularly grave circumstances of the offence, the Constitutional Court finds that the Supreme Court and the Zagreb County Court satisfied the relevant opinions and benchmarks when deciding to extend the applicant's detention relying on Article 102 paragraph 1(4) of the Code of Criminal Procedure, that concern, *inter alia*, the principle of proportionality."

On 6 September 2011 a three-judge panel of the Zagreb County Court extended the applicant's detention on the same grounds as before.

On 14 September 2011 the applicant appealed against that decision.

On 28 September 2011 the Supreme Court dismissed the applicant's appeal.

On 28 November 2011 a three-judge panel of the Zagreb County Court extended the applicant's detention on the same grounds as before.

On 7 December 2011 the applicant appealed against that decision.

The applicant was released from detention in July 2012.

## **B. Relevant domestic law**

The relevant part of the Article 102 of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998,

58/1999, 112/1999, 58/2002, 62/2003, 178/2004 and 115/2006) reads as follows:

**Article 102**

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

...

2. if there is a risk that he or she might destroy, hide, alter or forge evidence or traces relevant for the criminal proceedings or might suborn witnesses, or where there is a risk of collusion;

...

4. if the charges involved relate to murder, robbery, rape, terrorism, kidnapping, abuse of narcotic drugs, extortion or any other offence carrying a sentence of at least twelve years’ imprisonment, when detention is justified by the *modus operandi* or other particularly serious circumstances of the offence;

...”

The relevant part of Article 120 of the Criminal Code (*Osnovni krivični zakon Republike Hrvatske*, Official Gazette no. 31/1993) reads as follows:

**War Crimes against the Civilian Population**

“Whoever, in violation of the rules of international law during war, armed conflict or occupation, orders: ... the killing, torture or inhuman treatment of civilians; ... the infliction of grave suffering on or injuries to the bodily integrity or health of civilians; ... measures of fear and terror against civilians or the taking of hostages, ... illegal arrests ... shall be sentenced to not less than five years’ imprisonment or to twenty years’ imprisonment.

...”

## COMPLAINT

The applicant complains under Article 5 of the Convention about the length of his pre-trial detention.

## QUESTION TO THE PARTIES

Is the length of the applicant’s detention in breach of the “reasonable time” requirement of Article 5 § 3 of the Convention?

The Government are requested to submit two copies of the entire criminal case file in the applicant’s case.