

INTERNATIONAL STANDARDS FOR DAMAGE COMPENSATION FOR UNJUSTIFIED CONVICTION AND ILL-FOUNDED DEPRIVATION OF LIBERTY

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INTRODUCTION

The International Covenant on Civil and Political Rights establishes the right to compensation for unjustified convictions and unlawful arrests: the latter is guaranteed to anyone who has been a “victim of unlawful arrest or detention” (Article 9, paragraph 5), and the former to a person who has served a sentence based on a final verdict that was later revoked (or the person was pardoned) because “a new or newly discovered fact shows conclusively that there has been a miscarriage of justice”, and that the person is not “fully or partially guilty of untimely disclosure of an unknown fact” (Article 14, paragraph 6).

Article 5 paragraph 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) stipulates that

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anyone who has been the victim of arrest or illegal detention, contrary to the provisions of Article 5, shall be entitled to compensation (Article 5, paragraph 5). The right to compensation under Article 5 paragraph 5 of the European Convention presupposes, first of all, that the person has been the victim of arrest or detention contrary to the provisions of this Article (paragraphs 1–4). If a violation of this right has been established, and the domestic laws of the state allow only partial repairs or nothing, the European Court of Human Rights (hereinafter: the European Court) may grant satisfaction to the injured party, in accordance with Article 41 of the European Convention. On the other hand, there are clear illogicalities in a number of judgments of this court – despite finding that Article 5 paragraph 5 has been violated, it has refused compensation under Article 41.

The right to compensation can be characterized as a kind of “secondary right”, but before the secondary right becomes applicable – the primary violation must be established (*X v. Germany*, Application No. 4149/69 and *X v. Austria*, Application No. 5560/72). An applicant will be able to claim compensation in Strasbourg under Article 5 paragraph 5 of the European Convention only if he has been refused compensation at the highest level of domestic remedies by the national authorities (*Sakik and others v. Turkey*, ECHR 26 November 1997, § 59), despite violation of Article 5. In *Steel* case, the European Court concluded that in “civil proceedings for damage compensation against the police”, it was possible to successfully claim damages (*Steel and others v. United Kingdom*, ECHR 23 September 1998, § 83). What is decisive is not the abstract possibility of success, but a concrete situation of the applicant (*NC v. Italy*, 53–56). On the other hand, in many cases the European Court has concluded that the judgment itself, simply as a result of violation of the Convention, is sufficient satisfaction (*Hood v. United Kingdom*, Application No. 27267/95, 18 February 1999, § 84). It is important to provide convincing evidence in this regard (*Weeks v. United Kingdom*, 9787/82, ECHR 2 March 1987).

The first part of the paper refers to the relevant case law of the Constitutional Court of Bosnia and Herzegovina, primarily when the appellate allegations indicate a violation of the right to a fair trial in connection with misapplication of substantive law and lack of reasoning regarding the awarded amount of non-pecuniary damage in the proceedings following an appeal or review. Another aspect of the research concerns the examination of the scope and manner of application of relevant decisions of the European Court regarding compensation for damages. For the purpose of conducting the research in question, the current case law of these courts was analyzed.



CASE LAW OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

When the appellate allegations indicate a violation of the right to a fair trial in connection with the misapplication of substantive law and lack of reasoning regarding the awarded amount of compensation for non-pecuniary damage in the appeal and review procedure, a key question arises for the Constitutional Court of Bosnia and Herzegovina (hereinafter: the Constitutional Court.) as to whether it can enter into the assessment of the amount of compensation awarded for this specific type of damage. In this regard, the Constitutional Court emphasizes that its jurisdiction is determined by the Constitution of Bosnia and Herzegovina, as well as the restrictions (brakes) that the Constitutional Court has developed through its practice. One of such restrictions (brakes) is the principled position of the Constitutional Court not to examine the facts established by the regular courts. However, this position is not absolute, given that the case law of the Constitutional Court in this direction allows exceptions in cases where the relevant facts have been established “obviously arbitrarily”. The Constitutional Court justifies this exception in the fact that “arbitrariness” or “self-will” cannot be in accordance with the principles of the Constitution of Bosnia and Herzegovina, despite the fact that determining relevant facts falls within the basic jurisdiction of regular courts. Therefore, the mentioned exception is necessary in order to be able to correct a decision that is potentially unconstitutional. This exception must be applied with extreme caution, but it must not become an absolute rule, as this would ultimately represent a reduction in constitutional rights.

In addition, the Constitutional Court points to the case law of the European Court in *Tolstoy Miloslavsky v. United Kingdom* (Application No. 18139/91 of 13 July 1995), in which the European Court, in addition to the substance of requirement under Article 10 of the European Convention, the right to freedom of expression, dealt with applicability of Article 6 paragraph 1 of the European Convention in the context of awarded compensation for damages, pointing out that the case was limited to an objection regarding the amount of damages determined and the court order, and that it was different with regard to other defamation cases examined by the court until then. In the present case, the amount of non-pecuniary damages awarded for defamation was three times higher than the highest amount of defamation damages previously awarded in England, and no subsequent judgment has been made with which it could be compared. Therefore, according to the European Court (*Tolstoy Miloslavsky v. United Kingdom*), the amount of damages awarded must be brought into the context of the applicable (national) substantive law and the context of the requirement of proportionality. Having in mind the stated practice, the Constitutional Court finds that, in terms of Article 6 paragraph 1 of the European Convention, it can enter into discussion on the awarded



compensation from the aspect of its proportionality, in relation to the elements from which monetary compensation is formed as fair satisfaction for ill-founded deprivation of liberty, bearing in mind that the amount of damage compensation is determined on the basis of specific circumstances of each individual case.

Several decisions in the past case law of the Constitutional Court have been made in the direction of proving the existence of validity of decisions on arrest and detention, which apply *mutatis mutandis* to cases of unjustified conviction, i.e. final meritorious decisions on guilt. Thus, in decision No. **AP-2666/06 of 28 November 2008** (available at website of the Constitutional Court www.ustavnisud.ba), the Constitutional Court found that in the present case the appellant, in terms of domestic legislation, was not entitled to damage compensation because at the time of the disputed damage, i.e. detention as harmful event, the provision of Article 13 of the Law on the Application of the Criminal Procedure Code, which was taken over as the Republic Law, was in force, which excluded the right to damage compensation to persons unjustifiably convicted and ill-foundedly deprived of liberty. The relevant provision of Article 13 of this Law existed until the entry into force of the Criminal Procedure Code of the Federation of BiH (Official Gazette of the Federation of BiH, No. 43/98, entered into force on 29 November 1998). Therefore, in the specific case, the appellant, according to the domestic legislation, was not entitled to damage compensation to the extent that exceeds the scope of Article 5 of the European Convention.

In the context of the right to property, in the Decision on admissibility and merits, number **AP-941/10 of 16 May 2013**, the subject matter of dispute was the determination of damage compensation to the appellant for ill-founded deprivation of liberty. The Constitutional Court recalls that in the proceedings before the regular courts it was indisputably established that the appellant was sentenced to a shorter term of imprisonment in the renewed proceedings and that he spent two years and one month longer in prison than he was ultimately sentenced to by a judgment of the Supreme Court rendered in renewed proceedings. However, in the disputed judgment, the Supreme Court concluded that the provision of Article 527 of the Criminal Procedure Code of the Federation of BiH could not be applied to the appellant's case because there was no ill-founded deprivation of liberty in this case, given that prequalification of criminal offense was made in renewed proceedings and the appellant was sentenced to a shorter term of imprisonment. Therefore, although the interpretation and application of legal provisions is, in principle, a matter for the regular courts, the Constitutional Court considers that, in the circumstances of a particular case, the Supreme Court cannot go with its interpretation beyond something explicitly prescribed by law (the right to damage compensation even to persons who served sentence of deprivation of liberty and



in the renewed proceedings were sentenced to a shorter term of imprisonment than the sentence they served).

In the Decision on Admissibility and Merits, No. **AP-2414/11 of 10 June 2014**, the Constitutional Court notes that in parallel with positive assumptions, the court in civil proceedings also examines negative assumptions, namely the existence or absence of inadmissible proceedings that caused detention according to provision of Article 418 paragraph 3 of the Criminal Procedure Code. In this regard, it was established in the proceedings that the appellant was not in ill-founded detention because he caused his detention by his illegal actions, primarily by avoiding to receive the summons, and the detention followed the execution of the international arrest warrant and execution of detention order.

In case **AP-754/14 of 30 March 2017**, the Constitutional Court concludes that there is a violation of the right to a fair trial under Article II/3e of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention when the Court of BiH by partially upholding the appeal and by altering the first instance judgment regarding the awarded amount of damages, which was confirmed in the review procedure, failed to bring the amount of awarded damages into the context of substantive law with regard to specific circumstances concerning the appellant and, therefore, the context of proportionality requirement, so it concluded that the amount of non-pecuniary damage due to violation of honor and reputation, resulting from ill-founded deprivation of liberty in the circumstances of a particular case – was arbitrarily determined.

In Decision **AP-4364/16 of 6 December 2018**, the Constitutional Court concludes that there has been a violation of the right to a fair trial under Article II/3e of the Constitution of Bosnia and Herzegovina and Article 6 paragraph 1 of the European Convention when the amount for non-pecuniary damage for ill-founded deprivation of liberty was arbitrarily determined. The Constitutional Court recalls that, in accordance with the legal position of regular courts within the territory of Bosnia and Herzegovina (orientation criteria for determining the amount of a fair monetary compensation for non-pecuniary damage adopted by the Supreme Court of the Federation of BiH on 27 January 2016), “mental pain due to ill-founded deprivation of liberty is a unique type of damage that includes all harmful consequences of non-pecuniary damage related to the injured party resulting from ill-founded deprivation of liberty”.

In its Decision No. **AP-2911/11**, the Constitutional Court emphasized that it could not conclude that the regular courts arbitrarily applied substantive law when dismissing the appellant’s claim for damage compensation for ill-founded deprivation of liberty, as the claim became obsolete and, thus, his right to demand fulfillment of an obligation as well. The Constitutional Court pointed out that in this particular case it was the appellant’s failure to adjust his conducts to the applicable



regulations and to submit a request for compensation of non-pecuniary damage within the deadlines set by the provisions of the Law on Obligations, which is why his allegations on violation of the right to a fair trial were ill-founded.

In case No. **AP-3464/11 of 13 January 2015**, the appellant considered that the decision of the Cantonal Court violated his right to a fair trial due to arbitrary application of substantive law. The Constitutional Court points out that in previous practice it has already decided on issues relevant to this case, i.e. issues of the right to financial compensation for deprivation of liberty on the basis of detention, when subsequent proceedings did not result in a conviction (see, e.g., Decisions No. AP-1928/06 of 18 December 2006, AP-2666/06 of 28 November 2006 and AP-2774/10 of 22 March 2013). This practice points to the relevant fact that the legal basis of the claim in this case is based on a legal provision which stipulates that the right to damage compensation also belongs to a person who was in detention, and the procedure did not result in a conviction. This provision is a *lex specialis* in relation to Article 200 of the Law on Obligations because it regulates this right to this category of persons who have been detained. Having in mind the stated circumstances of the appellant's case from which it is indisputable that the appellant is a person who, in terms of Article 439 paragraph 1 item a) of the Criminal Procedure Code, is entitled to damage compensation for detention, which did not result in initiating criminal proceedings, the Constitutional Court considers that in the present case the Cantonal Court in the challenged decision arbitrarily applied relevant provisions of the Criminal Procedure Code, the Law on Obligations and Articles 7 and 123 of the Civil Procedure Code when it finally dismissed the appellant's claim for non-pecuniary damage and unjustifiably transferred the burden of proving certain facts on the appellant as the plaintiff.

CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The case law of the European Court with regard to damage compensation is all the more significant because the Constitutional Court has confirmed the positions from the Strasbourg cases in similar cases.

In *Sancaian v. Romania* (application No. 71723/10, judgment of 14 January 2014) case, the European Court found violations of: Article 5 paragraph 1 (right to liberty and security), Article 5 paragraph 4 (right to a prompt decision on the lawfulness of deprivation of liberty) and Article 5 paragraph 5 of the European Convention (right to compensation). Relying on Article 5 paragraph 1, the applicant complained that her detention had been unlawful following the reopening of the criminal proceedings, after the November 2009 judgment ordering the reopening



of the criminal proceedings. Referring to Article 5 paragraph 4, she complained about the excessive length of the proceedings for her release. Finally, invoking Article 5 paragraph 5, she complained that she was not entitled to damage compensation for the violation of the right under Article 5 of the Convention.

Violation of Article 5 paragraph 1 (right to liberty and security – in respect of S.T. and A.T.) and Article 5 paragraph 5 (right to compensation – in respect of S.T. and A.T.) was established in the judgment of the European Court in case *Tomaszewscy v. Poland* (application No. 8933/05, judgment of 15 April 2014). Referring to Article 5 paragraph 1 and Article 5 paragraph 5 of the European Convention, the applicants complained that their arrest and detention at the Police Station had been arbitrary and that they had not been able to provide compensation for the damage they had suffered.

In *Karaosmanoğlu and Özden v. Turkey* (application No. 4807/08, judgment of 17 June 2014) judgment, the European Court found a violation of Article 5 paragraph 4 (right to a prompt examination of the lawfulness of detention – due to failure of the applicants to appear before the judges deciding on their detention) and Article 5 paragraph 5 (right to compensation) of the European Convention. Relying on Article 5 paragraph 4 and Article 5 paragraph 5, the applicants complained that they did not have efficient legal remedy for the review of detention and a legal remedy for compensation for detention, which they considered to be contrary to Article 5 of the European Convention.

In the case of *Gutsanovi v. Bulgaria* (application No. [34529/10](#), judgment of 15 October 2013) it was first established that there was degrading treatment under Article 3 of the European Convention due to the gross nature of the police operation of arrest of a politician at his home, in the presence of his wife and underaged children. In addition, Article 5 paragraph 3 of the European Convention was violated because the police detention lasted for three days, five hours and 30 minutes. The objectives of the police operation were to arrest, search and confiscate items, with the intention of affirming the public interest in prosecuting crimes. Although four members of this family did not suffer any physical injuries during the police operation, the latter did result in some degree of physical force.

Law enforcement agencies have not considered alternative ways of conducting this operation at the applicant's home, such as conducting the operation in the later hours or engaging some other type of officers in this operation. Taking into account the legitimate interests of Ms. Gutsanova and her daughters was particularly necessary, as the wife was not suspected of involvement in the crimes for which her husband was suspected, and her two daughters were psychologically vulnerable because they were too young (five and seven years of age). These events left serious consequences on Ms. Gutsanova and her daughters.



The fact that the police operation took place in the early morning hours and involved special agents wearing masks, served to intensify the three applicants' feelings of fear and anxiety, to the extent that the treatment they underwent exceeded the severity threshold required for the application of Article 3 of the European Convention. They were, therefore, subjected to degrading treatment. The police operation was planned and conducted without taking into account a number of factors such as the nature of the crimes Mr. Gutsanov is suspected of, the fact that he had no history of violent behavior and the possible presence of his wife and daughters in the house. The manner in which he was arrested aroused strong feelings of fear, anxiety and helplessness in Mr. Gutsanov, which humiliated and diminished him in his own eyes and in the eyes of his family. Therefore, he was subjected to degrading treatment.

When it comes to the length of detention – Mr. Gutsanov was deprived of liberty for four months, of which he spent two months under compulsory residence. Even at the time of his first requests for release, the domestic courts rejected any risk of possible escape. However, they ordered the continuation of his detention on the grounds that he could commit new criminal offenses, and in particular that he could compromise the evidence. However, the measure of compulsory residence imposed on Mr. Gutsanov remained, and the second instance court did not provide any special evidence to justify this measure, which was in force for the next two months. Accordingly, the authorities failed to fulfill their obligation to state the reasons which would justify the extension of the applicant's detention after 25 May 2010.

Article 5, paragraph 5 of the European Convention: in the opinion of the European Court, the claim provided for in the State Liability Act could not be considered an efficient domestic legal remedy. There was no other provision in the domestic law that would provide compensation for the damage suffered due to the excessive length of detention or for postponing the appearance of the suspect before a judge.

Ruslan Yakovenko v. Ukraine (application No. 5425/11, judgment of 4 June 2015). The European Court reiterates that an act is in accordance with Article 5 paragraph 5 of the Convention if there is a possibility of claiming damage compensation for deprivation of liberty contrary to paragraphs 1, 2, 3 or 4 of this Article – if this deprivation of liberty was established by domestic authority or court. The efficient enjoyment of the right to compensation (guaranteed under Article 5 paragraph 5) must be ensured with a sufficient degree of security (see, *Lobanov v. Russia*, No. [16159/03](#), paragraph 54, of 16 October 2008, with further reference).

The European Court notes that in the present case the Government limited its objection to the statement that the applicant's detention was ill-founded and that he could have sought damage compensation under Article 1176 of the Civil Code. However, the Court points out that the said provision is formulated in a general



way: it does not establish legal preconditions for claiming damages, nor does it provide for specific mechanisms or procedures. Instead, Article 1176 refers to a special law regulating these issues. It turns out that this is a special law on damage compensation, which is applicable. The Government did not refer to this law in its observations. It did not specify which provision of domestic law in fact violated the applicant's detention. In view of such circumstances, the Court is not persuaded by the Government's argument that the remedy it presented was efficient and that the applicant had to use it.

Sinkova v. Ukraine (application No. 39496/11, judgment of 27 February 2018). The Court concluded that there had been no violation of Article 5 paragraph 1 of the Convention in respect of the applicant's arrest, which was based on a court order and aimed at securing her presence at the hearing in case conducted against her, because despite police efforts – they could not find her until March 2011. The European Court also finds that there has been a violation of Article 5 paragraphs 1, 3 and 5 of the Convention in that the applicant's detention from 29 May to 17 June 2011 was not covered by any court decision; the entire duration of detention from 29 March to 30 June 2011 was not justified. The court found that the applicant could not claim damage compensation at the national level as long as her detention was formally in accordance with domestic legislation. In addition, there was no statutory procedure prescribed under the law in Ukraine for damage compensation for deprivation of liberty that was contrary to the right to liberty and security guaranteed by the Convention. Thus, Ukrainian law did not provide an enforceable right to compensation for detention contrary to Article 5 paragraphs 1 and 3 of the Convention. Accordingly, there has been a violation of Article 5 paragraph 5 of the Convention.

CONCLUSION

The right to compensation for unjustified conviction or for ill-founded arrest or detention belongs to the category of fundamental human rights, which is guaranteed in modern human rights law and constitutional law. This right also represents a test of the readiness of a democratically oriented state to bear the consequences of illegal and improper work of its bodies and to take care of the protection of the rights of its citizens in case of unjustified recourse to criminal repression. The constitutionalization of this right implies the establishment and maintenance of constitutional guarantees of these rights and freedoms, which is also achieved through the judicial mechanism, including the constitutional courts.



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