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

FIRST SECTION

DECISION

Application no. 19120/15
Tomislav SERAŽIN
against Croatia

The European Court of Human Rights (First Section), sitting on 9 October 2018 as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Ksenija Turković,
Aleš Pejchal,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Gilberto Felici, *judges,*

and Abel Campos, *Section Registrar,*

Having regard to the above application lodged on 16 April 2015,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Tomislav Seražin, is a Croatian national who was born in 1989 and lives in Zagreb. He was represented before the Court by Mr D. Karačić, a lawyer practising in Zagreb.

2. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

A. The circumstances of the case

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

1. The applicant's participation in disorder at sports events

4. On 9 August 2012 the Zagreb Minor Offences Court (*Prekršajni sud u Zagrebu*) found the applicant guilty of hooliganism related to disorder that he, as a supporter of Dinamo Zagreb Football Club, had caused during a football match on 8 August 2012. He was sentenced under the Prevention of Disorder at Sports Events Act (*Zakon o sprječavanju nereda na športskim natjecanjima* – hereinafter "the Act") to twenty-five days in prison, suspended for a year.

5. In addition, under section 32(1) of the Act, a protective measure (*zaštitna mjera*) was applied prohibiting the applicant from attending Dinamo Zagreb matches and all matches taking place at Maksimir Stadium (the home of Dinamo Zagreb) for a period of one year. As part of the measure, the applicant was ordered to report to the police station nearest to his place of residence (or, if he was away from home, to the nearest police station) two hours before every relevant football match to provide information on his whereabouts during the football match and the two hours after it ended.

6. The above-mentioned judgment became final on the same day as the applicant waived his right to appeal.

7. On 3 October 2012 the applicant was arrested in Kyiv (Ukraine) following fighting between supporters of Dinamo Zagreb and Dynamo Kyiv Football Club. There is no information whether further action was taken in relation to his arrest.

8. On 6 November 2012 the applicant was arrested in Paris following fighting between supporters of Dinamo Zagreb and Paris Saint-Germain Football Club. There is no information whether further action was taken in relation to his arrest.

9. On 2 February 2013 the Mostar Municipal Court in Bosnia and Herzegovina found the applicant guilty of creating disorder and attacking police during a football match between Dinamo Zagreb and Zrinski Mostar Football Club held earlier that day. He was fined. As he pleaded guilty, the proceedings continued only with regard to the sanction imposed.

10. On 22 September 2013 the applicant was arrested with a group of other individuals in Osijek on suspicion of fighting following an incident involving supporters of Dinamo Zagreb and Osijek Football Club. Following his prosecution in the relevant minor offences court he was acquitted for lack of evidence.

11. On 30 October 2013 the applicant was arrested together with a group of other individuals in Unešić for chanting amounting to hate speech during a football match between Dinamo Zagreb and Zagora Football Club. He was prosecuted in the relevant minor offences court and fined. The protective measure under section 32(1) of the Act was not applied on the grounds that it was not needed. There is no information whether the judgment became final.

12. On 16 April 2014 the applicant was arrested following fighting on a public highway between rival supporters of Dinamo Zagreb and Hajduk Split Football Club. A criminal complaint was lodged against him with the relevant State Attorney's Office. There is no information on the outcome of those proceedings.

2. Application of the exclusion measure in respect of the applicant

(a) First application of the exclusion measure

13. On 1 April 2014 the police asked the Zagreb Minor Offences Court to apply section 34a(1) of the Act ("the exclusion measure") in respect of the applicant, to prohibit him from attending all football matches of Dinamo Zagreb and the Croatian national team in Croatia and abroad for one year and oblige him to report to the police station and surrender his travel documents.

14. In its request, the police referred to the case-law of the Constitutional Court (*Ustavni sud Republike Hrvatske*), which stated the measure in question was not a sanction but a preventive measure applied in respect of a person for whom there was information of participation in unlawful conduct and which was applied for the public interest reasons, in particular for the benefit and safety of other spectators at sports events (see paragraph 41 below). The police also referred to its hooliganism database and stressed that the applicant was a registered extreme supporter of Dinamo Zagreb who had already been prosecuted for hooliganism under the Act and the minor offences of breach of the peace and public order. In this context, they stressed that he had been found guilty by a final judgment of the Zagreb Minor Offences Court of hooliganism committed on 8 August 2012 (see paragraphs 4-6 above).

15. On 3 April 2014 the Zagreb Minor Offences Court allowed the request of the police and prohibited the applicant from attending all football matches of Dinamo Zagreb and the Croatian national team in Croatia and abroad for one year. It also ordered him to report to the police station nearest to his place of residence (or, if he was away from home, to the nearest police station) two hours before every relevant football match to provide information on his whereabouts during the football match and the two hours after it ended. He was also ordered to give his travel documents to the police seven days before every relevant sports competition.

16. The Zagreb Minor Offences Court reasoned its decision by relying on the information provided by the police, including the final judgment finding the applicant guilty of hooliganism, and stressed that the measure was needed in order to prevent him from committing further minor offences.

17. The applicant appealed against this decision to the High Minor Offences Court (*Visoki prekršajni sud Republike Hrvatske*). He argued, in particular, that the subsequent imposition of the exclusion measure against

him for conduct which he had already been found guilty of and sentenced for amounted to a breach of the *ne bis in idem* principle.

18. On 24 April 2014 the High Minor Offences Court dismissed the applicant's appeal. The relevant part of the decision reads:

> "... [U]nlike the protective measure [under section 32(1) of the Act] as a sanction, the measure prohibiting an individual from attending sports competitions under section 34a of the Act is a preventive measure aimed at the prevention of possible unlawful conduct of a person for whom there is information of previous [unlawful] conduct. [The measure in question], in view of its essence, preventive purpose and the period in which it can be applied, and in particular the manner of its application, is different from the protective measure under section 32(1) of the Act, which is imposed supplementarily to a penalty after the conclusion of minor offences proceedings.
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> The [exclusion] measure limits the rights of individuals under the law in order to protect the rights of others. Its application pursues a legitimate aim and is proportionate ... in view of the fact that [the applicant], as a member of the supporter group, does not respect social norms and prevents others from attending sports events in a normal manner and creates a bad image of the true sports supporters.
>
> In view of the above, this court did not accept the appellant's arguments of a breach of the *ne bis in idem* principle since the application of the measure in question was not a new trial for a minor offence. The legal basis for the measure in question is the information of the appellant's unlawful conduct [as provided by the police]."

19. The applicant challenged this decision before the Constitutional Court, reiterating his arguments of a breach of the *ne bis in idem* principle.

20. On 21 October 2014 the Constitutional Court declared the applicant's constitutional complaint inadmissible on the grounds that it had not been lodged against an individual act deciding on the applicant's rights and obligations or any criminal charge against him which could be challenged by a constitutional complaint. The decision of the Constitutional Court was served on the applicant's representative on 7 November 2014.

(b) Second application of the exclusion measure

21. On 9 July 2015 the police asked the Zagreb Minor Offences Court to apply the exclusion measure under section 34a(1) of the Act in respect of the applicant, to prohibit him from attending all football matches of Dinamo Zagreb and the Croatian national team in Croatia and abroad for one year and oblige him to report to the nearest police station. In its request, the police referred to the Constitutional Court's case-law (see paragraph 14 above) and relied on a report containing information on the applicant's participation in disorder at sports events (see paragraphs 4-12 above).

22. On 7 August 2015 the Zagreb Minor Offences Court allowed the police's request and prohibited the applicant from attending all football matches of Dinamo Zagreb and the Croatian national team in Croatia and abroad for one year. It also ordered him to report to the police station nearest to his place of residence (or, if he was away from home, to the

nearest police station) two hours before every relevant football match to provide information on his whereabouts during the football match and the two hours after it ended.

23. The Zagreb Minor Offences Court reiterated the reasoning of its earlier decision applying the exclusion measure in respect of the applicant (see paragraph 16 above).

24. The applicant then appealed to the High Minor Offences Court, alleging a breach of the *ne bis in idem* principle.

25. On 24 September 2015 the High Minor Offences Court dismissed his appeal, reiterating the arguments contained in its previous decision (see paragraph 18 above).

B. Relevant domestic law and practice

1. Relevant domestic law

(a) Constitution

26. Article 31 § 2 of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, with further amendments) reads as follows:

> "No one shall be tried or punished again in the criminal proceedings for a criminal offence for which he or she had already been finally acquitted or convicted in accordance with the law."

27. Section 62 § 1 of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu*, Official Gazette no. 99/1999, with further amendments) provides as follows:

> "Anyone may lodge a constitutional complaint with the Constitutional Court if he or she deems that the decision of a State authority, local and regional government, or a legal person vested with public authority, concerning his or her rights and obligations, or a suspicion or accusation of a criminal offence, has violated his or her human rights or fundamental freedoms, or the right to local and regional government guaranteed by the Constitution (hereinafter "constitutional right") ..."

(b) Minor Offences Act

28. The Minor Offences Act (*Prekršajni zakon*, Official Gazette no. 107/2007, with further amendments) is the law generally applicable to all matters concerning minor offences. Section 5 provides that the sanctions for minor offences are penalties (fines or imprisonment) and protective measures (*zaštitne mjere*). Section 6 provides that the general purpose of a sanction is to ensure that individuals respect the law and refrain from committing minor offences, and that the perpetrators of minor offences do not commit such offences in future.

29. Under section 50(2) of the Minor Offences Act, protective measures may appear in other legislation regulating minor offences. Section 51

provides that the purpose of a protective measure is to remove the conditions which enable or facilitate the commission of a minor offence.

(c) Prevention of Disorder at Sports Events Act

30. Section 1 of the Act states that its purpose is "to ensure the safety of spectators, competitors and other participants at sports competitions or sports events, create an environment which prevents, suppresses and sanctions improper behaviour, disorder and violence before, during and after a sports competition or sports event, protect spectators who behave properly, protect other citizens and their property and legal assets, and create conditions so that sports competitions or sports events may contribute more to the quality of life of citizens, particularly young people".

31. The Act contains (i) a definition of unlawful conduct before, during and after a sports competition or sports event; (ii) the obligations and responsibilities of spectators at a sports competition, in particular restrictions on the ability to attend a sports competition, and (iii) the criminal offences, minor offences and sanctions for unlawful conduct under the Act.

32. The sanctions for minor offences under the Act are imprisonment, fines and protective measures, and, for minors, educational measures (section 31).

33. The protective measures for minor offences are described in section 32 and the further means of their enforcement are set out in section 32a of the Act:

Section 32

"(1) In addition to the protective measures ... stipulated by the Minor Offences Act, the minor offences court may, besides a fine and a prison sentence, apply the following protective measures in respect of a person who has committed a minor offence covered by this Act:

- a ban on attending certain sports competitions in the territory of the Republic of Croatia, with an obligation to report to a police station,

- a ban on attending certain sports competitions in the territory of the Republic of Croatia, with an obligation to remain at a police station,

- a ban on travelling to certain sports competitions abroad in which Croatian representations or sports clubs participate, with an obligation to report to a police station and turn in any travel documents.

(2) The protective measures under paragraph 1 of this section may be imposed for a period of no less than one year and of no more than two years.

..."

Section 32a

"(1) The person in respect of whom the protective measure referred to in section 32(1)(1) of this Act has been applied shall, at least two hours prior to the

beginning of a certain sports competition, report to the... police station of his or her place of residence, and if that person is away from his or her place of residence but is in the Republic of Croatia, to the nearest police station, and he or she shall report to the police officer on duty and inform him or her of the address where he or she shall be while the certain sports competition is taking place and [for the] two hours after the end of the competition in question.

...

(4) The person in respect of whom the protective measure referred to in section 32(1)(3) of this Act has been applied shall, at least half an hour prior to the beginning of a certain sports competition at the latest, report to the ...police station of his or her place of residence, and if that person is away from his or her place of residence but is in the Republic of Croatia, to the nearest police station, and he or she shall report to the police officer on duty and inform him or her of the address where he or she shall be while the certain sports competition is taking place and [for the] two hours after the end of the competition in question, and is obliged, seven days before the sports competition, to give in his or her travel documents to the police station of his or her place of residence."

34. In addition to the above, the Act also provides for the application of the measure prohibiting (excluding) an individual from attending sports events as a separate measure.

35. In the initial version of the Act in 2003 (Official Gazette no. 117/2003) the exclusion measure was provided for in section 35. Following amendments to the Act in 2009 (Official Gazette no. 43/2009), the measure was abrogated on the grounds that it was impossible to enforce in practice and align it with the provisions of the Minor Offences Act, as the law generally applicable to minor offences. Following further amendments to the Act in 2011 (Official Gazette no. 34/2011), the measure was reintroduced. The explanatory report to the draft 2011 Act merely indicates that the measure was intended to be a tool for the police to ask for all individuals in respect of whom there is "information of previous unlawful conduct" to be excluded from sports competitions, in Croatia and abroad.

36. In its current version, following the 2011 amendments, section 34a of the Act defines the measure as follows:

Section 34a

"(1) To a person for whom there is information of previous unlawful conduct when going to, during or when leaving sports competitions, the minor offences court may, at the request of the relevant police department ..., impose a ban on attending a specific sports competition or a ban on attending sports competitions for a period of no less than six months or no more than one year.

(2) The person in respect of whom the ban referred to in paragraph 1 of this section has been applied shall, two hours prior to the beginning of a certain sports competition, report to the ... police station of his or her place of residence, and if that person is away from his or her place of residence but is in the Republic of Croatia, to the nearest police station, and he or she shall report to the police officer on duty and inform him or her of the address where he or she shall be while the certain sports

competition is taking place and [for the] two hours after the end of the competition in question.

(3) The address referred to in paragraph 2 of this section cannot be within a two kilometre radius of the arena where the [relevant] sports event is taking place unless the person in question has [his or her] place of domicile or residence or works in the area or in other justified cases."

37. Under section 39a(2) of the Act, failure to comply with the measures under sections 32 and 34a of the Act is a separate minor offence punishable by a fine of between 5,000 and 25,000 Croatian kunas (approximately 670 to 3,350 euros) or thirty to sixty days' imprisonment.

2. Relevant practice

38. According to the case-law of the High Minor Offences Court, the exclusion measure under section 34a of the Act is preventive and not punitive in nature and thus its application subsequent to a conviction in minor offences proceedings for the same event does not give rise to an issue under the *ne bis in idem* principle (for instance, lR-605/2015, 7 September 2015; IR-644/2015, 24 September 2015; IR-680/2015, 7 October 2015; IR-817/15, 22 December 2015).

39. The Constitutional Court dealt with the question of nature of the exclusion measure under section 34a of the Act both in the context of an individual constitutional complaint and a constitutionality review of the measure in question.

40. In case U-III-1574/2006, 26 November 2008, the Constitutional Court examined a constitutional complaint on the merits concerning the application of the exclusion measure under the Act. It considered that the measure in question was a preventive measure which did not give rise to the application of guarantees in criminal proceedings such as the presumption of innocence. It also considered that the application of the measure in the case under examination, based on the information provided by the police of the appellant's unlawful conduct at sports events, had been justified. It therefore dismissed the constitutional complaint.

41. In a constitutionality review of the exclusion measure under section 34a of the Act (proportionality of the restriction introduced by the measure on other constitutional rights), in case U-I-2186/2008, 29 May 2012, the Constitutional Court held as follows:

"... [T]he Constitutional Court finds that [the measure in question] is not a protective measure like one of the sanctions under the minor offences or criminal law but rather a *sui generis* preventive measure ... the application of which is defined in the European legal space.

The same follows from the fact that the measure in question is not listed as one of the protective measures under the Act since its purpose is different: the prevention of possible unlawful conduct of a person for whom there is information of previous unlawful conduct.

...

The legitimate aim of section 34a of the Act clearly and undoubtedly follows from the text: the prevention of unlawful conduct of a person for whom there is information of previous unlawful conduct [at sports events]. In particular, such a person breaches the peace and public order and endangers the safety of others and prevents other spectators from following sports events peacefully and in an unobstructed manner.

...

In view of the legitimate aim [of the measure in question], interfering with the rights of an individual in a situation where it has been undoubtedly established that a person has endangered constitutional values, such as respect for the rights and freedoms of others, the law and public morals and health, the Constitutional Court finds that the public interest and the rights of others to follow sports events in an unobstructed manner and safely outweigh the individual interests [of the person in respect of whom the measure has been applied]. Thus the preventive measure in question, in the Constitutional Court's view, is proportionate to the legitimate aim pursued."

C. Relevant international materials

42. The most important international instrument at European level on the issue of spectator violence is the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120) of 19 August 1985, which entered into force in respect of Croatia on 1 March 1993. It engages the Contracting Parties to take concrete measures to prevent and control spectator violence and misbehaviour at sports events, and provisions in order to identify and prosecute troublemakers.

43. The relevant provision reads as follows:

Article 3 – Measures

"1. The Parties undertake to ensure the formulation and implementation of measures designed to prevent and control violence and misbehaviour by spectators, including in particular:

...

c. to apply or, if need be, to adopt legislation which provides for those found guilty of offences related to violence or misbehaviour by spectators to receive appropriate penalties or, as the case may be, appropriate administrative measures.

...

4. The Parties shall seek to ensure, where necessary by introducing appropriate legislation which contains sanctions for non-compliance or by any other appropriate means, that, where outbreaks of violence and misbehaviour by spectators are to be feared, sports organisations and clubs, together with, where appropriate, stadium owners and public authorities, in accordance with responsibilities defined in domestic law, take practical measures at and within stadia to prevent or control such violence or misbehaviour, including:

...

d. to exclude from or forbid access to matches and stadia, insofar as it is legally possible, known or potential [troublemakers], ..."

44. The body in charge of monitoring the implementation of the Convention in question is the Standing Committee. In its reports on the systems in various countries, it has repeatedly emphasised the importance of exclusion measures as a response to hooliganism. In this context, the Standing Committee's position has been the following (see, for instance, its reports concerning Georgia (T-RV (2014) 25, 15 February 2015, pp. 36-37) and Slovakia (T-RV (2015) 05, 12 December 2015, pp. 43-44):

"European experience evidences that the impact of football-related violence and disorder is usually (though not always) greater than the character of the criminal or administrative offences committed by perpetrators during such incidents. This can pose challenges for the criminal justice and associated administrative arrangements as penalties imposed on conviction are usually based on evidence directly related to an individual (and often minor) offence. As a result, these penalties are often perceived (by the public, police and offenders alike) to be soft and unlikely to deter individuals and groups from seeking confrontation or otherwise misbehaving in connection with football events.

To redress this imbalance, practically all European countries have adopted the practice of supplementing criminal penalties with the imposition of exclusion measures on convicted offenders (often called banning orders or stadium bans). These measures have the impact of prohibiting the individual from attending football matches for a designated period within a minimum and maximum period, say between three and ten years, set out in enabling legislation. European experience evidences that the minimum period needs to be sufficient to: prevent repeat offending; deter misbehaviour generally; and encourage offenders to transform their behaviour in connection with football events. European experience also demonstrates that to be effective, the scope of the exclusion should be designed to incorporate additional conditions designed to prevent repeat misbehaviour outside of stadia and deny access to the football experience generally.

Exclusion measures have proven to be highly effective, especially if they are linked to a judicial or quasi-judicial procedure. The exact character of the measures varies across Europe, usually in accordance with a range of factors, like degree of problem, character of offending behaviour and the criminal, civil and administrative legal opportunities available in each country. Whatever arrangements are put in place, the police need to work closely with the prosecution authorities regarding the imposition of exclusion measures.

There are a number of issues related to the design of effective exclusion measures, including the need to gather and be able to present to the relevant adjudicating body, a convincing array of evidence from all available sources (for example, CCTV, television and social media coverage). Measures that permit such evidence to be produced are likely to be more effective in targeting ringleaders who orchestrate misbehaviour but who may elude arrest and prosecution unless a cumulative array of evidence can demonstrate their culpability."

45. In its assessment of exclusion measures in Croatia, the Standing Committee, following a consultative visit, noted as follows (T-RV (2014) 8, 27 March 2014):

"The Prevention of Disorder at Sports Events Act 2003 (as amended) makes extensive provision empowering the courts to supplement [the] penalties (fines and/or imprisonment) under the Misdemeanour Act or Criminal Code with the imposition of banning orders lasting up to two years or five years respectively. For both categories, the banning order arrangements can include stadium bans, reporting to police stations on match days, geographical restrictions and travel restrictions, including passport surrender. The maximum penalty for non-compliance is one year['s] imprisonment (Article 31d).

The legislation is tough and reinforced by the ability of the prosecuting agency to adduce evidence gathered over a period of time from within Croatia and/or abroad which is intended to assist the police in targeting and seeking sanctions against persistent offenders. However there does appear to be a significant discrepancy between the number of persons prosecuted for football-related offences and the number of banning orders imposed. Given that European experience evidences that exclusion is the most effective means for deterring football-related misbehaviour and repeat offending, this apparent discrepancy inevitably featured in discussions with the police and governmental representatives.

The police, governmental and football agencies share frustrations regarding this matter and offered a number of partial explanations including: variable willingness of the courts to impose banning orders (and associated preventative conditions); difficulties in engaging in meaningful dialogue with the judicial authorities as a result of the "independence of the judiciary" dynamic; and the reported practice of risk group leaders using younger supporters to misbehave on their behalf. These issues reflect widespread experience across Europe and are by no means unique to Croatia.

...

Recommendation 33 - the Croatian authorities should continue to accord a high priority to making the exclusion arrangements more effective through developing a shared understanding with the prosecuting and judicial authorities regarding the importance of judicially imposed banning orders ..."

46. On 1 November 2017 the Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events (CETS No.218) came into force (but is still not ratified by Croatia). It is intended to build on the 1985 Convention on Spectator Violence. In the relevant part, Article 10 provides as follows:

Article 10 – Prevention and sanctioning of offending behaviour

"1. The Parties shall take all possible measures to reduce the risk of individuals or groups participating in, or organising incidents of violence or disorder.

2. The Parties shall, in accordance with national and international law, ensure that effective exclusion arrangements, appropriate to the character and location of risk, are in place to deter and prevent incidents of violence or disorder.

3. The Parties shall, in accordance with national and international law, co-operate in seeking to ensure that individuals committing offences abroad receive appropriate sanctions, either in the country where the offence is committed or in their country of residence or citizenship.

4. Where appropriate, and in accordance with national and international law, the Parties shall consider empowering the judicial or administrative authorities

responsible to impose sanctions on individuals who have caused or contributed to incidents of football-related violence and/or disorder, with the possibility of imposing restrictions on travel to football events held in another country."

47. In a consultative visit to Greece in connection with the measures provided for under the new Convention, the Standing Committee interpreted the above-cited Article 10 in the following manner:

"Intent: The aim of Article 10 is to oblige all States to review its existing arrangements for preventing and sanctioning persons who act in a violent or other criminal way in connection with football events, notably in respect of ensuring that individuals committing offences are subject to effective measures excluding them from the football experience.

Compliance: European experience evidences the importance of effective exclusion in preventing and tackling football related violence, and facilitating stadium safety management arrangements.

Exclusion should be seen as a preventative measure, rather than a penalty for wrongdoing which is the function of sentencing on conviction of a criminal or administrative offence, and there are many varied exclusion options in place across Europe which enjoy different levels of success. ..."

D. European Union law

48. The Council of the European Union adopted a resolution on 17 November 2003 on the use by member States of bans on access to venues of football matches with an international dimension (2003/C 281/01) inviting member States to examine the possibility of introducing provisions establishing a means of banning individuals previously found guilty of violent conduct at football matches from stadiums at which football matches are to be held. It also invited member States to consider the possibility of taking appropriate steps to ensure that the orders issued domestically were also extended to cover certain football matches held in other member States and take into account orders issued by other member States. The Council Resolution also invited member States to supplement the banning orders with penalties for non-compliance in order to ensure their effective compliance.

49. The requirements flowing from the above-cited resolution were reiterated in a comprehensive set of requirements provided for in a resolution adopted on 3 June 2010 concerning an updated handbook with recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension, in which at least one member State is involved (2010/C 165/01).

E. Relevant comparative law and practice

50. In the legal system of England and Wales, banning orders prohibiting an individual from attending football matches exist as a measure applied on conviction of an offence (section 14A of the Football Spectators Act 1989 as amended by the Football (Disorder) Act 2000) and on a complaint by the police irrespective of whether there has been a conviction (section 14B of the cited Act). The latter measure may be applied in respect of any person who has at any time caused or contributed to any violence or disorder in the United Kingdom or elsewhere and it the relevant court is satisfied that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches. In addition to the exclusion from sports events, the ban includes an obligation on the person to report to a police station and surrender his or her passport. The minimum period of an order made under section 14B is two years and the maximum is three years.

51. In litigation before the UK courts over the application of the banning orders under sections 14A and 14B, it was considered that the measure in question did not involve the application of a "penalty" and that the relevant proceedings leading to the application of the order under section 14B were not criminal (*Gough and Smith v. Chief Constable of Derbyshire* [2001] EWHC Admin 554; and [2002] EWCA Civ 351).

52. With regard to the question of whether the nature of a banning order concerned the application of a "penalty" within the meaning of Article 7 of the Convention, Laws LJ for the Divisional Court held as follows:

> "42 In my judgment it is plain that a football banning order, whether made under s.14A or s.14B, is not a penalty within the autonomous sense of the term for the purposes of Art. 7.
>
> (1) In my judgment it is no part at all of the purpose of any such order to inflict punishment. The fact that it imposes a detriment on its recipient no more demonstrates that it possesses a punitive element than in the case of a *Mareva* injunction [on preventing the other party from disposing of assets outside the country]. The purpose is to protect the public, here and abroad, from the evil of football violence and the threat of it. So much is plain from the whole scheme, but in particular the preamble to the 1989 Act and the condition "that there are reasonable grounds to believe that making a banning order would help to prevent violence or disorder at or in connection with any regulated football matches": ss.14A(2), 14B(4)(b).
>
> (2) The order is not made as part of the process of distributive criminal justice. Under s.14B there is no requirement of a criminal conviction, so that the *Welch [v. the United Kingdom*, 9 February 1995, Series A no. 307-A] starting-point is not met. In s.14A, the existence of a relevant conviction is in my judgment no more than a gateway criterion for the making of the order, equivalent to the provision in s.14B(4)(a) where no conviction is involved. S.14A(4)(a) actually *contrasts* the banning order with the sentence imposed for the relevant offence.
>
> (3) (Plainly this overlaps with (2).) In other more detailed respects the order's characterisation under national law tells against its being treated as a penalty. I have in

mind the provisions relating to the alteration of requirements imposed (s.14G); the power to terminate the order in light of all the circumstances (s.14H); the provision in s.14J which treats breach of the order's requirements as a separate criminal offence, rather than a default for which a penalty is fixed when the order is made: cf. the Commission's reasoning in *Ibbotson* [*v. the United Kingdom*, no. 40146/98, Commission decision of 21 October 1998, unreported]; and all the regimes established by ss.19-21B. Ss.19-21 in particular provide for pragmatic administrative measures, whose good sense is plain but which by their nature are not about or within the ordinary framework of criminal justice.

(4) As for the orders' severity, I would accept that the restrictions they impose are more than trivial; and under the 1989 Act they are potentially more burdensome than previously. How harshly they might bear on any individual must, I would have thought, be largely subjective. However that may be, it is clear from the Strasbourg jurisprudence, not least *Welch* itself, that severity alone cannot be decisive; and in my judgment the burdens or detriments involved cannot conceivably confer the status of penalty on banning orders if otherwise they do not possess it, which in my judgment plainly they do not. ...

43 For these reasons I would hold that banning orders under ss.14A and 14B of the 1989 Act do not constitute penalties within the meaning of Art. 7 ECHR. I would have come to the same conclusion in relation to s.14A even had I not been of the clear view that the result must be the same as between the two sections ..."

53. Following an appeal against the above judgment, Lord Phillips MR gave the judgment of the Court of Appeal (Civil Division), in which he held as follows:

"Laws L.J. gave detailed consideration to the question of whether banning orders were 'penalties' in relation to submissions made on behalf of an appellant who has not appealed to us, that Article 7 of the Convention had been violated. Laws L.J. held that banning orders were not penalties. We endorse his conclusion for the reasons that he gave. We also reject the submission that section 14B proceedings are criminal. They neither require proof that a criminal offence has been committed, nor involve the imposition of a penalty. We find that the proceedings that led to the imposition of banning orders were civil in character."

54. A similar exclusion measure exists in the Italian legal system (DASPO), which was introduced by Act no. 401 of 13 December 1989, with further amendments. The measure is applied by the police and is considered to be preventive in nature. In addition to the exclusion from sports events, the exclusion order may involve an obligation on the person to report to a police station. It may be applied in respect of anyone who has, within the last five years, been reported or convicted (even if the sentence was not final) for one of the listed offences related to hooliganism (Standing Committee document T-RV (2008) 5, 3 June 2008).

55. In France, exclusion measures are provided for in the Criminal Code. The Code differentiates between judicial banning orders and administrative banning orders. Judicial banning orders can last up to five years, and are imposed by the court on conviction of an offence committed in a stadium or related to a football event. The order obliges the banned person to report to a police station during designated periods. Breach of the order or

non-compliance with a reporting summons is punishable by two years' imprisonment and a fine. Administrative banning orders last up to one year (the maximum period may be extended to twenty-four months if, within the last three years, the person concerned has been the subject of a ban) and are imposed by the prefecture (or in Paris, the police commissioner). The orders restrict the freedom of movement at the venue of a sports event of persons claiming to be supporters of a team or behaving as such, whose presence is likely to give rise to serious disturbances of the peace. The order sets out the precise circumstances of the offending behaviour and the geographical area to which it applies. Non-compliance with the conditions of the order is punishable by six months' imprisonment and a fine (Standing Committee document T-RV (2015) 17, 26 May 2016).

COMPLAINT

56. The applicant complained, under Article 4 of Protocol No. 7 to the Convention, that he had been tried and punished twice for the same conduct, first in the minor offences proceedings on charges of hooliganism and then in the proceedings concerning the application of the exclusion measure prohibiting him from attending sports events.

THE LAW

57. Complaining of a breach of the *ne bis in idem* principle in connection with his first prosecution and conviction in the minor offences proceedings on charges of hooliganism and then in the proceedings concerning the application of the exclusion measure prohibiting him from attending sports events, the applicant relied on Article 4 of Protocol No. 7 to the Convention, which reads as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
>
> 3. No derogation from this Article shall be made under Article 15 of the Convention."

A. The parties' arguments

1. The Government

58. The Government contended that the second set of proceedings against the applicant, in which the exclusion measure had been applied, had not concerned a criminal matter within the meaning of Article 6 of the Convention, nor the application of a penalty within the meaning of Article 7, and thus had not given rise to a *ne bis in idem* issue when combined with the first prosecution against him in the minor offences proceedings for hooliganism.

59. In particular, in the Government's view, it was already clear from the very purpose of section 34a of the Act that it aimed at the prevention of future unlawful behaviour and was not classified as a sanction for unlawful behaviour. With regard to the nature of the measure provided for in section 34a of the Act, the Government pointed out that its application was limited to people considered to be hooligans. Application of this measure was not intended to punish the perpetrators of hooliganism but to ensure that spectators and other participants could participate at sports events safely and in a normal way. The measure in question was not applied as a separate or supplementary sanction to a conviction in minor offences proceedings for hooliganism but in separate proceedings in which it was not possible to apply any supplementary sanction, such as a fine or imprisonment. Moreover, the effects of the measure were sufficiently precise and limited in time.

60. As to the degree of severity of the measure in question, the Government stressed that it was not directly commensurate with a fine or deprivation of liberty, but that would only happen in the event of non-compliance with the measure, for which another set of proceedings would need to be instituted. Moreover, they considered that the effects of the measure were not severe enough to amount to a penalty.

2. The applicant

61. The applicant maintained that he had been prosecuted and convicted twice for the same event of 8 August 2012, first in minor offences proceedings and then in a second set of proceedings when the exclusion measure under section 34a of the Act had been applied in respect of him. In his view, there was no doubt that the measure in question was criminal in nature.

B. The Court's assessment

1. Scope of the case

62. The Court notes that there is no dispute between the parties that the applicant's first conviction for hooliganism by the Zagreb Minor Offences Court on 9 August 2012 amounted to a conviction in "criminal proceedings" for the purposes of Article 4 of Protocol No. 7 (see also *Maresti v. Croatia*, no. 55759/07, §§ 58-61, 25 June 2009, concerning minor offences proceedings in Croatia for breaches of the peace and public order; and, in general, for the "minor" offence of hooliganism, *Šimkus v. Lithuania*, no. 41788/11, §§ 43-45, 13 June 2017). The matter in dispute is whether the two subsequent sets of proceedings concerning the application of the exclusion measure under section 34a of the Act, which took into account and relied on the applicant's conviction of 9 August 2012 (see paragraphs 13-16 and 21-22 above), amounted to the application of a "penalty" in "criminal proceedings" and thus ran counter to Article 4 of Protocol No. 7.

2. General principles

63. In this connection, the Court reiterates that Article 4 of Protocol No. 7, embodying the principle of *ne bis in idem* or double jeopardy, only applies to the trial and/or conviction of a person in "criminal proceedings" (see *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, § 103, ECHR 2016). Accordingly, in the present case, in the absence of any finding that the proceedings for the application of the exclusion measure amounted to a "criminal" prosecution and/or conviction, Article 4 of Protocol No. 7 is not applicable (see *Paksas v. Lithuania* [GC], no. 34932/04, § 68, ECHR 2011 (extracts)).

64. In making that assessment, the Court would stress that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *non bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention. The notion of "penal procedure" in the text of Article 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Articles 6 and 7 of the Convention respectively (see *Sergey Zolotukhin v. Russia* [GC], no. 14939/03, § 52, ECHR 2009, with further references).

65. The Court's established case-law sets out three criteria, commonly known as the "*Engel* criteria" (see *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22), to be considered in determining whether or not there was a "criminal charge" (see *A and B*, cited above,

§ 107). The first criterion is the legal classification of the offence or the relevant measure under national law, the second is the very nature of the offence or the relevant measure and the third is the degree of severity of the "penalty" that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see *Sergey Zolotukhin*, cited above, § 53, and *A and B*, cited above, § 105; see also *Escoubet v. Belgium* [GC], no. 26780/95, § 32, ECHR 1999-VII).

66. The Court will now examine whether, on the basis of the above three *Engel* criteria, the application of the exclusion measure under section 34a of the Act in respect of the applicant amounted to the application of a penalty in "criminal proceedings".

3. Application of these principles in the present case

(a) Legal classification of the measure under national law

67. The domestic legal classification of the exclusion measure under section 34a of the Act is a preventive measure distinct from any penalty that may be applied in criminal or minor offences proceedings. Indeed, despite an explicit indication of its nature in the text of section 34a of the Act, the consistent approach taken by the High Minor Offences Court and the Constitutional Court has been to consider the measure to be a *sui generis* preventive measure and not a penalty (see paragraphs 38-41 above).

68. In these circumstances, given that it is primarily for the domestic courts to interpret national law, the Court will proceed under the assumption that the measure in question is not classified as a "criminal penalty" under national law. Classification in domestic law is not, however, decisive for the purposes of the Convention, having regard to the autonomous and substantive meaning to be given to the term "criminal" charge and penalty (see paragraph 64 above; see also, among many other authorities, *Escoubet*, cited above, § 33, and *Becker v. Austria*, no. 19844/08, § 26, 11 June 2015). The Court must therefore examine the "very nature" of the measure in question.

(b) Very nature of the measure

69. The Court has not so far had an opportunity to examine whether the application of the exclusion measures in the context of suppression and prevention of spectator violence amount to a "criminal charge" against an individual within the autonomous meaning of the Convention (see *Ostendorf v. Germany*, no. 15598/08, § 80, 7 March 2013, where the Court examined the effects of such a measure on the right to liberty under Article 5 § 1 of the Convention). However, such measures, as already noted

above, exist in various forms in national legal systems (see paragraphs 50-55 above) and there is wide support for their introduction and application, as can be seen in the relevant international materials (see paragraphs 44-45, 47 and 49 above).

70. By way of general observation, the Court would note that both in the relevant international materials and comparative law there is a strong emphasis on the preventive nature of the exclusion measures in the context of suppression and prevention of spectator violence (see also, in the context of grounds justifying the deprivation of liberty, *Ostendorf*, cited above, § 80). In some instances, their nature is clearly differentiated from the function which the sentencing of an individual for a criminal or administrative offence might have, with emphasis being placed on ensuring the safety of the public from a threat of violence rather than punishing an individual for his or her previous violent behaviour in the context of sports competitions (see paragraphs 47, 52 and 54 above).

71. However, in some instances, the overlap which may exist between the purely preventive exclusion measures and other similar measures that can be imposed as a sentence in the context of criminal or administrative (minor offences) proceedings is not clearly differentiated in the international materials (see, for instance, paragraphs 44 and 48 above). Indeed, in its assessment of the Croatian legal system, the Standing Committee monitoring the Convention on Spectator Violence made reference only to the exclusion order that can be made in the context of a minor offence or criminal prosecution and conviction, without expressing any views on the nature and meaning of the exclusion measure under section 34a of the Act from the perspective of the measures that need to be implemented under the cited Convention (see paragraph 45 above).

72. For its part, in order to determine the "very nature" of the exclusion measure under section 34a from a Convention point of view, the Court finds it useful to observe the manner in which the Croatian legal system differentiates between the two types of measures (see, for the methodology, *Escoubet*, cited above, § 37).

73. The first type, set out in section 32 of the Act, is a sanction regarded as a "protective measure" that may be imposed in the context of a minor offences or criminal prosecution as a supplementary sanction to a fine or imprisonment. Application of the measure follows the same rules of criminal or minor offences procedure, as the case may be, and, even in terms of the relevant national law, its imposition amounts to a "sanction" following the conclusion of the criminal or minor offences proceedings (see paragraphs 31-33 above).

74. The protective measure under section 32 may be applied in three ways: (i) a ban on attending certain sports competitions in Croatia, with an obligation to report to a police station; (ii) a ban on attending certain sports competitions in Croatia, with an obligation to remain at a police station; and

(iii) a ban on travelling to certain sports competitions abroad, with an obligation to report to a police station and turn in any travel documents. The protective measure under section 32 may be imposed for a period of no less than one year and no more than two years. Failure to comply with the measure may result in a fine or imprisonment (see paragraphs 33 and 37 above).

75. The second form of measure, the application of which gives rise to the applicant's complaints in the present case, is the exclusion measure provided for in section 34a of the Act. As already noted above, this measure is considered by the domestic courts to be a *sui generis* preventive measure and not a sanction (see paragraph 67 above). It may be applied in respect of any person "for whom there is information of previous unlawful conduct when going to, during or when leaving sports competitions". Section 34a thus does not require a conviction nor does it provide that the measure has to be applied in the context of a minor offences or criminal prosecution. It rather states that the measure can be applied by the minor offences court on an application by the police (see paragraph 36 above).

76. The exclusion measure under section 34a involves a ban on attending sports competitions and an obligation on the person concerned to report to a police station when the relevant sports competition is taking place in order to inform the police of his or her whereabouts during the event and the two hours after it ends. Failure to comply with the measure may result in a fine or imprisonment (see paragraphs 33 and 37 above).

77. It follows from the above that there are at least two important distinctive features of the exclusion measure under section 34a when compared to the protective measure under section 32, which undoubtedly amounts to a sanction, even in terms of the relevant domestic law (see paragraph 73 above; see also, for the application of a similar measure in the context of road safety, *Malige v. France*, 23 September 1998, §§ 38-39, *Reports of Judgments and Decisions* 1998-VII).

78. The first distinctive feature is the fact that the exclusion measure under section 34a can be applied independently of a criminal or minor offences prosecution and conviction of an individual. Unlike the measure under section 32, the exclusion measure under section 34a cannot be applied as a supplementary sanction for the commission of an offence, nor can a request for its application be part of the sentencing procedure in the context of a minor offences or criminal prosecution. Moreover, in order to apply the measure, it is not necessary to meet the standard of proof for the conviction of an offence but simply to demonstrate that there is "information of previous unlawful conduct".

79. Thus, unlike the sanctions, which imply, to a greater or lesser degree, retribution and deterrence (see paragraph 28 above), the application of the exclusion measure under section 34a does not pursue any such aim and accordingly falls under the preventive limb of the general aims of the Act, namely to "create an environment which prevents ... improper behaviour, disorder and violence before, during and after a sports competition or sports event..." (see paragraph 30 above). The same finding follows from the case-law of the High Minor Offences Court and the Constitutional Court, which have both considered the measure in question to be a preventive measure aimed at the protection of other spectators and participants at sports events from a threat of violence (see paragraphs 38-41 above).

80. In this context, the Court does not ignore the fact that the application of the measure in the applicant's case followed his conviction in the minor offences proceedings and that it might have been seen by him as a punishment, particularly in view of the fact that he was obliged to report to his nearest police station in the relevant periods.

81. However, as noted above, the exclusion measure operates independently of a minor offences conviction and its application was not a direct consequence of the applicant's conviction as it remained open to the relevant minor offences court to, irrespective of his previous conviction, apply or refuse the application of the measure under section 34a (compare *Becker*, cited above, § 28). His previous conviction therefore merely lends evidentiary support to the determination of whether there was "information of previous unlawful conduct" (see paragraph 78 above). The fact that there was a previous conviction, of course, increased the likelihood of a measure under section 34a being applied but that does not affect the fact that the measure was applied to prevent a future threat of possible violence and not to subject the applicant to a second punishment for the same offence.

82. The same is true for the duty to report to a police station. Although it may be difficult in practice to draw a clear distinction between deterrence, as an element of a penalty, and prevention (see *M. v. Germany*, no. 19359/04, § 130, ECHR 2009), the Court notes that in its request for the application of the measure under section 34a the police relied on the measure's preventive purpose aimed at ensuring the safety of the public from a threat of violence rather than punishing the applicant for his previous conduct (see paragraph 14 above). This, in the Court's view, supports the conclusion that the measure sought and applied in respect of the applicant was chiefly preventive in nature in the sense that it aimed at removing the possibility of violent behaviour for the benefit of public safety (compare *Escoubet*, cited above, § 37) rather than inflicting a retributive or deterrent penalty on the applicant for his previous violent behaviour at sports events.

83. In the Court's case-law, in various other contexts, the absence of a predominantly punitive and deterrent purpose of a measure, which are the elements customarily recognised as the two aspects of a penalty (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 102, ECHR 2003-X; *Sergey Zolotukhin*, cited above, § 55; and *Mihai Toma v. Romania*, no. 1051/06, § 21, 24 January 2012, with further references), and the emphasis on its preventive nature was one of the main indications that the application of the measure in question did not involve the determination of a "criminal charge" within the autonomous meaning of the Convention (see, for instance, *Raimondo v. Italy*, 22 February 1994, § 43, Series A no. 281-A, and *De Tommaso v. Italy* [GC], no. 43395/09, § 143, ECHR 2017 (extracts), concerning the special supervision of those belonging to "mafia-type" groups; *Escoubet*, cited above, §§ 36-37, and *Becker*, cited above, § 27, concerning the withdrawal of a driving licence; *R v. the United Kingdom* (dec.), no. 33506/05, 4 January 2007, concerning the application of the warning scheme for sex offenders; and *Palmén v. Sweden* (dec.), no. 38292/15, § 26, 22 March 2016, concerning the revocation of a weapons licence).

84. In view of the above, the Court considers that the predominantly preventive nature of the exclusion measure under section 34a leads to the conclusion that its application did not amount to the application of a "criminal penalty" within the autonomous meaning of the Convention.

85. The second distinctive feature of the exclusion measure under section 34a, when compared to the protective measure as a sanction under section 32 of the Act, relates to its duration and the manner of its application.

86. The measure under section 32 can be imposed for a minimum period of one year, which is the same as the maximum period for which the measure under section 34a can be imposed (see paragraphs 33 and 36 above). Moreover, unlike the measure under section 32, the measure under section 34a does not require the confiscation of travel documents or an individual to remain at a police station during sports events. The measure under section 34a is limited to reporting to a police station (see paragraph 36 above). In the Court's view, these important differences also support its finding above as to the distinct nature of the protective measure under section 32 of the Act, as a sanction, and the exclusion measure under section 34a as a *sui generis* preventive measure in domestic law which does not have a penal connotation.

87. It is true that in the first application of the exclusion measure the applicant was erroneously ordered to hand in his travel documents, which is not required under section 34a. However, this was rectified in the second application of the exclusion measure in which such an order was not made (see paragraphs 15 and 2 above).

88. In the light of the above considerations, the Court does not find that the "very nature" of the exclusion measure under section 34a was "criminal" within the autonomous meaning of the Convention. It remains to be seen whether the degree of severity of the measure nevertheless suggests that the applicant was subject to a criminal charge (see paragraph 65 above).

(c) Degree of severity of the measure

89. The Court notes at the outset that the application of the exclusion measure under section 34a did not involve the imposition of fine or deprivation of liberty, which is normally an indication of a criminal sanction (see *Sergey Zolotukhin*, cited above, § 56; see also, *M. v. Germany*, cited above, §§ 126-129 and 132). It is true that non-compliance with the exclusion measure may result in a fine and imprisonment but that would not be a direct consequence. Such non-compliance is treated as a separate minor offence and an entirely new set of minor offences proceedings would be needed in order to impose any of those sanctions (see paragraph 37 above). According to the Court's case-law, such an indirect ability to apply the sanctions is not sufficient to determine the measure as "criminal" (see *Escoubet*, cited above, § 38).

90. The Court notes that it has previously found in different contexts that measures involving even more substantial effects on an applicant than those applied in the present case were found not to amount to a "criminal" penalty. For instance, the application of measures of special supervision of those belonging to "mafia-type" groups, which involved, among other things, an obligation to report once a week to the police, was not considered to amount to a "criminal" sanction within the autonomous meaning of the Convention (see *De Tommaso*, cited above, § 143). Moreover, the refusal to grant a residence permit to an individual following his conviction, thus restricting his possibility to live in a country, was not considered to amount to a criminal punishment within the meaning of Article 4 of Protocol No. 7 (see *Davydov v. Estonia* (dec.), no. 16387/03, 31 May 2005).

(d) Conclusion

91. In view of the above findings, the Court does not consider that the application of the exclusion measure under section 34a of the Act in respect of the applicant involved the determination of a "criminal charge". It therefore concludes that Article 4 of Protocol No. 7 does not apply in the present case.

92. It follows that the applicant's complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 8 November 2018.

Abel Campos
Registrar

Linos-Alexandre Sicilianos
President