PRE-TRIAL DETENTION

National Practice and International Standards

Analysis of pre-trial detention decisions delivered by National Basic Courts in the period of April 2004 to June 2007

Spillover Monitor Mission to Skopje

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Preface

The Rule of Law Department of the OSCE Spillover Monitor Mission to Skopje became interested in the issue of pre-trial detention because of the many complaints received from families of defendants, defense lawyers and defendants. The issue was also raised by judges and prosecutors, many of whom agreed that there was a problem in that too many people were being detained pre-trial and courts were reluctant to use the many alternatives to pre-trial detention contained in the law. The ROL Department also took note of the comments made in the Committee for Prevention of Torture reports and the many press reports about people being held pre-trial in cases where it did not appear justified.

In the course of January and February 2008 the Rule of Law Department within the OSCE Spillover Monitor Mission to Skopje analyzed detention decisions made by National basic courts. The decisions subject to this analysis were delivered by 15 courts from different geographical and demographical regions in the country, in the period between April 2004 and June 2007 (included). The decisions were provided by the courts after a letter was sent to the court Presidents, asking for access to copies of all court decisions where pre-trial detention was ordered in the afore-mentioned period. As a result of the request the RoL Department succeeded to acquire decisions[1] from BC Bitola, BC Gostivar, BC Tetovo, BC Gevgelija, BC Skopje 1[2], BC Ohrid, BC Prilep, BC Kavadarci, BC Kocani, BC Kicevo, BC Strumica, BC Kumanovo[3], BC Stip, BC Veles, and BC Struga. Most of the decisions were sent to us by mail or were collected by OSCE staff after being photocopied by the court. In no case was any OSCE staff allowed access to the court archives.

The purpose of the Analysis was to establish whether national court detention decisions are delivered in accordance with the country's Law on Criminal Procedure (LCP) and relevant international standards such as the European Convention on Human Rights and Fundamental Freedoms, and the UN Covenant on Civil and Political Rights. The detention orders were examined paying special attention to the reasonable suspicion and relevant reasoning provided by judges in order to support the grounds upon which a person is detained. The frequency of imposing alternatives to detention was also observed and relevant conclusions were reached. The findings were then compared with relevant case law of the European Court for Human Rights. A total of 595 first instance (Ki.#) decisions were analyzed, along with 62 (Ks.#) second instance decisions..

This paper gives a brief overview of the widely accepted standards for imposing detention and its alternatives, and then describes the findings from the analyzed detention decisions. At the end conclusions and recommendations are provided.

[1] Most of the courts provided us with copies of initial detention decisions (Ki.#) delivered in first instance by an investigating judge. Only few courts (BC, Skopje, BC Kavadarci, BC Strumica, BC Stip and BC Ohrid provided us with relevant (Ks.#) decisions upon appeals or ex-officio examination for continuation or termination of detention. Therefore, subject to this analysis were mostly (Ki.#) decisions.

[2] Due to the large number of available cases where detention is imposed (360 cases), BC Skopje provided us with decisions of only 80 cases (112 including the second instance decisions).

[3] BC Kumanovo provided us with (Ks.#) decisions only. Therefore these decisions were exempted from the analysis.

Content

Standards for Imposing Pre-trial Detention

A.
Domestic Law

Detention can be imposed solely under the conditions set in the Law on Criminal Procedure (LCP)[4].

The opportunity of National courts to impose "detention" is granted in Article 185 of the LCP along with the remaining "Measures for ensuring the presence of the accused and successful conduct of the criminal procedure", where in paragraph 2 it is stipulated that

> *"While deciding which of the measures will be applied, the court shall bare in mind the conditions for applying specific measures, taking into consideration that a more severe measure shall not be imposed if the goal could be achieved with a mitigated one…."*

Under domestic law, it is only the Public Prosecutors that can request detention to be imposed. The investigating judge cannot initiate a proposal for detention but only decide whether to accept or deny the prosecutors' request.

In Article 199 of the same Law there are strict conditions that the court must adhere to in cases where a decision to impose detention has been taken. Namely, the first condition is the existence of reasonable suspicion that the accused has committed the crime.

Once the existence of reasonable suspicion has been established, the Court may impose detention against the accused under the following legal grounds:

> i) if s/he hides, if his identity cannot be established or if there are other circumstances emphasising danger of escape;
> ii) if there is justified fear that s/he will destroy the traces of the crime or if certain circumstances point out that s/he will obstruct the investigation influencing the witnesses and collaborators;
> iii) if specific circumstances justify the fear that s/he will commit crime again, or s/he will complete the attempted crime or will commit crime with which he threatens.

(2) In case of item 1, paragraph 1 of this Article the pre- trial detention determined due to the failure of detecting the identity of the person, lasts until his identity is revealed. In case of item 2, paragraph 1 of this Article the pre- trial detention will be interrupted as soon as the evidence for the pre- trial detention are determined.

Article 200, paragraph 2 sets the essential elements of a detention order issued by a National court which are:

1. the name of the person deprived of his freedom;
2. the crime for which he is accused of;
3. the *legal grounds for pre-trial detention*;
4. the name of the institution in which pre-trial detention is carried out;
5. instruction on the right to appeal;
6. a brief reasoning, *with special (separate) reasoning on the grounds* under which pre-trial detention is imposed;
7. an official seal
8. the signature of the judge who has determined the pre-trial detention.

[4] Law on Criminal Procedure – consolidated text, OG (15/2005)

Article 198(2), explaining the exceptional nature of "Detention" stipulates the following:

> *"The duration of detention must be kept to the shortest necessary time. It is an obligation for all institutions that are involved in the criminal procedure, as well as all institutions that provide legal assistance to act with special urgency if the accused is in detention".*

Alternatives to detention

The LCP stipulates alternative measures to pre-trial detention in articles 189-197. According to the same law, alternative measures are available to courts considering whether or not to hold an accused in pre-trial detention. These alternative measures include:

- Promise (an oath) by the accused that he will not leave his temporary and his permanent residence. This measure can be combined with:
  - forbiddance to visit specific place or territory
  - forbiddance to be near a person or maintain contacts with that person
    - *In such cases the court shall bring a decision with details on the distance, place or territory, or data on the person(s) that the accused is forbidden to contact;*
  - forbiddance for the accused to undertake work-related activities that are connected to the criminal act
    - *This will be described in detail in a decision by the court;*
- Surety, (bail, guarantee);
- House arrest;
- Forbiddance from leaving the temporary and the permanent place of residence;
- Obligation of the accused to occasionally appear in front of an official or the competent state body;
- Temporary withdrawal of a travel or other kind of document for crossing the state border i.e. forbiddance for its issuing.

When deciding which measure to apply, the court should not apply more severe measures, if the same aim can be achieved with a more mitigated measure. The court can also apply several measures at the same time except in cases where the court orders pre-trial detention (article 185 (2) LCP).

It can be concluded that the provisions of the Domestic Law regulating detention are consistent with the International Human Rights Standards. The Law on Criminal Procedure, as the ECHR regards (pre-trial) detention as the most severe measure of ensuring the presence of the accused and successful conduct of the criminal procedure, not to be invoked when a less severe measure would achieve the same purpose. Accordingly, pre-trial detention is imposed only under strictly determined conditions and must be kept to the shortest time necessary while all agencies participating in the criminal proceedings have a duty to proceed with special urgency if the accused is being held in detention.

B.
International Standards

''Judges should constantly keep in mind that in order for the guarantee of liberty to be meaningful, any deprivation of it should always be exceptional, objectively justified and of no longer duration than absolutely necessary."[5]

The authority to apply pre-trial detention is restricted by the presumption of innocence and the right to liberty and security of the person. The right to presumption of innocence at the international level was first proclaimed in Article 3 of the Universal Declaration of Human Rights (1948). It has been elaborated in several international documents including the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR). These documents have binding effect on their member states, which includes the country by virtue of Article 118 of the Constitution which provides that "*international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law."*[6]

In line with the previous, the relevant Case Law of the European Court for Human Rights (ECtHR) presents a valid source of national law, since the Court has the right to interpret the Convention and decide in individual cases in accordance with the Convention.

The relevant provisions of the ICCPR and the ECHR relating to pre-trial detention are as follows:

> Article 9, ICCPR:
>
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> …
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. **It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.**

Article 9 of the ICCPR does not shed much light on the exact scope and content of the right to liberty and security of the person. However, it does provide that pre-trial detention shall not be arbitrary, shall be prescribed by law and shall be used as an exception not the rule in criminal justice. This tells us that the circumstances in which it can be used must be limited and set out in legislation. In its General Comment No. 8 the Human Rights Committee confirms that pre-trial detention "should be an exception and as short as possible".

[5] Macovei, Monica: The right to liberty and security of the person; A guide to the implementation of Article 5 of the European Convention in Human Rights. Human Rights Handbook, No 5, Council of Europe. (2002) Page 6. (http://www.humanrights.coe.int)
[6] Constitution of January 2006

Article 5, ECHR embodies a key element in protection of an individual's personal liberty and security, which are the essential conditions for everyone to enjoy. This article of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of an individual (see, for example, its link with Articles 2 and 3 in disappearance cases *e.g. Kurt v. Turkey*, judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, § 123) and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty.

Article 5 of the Convention defines detention as an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.

Article 5 states in part that:

> 1. Everyone has the right to liberty and security of person.[7] No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> …
> **c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;**
> …
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 5(3): *Pre-trial detention granted by competent judicial authority; Trial within a reasonable time or release pending trial; Considering alternatives to detention;*

This provision is applicable from the arrest of a person until his/her acquittal or conviction.

The primary task of the judge is to assess whether the initial deprivation of liberty was lawful, i.e. is it in accordance with the law and is not arbitrary[8]. Also, arrest or detention must be based on a *"reasonable suspicion"* of a person having committed a crime.

For pre-trial detention to continue past the questioning phase (i.e. during the investigative stage) the suspect must be brought before a judge "promptly". The purpose of this provision is:

a) to reduce the amount of time a person's liberty is interfered with;
b) to avoid abuse of the right of law enforcement authorities to detain suspects;
c) to allow judicial supervision over the lawfulness of the original arrest;

[7] I.e., nobody should be deprived of their liberty in the arbitrary manner. In ***Adler and Bivas v. Federal Republic of Germany*** the ECtHR held that "The term "liberty" and "security" must be read as a whole and, in view of its context, as referring only to physical liberty and security. "Liberty of person" in Article 5(1) thus means freedom from arrest and detention and "security of person" the protection against arbitrary interference with this liberty." However, the right to liberty and security is not an absolute rights but a "qualified right" and it can be limited by the state authorities under certain circumstances. The Constitution of thecountry clearly encapsulates this right, albeit in different terms in its Article 12 - *"The liberty of the individual is inviolable."*

[8] Arrest and detention is considered arbitrary, if it does not comply with the purpose of Article 5. Arbitrariness has been understood as deprivation of liberty which although ordered with the right motivation has not been proportionate to the purpose of Article 5, so the purpose may have been achieved with measures other than deprivation of liberty.

d) *to allow for a reasoned, judicial decision to be made on whether the suspect will be remain out of custody pending trial, whether pre-trial detention will be imposed by the court or whether alternative measures to pre-trial detention shall be ordered.*

For a judicial decision granting pre-trial detention to be lawful, in addition to the requirement that there be a reasonable suspicion that a crime was committed, according to the ECtHR case-law there must also be *objective evidence* that the suspect will:

- **Abscond** and thus not be available for trial. Factors to be taken into consideration include, history of flight in other criminal cases, specific evidence of plans to flee, links (family, property) with another country which may make flight easier, absence of links with the country in which the crime was committed, character, morals, status & responsibilities of the person concerned.

- **Interfere with the course of justice** (i.e. destroy evidence, intimidate witnesses, collude with anyone involved in the case as to how they will respond to the proceedings, etc.) This ground gradually loses its justification as the investigation continues and it will generally not be an acceptable justification for pre-trial detention when the investigation is completed.

- **Continue to commit the alleged crime**; applicable in cases of serious crime where it is plausible the offence may be committed if the individual is released and where there are circumstances which might facilitate his re-offending. Past convictions as well as the history and personality of the person concerned must be taken into account.

- **Disturb public order**; only applicable in certain cases, i.e. high profile political cases or cases where the public may take the law into its own hands because of the nature of the crime.

ECtHR case-law requires that judicial authorities indicate reasons in their pre-trial decisions. A reasoned decision allows public scrutiny of the administration of justice and fulfils the demand of legal certainty. A lack of proper justification of the detention decisions by all instance courts is not in line with European standards and violates article 5(3) of ECHR. (For example, paraphrasing of the procedural provisions or use of standard phrases in pre-trial decisions will not be considered as proper justification).

ECtHR holds that the detention of the accused may be continued during the whole of the pre-trial period if there are "relevant" and "sufficient" grounds of the kind listed above that justify it. However, even though such grounds continue to exist Article 5(3) may still be infringed if the accused's detention is prolonged beyond a reasonable time because the proceedings have not been conducted with the required expediency.

i. Relevant ECtHR case-law Standards

In this section, the relevant standards regarding Article 5(3) that have been established under the Court's case-law will be presented. These standards should be considered as an indelible part of the European Convention of Human Rights.

i. Presumption of innocence in favour of release pending trial

The presumption is in favour of release. As established in *Neumeister v. Austria* (judgment of 27 June 1968, Series A no. 8, p.37, § 4), the second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable (*McKay v. the United Kingdom [GC], no. 543/03, § 41, ECHR 2006-...).*

ii. Individual approach to detention; a genuine requirement of public interest

Under the Court's case-law, the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty *(see, among other authorities, W. v. Switzerland, judgment of 26 January 1993, Series A no. 254-A, p. 15, § 30, and Pantano v. Italy, no. 60851/00, § 66, 6 November 2003).*

iii. Persistence of reasonable suspicion supported by "relevant" and "sufficient" grounds for detaining a person; Special diligence by the national authorities in the conduct of proceedings;

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings *(see Ilijkov v. Bulgaria, no. 33977/96, § 77, 26 July 2001; I.A. v. France, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, pp. 2978-79, § 102; Contrada v. Italy, judgment of 24 August 1998, Reports 1998-V, p. 2185, § 54).*

"… any period of detention on remand, whatever its length, requires appropriate motivation by the competent national authorities which, moreover, are obliged to display "special diligence" in the conduct of the proceedings" *(see Jablonski v. Poland, no. 33492/96, § 80, 21 December 2000).*

iv. The national authorities must ensure that a detention case does not exceed a reasonable time. Courts must examine all facts arguing for or against release pending trial and insert them in their decisions

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of a public interest justifying a departure from the rule of respect for individual liberty, and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions, and any well-documented facts stated by the applicant in his appeals, that the Court is called upon to decide whether or not there

has been a violation of this aspect of Article 5 § 3 *(see Labita v. Italy [GC], no. 26772/95, § 152, ECHR 2000-IV).*

v. Any period of detention must be justified; the reasons that justify the detention must not be "general and abstract" but "relevant and sufficient"

Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be **convincingly demonstrated** by the authorities *(Belchev v. Bulgaria, no. 39270/98, § 82, 8 April 2004).*

In line with the previous standard, the ECtHR states that: "A person charged with an offence must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify the continued detention *(see, as a classic authority, Wemhoff v. Germany, judgment of 27 June 1968, Series A no. 7, pp. 24-25, § 12; Yagci and Sargin v. Turkey, judgment of 8 June 1995, Series A no. 319-A, § 52)*
Arguments for and against release must not be "general and abstract" *(see Clooth v. Belgium, judgment of 12 December 1991, Series A no. 225, § 44).*

A further function of a reasoned decision is to demonstrate to the parties that they have been heard. Moreover, a reasoned decision affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice *(Suominen v. Finland, no. 37801/97, § 37, 1 July 2003).*

vi. The courts should always bear the burden of proof and not the detained person

The Court reiterates ... that shifting the burden of proof to the detained person in matters of deprivation of liberty is tantamount to overturning the rule of Article 5 of the Convention *(see Ilijkov v. Bulgaria, no. 33977/96, §§ 84 and 85, 26 July 2001).*

vii. Courts must first examine alternatives to detention

Finally, the Court would also emphasise that, under Article 5 § 3, the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his or her appearance at trial. Indeed, that provision proclaims not only the right to "trial within a reasonable time or to release pending trial" but also lays down that "release may be conditioned by guarantees to appear for trial" *(see, amongst others, Kaszczyniec v. Poland, no. 59526/00, § 57, 22 May 2007).*

Analysis of Detention Orders Issued by National Courts

A.
General observations

The analysis of the detention orders supplied by the courts reveals that from a technical and formal aspect, decisions are generally well structured and in accordance with the specifications from Article 200 paragraph 2 of the LCP. Detention orders are by rule incorporated in *decisions for opening/expanding the investigation* where the court articulates the reasonable suspicion that the accused has committed the criminal acts. The titles of criminal acts are regularly inserted along with the respective Article numbers from the Criminal Code. In the vast majority of cases the court clearly states the grounds under which detention is imposed.

All three legal grounds for detention listed in Article 199(1) of the LCP are applied. In most cases more than one ground is stated as the justification for detention and in sometimes all three grounds are cited. The grounds most frequently used by courts are "risk of interference with the course of justice" and "risk of absconding". The third available ground "repetition, finishing or committing a new crime" is less used and in most cases in combination with other legal grounds. Several courts, among which the largest one, BC Skopje 1, have the tendency to (in almost all cases) impose detention under all 3 available grounds for detention.

Lack of uniformity in applying the same articles (numbers of articles) from the LCP is noted. Namely, different judges (even in the same court) use different numbers of articles when drafting detention decisions. Therefore, in a part of the analyzed decisions detention was ordered under the grounds of Article 184 of the LCP and the other part was under Article 199 of the LCP.

In most cases (as a rule) detention is initially set to 30 days, the remainder of decisions initially set to 15 days. However, from the information gathered in some courts detention is terminated earlier than the initially prescribed length.

It should be noted that most detention decisions lack specific articualble facts given by the judge in respect to the reasoning behind their decision, hence giving the impression that particular attention has been paid only to the form and procedure and not substance.

Several problematic practices that repeatedly appear in court detention orders country-wide were identified in respect to:

i. the failure to provide support for the finding of reasonable suspicion;
ii. lack of adequate reasoning of the legal grounds for detention;
iii. failure to consider the applicability of alternative measures;

The analysis shows that in nearly 87% of the decisions, 516 out of a total of 595 initial (Ki.#) detention decisions delivered in first instance by the investigating judge, there are certain deficiencies noted in the part where the court is required to provide relevant reasoning to support the grounds for detaining a person.

Out of 62 (KS.#) detention decisions delivered in second instance by the criminal panel of judges, upon appeals or regular examination of the grounds for detention, the majority contained the same or similar vague reasoning as the first instance decisions.

Another observation is that non-custodial measures have a rather limited scope of application – pre-trial custody is used as a rule rather than exception. Although the LCP provides a wide range of alternatives to detention they are not as a rule considered by courts prior to applying pre-trial detention. However, the courts do use "bail" and "seizure of travel documents" with an "obligation to report before a competent official".

As regards the issue of lack of justification of detention decisions, it may be noted that there is a line of well reasoned decisions in cases where there is evidence that:

- the accused has absconded, or has threatened to do so;
- have directly or indirectly threatened witnesses or victims, or there are specific circumstances that make this credible;
- have threatened to finish the attempted crime or commit a new one;
- live in the same household with the victim (mostly in cases involving sexual abuse and rape), etc.

In only one case the court rejects the initial prosecutorial request for detention on the basis of insufficient reasoning provided in the request for detention.

In addition, it was noted that while considering whether to apply detention in cases where two or more accused are involved, courts fail to provide individual examination of the subjective circumstances for each of the accused separately. Contrary to this, detention is imposed for all accused under the same circumstances.

B.
Specific results of the analysis of the examined court decisions

i. Reasonable suspicion

Detention decisions regularly contain paragraphs that claim there is reasonable suspicion that the accused brought before the court has committed the crime. However, there are cases where courts fail to specify the connection between the accused and the crime that is subject to the specific case. As a general rule these orders simply state that based on the case files (essentially the documentation from the Police) and the statement of the accused there is reasonable suspicion that s/he committed the criminal act. Additional arguments justifying the connection between the accused and the actual crime subject to the court proceedings are not available. Instead of providing explanation on how the specific circumstances warranted the suspect's deprivation of liberty (and bringing him before the court) the investigating judge would merely paraphrase the procedural provisions or use standard phrases.

The failure to specify the existence of reasonable suspicion is usually noted in cases where a person is accused for crimes such as Aggravated Theft (Art.236), where material damages are caused and there are no eye-witnesses. For example, in a case before BC Bitola (Ki.83/07), two persons are accused of breaking and entry and stealing IT equipment form a store in Bitola. In the reasoning of the decision the court states the following:

> "*Proceeding upon the request for investigation the investigating judge has heard the accused X.X. and has delivered a decision for commencing an investigation since it considers that upon his statement and the documentation submitted within the case files there is sufficient reasonable suspicion that he has committed the crime he is accused for" (unofficial translation).* There is no part of the decision explaining the connection between the accused and the crime committed.

In this regard, it is a well established ECtHR principle that:

> *"reasonable suspicion presupposes that the existence of facts or information can satisfy the objective observer in the sense that the person concerned may have committed an offence". (Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, pp. 16-17, § 32).*

In addition, ECtHR states that: "*the fact that a person has committed a similar offence in the past is not enough to meet the requirement of "reasonable suspicion" on its own."*

ii. Insufficient reasoning of the legal grounds for detention

The following deficiencies were identified in the reasoning on the grounds for detention:

- Simply quoting or paraphrasing the provisions of the LCP

The most common reasoning identified in the examined decisions is:

> "The court orders detention for the accused, since there are reasons that without any doubt show that if the accused is allowed to organize the defence out of custody s/he may hide or abscond…or interfere with investigation by influencing witnesses… or may repeat the crime/finish the attempted crime" *(unofficial translation)*

This or similarly paraphrased formulations are combined depending on the legal grounds cited in the decision. Interestingly, in some detention orders the full formulation is used even if a person is detained under only one or two of the available legal grounds. This fact points to the possibility that the alleged copy-paste method is used for drafting detention decisions.

- The severity of the sentence, nature of the crime, amount of damage caused, the circumstances under which the crime has been committed

In a significant number of cases the courts use another, enriched version of the previous formulation. Here additional supporting arguments to the risk of absconding are provided:

> "Taking into consideration the proposal for imposing the measure detention by the Public Prosecutor, the Investigating Judge finds the proposal grounded, considering the circumstances in which the crime(s) was committed, the nature and character of the crime, amount of appropriated benefit and damage caused, the severity of the sentence for the specific crime(s), all these pointing to the risk of absconding of the accused if they organize the defence out of custody, also the persistence of grounded fear that s/he will interfere with the investigation by influencing witnesses and eventually other co-perpetrators (accomplices), and also shall repeat the criminal acts/ or finish the commenced crime/ or repeat a new crime" *(unofficial translation)*

This formulation is used by courts to justify all three legal grounds for detaining the accused. It can be noticed that the risk of absconding is justified with several arguments, whereas the remaining "interference with investigation and influencing witnesses" and "re-offending" are simply reasoned by paraphrasing the law. However, even these additional arguments provide only general speculations of what might be the reasons for detaining a person, not providing *relevant or sufficient reasoning* in relation to the individual case.

Sometimes the court even adds the "existence of written evidence (documentation)" that justifies detention. Yet, additional references (or more details) to that evidence are not inserted within the decisions, leaving the reasoning vague.

> In relation to the previous, the ECtHR points out that the danger of an accused's absconding *cannot be gauged solely on the basis of the severity of the sentence risked*. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see, mutatis mutandis, the Letellier judgment previously cited, p. 19, para. 43). *(Yagci and Sargin v. Turkey, ECtHR, 9 June 1995, para. 52)*

Also, the *Judgment of Castravet vs. Moldova, Judgment, 13 March 2007,* shows the ECtHR view on cases where national courts fail to provide sufficient and relevant reasoning:

In this case, the applicant complained under Article 5 of the Convention that his detention on remand was unreasoned …

The circumstances of the case show that on *27 May 2005* the investigating judge of a Moldavian District Court, issued a warrant for his remand in custody for 10 days. The reasons given by the court for issuing the warrant were that:

"The criminal proceedings were instituted in accordance with the law in force. [The applicant] is suspected of having committed *a serious offence* for which the law provides *imprisonment of more than two years;* the evidence submitted to the court was obtained lawfully; the isolation of the suspect from society is necessary; he could abscond from law-enforcement authorities or the court; he could obstruct the finding of truth in the criminal investigation or re-offend".(para. 8)

Followed by this, on 3 June 2005 the same court prolonged the applicant's detention on remand for a further 30 days. The court reasoned that detention was necessary because:

"[the applicant] is suspected of having committed a very serious offence, there is a risk that he may put pressure on witnesses or put himself out of the reach of law-enforcement authorities; and there is a continuing need to isolate him from society".(para 11)

This was the only reasoning provided by the Moldavian Court. No additional arguments to support the speculations in the decision were provided. Therefore, the ECtHR assessment, taking in consideration the relevant principles mentioned afore is as follows:

In the Castravet v. Moldova case: "*…the reasons relied upon by the domestic courts in their decisions to remand the applicant in custody and to prolong his detention were limited to paraphrasing the reasons for detention provided for by the Code of Criminal Procedure, without explaining how they applied in the applicant's case. … (p. 34)*

There has accordingly been a violation of Article 5 § 3 of the Convention in this respect. (p. 36)

In **one of the examined cases** (BC Skopje, Ki.406/06) the investigating judge decided to reject the prosecutor's proposal for detaining several accused for "Misuse of official authority, Art 353 CC". Detention was requested upon all three legal grounds. The judge used the following explanation:

"The proposal for imposing the measure detention is refused as unfounded, since the risk of ***absconding cannot be supported solely from the severity of the crime for which investigation is conducted, or the type and severity of the sentence prescribed in the law;*** *it is a matter of adults, family people, relatively wealthy, the relevant documentation is acquired and there is no possibility for it to be concealed or destroyed; and furthermore there are no arguments in support to the suspicion that the accused might interfere with the investigation by intimidating witnesses, as so far there are no circumstances that point to this, i.e. there is no evidence that the accused have tried to influence or are preparing to directly or indirectly influence witnesses."*

However, in a second instance procedure upon the appeal by the prosecution office, the court panel quashed the decision by the investigating judge and imposed pre-trial detention under all available legal grounds. The second instance reasoning that is presented in this decision (Ks.212/06) is as follows:

"Taking in consideration the circumstances related to the type and severity of the crimes... the damage to society caused, the level of criminal responsibility, the foreseen sentence, the amount of appropriated benefit…"

"…as well as the circumstances concerning the personality of the accused, especially the facts that show that the accused **continuously threaten the co-accused and the witness**, and the fact that the accused are still own the dominant share of the Company…"

> "The accused are still able to manage the property of the Company and could take actions to repeat the crime..."

- No reasoning at all

There are several decisions where the courts fail to provide any reasoning whatsoever related to the legal grounds under which detention was ordered. Such decisions were observed in various courts. Although the LCP clearly states that brief reasoning should be provided for every ground separately, the detention orders do not reflect this. However, this occurrence cannot be observed as a tendency within National courts and it was noted in a small number of the analyzed cases.

- Detaining foreign citizens

There is significant number of cases in various courts where foreign citizens are subjected to detention simply because of the fact that their permanent residence is outside the country's borders.

In a case before BC Skopje *(Ki. # not provided)* a foreign citizen committed a traffic violation by passing a red light. After being stopped by traffic police he tried to bribe them with 10 EUR. He was apprehended and charged with Bribery and the investigating judge ordered a 7 day detention based on the risk of absconding. The following reasoning was used:

> *"Taking into consideration the nature and character of the criminal act, and also considering that the accused is a foreigner, pre-trial detention is determined..." (Unofficial translation)*
> No additional reasoning is provided.

In another case before BC Struga (Ki.29/04) a foreign citizen is accused of "Severe crimes against safety of people and property in traffic", Art.300 CC. She was charged for this crime because she ran into a biker on the regional road, after which the biker was severely injured and died. The court decided to impose detention under all three legal grounds. The reasoning provided in this decision is:

> *"Detention is ordered due to the reasons that show that if the accused is out of custody there are circumstances that there is danger of absconding since she is a foreign citizen and the border is near, the circumstances under which the crime is committed, and also that she will interfere with investigation by influencing witnesses"(Unofficial translation).*

No additional reasoning is provided. In the final paragraph of the decision the court states that the accused is detained under the first two legal grounds. However in the first part of the decision it is stated that she is detained under all three available grounds.

In cases like these, the courts fail to provide sufficient reasoning and arguments that support the decision to detain the accused. The fact that a person is a foreign citizen and the possibility to easily cross the border, without further elaboration, cannot be seen as sufficient argumentation in favour of detention.

In this regard, the ECtHR states:

> "One must note, in this respect, that the danger of an accused absconding **does not result just because it is possible or easy for him to cross the frontier** ... there must be a whole set of circumstances, particularly, the heavy sentence to be expected or the accused's particular distate of detention, or the lack of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem to him to be a lesser evil than continued imprisonment. (*Stögmuller v. Austria, p. 15)*

- Possibility to flee across borders

The courts justify the risk of absconding with the possibility of the accused (a national) to flee across borders just because of the fact that his parents/or relatives live abroad. No additional reasoning is provided. In such cases, courts fail to apply alternatives like seizure of travel documents, regular reporting to the police station etc.

Also, in cases before BC Stip, the reasoning "… the accused has several times legally crossed the border and stayed out of the country…" is used by the court.

In one case the BC Ohrid reasons the risk of absconding outside the country with the following: *"…since the parents of the accused have temporary residence abroad…he may abscond".*

In both cases additional reasoning is not provided and no alternative measures were considered.

- The personality of the accused

The "personality of the accused" is cited as the sole reason when detaining the accused without providing additional details as arguments to support these claims and the detention decision is based solely on them. This is another case where the reasoning provided is not sufficient.

- Intimidation of witnesses / eye-witnesses

    - Witnesses are close relatives or friends/acquaintances with the accused
    - Accused is working in the same institution with the witnesses

The most frequent reason for which the accused are detained by national courts is the fear of "intimidation /or influencing/ of witnesses or eye-witnesses". However, the reasoning in the detention decisions in general do not cite specific reasons why this ground applies to the accused. Most decisions of the court simply cite the "possibility for the investigation to be disrupted by influencing the witnesses" without further reasoning In some cases the court even considers the fact that "other witnesses that might be identified during investigation period will be influenced".

There are also cases where the only reasoning provided is that the witnesses are close relatives or acquaintances to the accused and may be easily influenced. Also, if the crime has been committed in the working environment of the accused, the fact that if s/he is out of custody shows the possibility to be near witnesses and influences them. Here the courts reason that the very possibility for the accused to be near a potential witness is sufficient to justify detention on remand. Again, there are no particular facts or circumstances that make the court speculations credible. Also, the courts do not routinely discuss the possibility of alternatives to detention when there is a grounded fear that the accused will interfere with the investigation. The court can order that the accused have no contact with a certain witness and that they are prohibited from going within a certain distance of the witness for example. If the accused is found to have violated these restrictions, then the court can impose detention.

- Interference with evidence *(Usually in cases of "misuse of official authorization" in public or private companies)*

When using this justification, the court usually states that *"…if allowed to defend out of custody, the accused may visit the working premises where the crime has been committed and destroy evidence needed to establish guilt…"* In such cases the accused is usually holding a higher function in the company and is considered eligible to intimidate and threaten employees working under his supervision.

In order to apply *the second* ground for detention, the court should be satisfied that particular circumstances point to the risk of influencing witnesses of interfering with evidence, and mention them in the detention decision. A general statement that the accused will interfere with the course of justice is not sufficient; supporting evidence must be provided. However, it has been noted that the majority of decisions merely reiterated the letter of the law and lacked reference to any specific circumstances.

ECtHR's standard in this regard is expressed with the following:

> **"The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon in abstracto, it has to be supported by factual evidence *(Trzaska v. Poland, no. 25792/94, § 65, 11 July 2000)."***

In addition, it has been noted that in such cases the courts fail to consider the application of alternative measures like:

- forbiddance for the accused to undertake work-related activities that are connected to the criminal act
- forbiddance to visit specific place or territory
- forbiddance to be near a person or maintain contacts with that person

- <u>The fear of relapse into crime</u>

In cases where the accused is detained under the third legal ground of Article 199(1) LCP, it has been noted that courts frequently impose pre-trial detention without making reference to the specific circumstances that prompt them to decide that keeping the accused in custody is necessary. In most cases the courts fail to even mention why certain alternative measures were not applicable.

The most common reasoning used for this legal ground is the simple paraphrasing of the law: "…there are circumstances that show that the accused may repeat the crime or commit a new crime"

- Finishing the attempted crime. Repeating the crime

In cases where the crime remained in *attempt* (e.g. of murder, rape or cases of sexual abuse, unauthorised production and release for trade of narcotics, psychotropic substances and precursors) the court finds it reasonable to detain the accused just due to the fact that if out of custody *s/he may finish the already started crime*. No further elaboration is provided. Here it is questionable, whether the possibility of the accused to contact the victim can be used as reasoning without any supporting arguments that point out that s/he indeed has the intention to finish the crime.

In such cases the application of alternatives like: (i) forbiddance to visit specific place or territory or (ii) forbiddance to be near a person or maintain contacts with that person could have been considered by the court.

- Previous convictions and indictments, ongoing procedures against the accused

It has been noted that often the courts justify the fear of relapse into crime with the mere fact that the accused had previous convictions. However, in a significant number of these cases the courts fail to provide details on the type and nature of the previous convictions.

In a case before BC Struga (Ki.3/2004) a person was accused for illegal possession of 2 automatic rifles and ammunition that were discovered in his house. He was charged with "Illicit production, holding, and trade with weapons or explosives", Art.396 CC. After being questioned he was detained under all 3 legal grounds. The reasoning of the court for the first two grounds is vague and it only paraphrases the

law, as for the third ground the court states: "…all circumstances of the case justify the fear that the suspect could commit a new crime, considering the fact that *he has been previously convicted several times."* Here the court does not provide any further elaboration of the previous convictions, in terms of their type and nature

The fact that the person concerned had previous convictions for *the same or similar offences* to the one under investigation would thus be significant, as would other offences apparently being committed between the beginning of the investigation and the person being charged with the one(s) for which his or her detention is sought. However, the continued detention of the person in such cases is likely to be inappropriate where the offences concerned were not comparable in either their nature or degree of seriousness.

Conclusions and Recommendations:

There are several reasons why detention orders need to be grounded in fact and in line with national and international standards:

- To avoid possibility for misuse of detention, or using detention as a penalty, i.e. detaining persons in order to extort evidence;
- Opportunity for the defense / prosecution to contest the arguments provided for or against detention.
- Guaranteeing consistent application of the law
- Increasing the public trust in the judiciary
- To avoid possible avalanche of ECtHR judgments against the country in the future, where violations of Article 5(3) of the Convention are established

Recommendations:

- All judges should provide proper and adequate reasons when issuing rulings related to pre-trial detention. The higher courts should consistently issue decisions which instruct lower courts that rulings on detention should be properly justified in accordance with the law

- Detention should be used as an exception and not be the rule as called for in domestic and international law; the presumption should always be in favor of release pre-trial until the prosecution overcomes this presumption with specific facts that would warrant detention under at least one of the specific grounds.

- Detention should only be used as a measure for securing the presence of the accused at trial and ensuring the proper conduct of the criminal proceedings, instead of punishment and rigid deprivation of liberty.

- The judicial authorities in the country should consider issuing strict Guidelines for imposing detention that include the need for decisions grounded in facts that can be attributed to the case of the specific accused.

- Prosecutors should only request detention if specific facts and evidence overcome the presumption that the defendant should be released pre-trial; Prosecutors should also take alternatives to detention into account.

- In cases involving two or more accused, courts need to consider the individual circumstances of each of the accused separately.

- The Academy for Training of Judges and Prosecutors should incorporate in its Curriculum classes for drafting detention orders and education on the relevant international standards concerning detention.

- Defence attorneys should pay attention to the reasoning provided in detention decisions and contest those decisions if insufficient reasoning is provided

- Judges should always consider application of available alternative measures prior to imposing detention and give the reasons for not imposing the alternatives in their orders so that a proper appeal can be had.