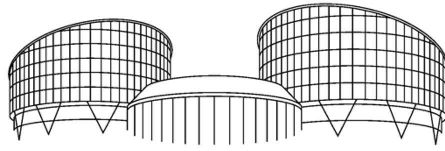

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF VIG v. HUNGARY

(Application no. 59648/13)

JUDGMENT

Art 8 • Respect for private life • Unlawful domestic law provisions for enhanced police checks in the absence of adequate safeguards • No real restrictions or review of executive's issuing of authorisation for enhanced checks, nor of police measures carried out during an enhanced check

STRASBOURG

14 January 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Vig v. Hungary,

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

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Alena Poláčková,
Péter Paczolay,
Gilberto Felici,
Erik Wennerström,
Raffaele Sabato, *judges,*
and Abel Campos, *Section Registrar,*

Having regard to:

the application against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr Dávid Vig ("the applicant"), on 16 September 2013;

the decision to give notice to the Hungarian Government ("the Government") of the application;

the observations submitted by the respondent Government and the observations in reply submitted by the applicant;

the comments submitted by *Res Publica,* who were granted leave to intervene by the President of the Section;

Having deliberated in private on 8 December 2020,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the power of the police, under the Police Act, to check individuals' identity and search persons during enhanced checks, allegedly in violation of the applicant's rights under Articles 5 (right to liberty and security), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the Convention.

THE FACTS

2. The applicant was born in 1984 and lives in Budapest. He was represented by Mr T. Fazekas, a lawyer practising in Budapest.

3. The Government were represented by their Agent at the Ministry of Justice, Mr Z. Tallódi.

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

5. On 16 January 2013, applying section 26 of Decree no. 30/2011 (IX.22.) of the Minister of the Interior on the Police Service Regulation ("the Service Regulation" – see paragraph 23 below), the National Police

Commissioner issued a notice ordering enhanced checks (*fokozott ellenőrzés*) throughout the whole of the territory of Hungary from 16 January to 31 March 2013, to "carry out regular checks on illegal migration routes leading to the European Union and to operate a screening network preventing illegal migration".

6. During that period, between 29 and 30 March 2013 a cultural festival took place in the Sirály Community Centre in Budapest (hereinafter, "the cultural centre"). On the basis of the notice issued by the National Police Commissioner, on 29 March the Budapest VI. District Police Department drew up an operational plan for carrying out an enhanced check at the centre, to monitor the visitors at the centre, check their identity and look for wanted persons. The police department had previously received information from the district mayor's office and the mayor of Budapest indicating that the centre operated irregularly, and lacked the necessary authorisation and fire safety measures. The operational plan stated that the aim of the enhanced check was to prevent the irregular operation of the centre and other related illegal activities.

7. At about midnight on 30 March 2013 a number of police officers appeared at the centre and someone, apparently an employee, informed the people who were present that the police were to check everyone, and that those who intended to leave were free to do so. Half an hour later everyone was asked to leave the premises and told that only those who had undergone the police check could return.

8. According to the applicant, when he asked why the checks were being carried out he was told that the police were conducting a "night check". The applicant insisted that under Act no. XXXIV of 1994 ("the Police Act" – see paragraph 22 below), a "night check" was not a legal basis for the police measure in question. He was then told that the police were searching for a missing person. Other people were apparently informed that the operation was part of the "enhanced checks".

9. The applicant was asked to hand over his identity card, which he did, and he was then told to go outside with the police officers. According to the applicant, he saw no reason to comply with the order once his identity had been checked, but felt so intimidated by the police officers surrounding him that he did not object. On his way out one of the officers tried to provoke him by pushing him.

10. The applicant's outer clothing was searched, nothing incriminating was found and he was allowed to go on his way.

11. On 29 May 2013 the applicant lodged a complaint with the Constitutional Court under section 26(2) of Act no. CLI of 2011 ("the Constitutional Court Act" – see paragraph 20 below), challenging the constitutionality of sections 30(1)-(3) and 31 of the Police Act (see paragraph 22 below) and section 26 of the Service Regulation (see paragraph 23 below).

12. On 7 June 2013 the complaint was declared inadmissible by a single judge under section 30(1) of the Constitutional Court Act, on the grounds that it was time-barred, since it had been lodged outside the statutory 180-day time-limit following the entry into force of the relevant legislative provisions (1 May 1994).

13. The applicant complained about the police measures to the Independent Police Complaints Board ("the Board"). He sought to challenge the legality of police measures carried out in the course of enhanced checks, stating that the provisions of the Police Act on enhanced checks, read together with the Service Regulation, gave the police an unfettered right to check and search anybody, without the people concerned being able to know the reasons for the measures. Furthermore, since no specific circumstances had to be present in order for the measures to be implemented, it was nearly impossible to challenge their legality and seek a remedy against them. Secondly, the applicant challenged certain procedural aspects of the identity check and search in question, namely the fact that the police officers had failed to give him their identification numbers and reasons for carrying out the measures, had used a tone of voice that had been injurious to his dignity, and had not informed him about his right to seek a remedy against the measures. He also maintained that the search of his clothing had had no legal basis and had served no purpose other than to intimidate him.

14. The Board found that the identity check and search of the applicant had been lawful and had not infringed his right to a private life and the protection of his personal data. It held that the police operation had been restricted in time and space and had aimed to prevent illegal activities. Nonetheless, it stated that the search of the applicant had had a repressive purpose and had thus violated his right to a fair trial. Furthermore, the manner in which the measures had been carried out had violated the applicant's right to dignity.

15. Subsequently, the applicant lodged a complaint with the Budapest Main Police Department, challenging the legality of the identity check and search, and the manner in which the measures had been carried out. He also maintained that the police officers had failed to identify themselves or the aim of the operation and had not informed him about the remedies available for such measures.

16. On 20 June 2014 the police department dismissed all of the applicant's complaints, except those regarding the manner in which the police had conducted the operation.

17. The applicant sought judicial review of that dismissal decision before the Budapest Administrative and Labour Court. He also asked – under section 25 of the Constitutional Court Act – the court to stay the proceedings and request that the Constitutional Court establish that

section 30(1)-(3) of the Police Act and section 26 of the Service Regulations were unconstitutional

18. On 28 April 2016 the court rejected his claim. The court established that the operational plan had been drawn up on 29 March 2013 to check the irregular operation of the cultural centre. The operational plan stated that police officers had to look for wanted persons and check visitors’ identity. The court also noted that the operational plan had been based on the authorisation issued by the National Police Commissioner on 16 January 2013 for enhanced checks throughout the country until 31 March 2013, to carry out regular checks on illegal migration routes leading to the European Union and to operate a screening network preventing illegal migration (see paragraph 5 above). The court held that it had no power to examine either the authorisation of the enhanced checks or the operational plan adopted under that authorisation, and that it could only review the individual police measures that had been carried out. The court found that those measures had been in compliance with the relevant legislative provisions and the operational plan which had authorised them. It did not elaborate on the applicant’s request for a constitutional review.

19. The applicant did not submit a petition for review to the *Kúria.*

RELEVANT LEGAL FRAMEWORK

20. The relevant provisions of Act no. CLI of 2011 (“the Constitutional Court Act”), provides as follows:

Judicial initiative for controlling norms in specific cases
Section 25

“(1) If a judge, in the course of adjudicating on a specific case which is in progress, is bound to apply a legal regulation that he or she perceives to be contrary to the Fundamental Law, or which has already been declared contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and, in accordance with Article 24 (2) (b) of the Fundamental Law, submit a petition for a declaration that the legal regulation or a provision of [that regulation] is contrary to the Fundamental Law, and/or the exclusion of the application of the legal regulation which is contrary to the Fundamental Law.

...”

Constitutional Complaint
Section 26

“(1) Under Article 24(2)(c) of the Fundamental Law an individual or organisation involved in a particular case may lodge a constitutional complaint with the Constitutional Court where owing to the application of a piece of legislation allegedly contrary to the Fundamental Law in the court proceedings conducted in the particular case

a) their rights enshrined under the Fundamental Law have been violated, and

b) they have exhausted the available legal remedies or no remedies are available.

(2) Divergently from subsection (1), Constitutional Court proceedings may be initiated under Article 24(2)(c) ... of the Fundamental Law exceptionally also where

a) the grievance has occurred directly, without a court ruling, as a result of the application or the taking effect of a provision of the law [allegedly] contrary to the Fundamental Law, and

b) no remedy is available for redressing the injury, or the complainant has already exhausted the remedies."

Section 27

"An individual or organisation involved in a particular case may file a constitutional complaint with the Constitutional Court against a court ruling allegedly contrary to the Fundamental Law under Article 24(2)(d) of the Fundamental Law, where the ruling taken on the merits of the case or another ruling closing the court proceedings:

a) violate the complainant's right enshrined under the Fundamental Law, and where

b) the complainant has already exhausted the remedies or no remedies are available to him."

21. Act no. III of 1952 on the (old) Civil Procedure Code, as in force at the material time, provided as follows:

Initiating Constitutional Court proceedings and proceedings before the *Kúria* for the review of municipal decrees
Section 155/B

"(1) Courts shall initiate proceedings before the Constitutional Court of their own motion or upon an application to review the constitutionality or compliance with an international treaty of any law or statutory provision, legal act for the governance of bodies under public law or uniformity resolution, in accordance with the Constitutional Court Act.

(2) The court action referred to in subsection (1) may be requested by the party or intervener who alleges that any legislation applicable to his case is contrary to the Fundamental Law or an international treaty.

(3) The court shall initiate the Constitutional Court proceedings by way of a ruling, and shall simultaneously order the suspension of its own proceedings.

(4) The ruling on the initiation of the Constitutional Court proceedings and the refusal of an application to initiate the Constitutional Court proceedings may not be contested separately."

22. The relevant provisions of Act no. XXXIV of 1994 ("the Police Act") read as follows:

Section 19

"(1) Apart from where exceptions are provided for in an Act of Parliament or an international agreement, everyone shall subject himself to police measures enforcing the law and obey police orders. With the exception of manifestly unlawful measures, the lawfulness of a police measure cannot be questioned during a police operation.

(2) A police officer can take measures and use means of coercion, as defined in the present Act, against a person who resists a lawful police measure.”

Enhanced check[s], [and] search[es] of clothing, luggage and vehicle[s]
Section 30

“(1) A police officer can check the identity of persons who enter or are present at a public place defined by the head of the police unit, to apprehend a perpetrator or to prevent or hinder an activity or incident endangering public security.

(2) For the purpose described in subsection (1), a police officer can search any building, dwelling, location, bag or vehicle.

(3) To prevent illegal conduct endangering the security of a venue [or the security of] an event or traffic, or [to prevent illegal conduct] endangering public order, a police officer can search the clothing and vehicle of [a] person present at a certain location defined by the head of the police unit; he can check the enforcement of rules set by the operator of the premises, seize objects which endanger public safety, or forbid [persons] from entering the venue with such objects.

...”

Section 31

“(1) Following a prior warning, the police can search the clothing of persons subjected to restrictive measures, in order to seize the objects defined in section 29/B (1).”

Arrest, short-term detention (*előállítás)*
Section 33

“...

(2) A police officer can place [the following] person[s] in short-term detention at a police station or at another authority with jurisdiction ... :

(a) [persons who], following an order from the police, cannot or do not want to identify [themselves].

...

(3) The police can restrict a person’s liberty through short-term detention for a period no longer than necessary, and for a maximum of eight hours. If the aim sought through the short-term detention cannot be achieved during this period, the head of the police unit may extend the short-term detention once, for an additional four hours. The period of short-term detention starts when the police measure is carried out.

...”

23. Decree no. 30/2011 (IX.22.) of the Minister of the Interior on the Police Service Regulation (“the Service Regulation”) provides, in so far as relevant, as follows:

Enhanced check[s]
Section 26

"(1) An enhanced check is a coordinated and concentrated police measure during which an area or part of an area for which a particular police unit is responsible is sealed and the identity of the persons present [in that area] is checked.

(2) An enhanced check can be ordered [by]

(a) the National Police Commissioner, the National Deputy Commissioner for Crime and the National Deputy Commissioner for Law Enforcement, in respect of the territory of the whole country or in respect of one or more counties;

(b) a chief of police, a police commissioner, the head of an operation centre, and the head of a border control unit, in respect of the area for which he or she is responsible; [or]

(c) the director of the Airport Police, the commander of the Intervention Police, or the director of the Counter Terrorism Centre, in order to carry out specific tasks within their jurisdiction.

(3) Under subsection (2) the National Police Commissioner, the National Deputy Commissioner for Crime and the National Deputy Commissioner for Law Enforcement, a police commissioner, the head of a border control unit, and the director of the Airport Police can order an enhanced check for the purposes of border control, control of a border crossing and the maintenance of order at the border.

(4) A senior police officer has to notify his or her supervisor of any planned enhanced check, and in the event that the enhanced check has already been carried out, has to report it to his or her supervisor."

24. Act no. II of 2102 on Minor Offences, as in force at the material time, provided as follows:

Failure to comply with a lawful order
Section 216

"(1) Anyone who fails to comply with the lawful order of a law-enforcement officer or a customs control officer commits a minor offence."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that he had been stopped for an identity check and searched by the police in violation of his rights under Article 8 of the Convention.

This provision reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

1. *The parties’ submissions*

(a) The Government

26. The Government submitted that the applicant had not exhausted domestic remedies. Firstly, he had not pursued a review of the decision of the Budapest Administrative and Labour Court before the *Kúria* (see paragraph 19 above), to seek a remedy against the manner in which the operation had been conducted by the police. Subsequently, he could have brought a constitutional complaint before the Constitutional Court, seeking to quash the judgment of the *Kúria* under section 27 of the Constitutional Court Act. In such proceedings, he could have argued that the *Kúria*’s judgment had infringed his rights enshrined in the Fundamental Law, either because the *Kúria* had applied a law which was unconstitutional (section 26(1) of the Constitutional Court Act), or because it had interpreted or applied a law in an unconstitutional manner (section 27 of the Constitutional Court Act). In a constitutional complaint under section 26(1) of the Constitutional Court Act, he could have challenged both the operational plan drawn up by the police and the underlying legislation.

(b) The applicant

27. The applicant referred to the decisions of the Administrative and Labour Court (see paragraph 17 above) to argue that the ordering of an enhanced check had not been subject to judicial review. Furthermore, the measures taken in the course of the enhanced check in question had been in compliance with the domestic legislation. Therefore, the court proceedings in his case had not had any chance of success and could not be held to be effective. Moreover, even if the *Kúria* had found, in the course of review proceedings, that the police measure had been unlawful, it would have had no jurisdiction to amend the decision in question, and could only have set it aside.

28. As regards constitutional complaints in general, the applicant submitted that under section 29 of the Constitutional Court Act, the Constitutional Court had to declare a constitutional complaint admissible only if a conflict with the Fundamental Law significantly affected the relevant judicial decision, or if the case raised constitutional-law issues of fundamental importance. However, these terms were subjective, and there was insufficient clarification in the Constitutional Court’s jurisprudence.

29. More particularly, as regards a constitutional complaint under section 27 of the Constitutional Court Act, the applicant submitted that

since measures carried out in the course of an enhanced check were always in compliance with the domestic legislation, requiring him to firstly initiate futile judicial review proceedings in order to be able to lodge a complaint against a final court decision would have placed an unreasonable and excessive burden on him.

30. The applicant argued that his complaint had not concerned the unlawfulness of a police measure, but the unconstitutionality of the law applied by the authorities. Therefore, the only constitutional complaint available to him would have been that under section 26(1) of the Constitutional Court Act. Nonetheless, the applicant contested the effectiveness of that remedy, on the grounds that although the Constitutional Court had the power to annul unconstitutional legal provisions, there were a number of exceptions to that rule, and in any case a decision to annul an unconstitutional provision had no effect on the legal relations established before the Constitutional Court's decision.

2. The Court's assessment

31. The general principles concerning the rule of exhaustion of domestic remedies were restated in *Vučković and Others v. Serbia* ((preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 69-77, 25 March 2014). The Court reiterates in particular that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States, of preventing or putting right the violations alleged against them. That rule is based on the assumption that there is an effective remedy available in the domestic system in respect of the alleged breach. The only remedies which Article 35 § 1 requires be exhausted are those that relate to the breach alleged and are capable of redressing the alleged violation. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness: it falls to the respondent State to establish that these conditions are satisfied (see, among many other authorities, *McFarlane v. Ireland* [GC], no. 31333/06, § 107, 10 September 2010). However, the existence of mere doubts as to the prospects of success of a remedy which is not obviously futile is not a valid reason for failing to exhaust that avenue of redress (*Vučković and Others*, cited above, § 74).

32. At the same time, there is a need to apply the rule on exhaustion with some degree of flexibility and without excessive formalism, given the context of protecting human rights (see *Ringeisen v. Austria*, 16 July 1971, § 89, Series A no. 13). The rule of exhaustion is neither absolute nor capable of being applied automatically; in monitoring compliance with this rule, it is essential to have regard to the circumstances of the individual case (see *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009)

33. Turning to the circumstances of the present case, the Court notes that the applicant did not argue that the police measure in respect of him had been in breach of the provisions of the Police Act, nor did he contest the application and interpretation of the Police Act in his case. The applicant's complaint in the proceedings before the Court related to the compatibility of the terms of the statutory scheme (the Police Act and the Service Regulation – see paragraphs 22 and 23 above) with the Convention. It was his contention that even if the power was used in accordance with domestic law, it breached Convention rights. In other words, the performance of the identity check and search had resulted from the terms of the Police Act and the Service Regulation applied together and the operational plan drawn up in respect of the cultural centre on the basis of these two legislative acts, rather than unlawful actions by the authorities (the police officers) at variance with those provisions.

34. The Court further observes that, in a similar vein, the applicant's complaint before the domestic authorities challenged the underlying legislation, and not the police measure's compliance with those provisions. However, as the Budapest Administrative and Labour Court hearing the applicant's case specifically mentioned, it had no power to review either the authorisation of the enhanced checks or the operational plan, but only the individual police measures (see paragraph 18 above). Thus, judicial review of the police measures in question, including a review before the *Kúria*, would have been limited to formal determination of whether the police powers described under section 30(1) of the Police Act (see paragraph 22 above) had been exercised in accordance with domestic law.

35. The Court therefore considers that recourse to the available channels of judicial review could have been effective only if the applicant had alleged that the interference with his rights had resulted from a misapplication of the Police Act. Since the applicant did not argue that the stop and search measures used against him had not complied with the Police Act, judicial review proceedings before the Administrative and Labour Court would not have constituted a relevant or effective remedy in respect of his complaint under the Convention to redress his grievances stemming from the terms of the legislation itself. As a consequence, the remedy identified by the Government – an application for a review by the *Kúria* of the Administrative and Labour Court's judgment – would not have been an effective remedy either. In the Court's view, in the circumstances, the applicant could not have been expected to make use of that legal avenue, which was not relevant for the core of his complaint.

36. As to the Government's argument that the applicant could have been expected to pursue an application for a review by the *Kúria* solely for the purpose of enabling a subsequent constitutional complaint under section 26(1) and/or 27 of the Constitutional Court Act, the Court makes the following observations.

37. The applicant did try to bring his case before the Constitutional Court. He firstly lodged a complaint under section 26(2) of the Constitutional Court Act. As the Court has previously noted, this type of complaint is a relevant remedy in cases where the rights of the person lodging the complaint have been violated through the application of an unconstitutional provision, in the absence of a judicial decision or a legal remedy to redress the alleged violation (see *Karácsony and Others*, cited above, § 77), which is the crux of the applicant's complaint. Thus, the applicant's grievance could, in principle, have been subjected to this type of constitutional scrutiny. However, a complaint under section 26(2) of the Constitutional Court Act must be lodged within 180 days of the entry into force of the legal regulation which is contrary to the Fundamental Law (see *Mendrei*, cited above, §§ 13 and 35). Since the provisions of the Police Act entered into force on 1 May 1994 (see paragraphs 11-12 above) and the impugned legislation was applied in the applicant's case on 29 March 2013, certainly outside the 180-day time-limit, (compare and contrast *Mendrei*, cited above, §§ 35-41), the applicant's complaint was declared inadmissible by the Constitutional Court.

38. The Court further notes that the applicant requested the Budapest Administrative and Labour Court, unsuccessfully, to initiate proceedings before the Constitutional Court to establish that section 30(1)-(3) of the Police Act and section 26 of the Service Regulation were unconstitutional (see paragraph 17 above).

39. Under those circumstances, the Court finds that the applicant raised the complaint of the unconstitutionality of the legal provisions before the domestic courts, thus providing the domestic authorities with the opportunity to put right the alleged violation. Furthermore, the effectiveness of those proceedings has not been disputed by the Government.

40. As regards the question of whether the applicant should have had recourse to other forms of constitutional complaint, the Court further observes that domestic law does indeed provide for a general possibility to contest before the Constitutional Court final judicial decisions which either apply a legal regulation that is contrary to the Fundamental Law (section 26(1) of the Constitutional Court Act) or are themselves in violation of the rights laid down in the Fundamental Law (section 27 of the Constitutional Court Act – see paragraph 20 above, and *Mendrei*, cited above, § 13).

41. However, the applicant's complaint was directed exclusively against the legal environment which applied in conjunction resulted in the presumed overbroad authorisation of enhanced checks and police powers, causing the alleged grievance in a direct way, in the absence of any intervening judicial proceedings. The Court does not consider that the applicant was expected to pursue further constitutional avenues which were to remedy a judicial decision applying the legislation, unrelated to the applicant's complaint.

42. In the light of the above considerations, the Court concludes that the Government's objection of non-exhaustion of domestic remedies must be dismissed.

43. The Court further notes that the complaint under Article 8 of the Convention is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

44. The applicant submitted that the power of the police to check and search anybody during an enhanced check amounted to an interference with the right to private life enshrined in Article 8 of the Convention, especially since the measures, which were carried out without any justification, were likely to humiliate the person concerned. Moreover, in the circumstances of the present case, his personal data had also been registered.

45. He maintained that enhanced checks arguably served a legitimate aim, the protection of the public interest. Nonetheless, it was not clear under which circumstances such checks could be ordered. The relevant provisions were so vaguely formulated that the existence of the requisite preconditions could be established at any given moment. Furthermore, in his case, he could not have known in advance that he had been present in an area where enhanced checks had been in force and the police could stop and search him.

46. The applicant further pointed out that during an enhanced check the police had an unfettered power to stop and search anybody, and there were no guarantees in place that could prevent abuse. The only restriction on police powers was territorial; however, there was nothing to hinder the National Police Commissioner from ordering enhanced checks throughout the whole country.

47. Lastly, once an enhanced check had been ordered, the legislation did not provide for any specific reasons (for example, a suspicion of wrongdoing) for identity checks and searches carried out in the course of such a check. As a consequence, it was impossible to challenge either the legality or proportionality of any police measure.

(b) The Government

48. The Government did not comment on the merits of the present complaint.

2. *The Court's assessment*

(a) Whether there was an interference

49. The Court notes that sections of the Police Act permit a police officer to check any person within the geographical area covered by the authorisation and physically search the person and anything which he or she is carrying. The check and search takes place in public, and failure to submit to it can result in short-term detention at a police station (see paragraph 22 above) and amount to a minor offence (see paragraph 24 above). The Court considers that the use of the coercive powers conferred by the legislation (see paragraph 22 above) to require an individual to submit, anywhere and at any time, to an identity check and a detailed search of his person, his clothing and his personal belongings amounts to an interference with the right to respect for private life (see, *mutatis mutandis*, *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 63, ECHR 2010 (extracts)).

50. The applicant was stopped by police officers and obliged to submit to a search under the provisions of the Police Act (see paragraphs 9 and 10 above). For the reasons above, the Court considers that this search constituted an interference with his right to respect for private life under Article 8. Such an interference is justified by the terms of paragraph 2 of Article 8 only if it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 and is "necessary in a democratic society" in order to achieve the aim or aims (see *Gillan and Quinton*, cited above, § 65).

(b) Whether the interference was "in accordance with the law"

51. The Court reiterates that the phrase "in accordance with the law" implies that the legal basis must be "accessible" and "foreseeable". A rule's effects are "foreseeable" if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct. In addition, there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention. It would be contrary to the rule of law for the legal discretion granted to the executive in areas affecting fundamental rights to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see *Al-Nashif v. Bulgaria*, no. 50963/99, § 119, 20 June 2002, with further references).

52. It is not disputed that the power in question in the present case to check a person's identity and search persons in the event of an enhanced check has a basis in domestic law, namely section 30(1) and (3) of the Police Act (see paragraph 22 above). In addition, the Service Regulation,

which is a ministerial decree, sets out the rules on ordering an enhanced check (see paragraph 23 above).

53. However, the applicant argued that the Service Regulation conferred an unduly wide discretion in terms of authorisation of an enhanced check, and that the Police Act provided for police officers having an unfettered right to check and search anybody once an enhanced check was ordered.

54. The Court firstly notes that the senior police officers referred to in section 26(2) of the Service Regulation (see paragraph 23 above) are empowered to order an enhanced check in any area specified by them within their jurisdiction. Although the geographical boundaries of the region where enhanced checks can be carried out is thereby limited, the National Police Commissioner can order enhanced checks for the whole territory of Hungary, as was the case at the material time (see paragraph 5 above).

55. Moreover, the legislation does not provide for a time-limit for the authorisation, which is apparently renewable.

56. There is no requirement in the legislation that an enhanced check be considered necessary for its stated objective at the stage when it is authorised. As a consequence, the senior police officer who authorises the check is not under any obligation to assess and substantiate the proportionality of the measure. Although the senior police officer ordering the enhanced check has to notify his or her supervisor of any planned enhanced check or, in the event that the enhanced check has already been carried out, report it to his or her supervisor (see section 26(4) of the Service Regulation, cited in paragraph 23 above), there is no scrutiny, either within the executive or by any authority independent from the police, of how the authorisation power is exercised.

57. The Court also notes that the authorisation of enhanced checks could not be subsequently challenged before the courts either. As stated in the judgment of 28 April 2016, the Budapest Administrative and Labour Court had no power to examine the authorisation of the enhanced checks or the operational plan adopted under that authorisation (see paragraph 17 above).

58. Based on the above, the Court is of the view that the legislature failed to provide for any real restrictions or checks on the executive's issuing of authorisation for enhanced checks.

59. As regards the rules on implementing such checks, the Court draws attention to the fact that, in the present case, the Budapest VIth District Police Department drew up an operational plan for carrying out an enhanced check on 29 March 2013 in the cultural centre, in order to prevent the irregular operation of the centre and other related illegal activities (see paragraph 6 above). The basis of the operational plan, as noted in the domestic proceedings (see paragraph 17 above), was the notice issued by the National Police Commissioner authorising enhanced checks throughout the whole of the territory of Hungary from 16 January to 31 March 2013, to "carry out regular checks on illegal migration routes leading to the

European Union and to operate a screening network preventing illegal migration" (see paragraph 5 above). In the Court's view, this discrepancy between the reasons underlying the authorisation of the enhanced checks throughout the country and the reasons for the actual police operation carried out at the centre in accordance with that authorisation demonstrates that the legislation did not provide for any requirement that the measures implementing enhanced checks relate to their stated objective.

60. The Court further takes note of the powers conferred on individual police officers under section 30 of the Police Act (see paragraph 22 above). The Police Act authorises police officers to check a person's identity and search persons at a location specified by a senior police officer, to apprehend a perpetrator or prevent an activity endangering public security. The legislation does not state that those measures are implemented in respect of persons who are suspected of wrongdoing. Thus, it is not necessary for a police officer to demonstrate the existence of any reasonable suspicion against the person subjected to the measures; the only condition provided for in the legislation is that the identity check and search has to be related to the objectives described in section 30 of the Police Act. As evidenced by the present case, in practice, a police officer has the discretion to carry out measures in respect of anybody who is present at the location where an enhanced check is carried out.

61. The Court also notes that whereas an individual can challenge the police measures carried out in respect of him or her by way of a complaint to a police department, and subsequently by way of a judicial review, the present case demonstrates that those remedies are limited to assessing the manner in which the measures were carried out, and do not cover the necessity of the identity check and search. In general, in the absence of any obligation on the part of a police officer to demonstrate that a person who is checked and searched is involved in or in any way linked to any of the activities described in section 30 of the Police Act, it appears that it is not possible to prove that a police officer has exceeded his or her powers when he or she has decided to perform an enhanced check on a given individual at an authorised location.

62. In the absence of any real restriction or review of either the authorisation of an enhanced check or the police measures carried out during an enhanced check, the Court is of the view that the domestic law did not provide adequate safeguards to offer the individual adequate protection against arbitrary interference. Therefore, the measures complained of were not "in accordance with the law" within the meaning of Article 8 of the Convention.

63. It follows that there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLES 5 § 1 AND 13 OF THE CONVENTION

64. The applicant further complained that the identity check breached his right to liberty and security and that he did not have at his disposal any effective remedy to challenge the interference with his right to private life.

65. He invoked Articles 5 § 1 and 13 of the Convention, which read as follows:

Article 5 § 1

> “1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

Article 13

> “Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. The parties’ submissions

66. The applicant maintained that when the relevant police officer had checked and searched him he had been subjected to a deprivation of liberty within the meaning of Article 5 § 1. Since his deprivation of liberty had had no legal basis, it had been in breach of that provision.

67. The Government did not comment on the applicant’s complaints.

68. Res Publica pointed to the critical stance of international instruments as to police searches in the absence of a reasonable suspicion of an actual or possible offence or crime, and as to the blanket designation of areas as a

security risk. In the view of the third-party intervener, stop and search in the absence of a suspicion could lead to misuse of power. Even in situations where a stop and search scheme served a legitimate aim, it still had to be circumscribed by certain guarantees to prevent arbitrary application.

B. The Court's assessment

69. The Court reiterates that Article 5 § 1 is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 § 1, the starting-point must be his specific situation, and account must be taken of a whole range of criteria, such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is one of degree or intensity, and not of nature or substance (see *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 57, ECHR 2012).

70. The Court observes that although the length of time during which the applicant was subjected to the police measures was rather short, during this period he was entirely deprived of any freedom of movement. He was obliged to remain on the premises of the cultural centre and submit to the identity check and the search, and if he had refused then he could have been placed in short-term detention at a police station (*előállítás*) and could have faced minor-offence proceedings (see section 33(2) (a) of the Police Act and section 216 of Act no. II of 2012 on Minor Offences, quoted, respectively, in paragraphs 22 and 24 above). This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1 (see, for example, *Foka v. Turkey*, no. 28940/95, § 78, 24 June 2008).

71. However, having regard to its findings under Article 8 of the Convention, concerning notably the absence, in the domestic law concerning enhanced checks, of safeguards against arbitrary interferences (see paragraph 62 above) and of the possibility of independent and meaningful scrutiny and review (see paragraphs 56-57 and 61 above), the Court considers that in the circumstances of the present case it is not necessary to examine separately the admissibility and merits of the applicant's complaints under Article 5 § 1 and Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

72. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

73. The applicant claimed 1,000 euros (EUR) in respect of non-pecuniary damage.

74. The Government contested this claim.

75. The Court awards the applicant the full amount claimed in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

76. The applicant also claimed EUR 4,080 plus VAT for the costs and expenses incurred before the Court, an amount comprising his lawyer's fees, which equated to thirty-four hours of legal work at an hourly rate of EUR 120 plus VAT.

77. The Government contested the claim, considering it excessive.

78. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 4,080 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

79. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 8 of the Convention admissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine the admissibility and merits of the complaints under Article 5 § 1 and Article 13 of the Convention;

4. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
(ii) EUR 4,080 (four thousand and eighty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 14 January 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Ksenija Turković
President