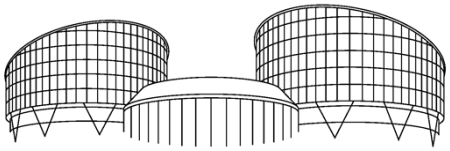

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF VLAHOV v. CROATIA

(Application no. 31163/13)

JUDGMENT

Art 11 • Freedom of association • Criminal conviction of trade union representative, for refusing to admit would-be members to join, not necessary in a democratic society • Lack of reasoning in domestic courts' decisions • Absence of hardship suffered by would-be members

STRASBOURG

5 May 2022

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

In the case of Vlahov v. Croatia,

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

Marko Bošnjak, *President,*
Péter Paczolay,
Krzysztof Wojtyczek,
Alena Poláčková,
Erik Wennerström,
Raffaele Sabato,
Davor Derenčinović, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 31163/13) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Goran Vlahov ("the applicant"), on 23 April 2013;

the decision to give notice to the Croatian Government ("the Government") of the complaints under Article 6 §§ 1 and 3 (d) and Article 11 of the Convention;

the parties' observations;

Having deliberated in private on 5 April 2022,

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

INTRODUCTION

1. The case mainly concerns the applicant's complaint under Article 11 of the Convention about his criminal conviction for refusing to admit several individuals to a trade union whilst acting in his capacity as a trade union representative.

THE FACTS

2. The applicant was born in 1959 and lives in Šibenik.

3. The applicant was granted leave for self-representation. The Government were represented by their Agent, Ms Š. Stažnik.

4. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

5. At the beginning of 2007 the applicant held the position of representative (*povjerenik*) of the Šibenik branch of the Croatian Customs Officers' Trade Union (*Carinski sindikat Hrvatske*, hereinafter: "the CSH").

6. The CSH is an independent and autonomous trade union designed to protect the employment rights and interests of customs officers employed in

the Customs Administration of the Ministry of Finance (*Ministarstvo financija*, *Carinska uprava*). It has no public powers and membership of the union is on a purely voluntary basis. The CSH's major source of income is membership fees. It receives no direct financial support from the State or other public funds (see paragraph 32 below). At the relevant time, the CSH was not the only trade union representing customs officers; another trade union operated within the Šibenik Customs Office.

7. Between 3 January and 16 February 2007, acting in his capacity as the trade union representative, the applicant refused the applications of fifteen employees of the Šibenik Customs Office, including P.N., P.M., G.Š. and I.Z., for membership of the Šibenik branch of the CSH.

8. According to the applicant, in so doing he acted in accordance with an agreement with other members of the trade union not to extend the membership of the CSH at the relevant time. He also wanted to prevent a manoeuvre by their employer to get a number of "its people" into the trade union, thereby changing the governing structures within the union. On 25 January 2007, acting as the trade union representative, he sent a letter to all those concerned within the Šibenik Customs Office, explaining that decision.

9. At the same time, there were various disagreements between the applicant and the president of the CSH, D.C., concerning the manner in which the trade union should be governed. Despite the applicant's refusal to extend the membership of the Šibenik branch of the CSH, in the period between 3 January and 16 February 2007, D.C., acting as the president of the CSH, enrolled the fifteen would-be members, including P.N., P.M., G.Š. and I.Z, in the Šibenik branch of the union (see paragraph 7 above).

10. On 1 March 2007 twenty-one members of the Šibenik branch of the CSH, including the fifteen new members, called for an extraordinary session of the union's assembly. The extraordinary session was held on 9 March 2007. The applicant's refusal to accept the fifteen new members was discussed and a decision was adopted (by 25 votes of those present, two abstentions and no votes against) to remove him from his position as the trade union representative. I.Z. was appointed as the new representative, and P.N. as his deputy.

11. On 10 May 2007 the Šibenik branch of the CSH lodged a criminal complaint against the applicant with the Šibenik Municipal State Attorney's Office (*Općinsko državno odvjetništvo u Šibeniku*, hereinafter: "the State Attorney's Office") in relation to charges of preventing citizens from joining trade unions under Article 109 of the Criminal Code (see paragraph 30 below), in connection with his refusal to accept the applications of the fifteen would-be members of the CSH in the period between 3 January and 16 February 2007 (see paragraph 7 above). The criminal complaint was signed by the representative I.Z. and co-signed by other members of the governing structures of the union, including P.N., P.M. and G.Š.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

12. In connection with the CSH's criminal complaint, the State Attorney's Office instructed the police to conduct a further inquiry into the matter.

13. On 7 May 2008 the police reported that on the basis of available documents concerning the admission of the fifteen would-be members to the union and interviews with all those concerned, they had established that there was a reasonable suspicion that the applicant had committed the offence of preventing citizens from joining trade unions under Article 109 of the Criminal Code.

14. On 16 May 2008, relying on the police report, the State Attorney's Office asked an investigating judge of the Šibenik County Court (*Županijski sud u Šibeniku*, hereinafter: "the County Court") to conduct an investigation into the case.

15. In the course of the investigation, the applicant and a number of witnesses were heard. The applicant stated that he had not prevented anyone from joining trade unions. He stressed that there were two trade unions operating within the Šibenik Customs Office, and that the would-be members had previously been members of the CSH but had voluntarily terminated their membership. He argued that when refusing to accept their applications, he had acted on the basis of a decision adopted by the Šibenik branch of the CSH not to extend its membership before an upcoming ordinary annual assembly was held.

16. In their statements to the investigating judge, the would-be members explained how they had wanted to join the CSH but the applicant had refused their applications, so they had needed to apply through the central office of the CSH. They further explained that the relations within the Šibenik branch of the CSH had been disturbed during the applicant's term in office. The new representative of the union, I.Z., also explained how the new members had managed to organise an extraordinary assembly and remove the applicant from his post as trade union representative.

17. For his part, D.C. explained that at the relevant time he had been president of the CSH. This meant that he had coordinated the work of representatives of the local branches of the CSH, but had not been superior to them. He also stated that the Statute of the CSH had not provided for any special conditions for becoming a member of the CSH, and that he had advised the applicant that a decision of the Šibenik branch of the CSH not to extend its membership did not have a basis in the Statute. Acting as the president of the CSH, D.C. had therefore enrolled the would-be members in the Šibenik branch of the CSH. In D.C.'s view, the applicant had refused to accept new members because the Šibenik branch of the CSH had had some thirty members, so he had been afraid that the fifteen new members could remove him from his position as trade union representative.

18. On the basis of the results of the investigation conducted by the investigating judge, on 17 October 2008 the State Attorney's Office indicted the applicant in the Šibenik Municipal Court (*Općinski sud u Šibeniku*; hereinafter: "the Municipal Court"). It argued that the applicant, acting as the trade union representative, had prevented fifteen would-be members from joining the Šibenik branch of the CSH, and had thus committed the offence of preventing citizens from joining trade unions under Article 109 of the Criminal Code (see paragraphs 7 above and 30 below).

19. On 28 October 2008 the Municipal Court accepted the indictment and issued a penal order (*kazneni nalog*), finding the applicant guilty as charged and sentencing him to three months' imprisonment, suspended for a year.

20. On 12 November 2008 the applicant objected to the penal order, and the case was sent for trial before the Municipal Court.

21. At a hearing on 23 September 2010 the applicant accepted that all evidence obtained by the investigating judge, including witness statements, would be read out at the trial without there being further examination. He also asked the Municipal Court to question three further witnesses who could give evidence on the reasons why the fifteen would-be members had wanted to join the CSH.

22. On the same day the Municipal Court dismissed the request for the witnesses to be questioned on the grounds that the reasons why the applicant wanted to hear them were irrelevant. It also found the applicant guilty as charged and sentenced him to four months' imprisonment, suspended for a year. The applicant was ordered to pay the costs of the proceedings, 400 Croatian kunas (HRK; approximately 53 euros (EUR)).

23. In a short statement of reasons, the Municipal Court found that there was no dispute between the parties that the applicant had prevented the fifteen would-be members from joining the Šibenik branch of the CSH. In the Municipal Court's view, that had clearly been contrary to the Constitution and relevant domestic law, as well as the Statute of the CSH. The Municipal Court thus found that the applicant had committed the offence of preventing citizens from joining trade unions under Article 109 of the Criminal Code.

24. The applicant challenged that judgment before the County Court. He argued that the fifteen would-be members had been free to form and join other trade unions, and he had in no way prevented them from doing that. In his view, their right to form and join trade unions could not be interpreted in a manner allowing them to join the Šibenik branch of the CSH irrespective of whether they had views and interests which were possibly divergent from those of the trade union. He pointed out that pluralism in trade union activity meant that employees were free to form and join trade unions that represented their values and ideas. The applicant also argued that the Municipal Court's decision to dismiss his proposal to hear further witnesses had prevented it from establishing all the relevant facts of the case.

25. On 16 December 2010 the County Court dismissed his appeal and upheld the first-instance judgment, endorsing the reasoning of the Municipal Court. In the County Court's view, there was no doubt that the applicant had acted contrary to the Constitution, the relevant law and the Statute of the CSH, and this was sufficient to find him guilty as charged. The County Court also considered that the Municipal Court's decision not to hear further witnesses had been justified.

26. On 18 April 2011 the applicant lodged a constitutional complaint before the Constitutional Court (*Ustavni sud Republike Hrvatske*), arguing in particular that he had acted as the trade union representative, who, under the Statute of the CSH, had a duty to protect the interests of the trade union and its members. He pointed out that the lower courts had provided no reasoning as to the restriction on his right and the right of other members of the Šibenik branch of the CSH not to be in the same trade union as the fifteen persons who had wanted to join their union and who had not shared their interests. He also stressed that he had in no way limited the right of the would-be members to form or join other trade unions, but had simply sought to protect the interests of the existing membership of the union. In his view, the lower courts' decisions had set a dangerous precedent whereby any person would have a right to join any trade union or other association, irrespective of the wishes or interests of the existing members of the union or association.

27. On 17 October 2012 the Constitutional Court dismissed the applicant's constitutional complaint as unfounded, endorsing the reasons for his conviction.

28. The decision of the Constitutional Court was served on the applicant's representative on 30 October 2012.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

29. The relevant parts of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette no. 56/1990, with further amendments) provide as follows:

Article 29

"In the determination of his rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial court established by law."

Article 43

"Everyone shall be guaranteed the right to associate freely for the protection of their interests or promotion of social, economic, political, national, cultural and other convictions or goals. For this purpose, anyone may freely form trade unions and other associations, join them or leave them, in accordance with the law.

The right to associate freely is limited by the prohibition of any violent threat to the democratic constitutional order and the independence, unity, and territorial integrity of the Republic of Croatia."

30. The relevant provision of the Criminal Code (*Kazneni zakon*, Official Gazette no. 110/1997, with further amendments), as in force at the relevant time, read as follows:

Violation of the Freedom of Association
Article 109

"Whoever denies or limits citizens' freedom of association in ... trade unions ... shall be punished by a fine or imprisonment for [a period of] not more than one year."

31. At the material time, the Labour Act (*Zakon o radu*, Official Gazette no. 137/2004 – consolidated text, with further amendment) provided the following:

Judicial protection of employment rights
Section 133

"(1) Worker who considers that the employer has breached some of his or her employment rights can ... request from the employer to fulfil that right.

(2) If the employer ... fails to comply with that request, the worker can, within a period of fifteen days, seek a judicial protection of the breached right before the competent court. ..."

XIX TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS
GENERAL PROVISIONS ON ASSOCIATIONS
Right to associate
Section 167

"(1) Workers have the right, without [there being] any distinction whatsoever, and according to their own free choice, to form and join a trade union, subject to only such requirements which may be prescribed by the statute or internal rules of the trade union.

...

(3) The associations referred to in subsection 1 ... of this section (hereinafter, 'the Associations') may be formed without any prior approval."

Free membership in the association
Section 168

"(1) Workers and employers respectively may freely decide on joining or leaving an association.

(2) No one shall be discriminated against on the grounds of his or her membership or non-membership of an association, or participation or non-participation in its activities."

Statute of the association
Section 174

"(1) An association or a higher-level association must have a statute of the association based on and adopted in accordance with the principles of democratic representation and the democratic exercise of will of its members.

(2) The statute of the association regulates its: purpose; name; seal; scope of activity; logo; bodies; method by which members of these bodies are elected and recalled; powers given to the bodies; procedure for accepting and terminating membership; methods for adopting and amending the statute, internal rules and other regulations; [and] termination of operations.

..."

Judicial protection of membership rights
Section 186

"Any member of the association may seek judicial protection in the event of a breach of his or her rights guaranteed by the statute of the association or other internal rules."

Judicial protection of the right to associate
Section 187

"(1) An association or a higher-level association may ask a court to prohibit actions breaching the right of workers and employers to associate.

(2) An association or a higher-level association may claim compensation for damage suffered as a result of the activities referred to in subsection 1 of this section."

32. The relevant provisions of the Statute of the Croatian Customs Officers' Trade Union (*Statut Carinskog sindikata Hrvatske*, 18 February 2006, hereinafter, "the Statute") read as follows:

Section 1

"The Croatian Customs Officers' Trade Union (hereinafter, 'the trade union') is a voluntary and independent association of customs officers and clerks employed by the Customs Administration of the Ministry of Finance.

The trade union is an independent, autonomous, voluntary and non-partisan association interested [in the protection of the interests of its members]. The trade union operates on the principles of democratic representation and the presentation of the will of its members, [and is] organised into branches and commissions."

Section 3

"The trade union is a legal entity [which is] independent of an employer and its associations in the promotion of the rights and interests of its members ..."

Section 10

"Persons employed by the Customs Administration of the Ministry of Finance may become members of the trade union, and they [must] seek membership on a voluntary basis ... One becomes a member of the trade union upon accepting the Statute and signing the membership application form, and [upon] paying the prescribed membership fee for the month when [he or she] joins the trade union.

Two copies of the application form shall be filled in and signed and personally submitted to the representative or deputy representative of the trade union ... The representative and deputy representative are responsible for how the admission procedure is conducted.

..."

Section 15

"The key entity within the trade union's structure is the local branch of the trade union.

...

In their operation, the local branches of the union are independent; they have their own bank accounts and operate in accordance with the Statute and their internal regulations.

..."

Section 16

"Bodies of the trade union, within its branches, are: the Assembly, [the executive] Commission, Representative Board and the Supervisory Board.

The Assembly is the highest body of a branch and consists of all members of the branch or their chosen representatives.

The Assembly elects the Commission, the Representative, the Supervisory Board and the treasurer.

...

The trade union representative is the person who represents the Commission and the branch of the trade union. He or she is also member of the Presidency of the trade union.
..."

Section 36

"The main source of income of the trade union, for financing its activities, is membership fees.

...

The trade union is a legal entity which has its own bank account.

The trade union may have other lawful sources of income."

33. The relevant parts of the Regulations of the Šibenik branch of the Croatian Customs Officers' Trade Union (adopted on 14 October 2000, hereinafter "the Regulations") provide:

Section 1

"The [Šibenik] branch [of the CSH] is a legal entity which operates within the structure of the trade union (CSH) ..."

Section 2

"The central form of trade union activity within the Customs Administration of the Ministry of Finance is the local branch, whose members act [collectively] in the

protection of their interests. The creation of [a local branch] is based on a voluntary expression of will by the employees, who become members by signing the membership application form. ...”

Section 10

“The [trade union] branch representative has the following rights and obligations:

- representing the branch

- organising and coordinating the work of the branch commission

- preparing, convoking and presiding over meetings of the branch and the Commission

- representing the branch and participating in the trade union Presidency ...

...

- representing each branch member whose rights are violated

- supporting the dignity and interests of the profession

- providing assistance by providing legal aid and protecting members

...

- proposing and forming committees, panels and workgroups for individual issues

- informing members on the proposals, conclusions and decisions of the Commission of the branch, and implementing the conclusions and decisions of the Presidency of the trade union

...

- performing all other tasks and implementing decisions of the branch commission

...”

Section 17

“Membership fees are the main source of income for financing the branch’s activities, but income may be procured from other sources. A decision to receive funds from other sources must be adopted by the Presidency of the trade union. ...”

Section 22

“The interpretation of these Regulations is within the powers of the Presidency of the trade union.”

II. RELEVANT INTERNATIONAL MATERIALS

A. International Labour Organization (ILO)

34. The relevant provisions of ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise (1948), ratified by Croatia, read as follows:

Article 2

"Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."

Article 3

"1. ... [E]mployers' organisations shall have the right ... to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

35. The relevant parts of ILO Convention No. 135 on Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (1971), ratified by Croatia, provide as follows:

Article 1

"Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements."

Article 3

"For the purpose of this Convention the term workers' representatives means persons who are recognised as such under national law or practice, whether they are--

(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; ..."

36. The relevant parts of ILO Convention No. 151 on Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (1978), not ratified by Croatia, provide:

Article 1

"1. This Convention applies to all persons employed by public authorities, to the extent that more favourable provisions in other international labour Conventions are not applicable to them.

..."

Article 5

"1. Public employees' organisations shall enjoy complete independence from public authorities.

2. Public employees' organisations shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration."

Article 9

> "Public employees shall have, as other workers, the civil and political rights which are essential for the normal exercise of freedom of association, subject only to the obligations arising from their status and the nature of their functions."

37. The ILO Committee on Freedom of Association, set up to examine complaints of violations of freedom of association, has held that the determination of conditions of eligibility for membership in a union is a matter that should be left to the discretion of the union by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right. Moreover, workers and their organisations should have the right to elect their representatives in full freedom and the latter should have the right to put forward claims on their behalf. The Committee has also held that the right of workers' organisations to elect their own representatives freely is an indispensable condition for them to be able to act in full freedom and to promote effectively the interests of their members. The public authorities refrain from any intervention which might impair the exercise of this right (Compilation of decisions of the Committee on Freedom of Association, 2018, paragraphs 586, 589 and 606, available at www.ilo.org).

38. Furthermore, the Committee has held that although holders of trade union office do not, by virtue of their position, have the right to transgress legal provisions in force, these provisions should not infringe the basic guarantees of freedom of association, nor should they sanction activities which, in accordance with the principles of freedom of association, should be considered legitimate trade union activities. Moreover, the Committee has stressed that the criminal prosecution and conviction to imprisonment of trade union leaders by reason of their trade union activities are not conducive to a harmonious and stable industrial relations climate. In addition, allegations of criminal conduct should not be used to harass trade unionists by reason of their union activities (Ibid., paragraphs 79-80 and 155).

B. The Council of Europe

39. Article 5 of the European Social Charter 1961 (ETS No.035) provides for the following "right to organise":

> "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. ..."

40. For a summary of the European Committee of Social Rights' conclusions on the United Kingdom legal system in relation to the right of a trade union to determine its conditions for membership, see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, §§ 23-24, 27 February 2007.

C. Other relevant materials

41. Other relevant instruments on the rights of trade unions are set out in *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 40-41, ECHR 2008.

III. EUROPEAN UNION LAW

42. The relevant part of Article 12(1) of the Charter of Fundamental Rights of the European Union provides as follows:

> "Everyone has the right ... to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

43. The applicant complained about his criminal conviction for refusing to admit new members to the Šibenik branch of the CSH whilst acting in his capacity as a trade union representative. He relied on Article 11 of the Convention, which reads as follows:

> "1. Everyone has the right ... to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

A. Admissibility

44. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicant

45. The applicant submitted that he had refused the membership applications of the fifteen would-be members only because he had wanted to protect the interests of the existing members of the Šibenik branch of the

CSH. He had considered that the interests of the would-be members conflicted with the interests of the existing members. Thus, in his view, D.C. had acted in breach of the relevant regulations and interests of the Šibenik branch of the CSH in accepting the fifteen membership applications. According to the applicant, as the trade union representative, processing the applications of new members had been solely within his authority. Moreover, the applicant contended that there had been a conflict of interest as regards D.C., as he (the applicant) had been his opponent in the elections for the CSH president.

46. The applicant further pointed out that two principles formed the pillars of the CSH's functioning: independence from the employer and the protection of members' interests. Pursuant to section 10 of the Regulations, it had been his duty to represent the trade union and protect the interests of its members. This had also been the case in relation to the extension of its membership, something which could not be based solely on objective grounds, such as the signing of an application form, but had depended on an assessment of whether the extension of the membership was in accordance with the interests of the existing members. At the relevant time, his opinion and that of the existing members of the union had been that membership should not be extended until an upcoming Assembly was held. By that decision, they had wanted to prevent changes to the governing structures of the union before the Assembly was held.

47. The applicant contended that his conviction and sentence for refusing the admission of the fifteen would-be members had been arbitrary and excessive. In his view, the domestic authorities had arbitrarily accepted that the would-be members' interests trumped his interests and those of the existing members of the union in governing the union activities as they saw fit. He argued that if somebody had been dissatisfied with his work and decisions, he or she could have sought protection before the civil courts under the Labour Act, without resorting to repression by means of criminal law.

48. In this connection, the applicant also argued that Article 109 of the Criminal Code had been inapplicable in his case, as it concerned only those who had the power to deny or limit citizens' freedom of association. He had had no such powers, as there had been another trade union operating within the Šibenik Customs Office which the employees could have joined. Lastly, the applicant argued that the domestic courts had failed to establish all the circumstances of the case, as they had failed to hear the witnesses he had proposed during the proceedings.

(b) The Government

49. The Government argued that while they fully accepted the right of trade unions to manage their own affairs, including their membership, the applicant in this case, as a trade union representative, had refused to admit fifteen persons to the trade union, acting contrary to the relevant law. In the

Government's view, no provision of the Statute had allowed the applicant not to accept new members to the union who fulfilled the objective criteria under section 10 of the Statute, namely they were employed in the Customs Administration and had accepted the Statute, signed the membership application form and paid the membership fee. They pointed out that this interpretation of the Statute had also been confirmed by D.C. when he had been heard as a witness during the criminal investigation against the applicant.

50. The Government further stressed that it was the applicant's arbitrary conduct in refusing to admit new members to the trade union that had led to the lodging of a criminal complaint against him and his conviction in the criminal proceedings. They pointed out that the relevant domestic courts had also found that the applicant had acted contrary to the Constitution, the relevant law and the Statute. Thus, by convicting the applicant for acting contrary to the relevant law, the domestic courts had not interfered with the functioning of the trade union or with the applicant's lawful activities as the union's representative. On the contrary, the domestic courts had protected the interests of the would-be members from the applicant's unlawful conduct.

51. Lastly, the Government submitted that all the relevant facts in the proceedings had been properly established and that the decisions of the domestic courts refusing to hear further witnesses proposed by the applicant had not been arbitrary or unreasonable.

2. The Court's assessment

(a) General principles

52. The Court refers to the general principles on trade union freedom set out in *Demir and Baykara*, cited above, §§ 109-11 and 119, and *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, §§ 130-135, ECHR 2013 (extracts).

53. Through its case-law, the Court has built up a non-exhaustive list of the constituent elements of trade union freedom, including the right of trade unions to draw up their own rules and administer their own affairs, including membership. The relevant principles in this context are set out in *Associated Society of Locomotive Engineers and Firemen (ASLEF),* cited above, §§ 37-46.

(b) Application of these principles to the present case

(i) Existence of an interference

54. The applicant was convicted, in his capacity as trade union representative, of refusing to admit fifteen would-be members to the Šibenik branch of the CSH. While the question of whether the applicant acted in accordance with the relevant union rules and the Statute are at the centre of the dispute in the present case (see paragraph 66 below), the Court notes that,

at the relevant time, the applicant was the lawfully appointed trade union representative whose tasks included taking actions to represent the union and protect the interests of its members (see paragraphs 5, 32 and 33 above, section 10 of the Statute and section 10 of the Regulations; see also paragraph 40 above). In this connection, it is noted that the domestic law – in particular sections 186 and 187 of the Labour Act (see paragraph 31 above) – provided for the possibility that other members of the union and/or the central office of the CSH could seek judicial protection of their membership rights and right to associate in general. However, no such proceedings were instituted against the applicant within the existing structures of the union following his notifying all those concerned of the decision not to enlarge the membership of the Šibenik branch at the relevant time (see paragraph 8 above).

55. In these circumstances, having regard to the fact that Article 11 protects the right of trade unions – as associations formed by people – to control their membership (see *Associated Society of Locomotive Engineers and Firemen (ASLEF)*, cited above, § 39), the Court considers that the applicant's criminal conviction for not admitting new members to the union at the relevant time whilst acting as the trade union representative amounted to an interference with Article 11 of the Convention.

(ii) Whether the interference was prescribed by law

56. Although the applicant challenged the applicability of Article 109 of the Criminal Code in his particular case (see paragraph 48 above), regard being had to the fact that it is primarily for the national courts to interpret and apply domestic law (see, for instance, *Tsonev v. Bulgaria*, no. 45963/99, § 45, 13 April 2006), the Court is prepared to accept that the interference in question was prescribed by law. In so far as the applicant challenges the domestic courts' assessment of the relevant facts and the quality of their reasoning, these issues fall to be examined in the context of the question of whether or not the impugned interference was necessary in a democratic society.

(iii) Whether the interference pursued a legitimate aim

57. The Court notes that the applicant was convicted for violating the freedom of association, which is a value protected by the Criminal Code (see paragraph 30 above). His conviction could therefore be seen as aimed at the prevention of crime. However, having regard to the Government's arguments (see paragraph 50 above), the Court will proceed under the assumption that the impugned interference had the aim of protecting the rights and freedoms of others, namely the fifteen would-be members, to exercise their right of association without undue hindrance. The crucial question is, as noted above, whether this interference was necessary in a democratic society.

(iv) Whether the interference was "necessary in a democratic society"

(α) General principles

58. The question that arises in the present case concerns the extent to which the State could intervene to protect the would-be trade union members from the hindrance of their right to associate, taking into account the applicant's rights and those of the trade union which he at the relevant time represented to control their membership by deciding with whom they wanted to associate.

59. The Court reiterates that the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, while in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law (see *Demir and Baykara*, cited above, § 144).

60. In this connection, the Court notes that whereas in some instances various Article 11 rights may deserve equal protection (see, for instance, *Sindicatul "Păstorul cel Bun"*, cited above, § 160), the right to join a union "for the protection of [one's] interests" cannot be interpreted as conferring a general right to join the union of one's choice, irrespective of the right of the union in question to decide on its membership in accordance with the union rules (see *Associated Society of Locomotive Engineers and Firemen (ASLEF)*, cited above, § 39). Indeed, Article 11 cannot be construed as permitting every kind of compulsion in the field of trade union membership, as that would strike at the very substance of the freedom it is designed to guarantee (see *Young, James and Webster v. the United Kingdom*, 13 August 1981, § 52, Series A no. 44). Moreover, it would strike at the very essence of Article 11 to exert pressure on a person in order to compel him or her to join, or be in an association with, those who do not share his or her views (ibid, § 57, *mutatis mutandis*). All this, of course, holds true where the association or trade union is a private body independent of the State and is not, for example, operating a closed shop agreement, in which case other considerations may apply (see *Associated Society of Locomotive Engineers and Firemen (ASLEF)*, cited above, § 40).

61. In any event, as explained in *Associated Society of Locomotive Engineers and Firemen (ASLEF)* (§ 43), a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Thus, the State must protect the individual against any

abuse of a dominant position by trade unions. In the cited case, with reference to the Commission's earlier case-law (see *Cheall v. the United Kingdom*, no. 10550/83, Comm. Dec. 13.5.85, D.R. 42, and *Johanssen v. Norway*, no. 13537/88, Comm. Dec. 7.5.90), the Court has identified that such abuse might occur, for example, where exclusion or expulsion from a trade union is not in accordance with union rules, or where the rules are wholly unreasonable or arbitrary, or where the consequences of exclusion or expulsion result in exceptional hardship. It would add to this that a form of abuse might also occur in the event of discriminatory treatment, against which the State is required to take the real and effective measures of protection (see, *mutatis mutandis*, *Danilenkov and Others v. Russia*, no. 67336/01, § 124, ECHR 2009 (extracts)).

62. Lastly, the Court reiterates that when it carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, for instance, *Zhdanov and Others v. Russia*, nos. 12200/08 and 2 others, § 141, 16 July 2019, with further references).

(β) Application of those principles

63. At the outset, the Court notes that the trade union in question in the present case, within which the applicant held the position of trade union representative at the relevant time, operates as an independent and autonomous trade union designed to protect the employment rights and interests of customs officers. It has no public powers and its membership is purely on a voluntary basis. Its major source of income is membership fees, and it receives no direct financial support from the State or other public funds. Moreover, it is not the only trade union representing customs officers, and there is no closed shop agreement in this area (see paragraphs 6, 16-17 and 32-33 above). The particular branch of the union in Šibenik which the applicant represented was a relatively small organisation apparently comprising some thirty members at the relevant time (see paragraph 17 above).

64. As there was no closed shop agreement, it is not apparent that the fifteen would-be members suffered, or were liable to suffer, any particular detriment or hardship in terms of their livelihood or their conditions of

employment owing to their inability to join the applicant's trade union at the relevant time. Given that that they were free to join the other existing trade union and/or establish their own or to protect their rights through legal proceedings concerning the conditions of their employment, there is nothing to suggest that they were at any individual risk of, or unprotected from, possible adverse actions by the employer (compare *Associated Society of Locomotive Engineers and Firemen (ASLEF)*, cited above, § 50; and see paragraphs 31 and 61 above).

65. Moreover, there is no indication that the fifteen would-be members were subject to discriminatory treatment by the applicant acting as the trade union representative. The Court also notes that in the present case no issue arises as regards the rules and Statute of the union itself. It has not been alleged that those rules or the Statute are wholly unreasonable or arbitrary (see paragraph 61 above).

66. Rather, a dispute arises over the question whether the applicant acted in an abusive and unreasonable manner in breach of the union rules when refusing to admit the fifteen would-be members (see paragraphs 61 above; and *Associated Society of Locomotive Engineers and Firemen (ASLEF)*, cited above, § 52). In particular, the central tenet of the Government's argument is that the applicant acted contrary to the Statute of the CSH in refusing to admit the fifteen would-be members to the union (see paragraphs 49-50 above).

67. In this connection, the Court reiterates, as it has stated on many occasions, that it is sensitive to the subsidiary nature of its role and must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them (see, for instance, *Barseghyan v. Armenia*, no. 17804/09, § 39, 21 September 2021, with further references). For its part, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in the Convention and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see paragraph 62 above).

68. In the present case, it would appear that there was no authoritative guidance on how to interpret the trade union internal rules on the admission of new members as provided for in its internal regulations (see paragraph 33 above; section 22 of the Regulations). At the same time, the domestic courts' reasoning was very succinct and did not elaborate on the considerations related to the applicant's compliance with the relevant rules and the Statute, seeing in light of the relevant domestic law and the requirements of Article 11 of the Convention (see paragraphs 59-61 above).

69. In particular, on the one hand, it is true that the Statute provided no specific requirements for the admission of new members to the union, and

that the applicant was eventually, albeit after the change in the membership of the union, removed from his position of trade union representative by a great majority of vote of the members (see paragraph 10 above). However, on the other hand, it is also true that that there was nothing to suggest that at the relevant time the applicant did not represent the interests of the union or other members of the Šibenik branch of the union, who did not institute any action against the applicant under the domestic law (see paragraph 31 above) after he had informed them of the refusal to admit the would-be members (see paragraph 8 above). Indeed, according to the internal union regulations and the Statute, the applicant's position of trade union representative included taking actions to represent the union and to protect the interests of its members (see paragraph 54 above).

70. Moreover, it is noted that there were established procedures allowing the would-be members eventually to join the CSH as well, and the applicant's actions, according to him, were intended not to deny their admission as such but to delay the decision on the extension of the membership until an upcoming ordinary annual assembly of the union (see paragraph 46 above). In this connection, it has not been suggested that the applicant had institutional or other power to decide for the assembly whether the membership would be extended or not or to prevent the admission of new members contrary to the decision of the assembly, which is the highest body of the union (see paragraph 32 above, Section 16 of the Statute).

71. However, the domestic courts did not explain, in the light of the relevant principles under Article 11 (see paragraphs 59-61 above), how these considerations relate to the applicant's conduct when refusing the admission of the would-be members to the union. They did not elaborate on the fact that the applicant's position of trade union representative at the material time conferred on him the right to take actions to represent the union and to protect the interests of its members (see paragraph 69 above). They also failed to elaborate on the internal relations in the CSH and their effects on the fifteen would-be members' wish to become members of that union and the applicant's decision not to accept their membership.

72. In this connection, the Court notes that the domestic courts refused the applicant's proposal to take further evidence, something which arguably could have shed light on the circumstances in which the fifteen would-be members had wanted to join the trade union (see paragraphs 21-22 and 25 above). In so doing, the courts merely noted that his request was irrelevant, which, given the circumstances, cannot be considered a properly reasoned decision (see, for instance, *Kuveydar v. Turkey*, no. 12047/05, § 44, 19 December 2017).

73. In these circumstances, in view of the lack of reasoning in the domestic courts' decisions, including their procedural failure to examine all the relevant circumstances of the case in the light of the principles set out in the Court's case-law (see paragraphs 59-61 above), and in the absence of any

identifiable hardship suffered by the would-be members or any discriminatory motive in the applicant's actions, it cannot be established convincingly and in conformity with the principles embodied in Article 11 that the interference complained of was necessary in a democratic society.

74. There has accordingly been a violation of Article 11 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (D) OF THE CONVENTION

75. The applicant complained that the criminal proceedings against him had been unfair, particularly as regards his right to obtain the attendance and examination of witnesses for the defence, as provided for under Article 6 §§ 1 and 3 (d) of the Convention.

76. The Government contested that argument.

77. The Court notes that this complaint is linked to the one examined above, and must therefore likewise be declared admissible.

78. Having regard to the findings relating to Article 11 of the Convention (see paragraphs 72-74 above), the Court considers that it is not necessary to examine whether there has been a violation of Article 6 of the Convention in this case (see, among other authorities, *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan*, no. 37083/03, § 94, ECHR 2009, with further references).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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

80. The applicant claimed EUR 30,000 in respect of non-pecuniary damage.

81. The Government considered this claim to be excessive, unfounded and unsubstantiated.

82. The Court considers that the applicant must have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. Ruling on an equitable basis, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

83. The applicant also claimed HRK 400 (EUR 53) for the costs and expenses incurred before the domestic courts.

84. The Government considered this claim unsubstantiated.

85. 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 have been 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 claimed covering costs and expenses in the domestic proceedings, plus any tax that may be chargeable.

C. Default interest

86. 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 application admissible;

2. *Holds* that there has been a violation of Article 11 of the Convention;

3. *Holds* that there is no need to examine the complaint under Article 6 §§ 1 and 3 (d) 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 Croatian kunas at the rate applicable at the date of settlement
   (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (ii) EUR 53 (fifty-three 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;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Marko Bošnjak President