



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

SECOND SECTION

CASE OF ISTVÁN GÁBOR KOVÁCS v. HUNGARY

(Application no. 15707/10)

JUDGMENT

STRASBOURG

17 January 2012

FINAL

17/04/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of István Gábor Kovács v. Hungary,

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

Françoise Tulkens, *President*,

Danutė Jočienė,

Dragoljub Popović,

András Sajó,

Işıl Karakaş,

Guido Raimondi,

Paulo Pinto de Albuquerque, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 13 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 15707/10) against the Republic of 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 István Gábor Kovács (“the applicant”), on 5 March 2010.

2. The applicant was represented by Ms Zs. Szirtesi, a lawyer practising in Szeged. The Hungarian Government (“the Government”) were represented by M L. Hölzl, Agent, Ministry of Public Administration and Justice.

3. The applicant alleged *inter alia* that the conditions of his detention amounted to inhuman and degrading treatment and an infringement of his right to respect for family life.

4. On 13 September 2010 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1969 and lives in Szatymaz. When introducing the application, he was detained at Szeged Prison.

6. The applicant was arrested on 8 January 2008. From 11 January 2008 on he was detained on remand at Szeged Prison on charges of trafficking in goods subject to excise tax. On 9 October 2009 the Csongrád County Regional Court found him guilty as charged. Pursuant to the final judgment of 9 June 2010 of the Szeged Court of Appeal, he served a prison sentence of three years and six months in a strict regime at Szeged Prison. His pre-trial detention was credited against his imprisonment.

7. Szeged Prison is comprised of two separate parts: Unit I, a strict- and medium-regime facility for sentenced prisoners, and Unit II, a facility for remand prisoners. The applicant's pre-trial detention, which is the subject matter of his complaints, took place in various cells of Unit II, and the remainder of his detention, as from 10 June 2010, in Unit I.

8. The applicant submitted that he had shared cells with an average of 16 sq metres' ground surface with five to seven persons, not counting furniture, and could stay outside the cell only about an hour daily. He also stated that he could receive visitors for only one hour every month (an exception being his brother, who was granted three extra visits, lasting two hours on each occasion); however, he had not been at all allowed to touch his family members during these visits. Moreover, despite his requests, the prison administration had not provided him with toiletries free of charge, nor had it authorised him to possess, with a view to preparing his defence, a personal computer in his cell, although it would have had no access to internet. Lastly, he submitted that the prison had not provided him with free stationery so that he could post submissions to the authorities in charge of his criminal case pending at that time.

9. He submitted that his requests and complaints concerning the above matters and also the catering at the prison, to various instances of the penitentiary administration were to no avail. He availed himself of a formal remedy with regard to the refusal by the prison administration to authorise him to possess a personal computer in his cell. Whilst the Government submitted that Szeged Prison had been inspected by the penitentiary prosecutor once every two weeks, the applicant stated that no such visit had taken place in Unit II during his detention.

10. According to the National Penitentiary Service's statistics available on its website¹, the average occupancy rate of Hungarian prisons was 118% in 2008, 124% in 2009 and 133% in 2010.

II. RELEVANT DOMESTIC LAW

11. Section 118(1) d) of Law-Decree no. 11 of 1979 on the Execution of Sentences and Measures provides that a remand detainee is entitled to at least one visit per month.

¹ www.bvop.hu

12. Rule 25 of Szeged Prison's House Regulations provide that a detainee is entitled to a visit of one hour every month.

13. According to Rule 34, no physical contact is allowed between a detainee and his/her visitor, unless a so-called family visit takes place in a dedicated room.

14. Rule 38 provides that family visits can be initiated by an inmate's warden, rather than the detainee himself.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

15. The applicant complained that his detention in overcrowded prison cells amounted to inhuman and degrading treatment in breach of Article 3 of the Convention, which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

16. The Government contested that argument.

A. Admissibility

17. The Government argued that the applicant had not exhausted domestic remedies in that he had not pursued formal complaints in this respect, notably to the public prosecutor supervising penitentiary matters.

18. The applicant contested this view, pointing out that he had repeatedly complained to the prison administration about the cramped conditions.

19. The Court recalls that a similar objection raised by the Government in respect of Budapest Prison was dismissed on account of the little prospect of success of the remedies referred to, in the face of the high occupancy rate of that facility (see *Szél v. Hungary*, no. 30221/06, §§ 11 to 13, 7 June 2011). Given that the average occupancy rate of Hungarian prisons was 118 to 133% in the material period (see paragraph 10 above), the Court is not convinced that, in addition to those addressed to the prison administration, a further complaint to the public prosecutor could have remedied the applicant's situation, which seems to have derived from material constraints. Therefore it sees no reason to depart from its earlier conclusion, and finds that this complaint cannot be rejected for non-exhaustion of domestic remedies.

20. Moreover, 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

21. The applicant submitted that he had been kept in cells with a personal space of around 2.5 sq metres, calculated without taking into account the furniture, which he had found very hard to bear, especially in the summer heat of 2008 and 2009.

22. The Government pointed out that, applying the method of calculation without deducting the space taken up by the furnishings, the average personal space in the respective cells in which the applicant had been detained on remand was as follows: 3.50 sq metres (1 day), 4.00 sq metres (260 days), 4.41 sq metres (174 days), 4.77 sq metres (64 days), 5.09 sq metres (151 days), 5.42 sq metres (98 days), 5.60 sq metres (86 days), 7.00 sq metres (1 day), 7.75 sq metres (6 days) and 10.33 sq metres (6 days). Being aware of the fact that these figures reflect the average occupancy of the respective cells and the actual number of detainees in each of them fluctuated somewhat during the periods concerning the applicant, the Government emphasised that the applicant at no time had had less personal space than 3.50 sq metres of ground surface. A total of 67 days during the applicant's pre-trial detention corresponded to personal space of between 3.50 and 4.00 sq metres, and these periods did not coincide with the months of July or August. In these circumstances, the Government argued that the conditions complained of had not attained the minimum level of severity required for them to fall within the scope of Article 3.

23. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

24. The Court further recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of such a purpose cannot conclusively rule out a finding of a violation of Article 3 (see *Peers v. Greece*, no. 28524/95, §§ 67-68, 74, ECHR 2001-III).

25. The Court has consistently stressed that a breach of Article 3 of the Convention would generally involve suffering and humiliation beyond that which is inevitably connected with a given form of legitimate treatment or punishment. Measures depriving a person of his or her liberty may often involve such elements. Thus, under this provision, the State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the prisoner's health and well-being are adequately secured (see *Kudła v. Poland* [GC], no. 30210/96, §§ 92-94, ECHR 2000-XI).

26. The Court notes that in Unit II of Szeged Prison, the applicant was accommodated for 67 days in cells with under 4.00 sq metres' ground surface per person (see paragraph 22 above), furnishings included. It observes by contrast that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") considers 4.00 sq metres' living space per inmate an acceptable minimum standard in multi-occupancy cells (see, for example, paragraphs 65 and 80 of the Report to the Hungarian Government on the visit to Hungary carried out by the CPT from 24 March to 2 April 2009). The Court therefore finds that the applicant's detention under cramped conditions at Szeged Prison in conjunction with the fact that he had to spend almost the entirety of the days inside those cells, (a non-refuted allegation – see paragraph 8 above) failed to respect basic human dignity and must therefore have been prejudicial to his physical and mental state (see, *mutatis mutandis*, *Savenkovas v. Lithuania*, no. 871/02, §§ 81-82, 18 November 2008). Accordingly, it concludes that the overcrowded conditions of this detention amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

27. Finally, mindful of the fact that the seriousness of the problem of overcrowding and of the resultant inadequate living and sanitary conditions in Hungarian detention facilities has been acknowledged by the domestic authorities (see *Szél v. Hungary*, no. 30221/06, § 8, 7 June 2011), the Court considers that an effective remedy responding to this issue could be offered by taking the necessary administrative and practical measures. In the Court's view, the authorities should react rapidly in order to secure appropriate conditions of detention for detainees.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant complained that the fact that, while detained on remand, he could receive visitors for only one hour every month amounted to a breach of his right to respect for his family life, enshrined in Article 8 of the Convention, which provides as relevant:

“1. Everyone has the right to respect for his ... family life...

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.”

29. The Government contested this view.

A. Admissibility

30. The Government submitted that under section 118(1) d) of Law-Decree no. 11 of 1979 on the Execution of Sentences and Measures (see paragraph 11 above) it was not excluded that the applicant be granted extra visits; however, he had not requested this.

31. The applicant did not address this issue.

32. The Court observes that, under the legal provision cited by the Government, remand detainees are entitled to one visit per month. This visit lasts one hour, according to Rule 25 (see paragraph 12 above). It notes that the Government have not pointed to any other legal provision or procedure which could give a reasonable prospect of success to a detainee requesting longer or extra visits, the latter appearing a mere favour potentially obtainable from the prison administration. It follows that this complaint cannot be rejected for non-exhaustion of domestic remedies. Moreover, it notes that it 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

33. The Government submitted that the statutory limitation on prison visits was a justified interference with the applicant's rights, dictated by the conditions of pre-trial detention.

34. The applicant contested this view in general terms.

35. The Court reiterates that detention, like any other measure depriving a person of his liberty, entails inherent limitations on his private and family life. However, it is an essential part of a detainee's right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family. Such restrictions as limitations imposed on the number of family visits, supervision over those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special visit arrangements constitute an interference with his rights under Article 8 but are not, by themselves, in breach of that provision. Nevertheless, any restriction of that kind must be applied “in

accordance with the law”, must pursue one or more of the legitimate aims listed in paragraph 2 and, in addition, must be justified as being “necessary in a democratic society” (see, among other authorities, *Estrikh v. Latvia*, no. 73819/01, § 166, 18 January 2007; *Kučera v. Slovakia*, no. 48666/99, § 127, 17 July 2007 (extracts); and *Klamecki v. Poland (no. 2)*, no. 31583/96, § 144, 3 April 2003).

36. It was submitted by the applicant, and not contested by the Government, that during the applicant’s pre-trial detention family visits had been limited to one one-hour meeting per month (with the exception of three extra visits by the applicant’s brother). The Court finds that this restriction amounted to an interference with the applicant’s right to respect for his family life. It will now proceed to examine whether each of the above-mentioned restrictions was justified in the present case.

37. The limitation on the frequency and duration of family visits afforded to detainees is regulated by section 118(1) d) of Law-Decree no. 11 of 1979 on the Execution of Sentences and Measures as well as Szeged Prison’s House Regulations, and had therefore a lawful basis. The Court moreover accepts that the limitation pursued the legitimate aims of protecting public safety and preventing disorder and crime.

38. As regards necessity in a democratic society, the Court notes that the Government have not put forward any argument for justification of the restriction beyond a reference to the applicable section of the Law-Decree. The Court notes with concern that the latter restricts the frequency of family visits to one per month in a general manner, without affording sufficient flexibility for determining whether such limitations were appropriate or indeed necessary in each individual case. As regards the applicant’s personal situation, the Court is unable to discern the necessity for such stringent limitations on the frequency and duration of family visits, in view of the fact that the applicant was detained on remand – rather than convicted – on the relatively mild charge of excise tax fraud. In these circumstances, and having regard to the duration of the impugned period (it lasted from January 2008 until June 2010), the Court concludes that the limitation went beyond what was necessary in a democratic society “to prevent disorder and crime”. Indeed, the measure in question reduced the applicant’s family life to a degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government. The Court therefore holds that the authorities failed to maintain a fair balance of proportionality between the means employed and the aim they sought to achieve (see, *mutatis mutandis*, *Moiseyev v. Russia*, no. 62936/00, § 255, 9 October 2008).

39. There has therefore been a violation of Article 8 on account of the restrictions on the frequency and duration of family visits.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

40. The applicant also complained that he was not allowed to touch his family members during the visits, which represented a breach of his rights under Article 8 of the Convention.

41. The Government argued that the applicant should have complained to the prison authorities and the penitentiary prosecutor (who had regularly inspected the premises) about these issues. In any case, he had made no specific request for the authorisation of physical contacts with his family members in the framework of family visits. In sum, he had not exhausted domestic remedies in this regard.

42. The applicant contested these arguments, submitting that initially he had not been aware of the possibility to obtain family visits. Once he had learned thereof, he had repeatedly requested the same from his warden, but in vain. Moreover, he reiterated that the public prosecutor had never inspected Unit II during his pre-trial detention.

43. The Court notes the parties' diverging positions about the exhaustion of the remedies suggested by the Government. It recalls that, in the area of exhaustion of domestic remedies, Article 35 apportions the burden of proof. It is incumbent on the Government claiming non-exhaustion to convince the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, *inter alia*, *Horvat v. Croatia*, no. 51585/99, § 39, ECHR 2001-VIII).

44. In the present case, the Court considers it unnecessary to embark on a detailed scrutiny of the effectiveness of a complaint to the prison authorities or the prosecutor, since the applicant has failed to show that he pursued any formal primary request whatsoever about the issue in question. In particular, he has not demonstrated that he requested his warden to initiate the granting of family visits which could have potentially resolved the problem of no-touch visits under Rules 34 and 38 (see paragraphs 13 and 14 above).

In any event, this part of the application is unsubstantiated and should be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

45. Lastly, the applicant complained that the fact that toiletries were available only for money in the prison was a violation of Article 14, whereas the deprivation of computer and free stationery prejudiced his

defence rights, an infringement of Article 6 § 3. He also invoked Article 17 of the Convention, without further developing this complaint.

46. The Court is not convinced that the applicant's defence rights were impaired in any way on account of the mere fact that he could not use a computer and stationery was available only for money. It moreover considers that the remainder of his submissions does not disclose any appearance of a violation of his rights under the Convention. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 (a) and must be rejected, pursuant to Article 35 § 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

47. 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

48. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

49. The Government contested this claim.

50. The Court considers that the applicant must have suffered some non-pecuniary damage and awards him, on the basis of equity, EUR 10,000 under this head.

B. Costs and expenses

51. The applicant also claimed EUR 2,500 for the costs and expenses incurred before the Court. This sum corresponds to twenty hours of legal work billable by his lawyer at an hourly rate of EUR 100, plus EUR 500 incurred as miscellaneous, largely clerical, expenses.

52. The Government contested this claim.

53. 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 EUR 1,500 under this head.

C. Default interest

54. 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

1. *Declares* unanimously the complaints concerning inhuman and degrading treatment and non-respect for family life on account of the scarce visits admissible and the remainder of the application inadmissible;
2. *Holds* unanimously that there has been a violation of Article 3 of the Convention;
3. *Holds* by 6 votes to 1 that there has been a violation of Article 8 of the Convention;
4. *Holds* unanimously
 - (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 Hungarian forints at the rate applicable at the date of settlement:
 - (i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,500 (one thousand five hundred 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* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Jočienė is annexed to this judgment.

F.T.
S.H.N.

DISSENTING OPINION OF JUDGE JOČIENĚ

I voted against the finding of a violation in this case as regards the Article 8 complaint. The applicant was entitled, according to the domestic law, to at least one visit per month (see paragraph 11 of the judgment). He received one visit per month while detained on remand.

Even accepting that the Szeged Prison's House regulations (see paragraph 12 of the judgment) limited the above-mentioned, more positive provision to only one visit per month, my position is that the applicant himself had an obligation to take a more active approach in order to receive an additional visit as allowed under section 118(1) of Law-Decree no. 11 of 1979.

In the hierarchy of legal norms, the law has priority over the regulations adopted by State institutions. In my opinion, the applicant should at least have shown his wish to receive an extra visit, to which he was entitled under the law, applying directly to the Szeged Prison's House Administration or to the Director of that prison. The applicant did not do this at the domestic level (see paragraph 30 of the judgment), submitting such a complaint directly to the European Court of Human Rights.

Therefore, the question arises as to how the State/Prison Administration could have known about his wish or intention to receive an extra or longer visits per month, which was not excluded under the domestic law (see paragraph 11 of the judgment), when no such request had been submitted. I agree that in this case no effective domestic remedies were available to the applicant as regards the Article 8 complaint at the domestic level (see, *mutatis mutandis*, *L. v. Lithuania*, no. 27527/03, §§ 35-36, 11 September 2007), but in my personal opinion the applicant has not even shown any wish to receive an extra visit while detained on remand (*a contrario*, in the aforementioned *L. v. Lithuania* case the applicant clearly showed at the domestic level his serious intention and willingness to undergo the gender reassignment surgery).

Therefore, I conclude that the State's positive obligation under Article 8 of the Convention cannot be without limits (as regards the State's positive obligation, see the Court's jurisprudence: *Evans v. the United Kingdom* [GC], no. 6339/05, § 75, ECHR 2007-IV; *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI; etc.). I nonetheless recall that Article 8, like any other provision of the Convention or its Protocols, must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Shevanova v. Latvia*, no. 58822/00, § 69, 15 June 2006), but in the circumstances of this case, the applicant should have at least shown or demonstrated clearly at the domestic level his wish/intention to receive an extra visit or longer ones during his detention on remand. Moreover, the State's positive obligation under Article 8 of the Convention cannot be interpreted so broadly as to impose an

obligation on the prison authorities to request every detainee separately about his/her wish to receive or not an extra visit or longer ones. It should remain the right of every detainee to ask for it.

Therefore, I conclude that there has been no violation of Article 8 of the Convention in this case.