



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

FIFTH SECTION

CASE OF BUISHVILI v. THE CZECH REPUBLIC

(Application no. 30241/11)

JUDGMENT

STRASBOURG

25 October 2012

FINAL

25/01/2013

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

In the case of Buishvili v. the Czech Republic,

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

Dean Spielmann, *President*,

Mark Villiger,

Karel Jungwiert,

Boštjan M. Zupančič,

Angelika Nußberger,

André Potocki,

Paul Lemmens, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 2 October 2012,

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

PROCEDURE

1. The case originated in an application (no. 30241/11) against the Czech Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Georgian national, Mr Artur Buishvili (“the applicant”), on 16 May 2011.

2. The applicant was represented by Ms H. Franková, a lawyer at the Organization for Aid to Refugees (OPU), Prague. The Czech Government (“the Government”) were represented by their Agent, Mr Vít A. Schorm, of the Ministry of Justice.

3. The applicant alleged, in particular, a violation of Article 5 § 4 of the Convention, because he had no access to judicial proceedings in which his release could be ordered.

4. On 10 October 2011 the application was communicated to the Government. The Government of Georgia were invited to state whether they wished to submit written comments on the case (Article 36 of the Rules of Court). They did not avail themselves of that opportunity.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Artur Buishvili, is a Georgian national who was born in 1975 and is currently an asylum seeker in the Czech Republic.

6. On 7 March 2011 the applicant was transferred to the Czech Republic from the Netherlands under EU Regulation no. 343/2003/EC (the Dublin Regulation) and applied for asylum. He was held at the reception centre for asylum seekers at Prague airport. On his arrival he handed the staff of the reception centre medical records issued in Georgia and the Netherlands, showing that he was suffering from hepatitis C and had been treated at a hospital neurology department.

A. The proceedings concerning the applicant's time in the reception centre

7. On 9 March 2011 the Ministry of the Interior ("the Ministry") refused the applicant entry to the territory of the Czech Republic: that is, it refused to allow him to leave the reception centre. The applicant had not been interviewed before the decision was taken. He applied for judicial review, seeking to have the refusal quashed, arguing in particular that his medical condition was incompatible with his being in the reception centre.

8. On 6 April 2011 the Prague Municipal Court (*městský soud*) quashed the refusal, on the grounds that the Ministry had first to consider whether the applicant was a vulnerable person under section 73(7) of the Asylum Act, in view of his medical condition, and thus whether he was to be allowed to enter the country. It added that the applicant must be heard in person.

9. On 11 April 2011 the Ministry again refused the applicant entry to the country. It held that he was suffering from an ordinary illness, which did not require any specialist treatment, and that he was receiving appropriate treatment at the reception centre.

10. On 13 May 2011 the Municipal Court rejected the applicant's request for judicial review of the second refusal, stating that his state of health did not require him to be hospitalised. Moreover, as his medical treatment had not yet started, his transfer to a medical facility was not necessary. If the situation changed a fresh assessment might be required.

11. On 28 April and 23 May 2011 the applicant once again requested leave to enter the country. The Ministry did not decide on his requests, relying on section 73(6) of the Asylum Act, which stipulated that a foreigner was not entitled to lodge a new request for leave to enter the country until one month had passed since the rejection of a previous one. It added, though, that it was *proprio motu* continuing to review the existence of the reasons for the applicant's detention.

12. On 6 June 2011 the Ministry granted the applicant entry to enable him to have medical treatment. It took into account his latest medical reports; the impossibility for him to have treatment at the reception centre and the impossibility for him to have treatment at Motol Hospital because of lack of facilities.

13. On 27 October 2011 the Supreme Administrative Court (*Nejvyšší správní soud*) quashed the 13 May 2011 judgment and remitted the case to the Municipal Court, holding that it was insufficiently reasoned.

14. On 10 November 2011 the Municipal Court again rejected the applicant's request for judicial review. The applicant did not lodge an appeal on points of law, as by then he was no longer detained.

15. The asylum proceedings seem to be still pending.

B. Medical reports

16. On 19 April 2011 the applicant was examined by a specialist at Motol Hospital, who concluded that he was suffering from hepatitis C and that the requisite medical treatment should begin as soon as possible following further examinations.

17. On the same day a doctor at the reception centre, noting the results of the applicant's examination at Motol Hospital, informed the applicant's lawyer in writing that the reception centre was unable to provide adequate treatment for his client. He added that it was not appropriate for the applicant to be held at the reception centre, because of the psychological stress caused by the medical treatment he required, and that he should be transferred to an open asylum facility.

18. During May 2011 several other medical reports confirmed that the applicant's condition required urgent specialist treatment, which was not available at the reception centre.

19. In a letter of 26 May 2011 the reception centre doctor informed the Ministry of the Interior that the applicant's state of health had been stabilised, that an appropriate diet was being provided, and that he was being provided with medication to enhance his liver function. He further stated that the medical care was adequate and that the applicant was under the permanent supervision of medical personnel. The doctor admitted that his previous assessment had been based on the assumption that a sudden deterioration of the condition was possible; however, this had not been confirmed later. He concluded that the recent care was fully comparable to the care provided to ordinary citizens, and was appropriate to the applicant's actual state of health.

II. RELEVANT DOMESTIC LAW AND PRACTICE

20. The relevant domestic law and practice are set out in the Court's judgment, *Rashed v. the Czech Republic*, no. 298/07, 27 November 2008.

21. With effect from 1 January 2011 a new paragraph 5 was introduced into section 73 of the Asylum Act (no. 325/1999) setting a time-limit of seven working days for a court to decide on a request for judicial review of a decision of the Ministry refusing entry to the Czech Republic to an asylum

seeker who was being held at an airport reception centre. If the judicial review quashes the decision, the Ministry must issue a new decision within three days or grant the asylum seeker entry.

22. Under section 73(7) of the Asylum Act the Ministry shall allow asylum seekers to enter the territory if they are unaccompanied minors, a family including minors, people with serious health problems, pregnant women, or people who have been tortured or subjected to other forms of psychological, physical or sexual violence.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

23. Article 9 § 4 of the International Covenant on Civil and Political Rights (“the ICCPR”) provides a similar guarantee as Article 5 § 4 of the Convention:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The Human Rights Committee, which is empowered to interpret the ICCPR, has on numerous occasions expressed the opinion that the court mentioned in Article 9 § 4 of the ICCPR must have the power to order release if the detention is unlawful (see, for example, *A. v. Australia*, no. 560/1993, § 9.5, 3 April 1997, and *Danyal Shafiq v. Australia*, no. 1324/2004, § 7.4, 31 October 2006).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

24. The applicant complained that the courts in the judicial review proceedings against the decision of the Ministry of the Interior not to grant him entry to the Czech Republic did not have the power to order his release as provided in Article 5 § 4 of the Convention, which reads as follows:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

25. The Government contested that argument.

A. Admissibility

26. The Government raised an objection of non-exhaustion of domestic remedies. They maintained that the applicant had not requested release in the judicial review proceedings and neither had he complained that the domestic law contradicted the Convention. Nor had he lodged an appeal on points of law when he was not released by the Municipal Court, which had quashed the decision not to release him. Furthermore, the applicant had not lodged a constitutional appeal, even though the Constitutional Court had the power to repeal a law that violated the Convention, and proceedings brought before it could also have indirectly led to his release.

27. The applicant maintained that he had exhausted all effective domestic remedies. He had requested judicial review of the administrative decision not to release him. It was not possible in those proceedings for him to request release under the applicable domestic law; he could only request the quashing of the administrative decision.

28. The Court notes that the key point of the applicant's complaint is that no proceedings were available by which he could have challenged the lawfulness of his detention and which would satisfy the guarantees of Article 5 § 4 of the Convention. The Court considers that this question is closely linked to the Government's plea on the merits that there existed such a remedy. The Court therefore joins this question to its examination on the merits of the complaint (see *Rashed*, cited above, § 46).

29. It adds that the present complaint is materially different from cases where the Court examined the issue of exhaustion of domestic remedies under Article 5 § 4 of the Convention at the admissibility stage, because in those cases the issue was not the existence of such a remedy itself but the fairness or speediness or otherwise of the Article 5 § 4 proceedings (see, *a contrario*, *Knebl v. the Czech Republic*, no. 20157/05, § 77, 28 October 2010).

30. The Court notes that the 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

31. The applicant maintained that he could not have instituted any judicial proceedings in which a court could have ordered his release as the administrative courts could only quash the Ministry's decision but not order his release. The only way to do this was for the Ministry to issue a new decision to release him, as eventually happened in his case (see paragraphs 12 and 14 above).

32. The Government acknowledged that the judicial review proceedings instituted by the applicant were the only proceedings in which the lawfulness of his detention could have been reviewed. They maintained however that these proceedings satisfied all the guarantees of Article 5 § 4 of the Convention.

33. In their view, it was sufficient for the purposes of this provision that the judicial proceedings could lead indirectly to the detainee's release. They pointed out that if the administrative courts found the detention unlawful, the Ministry was then bound by that decision. They referred to the Court's case-law that Article 5 § 1 (c) of the Convention was not violated if a court quashed a detention decision for some minor irregularities but did not order a release (for example *Mooren v. Germany* [GC], no. 11364/03, 9 July 2009). Consequently, the same should apply to a remedy under Article 5 § 4 of the Convention.

34. Under the domestic law, if a decision of the Ministry was quashed the latter had to make a new decision within three days, otherwise the person must be released. This short time constitutes, according to the Government, a sufficient guarantee against arbitrary detentions.

35. Lastly, the Government maintained that under Article 5 § 1 (f) of the Convention States enjoyed a margin of appreciation. According to them, the administrative authorities are better equipped to decide whether to release detainees.

36. The Court notes that the parties did not dispute that the applicant had been deprived of his liberty within the meaning of Article 5 of the Convention, and that no court could have directly ordered his release.

37. At the outset, the Court is not persuaded by the Government's argument that the applicant should have complained in judicial review proceedings and before the Constitutional Court that there was no direct power to release him. Indeed, without referring to any domestic judicial practice, they did not explain how such a complaint could lead to an extension of the powers of the administrative courts, that is to enable them to directly order the release of the applicant. In this context, the Court notes that the Constitutional Court was empowered to repeal laws which it found unconstitutional, but not to adopt a new law. Moreover, the judicial review proceedings were still pending when the applicant was released, his constitutional appeal was likely to be dismissed as premature (see *Rashed v. the Czech Republic*, cited above, § 55). Accordingly, this objection must therefore be dismissed.

38. In respect of the merits of the applicant's complaint, the Court reiterates that Article 5 § 4 is a *lex specialis* in relation to the more general requirements of Article 13. It entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty. The reviewing "court" must not have merely advisory functions, but must

have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful (see *Benjamin and Wilson v. the United Kingdom*, no. 28212/95, § 34, 26 September 2002, with further references, and *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009).

39. Moreover, as a matter of textual interpretation, the wording of Article 5 § 4, especially its French version, clearly suggests that the court must have the power to order a release if it finds the detention unlawful (... *un tribunal, afin qu’il statue à bref délai sur la légalité de sa détention et ordonne sa libération si la détention est illégale*).

40. Turning to the present case, the Court notes that there was no formal decision to detain the applicant who was held in the reception centre *ex lege*. The Ministry refused to let him enter the territory and thus effectively decided to keep him in detention. It was required to take this decision by law at the latest five days after the applicant’s asylum request. The applicant requested judicial review of this decision.

41. In the present case whilst the courts in the domestic proceedings could establish whether the detention was lawful or not, they could not order the applicant’s release if the detention was unlawful. The Court must therefore assess whether, as the Government suggest, an arrangement whereby a finding of unlawful detention can lead indirectly to release, is sufficient to comply with the requirements of Article 5 § 4 of the Convention.

42. The Court has already mentioned above that the Czech courts could only quash the administrative decision, having no power to release the applicant. It is true that the Ministry of the Interior would then be bound by the court’s legal opinion and would have to issue a new decision releasing the applicant if the court so found.

43. And yet, the Court has previously found a similar practice to be at variance with Article 5 § 4, in *Benjamin and Wilson*, cited above, § 36. In that case the tribunal could technically only issue a recommendation to release. The Court based its decision on the assumption that the administrative authority was not able lawfully to depart from the recommendation. Therefore, that reasoning is fully applicable to the present case where the administrative courts were able to issue a binding decision on the lawfulness of the detention but could not order release.

44. In addition, the Court notes its interpretation of Article 5 § 3 of the Convention that when a detention is unlawful, the judicial officer must then have the power to release (see *McKay v. the United Kingdom* [GC], no. 543/03, § 40, ECHR 2006-X); the Court also notes the close affinity between this provision and Article 5 § 4 which requires consistent interpretation.

45. The Court notes that the Government relied, in support of their position that indirect power of release suffices for the purposes of Article 5

§ 4 of the Convention, on the case of *Smatana v. the Czech Republic* (no. 18642/04, § 122, 27 September 2007), where the Court applied that provision to proceedings before the Constitutional Court because its decision could indirectly lead to the release of the applicant. The Court, however, considers that the present case is different. First, in *Smatana* the issue was applicability of Article 5 § 4 to a further stage of proceedings to which that provision undoubtedly applied, whereas here the question is the existence of proceedings satisfying this provision at all. Secondly, in *Smatana* the Constitutional Court was able to quash a decision of the ordinary courts that then had the power to release the detainee, whereas in the present case there were no courts with that power.

46. The foregoing considerations are sufficient to enable the Court to conclude that the applicant could not have instituted any proceedings before a court which could have directly ordered his release as required by Article 5 § 4 of the Convention.

47. Accordingly, the Court dismisses the Government's objection of non-exhaustion of domestic remedies in this respect and finds that there has been a violation of Article 5 § 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

48. The applicant complained that his detention contravened the domestic law because due to his illness he was a vulnerable person who should have been released under section 73(7) of the Asylum Act. He further argued that due to his illness his detention was not necessary or proportionate. He relied on Article 5 § 1 of the Convention which reads, so far as relevant as follows:

“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:...

(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.

49. The Court considers that Article 5 § 1 (f) of the Convention is applicable to the applicant's detention as his liberty was restricted in order to prevent his effecting an unauthorised entry into the country (see *Rashed*, cited above, § 70). That provision does not require that the detention be necessary or proportionate (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 74, ECHR 2008). Reiterating its constant case-law in this matter (see *Rusu v. Austria*, no. 34082/02, § 55, 2 October 2008), it further considers that the domestic decisions in the present case were not unreasonable and do not show any sign of arbitrariness.

50. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

51. Relying on Article 3 of the Convention, the applicant complained that he was detained for three months at the reception centre without receiving an appropriate medical treatment.

52. The Government objected that the applicant failed to exhaust domestic remedies. They maintained that the proceedings instituted by the applicant were not aimed at the provision of an appropriate healthcare. According to them, the applicant should have introduced proceedings under Article 82 of the Code of Administrative Court Procedure, in which he could have also requested an interim measure to receive the required treatment immediately. Furthermore, he should have also lodged a constitutional appeal, in which he could similarly have asked for an interim measure.

53. The applicant disagreed, without providing any further arguments.

54. The Court observes that alongside its general interpretation of the principle of exhaustion of domestic remedies laid down in Article 35 § 1 of the Convention (see, for instance, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V), it usually requires, in respect of applications against the Czech Republic, that the applicants lodge a constitutional appeal unless they can provide cogent reasons that it is not an effective remedy in their case (see *Miler v. the Czech Republic* (dec.), no. 56347/10, § 24, 25 September 2012).

55. Turning to the present case, the Court notes that the only court proceedings that the applicant instituted were aimed at securing his release from detention. In those proceedings the authorities were considering whether the applicant was suffering from a serious health problem, which is one of the grounds under the Asylum Act for releasing asylum seekers from detention. However, neither the administrative authorities nor the courts dealt with the question of appropriate medical treatment of the applicant. Accordingly, the remedy used by the applicant was not an adequate remedy for the purpose of Article 35 § 1 of the Convention.

56. The Court considers that the applicant should have used the remedies suggested by the Government. Furthermore, he should have addressed his issues to the Constitutional Court, which is empowered to decide on violations of the human rights of an individual, including those guaranteed by the Convention, and it may also issue interim measures. The Court reiterates in this connection that it 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 (see *Austin and Others v. the United*

Kingdom [GC], nos. 39692/09, 40713/09 and 41008/09, § 61, 15 March 2012). In the instant case, there were avenues in which the applicant could have raised his complaint of inadequate medical treatment before the domestic authorities.

57. Accordingly, this part of the application must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. 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.”

59. The applicant claimed just satisfaction only in respect of non-pecuniary damage, in an amount that the Court considers appropriate.

60. The Government considered that the amount of just satisfaction should not exceed 2,000 euros (EUR).

61. The Court considers that the applicant undoubtedly suffered feelings of frustration and anxiety which cannot be compensated for solely by the finding of a violation. Having regard to the circumstances of the case, and ruling on an equitable basis, as required by Article 41, it awards him EUR 3,000 in respect of non-pecuniary damage.

62. 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 concerning Article 5 § 4 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 4 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Czech korunas at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 25 October 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President