



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

FOURTH SECTION

CASE OF ALEXANDRU ENACHE v. ROMANIA

(Application no. 16986/12)

JUDGMENT
(Extract)

STRASBOURG

3 October 2017

FINAL

03/01/2018

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

In the case of Alexandru Enache v. Romania,

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

Ganna Yudkivska, *President*,

Paulo Pinto de Albuquerque,

Faris Vehabović,

Egidijus Kūris,

Iulia Motoc,

Marko Bošnjak,

Péter Paczolay, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 4 July 2017

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

PROCEDURE

1. The case originated in an application (no. 16986/12) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Romanian national, Mr Alexandru Enache (“the applicant”), on 13 March 2012.

2. The applicant was represented until February 2015 by Mr S.D. Bartha, a lawyer practising in Bucharest, and subsequently by Ms N. Mircioi, a lawyer practising in Bucharest. The Romanian Government (“the Government”) were represented by their Agent, Ms C. Brumar, of the Ministry of Foreign Affairs.

3. The applicant complained in particular about his conditions of detention in the 4th section of Bucharest police station, in Bucharest-Rahova Prison and in Mărgineni Prison. He also complained of discrimination in the exercise of his right to respect for his family life on the grounds that under Romanian law only convicted mothers of children under the age of one could request a stay of execution of their prison sentence.

4. In a decision of 5 February 2013 the Court communicated the complaints under Article 3 of the Convention and Article 14 taken in conjunction with Article 8 of the Convention and declared the remainder of the application inadmissible.

5. On 16 December 2014 the Court decided to request further information from the parties concerning the applicant’s conditions of detention in Giurgiu Prison, to which he had been transferred in the meantime.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973 and lives in Bucharest. He is a lawyer.

7. In a judgment of 25 May 2011, the Bucharest Court of First Instance sentenced him to seven years' imprisonment for embezzlement and forgery. On 1 December 2011 he was imprisoned in the police station's detention facility in Bucharest (*Centrul de reținere și arestare preventivă nr. 2 – secția 4 Poliție*), where he started serving his sentence. The judgment of the Court of First Instance was upheld by a final judgment of the Bucharest Court of Appeal of 25 November 2011, which was finalised on 25 May 2012.

A. Requests for a stay of execution of sentence

8. The applicant lodged two applications for a stay of execution of sentence under Article 453 § 1 b) and c) of the former Code of Criminal Procedure ("the CCP") (see paragraph 22 below). He submitted that he was married and had a child who was only a few months old, born on 19 May 2011, whom he wanted to look after, and that his family were experiencing financial and social difficulties on account of his detention.

9. In a judgment of 27 March 2012, the Bucharest Court of First Instance dismissed his first application on the grounds that a stay of execution of sentence provided for by Article 453 § 1 b) of the CCP for convicted mothers up to their child's first birthday had to be interpreted strictly and that the applicant could not seek application of that provision by analogy. It also found that the financial and family difficulties referred to by the applicant did not fall within the category of special circumstances required by Article 453 § 1 c) of the CCP to allow a deferral of sentence, especially as they had existed prior to his placement in detention.

10. On appeal by the applicant, the Bucharest County Court upheld the judgment of the Court of First Instance in a judgment of 7 May 2012.

11. In a judgment of 13 June 2012, the Bucharest Court of First Instance dismissed the second application lodged by the applicant under Article 453 § 1 c) of the CCP on the grounds that the statutory conditions were not satisfied. In particular, the court found that enforcement of the sentence did not endanger the applicant's personal or family situation. In a judgment of 17 July 2012, the Bucharest County Court dismissed an appeal by the applicant against that judgment.

B. Conditions of detention

12. The applicant was detained in a number of different prisons, including the Bucharest police detention facility (from 1 to 13 December 2011), Bucharest-Rahova Prison (from 13 to 19 December 2011, 21 December 2011 to 9 January 2012 and 17 January 2012 to 30 January 2013), Mărgineni Prison (from 9 to 17 January 2012) and Giurgiu Prison (from 30 January to 25 February 2013 and from 11 March to 26 September 2013).

1. The applicant's version

13. With regard to the Bucharest police detention facility, the applicant stated that he had been detained there with three other detainees, in cell no. 1, which he said measured 1.80 x 2 sq. m. He said that the cell had only one window, measuring 30 x 40 sq. cm, which had two rows of bars across it and therefore did not let natural light in. He added that the toilets were dirty and separated from the rest of the cell only by a curtain. Lastly, he stated that running water was available only two hours per day.

14. With regard to Bucharest-Rahova Prison, the applicant said that he had been detained in cell no. 209 with eight other detainees. He said that the cell measured 3.20 x 5.80 sq. m and had only one window, measuring 1 x 1.20 sq. m, with bars and a grille and thus no natural light. He added that the cell had been damp and had an unpleasant smell.

15. With regard to Mărgineni Prison, he stated that he had been detained there with twenty-four other detainees in a 2 x 6 sq. m. cell and that there had been no running water.

16. Regarding Giurgiu Prison, he said that he had been detained in an overcrowded cell. He alleged, among other things, that hot water had only rarely been available and that the mattress and bed linen had been dirty. He also complained of the presence of cockroaches, rats and bed bugs.

2. The Government's version

17. The Government stated that in the Bucharest police detention facility the applicant had been held in a 10.68 sq. m cell containing four bunk beds, a television, natural light and toilets measuring 2.5 sq. m.

18. At Bucharest-Rahova Prison the applicant had been successively detained in seven cells, varying from 19.30 sq. m to 19.58 sq. m in size and containing ten bunk beds. They added that the cells were equipped with toilets, a kitchenette and ventilation and had natural light.

19. At Mărgineni Prison the applicant's cell had measured 28.35 sq. m and contained twenty-one beds. They specified that it was equipped with toilets, a kitchenette, ventilation and natural light.

20. At Giurgiu Prison the applicant had been detained successively in four cells, varying from 20.35 sq. m to 20.96 sq. m in size and containing

space for six detainees. They contained individual beds, a table allowing the inmates to eat their meals together, three bedside tables, a small bench, a television socket and a shoe cupboard. They added that the cells all had toilets measuring 4.03 sq. m, but did not specify whether these were included in the cell area. They stated, lastly, that the cells and the laundry provided to inmates were in good condition.

...

THE LAW

1. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

30. The applicant complained about his conditions of detention in the prisons where he had been detained. He relied on Article 3 of the Convention, which provides:

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

A. Subject of the complaint

31. In their supplementary observations on the complaint based on the conditions of detention in Giurgiu Prison the Government expressed doubts as to the reality of the complaint, submitting that the applicant had not substantiated it.

32. The applicant repeated his complaint in that regard.

33. The Court notes that the applicant was transferred to Giurgiu Prison on 30 January 2013 (see paragraph 12 above) and that his application to the Court was communicated to the respondent Government six days later, namely on 5 February 2013 (see paragraph 4 above). In his reply of 7 January 2014 to the Government’s observations the applicant, who was still in prison, said that “all the prisons” where he had been detained were overcrowded and emphasised the continuing nature of the situation.

34. The Court therefore considers that the applicant did intend to complain about his conditions of detention in Giurgiu Prison, to which he was transferred shortly before his application was communicated.

35. It also notes that, in his reply to the Government’s observations, the applicant raised new complaints based on certain particular aspects of his conditions of detention, relating, *inter alia*, to inappropriate conditions of transport and to frequent body searches. It observes that these complaints were raised after the case was communicated to the respondent Government. The Court has previously held that it is not required to rule on new complaints raised after communication and regarding which the Court

has not considered it necessary to put additional questions to the Government (see, in this regard, *Enășoaie v. Romania*, no. 36513/12, § 60, 4 November 2014). Accordingly, the Court will confine its examination to the aspects of the conditions of detention described by the applicant in his application form, namely prison overcrowding and poor sanitary conditions.

...

C. Merits

39. The applicant complained of prison overcrowding in the Bucharest police detention facility and in Bucharest-Rahova, Mărgineni and Giurgiu Prisons. Referring to CPT reports and to reports by a Romanian non-governmental organisation, he alleged that the living space that had been available to him in those prisons had been far less than the standard recommended by the CPT. He added that there had been no hot water or heating, that the mattresses and bed linen had been dirty and the cells infested with rats, cockroaches and parasites.

40. The Government submitted that the conditions of detention in question had not exceeded the threshold of severity required for Article 3 of the Convention to apply. With regard to Giurgiu Prison in particular, they stated that the living space available to the applicant had been between 3.39 sq. m and 3.49 sq. m.

41. The Court reiterates that Article 3 of the Convention imposes a positive obligation on the authorities to ensure that a person is detained in conditions which are compatible with respect for their human dignity and that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (see *Kudla v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, § 141, 10 January 2012; and *Enășoaie*, cited above, § 46).

42. The Court has recently reiterated the relevant principles, particularly those relating to prison overcrowding and to factors capable of offsetting the lack of personal space, in *Muršić v. Croatia* ([GC], no. 7334/13, §§ 96-141, 20 October 2016). It has held, *inter alia*, that when the personal space available to a detainee falls below 3 sq. m of floor surface in multi-occupancy accommodation in prisons, the lack of personal space is considered so severe that a strong presumption of a violation of Article 3 arises. The burden of proof is on the respondent Government, which can, however, rebut that presumption by demonstrating that there were factors capable of adequately compensating for the scarce allocation of personal space (*ibid.*, § 137). However, where a prison cell – measuring in the range of 3 to 4 sq. m of personal space per inmate – is at issue the space factor remains a weighty factor in the Court's assessment of the adequacy of conditions of detention. In such instances a violation of Article 3 will be

found if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements (*ibid.*, § 139).

43. Applying those principles to the instant case, the Court notes that the applicant complained of overcrowding in the Bucharest police detention facility and in Bucharest-Rahova, Mărgineni and Giurgiu Prisons. It notes that, with regard to the first three prisons, the parties differ in their account both of the surface area of the cells in which the applicant was detained and the number of inmates (see paragraphs 13, 14 and 15 for the applicant's version and paragraphs 17, 18 and 19 for the Government's version). Be that as it may, the Court notes that, even according to the Government's version, it can conclude that in all three prisons the living space available to the applicant was less than 3 sq. m.

44. Apart from the problem of prison overcrowding, the applicant's allegations of poor sanitary conditions tally with the Court's conclusions in similar cases concerning Bucharest-Rahova Prison (see *Geanopol v. Romania*, no. 1777/06, § 62, 5 March 2013, and *Constantin Aurelian Burlacu v. Romania*, no. 51318/12, § 27, 10 June 2014) and Mărgineni Prison (see *Iacov Stanciu v. Romania*, no. 35972/05, 24 July 2012, § 175, and *Necula v. Romania*, no. 33003/11, § 57, 18 February 2014). With regard to the sanitary conditions in the Bucharest police detention facility, the applicant's allegations are more than plausible and reflect the realities described by the CPT in its report following visits carried out in 2010 in the Bucharest police detention facility

45. In these circumstances the Court cannot consider that, in respect of these three prisons, the Government have provided evidence capable of refuting the strong presumption of a violation of Article 3 as a result of affording personal space of less than 3 sq. m.

46. The Court notes that the parties disagree with regard to Giurgiu Prison. The applicant stated that he had been detained in overcrowded cells, without, however, giving details about their dimensions, whereas the Government submitted that throughout his seven months' detention in that prison living space of between 3.39 sq. m and 3.49 sq. m had been available to the applicant (see paragraph 20 above). However, the Court observes that it has found a violation of Article 3 of the Convention in previous cases mainly on account of lack of individual space and poor sanitary conditions in Giurgiu Prison, during a period corresponding to when the applicant was imprisoned there (see *Marian Toma v. Romania*, no. 48372/09, § 33, 17 June 2014, and *Adrian Radu v. Romania*, no. 26089/13, § 29, 7 April 2015). It concludes from this that, apart from prison overcrowding, the applicant also had to contend with other inappropriate physical conditions

of detention in that prison, particularly regarding sanitary and hygienic requirements (see *Muršić*, cited above, § 139).

47. Accordingly, it considers that the conditions of detention in the prisons in question subjected the applicant to an ordeal of an intensity exceeding the unavoidable level of suffering inherent in detention.

48. Having regard to the foregoing, the Court concludes that there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

49. The applicant alleged that he had been discriminated against on grounds of sex because he had been refused the possibility of obtaining a stay of execution of his prison sentence, as under Article 453 § 1 b) of the CCP only convicted mothers of children under the age of one could seek a stay of execution. He relied on Article 14 of the Convention taken in conjunction with Article 8 and on Article 1 of Protocol No. 12 to the Convention.

50. Since the Court is master of the characterisation to be given in law to the facts of the case (see, among other authorities, *Guerra and Others v. Italy*, 19 February 1998, § 44, *Reports of Judgments and Decisions* 1998-I), it considers that this complaint must be examined only under Article 14 taken in conjunction with Article 8 of the Convention (see, *mutatis mutandis* and with regard to conjugal visits in prison, *Laduna v. Slovakia*, no. 31827/02, § 54, ECHR 2011, and *Varnas v. Lithuania*, no. 42615/06, § 110, 9 July 2013). Those provisions provide:

Article 8

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

...

B. Merits

1. Submissions of the parties

60. The Government explained that at the material time the CCP provided for a stay of execution of sentence only in special circumstances personal to the person detained. They observed that the purpose of the statutory provisions in question was not to discriminate, but to take into consideration specific personal situations, including pregnancy of convicted female prisoners and the period preceding the child's first birthday, which was a logical and coherent sequel to pregnancy. They based their submission on the special bonds that existed between the mother and child during the first months following birth. Referring to the Bangkok Rules adopted by the United Nations ..., they submitted that Article 453 of the CCP was in the same vein as international legal provisions designed to protect women and children. Accordingly, the situation of a woman with a child aged under one and that of a man with a child of the same age were not comparable.

61. They also stated that the principles applicable under labour law, particularly those relating to parental leave, could not apply in the present case owing to the criminal nature of the legal provisions in question. They indicated that the right to parental leave was available to persons who had worked and contributed to the social-security system. In their submission, the possibility of obtaining a stay of execution of sentence was not comparable as it amounted to a measure designed to protect the newborn child's best interests and, in that area, the State enjoyed a wide margin of appreciation. The aim of a criminal provision such as Article 453 of the CCP was neither to benefit convicted prisoners nor to reduce the unpleasantness inherent in a prison sentence.

62. The Government indicated, lastly, that the domestic courts had examined the applicant's requests and the supporting evidence submitted by him, given decisions that were not arbitrary and were duly reasoned and had found that the applicant's family situation did not justify a stay of execution of sentence.

63. Referring to the provisions of Article 453 § 1 b) of the CCP, the applicant submitted, for his part, that he had suffered unjustified discrimination. Basing his submission on the principle of equality between parents, he argued that the presence of the father in a newborn's life was just as important as that of the mother, even where the mother breastfed her child. In his submission, the father could and should contribute to the daily care of the child and thus support the mother.

2. The Court's assessment

a) Whether the applicant's situation was comparable to that of a female prisoner with a child under the age of one

64. The Court reiterates that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or comparable situations (see *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV). The requirement to demonstrate an analogous position does not require that the comparator groups be identical. It has to be established that the applicant, having regard to the particular nature of his complaint, was in a comparable situation to others treated differently (see *Clift v. the United Kingdom*, no. 7205/07, § 66, 13 July 2010).

65. In the instant case it is not disputed between the parties that Romanian law provided for a difference in treatment between two categories of prisoners with children under the age of one: women, who could apply for a stay of execution of sentence, and men, who were not eligible for such a measure. It remains to be determined whether, with regard to an application for a stay of execution of sentence under Article 453 § 1 b) of the CCP, the applicant was in a comparable situation to that of a female prisoner with a child aged under one.

66. The Court has previously held, in an employment context, that men are in a comparable situation to women as regards parental leave and parental leave allowance (see *Petrovic*, cited above, § 36, and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 132, ECHR 2012 (extracts)). In those two cases the Court held, whilst being aware of the differences which might exist between mother and father in their relationship with the child, that as far as the role of taking care of the child during the period corresponding to parental leave was concerned (which could extend to the child's third birthday in the case of *Konstantin Markin*, cited above), men and women were similarly placed.

67. The Court cannot ignore the Government's submission that a difference has to be drawn between the present case and cases concerning parental leave owing to the criminal nature of the measure in issue here and the margin of appreciation enjoyed by the State in implementing its criminal-law policies (see paragraph 61 above). It agrees with the Government that, as a stay of execution of a custodial sentence is a criminal-law measure, it is fundamentally different from parental leave, which comes under labour law.

68. However, with regard to the question whether during the first year of the child's life an imprisoned father is in a comparable situation to that of an imprisoned mother, the Court considers that the criteria which it set out in the cases of *Petrovic* and *Konstantin Markin* (cited above) are applicable to the instant case. As the Government themselves have conceded (see

paragraph 61 above), the measure allowing a stay of execution of a custodial sentence has the primary aim of safeguarding the best interests of the child in order to ensure that it receives the appropriate attention and care during the first year of its life. Whilst there may be differences in their relationship with their child, both the mother and the father can provide this attention and care (see, *mutatis mutandis*, *Konstantin Markin*, cited above, § 132). Furthermore, the Court observes that entitlement to a stay of execution of sentence continues up to the child's first birthday and therefore extends beyond the period following the mother's pregnancy and the birth.

69. The Court therefore considers that, with regard to the facts of the case, the applicant can claim to be in a situation comparable to that of a female prisoner. The Government's arguments based on the State's margin of appreciation in implementing its criminal-law policies must rather be examined from the point of view of justification for the difference in treatment (see paragraph 78 below).

b) Whether the difference in treatment was objectively justified

70. The Court reiterates that a difference of treatment is discriminatory if it has no objective and reasonable justification, in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 64, ECHR 2017, and the cases cited therein).

71. According to the Government, the legitimate aim pursued by the Romanian legislation in reserving exclusively to female prisoners the right to apply for a stay of execution of sentence until their child's first birthday was to protect the best interests of the newborn child (see paragraph 61 above). The Government also referred to the special bonds between mother and child during the first months after the birth (see paragraph 60 above). In that connection the Court refers to its previous rulings, in cases concerning the right to respect for private and/or family life, that the child's best interests must be paramount and that there is a broad consensus surrounding the idea that in all decisions concerning children their best interests must be a primary consideration (see, *mutatis mutandis*, *X v. Latvia* [GC], no. 27853/09, §§ 95-96, ECHR 2013, and *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 208, 24 January 2017). It also takes note of the various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood

72. The Court next reiterates having stated on many occasions that very weighty reasons have to be put forward to justify a difference of treatment

on grounds of sex, and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot in themselves constitute justification for a difference in treatment on grounds of sex, any more than similar stereotypes based on race, origin, colour or sexual orientation (see, *mutatis mutandis*, *Konstantin Markin*, cited above, § 127; *X and Others v. Austria* [GC], no. 19010/07, § 99, ECHR 2013; *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 77, ECHR 2013 (extracts); and *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014). It has also stated that the national authorities, whose duty it is also to consider, within the limits of their jurisdiction, the interests of society as a whole, enjoy broad discretion when they are asked to make rulings on sensitive matters such as penal policy (see *Khamtokhu and Aksenchik*, cited above, § 85; see also *Clift*, cited above, § 73, and the cases referred to therein, and *Costel Gaciu v. Romania*, no. 39633/10, § 56, 23 June 2015).

73. In the present case the Court observes that the applicant sought a stay of execution of his sentence, arguing that he had a child aged under one, and that his application was dismissed by the domestic courts on the grounds that the statutory provision he relied on had to be interpreted strictly and he could not seek application of that provision by analogy (see paragraph 9 above). The Court considers that in the present case a number of factors have to be taken into consideration. Thus, as pointed out by the Government, it notes that female prisoners are not automatically granted a stay of execution of their sentence. It can be seen from the evidence produced by the parties that, when dealing with similar requests made by female prisoners, the domestic courts carried out a detailed assessment of the requests and dismissed them where the applicant's personal situation did not justify a stay of execution of sentence

74. The Court observes next that the Romanian criminal law in force at the material time provided all prisoners, regardless of sex, with alternative means of requesting a stay of execution of sentence. The courts could, in particular, consider whether any special circumstances of execution of the sentence were liable to have serious consequences for the prisoner and also for his family or employer The applicant availed himself of that legal possibility, moreover, but the domestic courts ruled that the difficulties referred to by him did not fall into the category of special circumstances provided for in Article 453 § 1 c) of the CCP (see paragraphs 9 and 11 above).

75. It is true that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see, *mutatis mutandis*, *Petrovic*, cited above, § 37).

76. The Court also takes into consideration the Government's submission that the aim of the statutory provisions in question was to take account of specific personal situations, including pregnancy of female prisoners and the period preceding the baby's first birthday, having regard in particular to the special ties which exist between the mother and child during that period (see paragraphs 60 and 71 above). The Court considers that this aim can be regarded as legitimate for the purpose of Article 14 of the Convention and that the arguments advanced by the Government cannot be considered manifestly ill-founded or unreasonable. It is willing to consider that, in the specific area concerned by the present case, these considerations can constitute a sufficient basis for justifying the difference in treatment of the applicant.

77. The Court accepts that motherhood has specific features which need to be taken into consideration, sometimes by means of protective measures. It notes for example that Article 4 § 2 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women expressly provides that adoption by States Parties of special measures aimed at protecting maternity shall not be considered discriminatory ... and that similar provision is made in norms of international law It considers that these findings are also valid where a woman is deprived of her liberty.

78. In the light of the foregoing, the Court considers that, having regard to the broad margin of appreciation afforded to the respondent State in this area, there is a reasonable relationship of proportionality between the means employed and the legitimate aim pursued. The impugned exemption does not therefore constitute a prohibited difference in treatment for the purposes of Article 14 taken in conjunction with Article 8 (see, *mutatis mutandis*, *Khamtokhu and Aksenchik*, cited above, § 87).

79. Accordingly, the Court concludes that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

...

FOR THESE REASONS, THE COURT

...

3. *Holds*, unanimously, that there has been a violation of Article 3 of the Convention;
4. *Holds*, by five votes to two, that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8;

...

Done in French, and notified in writing on 3 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Ganna Yudkivska
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Yudkivska;
- (b) joint partly dissenting opinion of Judges Pinto de Albuquerque and Bošnjak.

G.Y.
M.T.

CONCURRING OPINION OF JUDGE YUDKIVSKA

I am absolutely convinced that Article 14 was not violated in the present case. I do disagree, however, with my esteemed colleagues in the majority in their approach to the case. In particular, I cannot share the conclusion in paragraphs 68-69 that “le requérant peut prétendre se trouver dans une situation comparable à celle des femmes détenues”.

Whilst both men and women engage in reproduction, only women have the capacity to become pregnant and give birth, and this difference has its physical, psychological and emotional dimensions.

According to CEDAW General Recommendation No. 24 (20th session, 1999), “the health rights of women [should be addressed] from the perspective of women’s needs and interests [in view of] distinctive features and factors that differ for women in comparison to men, such as: (a) Biological factors ... such as their ... their reproductive function... (c) Psychosocial factors that vary between women and men ... [including] post-partum depression...”

Article 453 § 1 b) of CPP, which is the base for the applicant’s complaint under Article 14 of the Convention, appears to follow strictly the above recommendation. It covers a particular group - pregnant women and women who had recently gave birth, and most probably breast-feed. Naturally, they cannot be said to be in analogous situations as men – those who are expecting their child or fathers of a newborn. Men and women are equal, but they are not the same. There are fundamental biologically based differences related to their reproductive function that must be acknowledged in the law and accommodated by the law; and the impugned CCP provision, as well as number of international documents referred to in the judgment, address them. Gender equality does not mean that men and women are forced into sameness. Wrong perception of equality may identify it as sameness, which should not be promoted by a fight against discrimination.

The reproductive difference undoubtedly justifies legal recognition of a separate sphere for women that relates to childbirth. Much of scientific literature is written about mother-infant attachment, and infant’s dependence on a mother. A strength emotional bond is developed during 9 months of pregnancy; this bond pushes a child to seek direct physical contact precisely with a mother. Foetus is affected by sounds of mother’s heartbeat, and after the birth this mother’s heartbeat calms a baby. Mothers and infants are aligned literally at the level of the nervous system; touching by a mother and sounds of her heart are sources of comfort and safety feeling for a baby; that is why being with a mother after the birth is vitally important for a child and serves his/her best interests. Any father, however wonderful he might be, cannot provide these elements.

It is also widely recognized that the separation of a child from his/her mother in the first year of life causes significant disruptions in the child’s

mental development, and this separation might leave an indelible imprint on his/her entire life. In this respect, the “attachment theory”, developed by the prominent British psychologist and psychoanalyst John Bowlby, serves guidance for accessing the best interest of a child.

Further, the World Health Organization in its global strategy on infant and young child feeding stresses on breastfeeding as “an unequalled way of providing ideal food for the healthy growth and development of infants...[and] ... an integral part of the reproductive process with important implications for the health of mothers”. It recommends exclusive breastfeeding for the first six months of life “to achieve optimal growth, development and health” and continuation for up to two years of age or beyond. Breastfeeding is an exclusive prerogative of women.

These significant elements were taken into account by the Romanian legislature in order to serve the best interest of children. The majority accept that in paragraphs 76-77, but view it as part of the proportionality analysis rather than acknowledgment of a lack of “analogous situation”, which would be much more logical in my view.

I believe that the correct approach in the present case was to recognize that men and women who are parents of a newborn are distinguishable when it comes to the newborn’s needs, and that new mothers have different duties which thus require different legal remedies. Consequently, equality calls for a special treatment for pregnancy and birthing that apply to women in a sphere where men cannot supersede them or compete with them.

31 July 2017

JOINT PARTLY DISSENTING OPINION OF JUDGES PINTO DE ALBUQUERQUE AND BOŠNJAK

1. To our regret, we cannot agree with the majority that there has been no violation of Article 14 in conjunction with Article 8 of the Convention. After finding Article 8 to be applicable in the present case, the majority correctly establish that the applicant found himself in a situation comparable to a situation of a detained woman having a child younger than twelve months and that there exists difference in treatment between the two categories. However, we cannot subscribe to the majority's conclusion that there exists objective and reasonable justification for such difference in treatment.

2. According to the well-established case law of this Court, differences based exclusively on sex require "very weighty reasons", "particularly serious reasons" or, as it is sometimes said, "particularly weighty and convincing reasons" by way of justification (see, for example, *Van Raalte v. the Netherlands*, 21 February 1997, § 39 in fine, Reports of Judgments and Decisions 1997-I; *Petrovic v. Austria*, 27 March 1998, § 37, Reports 1998-II; *Stec and Others v. the United Kingdom (dec.)* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2005-X; and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 77, ECHR 2013 (extracts), and the references cited in that judgment). More particularly, the Grand Chamber has emphasised "that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe and that very weighty reasons would have to be put forward before such a difference in treatment could be regarded as compatible with the Convention (see *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex" (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts)). We find it of relevance for the present case that the Court has also observed that contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition (*ibid.*, § 140). Furthermore, as the Court noted in *Petrovic v. Austria* (cited above, para. 38), that while being aware of the differences which may exist between mother and father in their relationship with the child, it started from the premise that so far as taking care of the child is concerned, both parents are "similarly placed".

3. In the light of the Court's jurisprudence emphasizing the equality of both parents when taking care of the child is at stake and requiring particularly serious reasons to justify any differences in treatment based on sex, we find it hard to share the majority's view that the national authorities

enjoy wide margin of appreciation when it comes to questions of penal policy (para. 72 of the judgment), this in turn justifying difference in treatment in the present case. Criminal law policy choices must be rational and their rationale is under the Court's supervision. Regardless to the width of this margin in general, it is framed by human rights and fundamental freedoms as protected by the Convention and the Court's jurisprudence. Consequently, it may not override the mentioned well-established requirement of particularly serious reasons for any difference of treatment on the basis of sex. What is more, we are of the view that the Court is bound to make an autonomous assessment of the existence of such particularly serious reasons, whereas it falls to the Respondent State to discharge the burden of proof place upon it and justify the difference in treatment (see *mutatis mutandis* DH v. Czech Republic..., para. 188).

4. We believe that in this particular case, the Romanian Government failed to put forward particularly serious reasons to justify difference in treatment between women and men in the applicant's situation. According to the Government, the disparate treatment of both relevant categories is in the protection of the best interest of the child. They also make reference to the particular links between a mother and a child during the first months after the birth. Bearing this in mind, it is apparent that the pertinent piece of Romanian legislation, namely Article 453 para. 1 b) of the Code of Criminal Procedure, aims at the protection of children under the age of twelve months. In light of the Court's case law, emphasizing the importance of fathers from the child's earlier age, it is difficult to see how this difference in treatment can serve the best interest of children, let alone how this best interest could provide objective and reasonable justification for excluding fathers *ex lege* from the circle of beneficiaries of the provision.

5. The majority emphasize additional reasons for the difference in treatment, namely protection of women against sexual violence, abuse and sexual harassment in the penitentiary environment as well as the need to protect pregnant women and mothers. Leaving aside the fact that these arguments were not advanced by the Government it is hard to accord them any relevance. We are strongly convinced that the motherhood in general and women in the vulnerable period after giving birth in particular would not be protected to any lesser extent if the law provided for a suspension of sentence for fathers of newborn children, if their particular circumstances so warrant. The risks associated with changing the law to allow men, as well as women, to petition for a stay in their sentences to care for their infant children are very low. As the government argued on a number of occasions, judges will take into account the totality of the circumstances and grant stays only when they are warranted. Changing the law to allow men the same opportunities as women would not provide an automatic suspension of their sentence to all fathers who have children younger than one (just as the current version of the law does not provide an automatic postponing to

mothers). It simply gives men and women the right to make an argument as to why their sentences should be postponed. Ensuring both fathers and mothers have an opportunity to make their case before a judge poses no serious risks or threats to the judicial system or to broader goal of fairness in the Romanian society. If anything, it will do the opposite. It will ensure both men and women are seen as primary caregivers and that fathers are equally important in the lives of their children. This will indirectly contribute to promoting, rather than hindering, gender equality in Romania.

6. Bearing this in mind, we see no particularly weighty and serious reasons to justify the difference in treatment. To the contrary, we are of the opinion that it would be precisely the leveling up of the benefits awarded to convicts of both sexes that would, in the light of the present case, serve to the fullest the proclaimed best interests of a child. Because leveling down is thus not permitted and would be ill advised, and no good reason exists for creating such a separation, a violation of Article 14 should be found and the law should be changed in such a way that it permits men and women to petition for a suspension in sentence due to child-care responsibilities.

7. Therefore, we believe that there has been a violation of Article 14 in connection with Article 8 of the Convention.