



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

FIFTH SECTION

CASE OF KUPINSKYI v. UKRAINE

(Application no. 5084/18)

JUDGMENT

Art 7 • Art 3 • Heavier penalty • Inhuman or degrading punishment • Conversion, upon prisoner's transfer, of foreign reducible life sentence into irreducible one owing to unavailability of parole for life prisoners in his home State • Significant change of scope of penalty by domestic courts, going beyond mere measures of enforcement, thus rendering Art 7 applicable

STRASBOURG

10 November 2022

FINAL

10/02/2023

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

In the case of Kupinskyy v. Ukraine,

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

Síofra O’Leary, *President*,
Stéphanie Mourou-Vikström,
Lətif Hüseyinov,
Lado Chanturia,
Arnfinn Bårdsen,
Mattias Guyomar,
Mykola Gnatovskyy, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 5084/18) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Sergiy Onisiyevych Kupinskyy (“the applicant”), on 15 January 2018;

the decision to give notice to the Ukrainian Government (“the Government”) of the complaints concerning the irreducibility of the applicant’s life sentence under Articles 3 and 7 of the Convention and to declare the remainder of the application inadmissible;

the parties’ observations;

Having deliberated in private on 4 October 2022,

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

INTRODUCTION

1. The applicant complained that the reducible life sentence imposed on him by the Hungarian courts had been converted into a *de facto* irreducible life sentence by the Ukrainian courts in violation of Article 7 of the Convention. He also complained that his irreducible life sentence was contrary to Article 3 of the Convention.

THE FACTS

2. The applicant was born in 1973 and is serving his life sentence in the Izyaslav Correctional Colony, Ukraine. The applicant was represented by Ms O.O. Protsenko, Ms A.G. Kozmenko, Ms V.P. Lebid and Mr M.O. Tarakhkalo, lawyers practising in Kyiv, Ukraine.

3. The Government were represented by their acting Agent, Ms O.V. Davydchuk, from the Ministry of Justice.

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

5. On 8 December 1999 the applicant was arrested in Hungary on suspicion of having committed a double murder with Mr K.

6. On 21 March 2002 the Békés District Court (Hungary) found the applicant and his accomplice K. guilty of conspiracy to commit premeditated double murder for motives of personal gain, the offence being committed on 11 November 1999. The applicant was sentenced to life imprisonment with the possibility of release on parole after serving twenty years of imprisonment and being deported.

7. On 21 August 2003 the Szeged Court of Appeal (Hungary) upheld the judgment of 21 March 2002.

8. On 6 May 2004 the Hungarian Ministry of Justice initiated the procedure for the applicant's transfer to Ukraine, his home country, to serve his sentence, on the basis of the Convention on the Transfer of Sentenced Persons (opened for signature on 21 March 1983, entered into force on 1 July 1985, ETS 112 – "the 1983 Convention"). That procedure, which required the applicant's consent, failed for want of such consent.

9. On 23 January 2006 the Hungarian Ministry of Justice initiated another procedure for the applicant's transfer to Ukraine under the Additional Protocol to the 1983 Convention. That procedure did not require the consent of the person who was to be transferred (see paragraph 34 below).

10. On 8 May 2007 the applicant was transferred to Ukraine.

11. On 14 June 2007 the request for enforcement of the applicant's sentence was sent to the Supreme Court of Ukraine.

12. On 26 September 2007 the Zakarpattia Regional Court of Appeal recognised the sentence imposed on the applicant by the Hungarian courts. The appellate court noted that the classification of the applicant's actions fully corresponded to the qualifying features contained in Article 93 of the Criminal Code of 1960 and was punishable by the death penalty, which was a more serious punishment than life imprisonment. It further noted that at the time of the conversion of the applicant's sentence, the new Criminal Code of 2001 was in force and Article 115 of that Code provided for life imprisonment for the same crime. The court thus decided that the applicant should be considered guilty under Article 115 § 2 (1), (6) and (12) of the Criminal Code of 2001, which provided for life imprisonment. It also observed that although Article 115 § 2 (6) provided for an additional punishment of the forfeiture of property, no such punishment had been imposed in the original sentence. The appellate court therefore did not inflict that punishment on the applicant either in order not to aggravate his situation. The ultimate punishment imposed was thus life imprisonment without forfeiture of property and with the possibility of seeking release on parole after serving twenty years.

13. On 20 December 2007 the Supreme Court upheld the decision of 26 September 2007 with minor changes. It confirmed that the applicant's punishment was life imprisonment without forfeiture of property and with the possibility of seeking release on parole after serving twenty years.

14. By a decision of 11 November 2016, the Izyaslav District Court of the Khmelnytskyi Region ("the District Court") refused to grant a request by the

applicant for release on parole. The court noted that the applicant was serving his sentence in accordance with Ukrainian legislation, which did not provide for release on parole for life prisoners.

15. On 17 January 2017 the Khmelnytskyi Court of Appeal (“the Court of Appeal”) partly allowed an appeal by the applicant against the decision of 11 November 2016 for procedural violations and remitted the case to the first-instance court for fresh consideration.

16. On 11 May 2017 the District Court rejected the applicant’s request for release on parole. In addition to its previous reasoning (see paragraph 14 above), the court noted that according to the information submitted by prison officials, the applicant’s behaviour demonstrated that he had not reformed and there was no procedure set forth in the domestic law for his release on parole.

17. On 17 July 2017 the Court of Appeal upheld the decision of the first-instance court. It noted, *inter alia*, that the applicant considered that the first-instance court had acted contrary to the 1983 Convention, which prohibited “aggravation of the sentence”. The court did not reply to that argument, focusing instead in its reasoning on the applicant’s failure to demonstrate that his behaviour proved that he had reformed.

18. On 14 May 2018 the District Court rejected the applicant’s request for release on parole on the same grounds as in its previous decision. On 26 July 2018 the Court of Appeal upheld the decision of 14 May 2018 for want of proof that the applicant had reformed.

19. By decisions of the District Court of 17 August 2016 and 26 June 2018, the periods of the applicant’s pre-trial detention in, respectively, Hungary (8 December 1999 to 21 August 2003) and Ukraine (8 May 2007 to 20 December 2008) were recalculated as two days of imprisonment for one day of pre-trial detention under the legislation in force at that time.

20. On 8 February 2019 the District Court examined a request by the applicant for his release on the grounds of the expiry of his term of imprisonment. The court rejected the request on the ground that the original sentence imposed by the Hungarian courts did not fix the maximum term of the applicant’s imprisonment but provided for the possibility of seeking release on parole after serving twenty years of the term of imprisonment. That decision was upheld by the Court of Appeal on 9 April 2019.

21. On 23 September 2019 the District Court refused to examine a further request by the applicant for release, on the ground that that request was identical to the one examined on 8 February 2019. The decision of the first-instance court was upheld by the Court of Appeal on 19 November 2019.

22. On 11 December 2019 the District Court refused to examine a further request by the applicant for release and on 20 May 2020 that decision was upheld by the Court of Appeal.

23. On 27 April 2021 the District Court rejected a request by the applicant for release on parole or the commutation of his remaining sentence. On

29 July 2021 the Court of Appeal upheld the decision of the first-instance court, reiterating that the relevant domestic law did not provide for release on parole or commutation of the remainder of the sentence for life prisoners.

RELEVANT DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK

I. RELEVANT LAW IN HUNGARY

24. Act no. IV of 1978 on the Criminal Code (as in force from 1 March 1999 until 30 June 2013, when it was replaced by Act no. C of 2012 on the Criminal Code) provided as follows:

Imprisonment Article 40

“1. Imprisonment shall last for life or for a fixed duration.
...”

Release on parole Article 47/A

“1. If a life sentence is imposed, the court shall define in the judgment the earliest date of eligibility for parole or it shall exclude eligibility for parole.
2. If eligibility for parole is not excluded, the earliest date of release on parole shall be after a term of twenty years has been served, or a term of at least thirty years if the life sentence was imposed for a criminal act that is punishable without a statute of limitations.”

25. The relevant parts of Act no. C of 2012 on the Criminal Code (as in force from 1 July 2013) read as follows:

Imprisonment Article 34

“Imprisonment shall be imposed for a fixed duration or for a life term.”

Release on parole from life imprisonment Article 42

“In the event that a sentence of life imprisonment is imposed, the court shall specify the earliest date of eligibility for parole or shall exclude any eligibility for parole.”

II. RELEVANT LAW AND PRACTICE IN UKRAINE

A. 1960 Criminal Code

26. The relevant provisions of the Code (as worded prior to 29 December 1999) provided as follows:

Article 93 – Aggravated murder

“Murder: (a) committed for profit ... (d) of two or more persons ... (j) committed with premeditation by a group of persons or an organised group

shall be punishable by imprisonment for a term of eight to fifteen years or by the death penalty and, in cases provided for by sub-paragraph (a), with forfeiture of property.”

27. By a decision of 29 December 1999, the Constitutional Court of Ukraine abolished the death penalty and the parliament passed Law no. 1483 of 22 February 2000 amending the Criminal Code; the death penalty, as a punishment for some crimes, was replaced with life imprisonment. The amendments entered into force on 29 March 2000 (see, for more details, *Ruban v. Ukraine*, no. 8927/11, §§ 20-22, 12 July 2016).

B. 2001 Criminal Code

28. On 5 April 2001 Parliament adopted a new Criminal Code, which entered into force on 1 September 2001. The relevant provisions of the Code in the original wording read as follows:

Article 5

Retrospective effect of the law on criminal liability

“1. A law on criminal liability which decriminalises an action, mitigates criminal liability or otherwise improves the situation of a person shall have retrospective effect; it shall apply to persons who had committed the relevant act before such a law entered into force, including persons serving their sentence or those who have completed their sentence but have a criminal record ...”

Article 81

Release on parole

“1. Release on parole may be applied to persons sentenced to correctional work, duty-related restrictions for military officers, restriction of liberty, custody in a penal battalion for military officers, or [fixed-term] imprisonment ...

2. Parole may be applied, if a sentenced person displays decent behaviour and diligence in work as a proof of his or her reformation ...”

Article 115

Murder

“1. Murder – that is to say the wilful unlawful causing of the death of another person – shall be punishable by imprisonment for a term of seven to fifteen years.

2. The murder ... (1) of two or more people; ... (6) on the basis of motives of personal gain; ... (12) committed by a group of persons upon prior conspiracy; ... shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment with the forfeiture of property, under [any of the circumstances] provided by sub-paragraph 6 of paragraph 2 of this Article.”

C. 1960 Code of Criminal Procedure

29. The 1960 Code, which was in force at the time of the applicant's transfer, did not provide for any specific procedure in respect of the enforcement of sentences imposed by foreign States. It had a general provision on international cooperation in Article 31, which read as follows:

"The procedure for communication between courts, prosecutors, investigators and bodies of inquiry and relevant institutions of foreign States, as well as the procedure for the implementation of mutual letters rogatory shall be determined by the legislation of Ukraine and international treaties of Ukraine."

D. 2012 Code of Criminal Procedure

30. The 2012 Code contained a separate chapter on international legal assistance, which provided, *inter alia*:

Article 611

Arranging execution of sentence in respect of a transferred sentenced person

"... 2. The sentence in respect of a transferred person sentenced by the court of a foreign State shall be executed in Ukraine in accordance with the laws of Ukraine governing the execution of criminal sentences. The legal consequences for the convicted person transferred to Ukraine for serving his or her sentence shall be the same as for persons sentenced in Ukraine for the commission of a similar criminal offence.

3. A person transferred to Ukraine for the continued serving of his or her punishment may be subject to parole, amnesty or pardon in accordance with the procedure established by legislation ..."

E. Judgment of 16 September 2021 of the Constitutional Court of Ukraine on the review of the sentence of a person condemned to life imprisonment

31. With reference to, among other things, the case-law of the Court, the Constitutional Court found the first paragraph of Article 81 of the Criminal Code (see paragraph 28 above) unconstitutional in so far as it did not allow its application to persons who were sentenced to life imprisonment.

F. Judgment of the Grand Chamber of the Supreme Court of Ukraine of 8 July 2020 in case no. 1-42/2004

32. In 2019 the Court found a violation of Article 3 of the Convention in *Petukhov v. Ukraine (no. 2)* (no. 41216/13, 12 March 2019) in respect of insufficient medical assistance provided to Mr Petukhov and the irreducibility of his life sentence. Mr Petukhov sought a review of his case before the Supreme Court on the basis of the Court's judgment. The Grand Chamber of the Supreme Court rejected his request. In particular, with regard to the irreducibility of his life sentence, it referred to the Court's conclusions under

Article 46 of the Convention (see the quotation from *Petukhov*, cited above, in paragraph 40 below) and noted:

“78. The national legislation of Ukraine, as noted by the [Court], has a significant legislative gap concerning the regulation of the possibility of release on parole for persons who were sentenced to life imprisonment. However, the improvement of normative legal acts by the passing of laws and the introduction of amendments and additions to them is the prerogative of the legislative branch of power and does not belong to the competences of a court at any level of jurisdiction. In fact, it is worth distinguishing between the powers of the law-making body and the powers of the judicial bodies in the process of justice.

79. The only legislative body in Ukraine is the *Verkhovna Rada* of Ukraine [Ukrainian Parliament] ...

80. Taking into account the fact that at the time of the examination [of the case] by the Grand Chamber of the Supreme Court of Ukraine, the legislative body has not introduced the necessary changes to national legislation in the execution of the [Court’s] judgment [in] *Petukhov v. Ukraine (no. 2)*, [and] there is no normative definition of the procedure and conditions for the revision of the penalty in the form of life imprisonment, the Supreme Court is deprived of the possibility of considering the issue of the revision of the sentence of [Mr] V.S. Petukhov in the form of life imprisonment, as the appellant asks.”

III. RELEVANT INTERNATIONAL LAW

A. Convention on the Transfer of Sentenced Persons (ETS 112)

33. The relevant provisions of the Convention read as follows:

Article 9 – Effect of transfer for administering State

“1. The competent authorities of the administering State shall:

(a) continue the enforcement of the sentence immediately or through a court or administrative order, under the conditions set out in Article 10, or

(b) convert the sentence, through a judicial or administrative procedure, into a decision of that State, thereby substituting for the sanction imposed in the sentencing State a sanction prescribed by the law of the administering State for the same offence, under the conditions set out in Article 11.

...

3. The enforcement of the sentence shall be governed by the law of the administering State and that State alone shall be competent to take all appropriate decisions ...”

Article 10 – Continued enforcement

“1. In the case of continued enforcement, the administering State shall be bound by the legal nature and duration of the sentence as determined by the sentencing State.

2. If, however, this sentence is by its nature or duration incompatible with the law of the administering State, or its law so requires, that State may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its

own law for a similar offence. As to its nature, the punishment or measure shall, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State.”

Article 11 – Conversion of sentence

“1. In the case of conversion of sentence, the procedures provided for by the law of the administering State apply. When converting the sentence, the competent authority:

(a) shall be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State;

(b) may not convert a sanction involving deprivation of liberty to a pecuniary sanction;

(c) shall deduct the full period of deprivation of liberty served by the sentenced person; and

(d) shall not aggravate the penal position of the sentenced person, and shall not be bound by any minimum which the law of the administering State may provide for the offence or offences committed ...”

B. Additional Protocol to the Convention on the Transfer of Sentenced Persons

34. The relevant provisions of the Additional Protocol to the Convention on the Transfer of Sentenced Persons (opened for signature on 18 December 1997, came into force on 1 June 2000, ETS 167) provides:

Article 3 – Sentenced persons subject to an expulsion or deportation order

“1. Upon being requested by the sentencing State, the administering State may, subject to the provisions of this article, agree to the transfer of a sentenced person without the consent of that person, where the sentence passed on the latter, or an administrative decision consequential to that sentence, includes an expulsion or deportation order or any other measure as the result of which that person will no longer be allowed to remain in the territory of the sentencing State once he or she is released from prison ...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

35. The applicant complained that his irreducible life sentence was incompatible with Article 3 of the Convention, which reads as follows:

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

A. Admissibility

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

B. Merits

1. *The parties' submissions*

37. The applicant referred to the case-law of the Court as to the incompatibility of an irreducible life sentence with the requirements of Article 3 of the Convention (he referred to *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, §§ 124-30, ECHR 2013) and the findings of the Court in respect of the same issue in the Ukrainian context (he referred to *Petukhov*, cited above, §§ 169-87). He maintained that the absence of a regulatory framework for the application of the release on parole procedure to life prisoners had been found by the Grand Chamber of the Supreme Court in the judgment of 8 July 2020 to be an obstacle to the examination of such requests for release on parole by Ukrainian courts (see paragraph 32 above). He further contended that the judgment of the Constitutional Court of 16 September 2021, in which the relevant provision of the Criminal Code had been found to be unconstitutional in so far as it did not allow its application to persons who had been sentenced to life imprisonment, was in itself not sufficient to resolve the problem in the absence of further legislative changes for the introduction of the relevant procedure and rules. He lastly argued that seeking release on parole in Hungary could not be considered to be a remedy which was practical and effective for a number of reasons, in particular because of the fact that under the relevant provision of the 1983 Convention, the enforcement of his sentence was the responsibility of Ukraine as the administering State (Article 9 § 3 of the 1983 Convention, quoted in paragraph 33 above).

38. The Government contended that the Ukrainian authorities had merely executed the sentence of the Hungarian courts and had not decided on the applicant's guilt. They argued that the applicant's transfer had taken place in accordance with international treaties other than the Convention, and the Court was not competent to examine the compliance of the applicant's transfer with those treaties. They further asserted that the Ukrainian legislation did not provide for the possibility of applying for parole and amnesty to persons who had been sentenced to life, but such persons could seek a presidential pardon. They contended that the applicant could have addressed his request for conditional release to the Hungarian authorities, which he had not done. They also submitted that the decision on the recognition of the applicant's sentence in Ukraine did not change his punishment, and that Ukraine was responsible only for the manner of the

execution of the judgment against the applicant. The Government submitted that there had been no violation of the applicant's rights guaranteed by Article 3 of the Convention.

2. *The Court's assessment*

39. As to the Government's argument that the applicant could seek release on parole from the Hungarian authorities, the Court notes that the Government have not indicated the legal basis on which this could be done. Furthermore, regardless of any other reasons, it is difficult to see in what way and on what basis the enforcement of the applicant's sentence in Ukraine and his behaviour and attitudes during his imprisonment in the Ukrainian prison could be properly evaluated by the representatives of the other State, even though his sentence had originated in that country. The Court considers that the violation of Article 3 complained of is attributable to Ukraine and dismisses the Government's argument.

40. The Court reiterates that an irreducible life sentence is not compatible with the requirements of Article 3. The Court refers to the general principles established in its case-law on that matter (see *Vinter and Others*, cited above, §§ 103-22, and *Hutchinson v. the United Kingdom* [GC], no. 57592/08, §§ 42-45, 17 January 2017) and the detailed assessment of the Ukrainian legislation and practice in *Petukhov* (cited above, §§ 168-87), which are equally pertinent to the present case. In *Petukhov* (§ 194) the Court noted, in particular:

“[T]he present case, in so far as it concerns the irreducibility of a life sentence, discloses a systemic problem calling for the implementation of measures of a general character. The nature of the violation found under Article 3 of the Convention suggests that for the proper execution of the present judgment the respondent State would be required to put in place a reform of the system of review of whole-life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole-life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions, in accordance with the standards developed in the Court's case-law.”

41. In the present case, unlike in *Petukhov* (cited above), the applicant's life sentence was not the result of a conviction by the Ukrainian courts but was imposed by them following his transfer from Hungary to Ukraine for the purpose of serving his sentence. However, it is clear from the judgments of the Ukrainian courts in the applicant's case (see paragraphs 14 to 17 above) that this difference did not affect in any way the applicant's situation in law and in practice and, therefore, his sentence is considered irreducible under current Ukrainian law.

42. By the Government's own admission, the Ukrainian legislation did not provide for the possibility of applying parole to life prisoners (see paragraph 38 above). It is true that the Constitutional Court of Ukraine in its

judgment of 16 September 2021 declared the provision on release on parole in Article 81 of the Criminal Code unconstitutional in so far as it did not apply to life prisoners (see paragraph 31 above). However, the procedure and manner of the application of the rule on release on parole to life prisoners has not yet been established, and in the absence of such rules and such a procedure the domestic courts considered that they had no jurisdiction to decide on the release on parole of life prisoners, as was reflected in the judgment of the Grand Chamber of the Supreme Court in the case of Mr Petukhov (see paragraph 32 above). The applicant's situation has therefore not changed for the purposes of Article 3 with the adoption of the judgment of the Constitutional Court of 16 September 2021 taken alone, a judgment which moreover was delivered more than three years after his application was lodged and after the refusal of numerous requests for release. Thus, the Court's reasoning in *Petukhov* (cited above, §§ 168-87 and 194) is equally pertinent to the present case.

43. There has accordingly been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

44. The applicant complained that although the Hungarian courts had sentenced him to a reducible life sentence, the Ukrainian courts had converted that sentence into what had turned out to be a *de facto* irreducible life sentence, amounting to a heavier penalty, in violation of Article 7 of the Convention, which reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

A. Admissibility

1. Applicability of Article 7

45. The Government argued that in bringing the judgment of the Hungarian court into line with Ukrainian legislation, the Zakarpattya Regional Court of Appeal's decision of 26 September 2007 had not imposed a penalty on the applicant. They referred to the Court's case-law which stated that transfer decisions, in either the sentencing or the administering State, did not fall within the ambit of Article 7 of the Convention, which did not apply to the enforcement of a sentence (the Government cited *Cioek v. Poland* (dec.), no. 498/10, §§ 32-33, 23 October 2012, with further references). They submitted that Article 7 was not applicable in the present case.

46. The applicant contended that the conversion of his reducible life sentence to a *de facto* irreducible life sentence had affected the scope of the penalty and led to a less favourable penalty being imposed on him. He maintained that Hungarian law distinguished between reducible and irreducible life sentences (see paragraphs 24 and 25 above), and given that the Hungarian authorities had imposed a reducible life sentence on him, the Ukrainian authorities had worsened his situation by replacing it with what had turned out to be an irreducible life sentence.

47. The Court reiterates that in its established case-law a distinction is drawn between a measure that constitutes in substance a “penalty” and a measure that concerns the “execution” or “enforcement” of a “penalty”; Article 7 applies only to the former (see *Kafkaris v. Cyprus* [GC], no. 21906/04, § 142, ECHR 2008, and *Del Río Prada v. Spain* [GC], no. 42750/09, § 83, ECHR 2013, and the cases cited therein). Whether the case concerned a change in the regime for release on parole within the country or such a change in the regime took place as a result of the transfer of prisoners, the Court has consistently held that such a regime relates to the execution of a sentence and thus excludes the application of Article 7 (see *Kafkaris*, cited above, § 142; *Grava v. Italy*, no. 43522/98, § 51, 10 July 2003; and *Cioek*, cited above, § 34).

48. In particular, in cases concerning the transfer of prisoners, the Court has held that despite the fact that prospects of release on parole in the administering State were less favourable than in the sentencing State, the transfer decisions remained within the scope of execution of penalties and did not amount to a “penalty” itself within the meaning of Article 7 (see *Csoszánzski v. Sweden* (dec.), no. 22318/02, 27 June 2006, and *Szabó v. Sweden* (dec.), no. 28578/03, ECHR 2006-VIII). The Court reached the same conclusion in respect of decisions on conversion of sentences in the administering State, when the penalty remained the same while the rules on release on parole in the administering State were stricter than in the sentencing State (see *Müller v. the Czech Republic* (dec.), no. 48058/09, 6 September 2011).

49. However, the Court has also acknowledged that in practice the distinction between a measure that constitutes a “penalty” and a measure that concerns the “execution” or “enforcement” of the “penalty” may not always be clear cut (see *Kafkaris*, § 142, and *Del Río Prada*, § 85, both cited above). The concept of “penalty” in Article 7 is, like the notions of “civil right and obligations” and “criminal charge” in Article 6 § 1 of the Convention, autonomous in scope. The wording of the second sentence of Article 7 § 1 indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a “criminal offence”. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity (see *Welch v. the United*

Kingdom, 9 February 1995, §§ 27-28, Series A no. 307-A, and *Del Río Prada*, cited above, §§ 81-82).

50. As stated in *Del Río Prada* (cited above):

“89. [T]he Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the ‘penalty’ imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 § 1 *in fine* of the Convention. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person’s detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed. In such conditions Article 7 § 1 would be deprived of any useful effect for convicted persons, the scope of whose sentences was changed *ex post facto* to their disadvantage. The Court points out that such changes must be distinguished from changes made to the manner of execution of the sentence, which do not fall within the scope of Article 7 § 1 *in fine*.

90. In order to determine whether a measure taken during the execution of a sentence concerns only the manner of execution of the sentence or, on the contrary, affects its scope, the Court must examine in each case what the ‘penalty’ imposed actually entailed under the domestic law in force at the material time or, in other words, what its intrinsic nature was. In doing so it must have regard to the domestic law as a whole and the way it was applied at the material time ...”

51. The Court notes that unlike the cases in which a change in the regime for release on parole was found to belong exclusively within the domain of the execution of a sentence (see paragraphs 47 and 48 above), in the present case the applicant’s transfer and, in particular, the manner in which his penalty was converted ultimately amounted to a change from a regime allowing release on parole to no availability of parole at all. As the Court has found, the applicant’s sentence imposed as a result of the conversion is irreducible under current Ukrainian law (see paragraph 42 above). Thus, the principal difference between the present case and previous ones concerning the transfer of prisoners (see paragraph 48 above) is that those cases concerned the terms for granting parole in the State to which the prisoner was transferred, while in the present case there is an issue of unavailability of parole as a matter of law. The Court also observes that, as can be seen from its relevant provisions, the Hungarian legislation does differentiate between reducible and irreducible life sentences (see paragraphs 24 and 25 above) and provides for both. In the applicant’s case, the domestic courts in Hungary had explicitly decided to impose on him a reducible life sentence and not an irreducible one.

52. In the Court’s opinion, irreducible and reducible life sentences differ as to their scope, and the difference has been significant enough for the Court to find the former incompatible with the requirements of the Convention (see *Vinter and Others*, §§ 124-30, and *Petukhov*, §§ 169-87, both cited above),

while the latter has been found to be compatible (see *Hutchinson*, cited above, §§ 70-72). Such a distinction reinforces the importance of the ground of rehabilitation, which is central for European penal policy nowadays, as reflected in the practice of the Contracting States, in the relevant standards adopted by the Council of Europe, and in the relevant international materials (*ibid.*, § 42).

53. The Government relied heavily (see paragraphs 38 and 45 above) on the fact that the transfer and conversion of the applicant's sentence had taken place pursuant to another international treaty, namely the 1983 Convention and its Additional Protocol, and that they were responsible only for the enforcement of the sentence under Article 9 § 3 of that Convention (see paragraph 33 above). They apparently considered that that fact was of particular relevance.

54. The Court reiterates that it is not competent to review the Contracting Parties' compliance with instruments other than the European Convention on Human Rights and the Protocols thereto (see *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V). It is not precluded, however, from assessing whether the State complies with its Convention obligations when implementing international legal assistance treaties (see, among many other authorities, cases on extradition: *Soldatenko v. Ukraine*, no. 2440/07, 23 October 2008; on transfer of proceedings in criminal matters: *Garkavyi v. Ukraine*, no. 25978/07, 18 February 2010; and on mutual assistance in criminal matters: *Zhukovskiy v. Ukraine*, no. 31240/03, 3 March 2011).

55. Regarding the autonomous concept of "penalty" within the meaning of Article 7 of the Convention, the Court does not consider that its interpretation could be substantially different depending on whether the measure claimed to amount to a new "penalty" was the result of the operation of domestic law alone or also involved the application of international treaties binding on the respondent State.

56. The Court therefore concludes that by converting the applicant's original reducible life sentence to one that was irreducible under Ukrainian law, the domestic courts in the particular circumstances of the present case went beyond mere measures of enforcement and changed the scope of the applicant's penalty. Article 7 is therefore applicable in the present case.

2. Compliance with the time-limit under Article 35 § 1 of the Convention

57. The Government did not submit any observations on the above question. In this connection the Court reiterates that the time-limit under Article 35 § 1 of the Convention, in reflecting the wish of the Contracting Parties to prevent past decisions being called into question after an indefinite lapse of time, serves the interests not only of the respondent Government but also of legal certainty as a value in itself. It marks out the temporal limits of

supervision carried out by the Convention institutions and signals to both individuals and State authorities the period beyond which such supervision is no longer possible. It is therefore not open to the Court to set aside the application of this time-limit solely because the Government have not made a preliminary objection based on it (see *Walker v. the United Kingdom* (dec.), no. 34979/97, ECHR 2000-I).

58. The applicant's transfer to Ukraine and the decisions on the conversion of his original sentence took place as far back as 2007 (see paragraphs 10-13 above), while the application to the Court was lodged on 15 January 2018. In this connection the Court notes, *mutatis mutandis*, its case-law according to which, where domestic law did not provide for any mechanism or possibility for review of a whole-life sentence, the incompatibility with Article 3 on this ground already arose at the moment of the imposition of the whole-life sentence and not at a later stage of incarceration (see *Vinter and Others*, cited above, § 122). In principle, the above could have implications on the starting-point of the time-limit under Article 35 § 1 of the Convention with regard to complaints under its Article 7.

59. However, in the present case, in its transfer decision of 26 September 2007, the Zakarpattya Regional Court of Appeal and the Supreme Court in its final decision of 20 December 2007 clearly indicated that the applicant had the right to seek release on parole (see paragraphs 12 and 13 above). While this indication proved to be without any foundation in Ukrainian law, it cannot be ruled out that the applicant was nonetheless led to believe that in his particular situation he would be entitled to release on parole if the other relevant conditions, such as serving a minimum number of years of imprisonment, were met.

60. The domestic courts later denied him that right by rejecting his request for release on parole and ignored his argument about "aggravation of his sentence" (see paragraphs 14 to 17 above). The domestic courts confirmed that no procedure and no rules for release on parole for a life prisoner existed under Ukrainian law, regardless of the fact that the applicant's sentence was the result of a conversion of a foreign sentence. Their arguments concerning the applicant's lack of proof of reform apparently had no bearing on their finding that he was not entitled to release on parole regardless of his behaviour. The proceedings concerning the applicant's requests for parole, from which he could have arguably realised that any request for release did not have even a theoretical chance of success owing to the state of the national law, were concluded on 17 July 2017, and thus less than six months prior to the lodging of the present application on 15 January 2018. Furthermore, those proceedings and the ensuing proceedings on the same matter in 2018 (see paragraph 18 above) seem to have made the applicant believe that the main obstacle to his release was want of proof that he had reformed rather than the state of the domestic law. It follows that the applicant lodged his application in time.

3. *Conclusion on admissibility*

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

B. Merits

62. The applicant submitted that his situation had worsened when his reducible life sentence had been converted into an irreducible life sentence, which was a heavier penalty. He contended that the Ukrainian judges must have known the state of the domestic law and realised that the applicant had no right to seek release on parole under the Ukrainian legislation. Thus, in his opinion they should not have worsened his situation and should have sentenced him to fixed-term imprisonment for a maximum of fifteen years. Instead, they had misled him by indicating in their decisions of 2007 that his life sentence was reducible, and that he had a possibility of seeking release on parole after serving twenty years in prison.

63. The Government did not submit any observations on the merits given that in their view, Article 7 was not applicable.

64. The Court observes that the penalty “that was applicable at the time the criminal offence was committed”, within the meaning of Article 7, was a reducible life sentence. The Court considers that the domestic authorities, by denying the applicant a real possibility of seeking release on parole, confirmed that they had converted his original reducible sentence into a *de facto* and *de jure* irreducible life sentence and thus had changed the scope of the original punishment, to the applicant’s detriment, by imposing a heavier penalty. In the light of the consideration above, the Court concludes that there has been a violation of Article 7 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

65. 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

66. The applicant claimed 415,000 euros (EUR) in respect of non-pecuniary damage.

67. The Government considered this claim unsubstantiated.

68. The Court considers that the applicant has suffered some non-pecuniary damage but finds the amount claimed excessive. Ruling on an

equitable basis, the Court awards the applicant EUR 2,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

69. The applicant also claimed EUR 6,450 for the costs and expenses incurred before the Court.

70. The Government considered that the claim was not sufficiently itemised and must be rejected.

71. 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. The Court also points out that under Rule 60 of the Rules of Court, any claim for just satisfaction must be itemised and submitted in writing together with the relevant supporting documents or vouchers, failing which the Chamber may reject the claim in whole or in part (see *Malik Babayev v. Azerbaijan*, no. 30500/11, § 97, 1 June 2017). In the present case the applicant produced a contract with his representatives which indicated only the number of hours they had spent on the applicant's case and their fees. The contract further stated that the fees would be paid on condition that the Court awarded the amount claimed. The applicant failed to produce any documents showing that he had paid or was under a legal obligation to pay the fees charged by his representatives (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 372, 28 November 2017). Therefore, the Court dismisses the claim for costs and expenses.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 3 of the Convention;
3. *Holds* that there has been a violation of Article 7 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State 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;

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

Done in English, and notified in writing on 10 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytschik
Registrar

Síofra O'Leary
President