



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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 41707/98
by Mykola KHOKHLICH
against Ukraine

The European Court of Human Rights (Fourth Section) sitting on 25 May 1999 as a Chamber composed of

Mr M. Pellonpää, *President*,
Mr A. Pastor Ridruejo,
Mr L. Caflisch,
Mr J. Makarczyk,
Mr V. Butkevych,
Mr J. Hedigan,
Mrs S. Botoucharova, *Judges*,

with Mr V. Berger, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 9 February 1998 by Mykola KHOKHLICH against Ukraine and registered on 15 June 1998 under file no. 41707/98;

Having regard to the reports provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 5 January 1999, the observations in reply submitted by the applicant on 25 February 1999 and further observations submitted by the respondent Government on 26 March 1999;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Ukrainian national, born in 1976. He is currently detained in the prison of Khmelnytsky (Ukraine).

He is represented before the Court by Mr Igor Voskoboynikov, a lawyer practising in Donetsk region.

The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

In February 1995 the applicant was arrested by the police on several occasions and on 13 March 1995 he was detained on remand.

On 9 February 1996 the Criminal Chamber of the Khmelnytsky Regional Court (*Судебная коллегия по уголовным делам Хмельницкого областного суда*) convicted the applicant of the murder of two persons and sentenced him to death.

On 26 March 1996 the Criminal Chamber of the Supreme Court of Ukraine (*Судебная коллегия по уголовным делам Верховного Суда Украины*) upheld the judgment of the first instance court.

In September 1997 the applicant was diagnosed as having tuberculosis.

On 29 October 1997 the Khmelnytsky Regional Prosecution (*Прокуратура Хмельницької області*) informed the applicant's mother that the domestic law did not provide for visits of a notary to persons sentenced to death. On 30 October 1997 the Ministry of the Interior confirmed this information.

On 10 December 1997 the Khmelnytsky Regional Court gave the applicant leave for a visit of a notary.

On 6 January 1998 the Khmelnytsky Notary Office (*Перша Хмельницька державна нотаріальна контора*) confirmed that between 5 December 1997 and 6 January 1998 they did not receive any written permission for a visit of the applicant.

On 10 February 1998 a notary visited the applicant and certified his signature on the power of attorney.

B. Constitution of Ukraine

Article 8 §§ 2 and 3 - Стаття 8 §§ 2 та 3

“Конституція України має найвищу юридичну силу. Закони та інші нормативно-правові акти приймаються на основі Конституції України і повинні відповідати їй.

Норми Конституції України є нормами прямої дії. Звернення до суду для захисту конституційних прав і свобод людини і громадянина безпосередньо на підставі Конституції України гарантується.”

The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted on the basis of the Constitution of Ukraine and shall conform to it.

The norms of the Constitution of Ukraine are norms of direct effect. Appeals to the court in defence of the constitutional rights and freedoms of the individual and citizen directly on the grounds of the Constitution of Ukraine are guaranteed.

Article 9 § 1 - Стаття 9 § 1

“Чинні міжнародні договори, згода на обов’язковість яких надана Верховною Радою України, є частиною національного законодавства України.”

International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.

Article 15 § 3 - Стаття 15 § 3

“Цензура заборонена.”

Censorship is prohibited.

Article 19 - Стаття 19

“Правовий порядок в Україні ґрунтується на засадах, відповідно до яких ніхто не може бути примушений робити те, що не передбачено законодавством.

Органи державної влади та органи місцевого самоврядування, їх посадові особи, зобов’язані діяти лише на підставі, в межах повноважень та у спосіб, що передбачені Конституцією та законами України.”

The legal order in Ukraine is based on the principles according to which no one shall be forced to do what is not envisaged by legislation.

Bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine.

Article 22 - Стаття 22

“Права і свободи людини і громадянина, закріплені цією Конституцією, не є вичерпними.

Конституційні права і свободи гарантуються і не можуть бути скасовані.

При прийнятті нових законів або внесенні змін до чинних законів не допускається звуження змісту та обсягу існуючих прав і свобод.”

Human and citizens’ rights and freedoms affirmed by this Constitution are not exhaustive.

Constitutional rights and freedoms are guaranteed and shall not be abolished.

The content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force.

Article 29 § 2 - Стаття 29 § 2

“Ніхто не може бути заарештований або триматися під вартою інакше як за вмотивованим рішенням суду і тільки на підставах та в порядку, встановлених законом.”

No one shall be arrested or held in custody other than pursuant to a substantiated court decision and only on the grounds and in accordance with the procedure established by law.

Article 29 § 4 - Стаття 29 § 4

“Кожному заарештованому чи затриманому має бути невідкладно повідомлено про мотиви арешту чи затримання, роз’яснено його права та надано можливість з моменту затримання захищати себе особисто та користуватися правовою допомогою захисника.”

Everyone arrested or detained shall be informed without delay of the reasons for his or her arrest or detention, apprised of his or her rights, and from the moment of detention shall be given the opportunity to personally defend himself or herself, or to have the legal assistance of a defender.

Article 55 §§ 2 and 4 - Стаття 55 §§ 2 та 4

“Кожному гарантується право на оскарження в суді рішень, дій чи бездіяльності органів державної влади, органів місцевого самоврядування, посадових і службових осіб.

Кожен має право після використання всіх національних засобів правового захисту звертатися за захистом своїх прав і свобод до відповідних міжнародних судових установ чи до відповідних органів міжнародних організацій, членом або учасником яких є Україна.”

Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers.

After exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.

Article 59 - Стаття 59

“Кожен має право на правову допомогу. У випадках, передбачених законом, ця допомога надається безоплатно. Кожен є вільним у виборі захисника своїх прав.

Для забезпечення права на захист від обвинувачення та надання правової допомоги при вирішенні справ у судах та інших державних органах в Україні діє адвокатура.”

Everyone has the right to legal assistance. Such assistance is provided free of charge in cases envisaged by law. Everyone is free to choose the defender of his or her rights.

In Ukraine, the advocacy acts to ensure the right to a defence against accusation and to provide legal assistance in deciding cases in courts and other state bodies.

Article 63 § 3 - Стаття 63 § 3

“Засуджений користується всіма правами людини і громадянина, за винятком обмежень, які визначені законом і встановлені вироком суду.”

A convicted person enjoys all human and citizens' rights, with the exception of restrictions determined by law and established by a court verdict.

Article 64 - Стаття 64

“Конституційні права і свободи людини і громадянина не можуть бути обмежені, крім випадків, передбачених Конституцією України.”

Constitutional human and citizens' rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine.

C. Provisions of domestic law, *inter alia*, presented by the Government in their observations

Imprisonment Before Trial Act 1993 - Закон України Про попереднє ув'язнення - 1993

Section 1 - Стаття 1

“Попереднє ув'язнення відповідно до кримінально-процесуального законодавства України є запобіжним заходом щодо обвинуваченого, підсудного, підозрюваного у вчиненні злочину, за який може бути визначено покарання у вигляді позбавлення волі, та засудженого, вирок щодо якого не набрав законної сили.

Порядок попереднього ув'язнення визначається цим законом, Кримінально-процесуальним і Виправно-трудовим кодексами України та іншими актами законодавства.

Тримання осіб, взятих під варту, відповідно до завдань кримінального судочинства здійснюється на принципах неухильного додержання Конституції України, вимог Загальної декларації прав людини, інших міжнародних правових норм і стандартів поводження з ув'язненими і не може поєднуватися з навмисними діями, що завдають фізичних чи моральних страждань або принижують людську гідність.”

According to the Code of Criminal Procedure of Ukraine, an imprisonment before trial is a preventive measure with regards to an accused, a defendant or a person suspected of

having committed a crime punishable with imprisonment, as well as a sentenced person with regards to whom a sentence has not yet been enforced.

The procedure of imprisonment before trial is defined by this law, the Criminal Procedure Code and the Corrective labour Code of Ukraine and other legislative acts.

In accordance with the objectives of criminal jurisdiction the detention is effected on the principles of compliance with the requirements of the Constitution of Ukraine, provisions of the General Declaration of Human Rights and other legal norms and standards for treatment of detained persons and cannot be based on deliberate actions causing physical or moral suffer or degradation.

Section 8(4) - Стаття 8 (частина 4)

“Засуджених до смертної кари тримають ізольовано від усіх інших осіб, які перебувають під вартою.”

Persons sentenced to capital punishment are to be held separately from all other detained persons.

Section 9(1) - Стаття 9 (частина 1)

“Особи, взяті під варту, мають право (1) на захист відповідно до кримінально-процесуального законодавства, (2) знайомитися з правилами тримання під вартою, (3) на щоденну прогулянку тривалістю одна година (вагітним жінкам і жінкам, які мають при собі дітей, неповнолітнім, а також хворим з дозволу лікаря та за їх згодою тривалість щоденної прогулянки встановлюється до двох годин), (4) одержувати два рази на місяць передачі або посилки вагою до восьми кілограмів та без обмежень грошові перекази і передачі, (5) купувати протягом місяця за безготівковим розрахунком продукти харчування і предмети першої необхідності на суму до одного мінімального розміру заробітної плати та без обмежень письмове приладдя, газети, книги через торгівельну мережу на замовлення, (6) користуватися власним одягом і взуттям, мати при собі документи і записи, що стосуються кримінальної справи, (7) користуватися телевізорами, одержаними від родичів або інших осіб, настільними іграми, газетами і книгами з бібліотеки місця попереднього ув'язнення та придбаними через торгівельну мережу, (8) відправляти в індивідуальному порядку релігійні обряди і користуватися релігійною літературою та властивими їх віруванню предметами релігійного культу, виготовленими з малоцінних матеріалів, якщо при цьому не порушується встановлений у місцях попереднього ув'язнення порядок, а також не обмежуються права інших осіб, (9) на восьмигодинний сон в нічний час, під час якого не допускається залучення до участі в процесуальних та інших діях, за винятком невідкладних випадків, (10) звертатись зі скаргами, заявами та листами до державних органів і службових осіб у порядку, встановленому Статтею 13 цього Закону.”

Detained persons have the right (a) to be defended in accordance with the rules of criminal law, (b) to be acquainted with the rules of detention, (c) to one hour's walk a day (the length of the walk may be extended to up to two hours for pregnant women, women who have children accompanying them, persons under 18 years old and sick persons with permission from their doctor and with their own consent), (d) twice a month to receive a parcel (*передача, посилка вагою до 8 кг*) weighing up to eight kilograms and unlimited

money transfers and unlimited amounts of money by way of remittance or personal delivery, (e) to buy foodstuffs and toiletries to the value of one month's minimum salary, paying by written order, as well as stationery, newspapers and books without limitation through shops, (f) to use his or her own clothing and footwear and to have with him or her documents and notes related to his or her criminal case, (g) to make use of TV sets received from relatives or other persons and board games, newspapers and books borrowed from the library in his or her previous place of imprisonment or bought through shops, (h) individually to perform religious rituals and use religious literature and objects made of semi-precious materials pertaining to his or her beliefs provided that this does not lead to a breach of the order applicable to places of imprisonment before trial or restrict the rights of other persons, (i) to sleep for eight hours a night, during which time they shall not be required to participate in proceedings or to do anything else except in cases of extreme emergency and (j) to lodge complaints and petitions and send letters to State authorities and officials in accordance with the procedure prescribed by Article 13 of this Act.

Section 11 - Стаття 11

“Особам, взятим під варту, забезпечуються побутові умови, що відповідають правилам санітарії та гігієни.

Норма площі в камері для однієї взятої під варту особи, не може бути менше 2.5 квадратного метра, а для вагітної жінки або жінки, яка має при собі дитину, - 4.5 квадратного метра.

Особам, взятим під варту, надаються безплатно за єдиними нормами, встановленими Кабінетом Міністрів України, харчування, індивідуальне спальне місце, постільні речі та інші види матеріально-побутового призначення. В необхідних випадках їм видається одяг і взуття встановленого зразка.

Медичне обслуговування, а також лікувально-профілактична і протиепідемічна робота в місцях попереднього ув'язнення організуються і проводяться відповідно до законодавства про охорону здоров'я.

Порядок надання ув'язненим медичної допомоги, використання лікувальних закладів органів охорони здоров'я, залучення з цією метою їх медичного персоналу та проведення медичних експертиз визначається Міністерством Внутрішніх Справ України, Службою Безпеки України і Міністерством Здоров'я України.”

Detained persons should be provided with everyday conditions which meet sanitary and hygienic requirements.

The cell area allocated to one detained person should be not less than 2.5 square metres, and for a pregnant woman or a woman accompanied by a child, not less than 4.5 square metres.

Detained persons are to be supplied with meals, an individual sleeping-place, bedclothes and other types of material and everyday provision free of charge and according to the norms laid down by the Government. In case of necessity, they are to be supplied with clothes and footwear of a standard form.

Medical service and treatment and prophylactic and anti-epidemic measures in detention cells are to be arranged and provided pursuant to legislation on health protection.

Medical care provided to detained persons, use of medical facilities of the healthcare system, involvement of medical staff and conduction of medical examinations fall within the competence of the Ministry of Interior of Ukraine, the Security Service of Ukraine and the Ministry of Health Care of Ukraine.

Section 12(1) - Стаття 12 (частина 1)

“Побачення з родичами або іншими особами (як правило, один раз на місяць тривалістю від однієї до двох годин) може надавати взятим під варту адміністрація місця попереднього ув'язнення лише з письмового дозволу слідчого, органу дізнання або суду, в провадженні яких знаходиться справа.”

Permission for relatives or other persons to visit a detained person (in principle, once a month for one to two hours) can be given by the administrative authorities of the places of imprisonment, but only with the written approval of an investigator, an interrogating authority or a court dealing with the case.

Section 12(4) - Стаття 12 (частина 4)

“Особа, взята під варту, має право на побачення з захисником наодинці, без обмеження кількості побачень та їх тривалості, з моменту допуску захисника до участі у справі, підтвердженого письмовим повідомленням особи або органу, в провадженні яких знаходиться справа.”

Detained persons have the right to be visited by a defence counsel, whom he or she may see alone, with no limitation as to the number of visits or their length, from the moment the said counsel is authorised to act as a defender, this to be confirmed in writing by the person or body dealing with the case.

Section 13(1) - Стаття 13 (частина 1)

“Особи, взяті під варту, можуть листуватися з родичами або іншими громадянами, а також підприємствами, установами, організаціями з письмового дозволу особи або органу, в провадженні яких знаходиться справа. Після набрання вироком законної сили листування здійснюється без обмежень.”

Detained persons can exchange letters with their relatives and other persons and enterprises, establishments and organisations with the written permission of an authority dealing with the case. After a sentence starts to run, correspondence is no longer subject to any limitations.

Correctional Labour Code - Виправно-трудоий кодекс України

Section 28 - Стаття 28

“Основними вимогами режиму в місцях позбавлення волі є: обов'язкова ізоляція засуджених і постійний нагляд за ними з тим, щоб виключалася можливість

учинення ними нових злочинів чи інших антигромадських вчинків; точне і неухильне виконання ними своїх обов'язків; різні умови тримання залежно від характеру та ступеня суспільної небезпечності вчиненого злочину, особи і поведінки засудженого.

Засуджені носять одяг єдиного зразка, їх піддають обшукові; особистий обшук проводиться особами однієї статі з обшукуванням. Кореспонденція засуджених підлягає цензурі, а посилки, передачі і бандеролі - преглядові.

У виправно-трудових установах встановлюється суворо регламентований внутрішній розпорядок.

Зберігання заудженими при собі грошей та цінних речей, а також предметів, які заборонено використовувати у виправно-трудових установах, не допускається. Виявлені у засуджених гроші та інші речі вилучаються і, як правило, передаються в доход держави за мотивованою постановою начальника виправно-трудової установи санкціонованою прокурором.

Перелік і кількість предметів та речей, які засуджені можуть мати при собі, а також порядок вилучення предметів, які заборонено використовувати у виправно-трудових установах, встановлюються Правилами внутрішнього розпорядку виправно-трудових установ.

У порядку, встановленому цим Кодексом, засудженим дозволяється купувати за безготівковим розрахунком продукти харчування і предмети першої потреби, мати побачення, одержувати посилки, передачі, бандеролі, грошові перекази, листуватися, відправляти грошові перекази родичам.”

The main features of the regime in detention establishments are: the compulsory isolation of sentenced persons and permanent supervision over them, so as to exclude any possibility of new crimes or other anti-public acts being committed by them; precise and steady observance of obligations by these persons; and various detention conditions dependent on the character and gravity of the committed offence and the personality and behaviour of the sentenced person.

Sentenced persons shall wear a uniform. They shall be searched; body searches shall be conducted by persons of the same sex as the person searched. Correspondence shall be subject to censoring, parcels and post packages - to opening and checking.

A strict internal routine and rules shall be established in corrective labour establishments.

Sentenced persons shall be prohibited to keep money and valuable objects, or other objects not allowed to be used in corrective labour establishments. When found, money and valuable objects shall be confiscated and, as a rule, transferred to the State under a reasoned decision of the governor of the institution, sanctioned by a prosecutor.

A list of objects which sentenced persons are allowed to possess, showing the number or quantity of each which they are allowed to possess, as well as a procedure for confiscating objects the use of which is prohibited in corrective labour establishments, shall be established by internal regulations of corrective labour establishments.

Under the procedure established by this Code, sentenced persons are allowed to buy food and articles of daily necessity, paying by written order, to be visited, to receive parcels, packages, postal packages and money by remittance, to correspond and to send money to relatives by remittance.

Section 37(1) - Стаття 37 (частина 1)

“Засудженим дозволяється купувати за безготівковим розрахунком продукти харчування і предмети першої потреби на кошти, одержані за переказами.”

Sentenced persons are allowed to buy food and articles of daily necessity, paying by written order, out of the money received by remittance.

Section 41 - Стаття 41

“Засудженим, яких тримають у виправно-трудових колоніях, дозволяється одержувати протягом року: у колоніях загального режиму - 7 посилок (передач), посиленого режиму - 6 посилок (передач), суворого і особливого режиму - 5 посилок (передач). Засудженим, яких тримають у виховно-трудових колоніях, дозволяється одержувати протягом року: у колоніях загального режиму - 10 посилок (передач), посиленого режиму - 9 посилок (передач).

Засудженим, які відбувають позбавлення волі в тюрмах, одержання посилок і передач не дозволяється.

Засудженим, незалежно від призначеного їм виду режиму, дозволяється одержання не більш як двох бандеролей на рік, а також придбання без обмеження літератури через книготоргівельну мережу.

У виправно-трудових колоніях-поселеннях усіх видів кількість посилок, передач і бандеролей, одержуваних засудженими, не обмежується.

Перелік продуктів харчування і предметів першої потреби, які дозволяється одержувати засудженим у посылках, передачах і бандеролях, а також порядок приймання та вручення засудженим посилок, визначаються Правилами внутрішнього розпорядку виправно-трудових установ.”

Sentenced persons held in corrective labour colonies are allowed to receive, per year: 7 parcels or packages in the general regime colonies, 6 parcels or packages in the strengthened regime colonies and 5 parcels or packages in the strict and special regime colonies. Sentenced persons held in the educational labour colonies are allowed to receive per year: 10 parcels or packages in the colonies of general regime and 9 parcels or packages in the colonies of strengthened regime.

Sentenced offenders serving their sentence in a prison are not allowed to receive parcels or packages.

Irrespective of the type of regime under which they are held, sentenced persons shall be allowed to receive not more than 2 postal packages per year, as well as to buy literature through the sales distribution network without any restriction.

The quantity of parcels, packages and postal packages of all types is not restricted for sentenced persons held in corrective labour colonies.

A list of foodstuffs and articles of daily necessity which sentenced persons are allowed to receive in parcels, packages and postal packages, as well as the procedure for the receipt of the parcels, packages and postal packages and their delivery to the sentenced persons, shall be defined in the internal regulations of corrective labour establishments.

Section 42 - Стаття 42

“Засудженим дозволяється одержувати без обмеження грошові перекази і відправляти грошові перекази родичам, а з дозволу адміністрації виправно-трудової установи і іншим особам. Одержані по переказах гроші зараховуються на особовий рахунок засудженого.”

Sentenced persons are allowed to receive unlimited amounts of money by remittance, as well as to send money to their relatives and, if this is permitted by the authorities of the corrective labour establishments, to other persons. The money received by remittance is transferred to the personal account number of the sentenced person.

Section 43(2) - Стаття 43 (частина 2)

“В тюрмах засуджені можуть одержувати листи без обмеження їх кількості, а відправляти листи за такими нормами: на загальному режимі - один лист на місяць, на суворому режимі - один лист на два місяці.”

Sentenced persons held in prisons may receive unlimited mail and may send letters as follows: one letter per month for those held under general regime and one letter every two months for those held under the strengthened regime.

Public Prosecution Office Act - Закон України Про прокуратуру

Section 12(1) - Стаття 12 (частина 1)

“Прокурор розглядає заяви і скарги про порушення прав громадян та юридичних осіб, крім скарг, розгляд яких віднесено до компетенції суду.”

The public prosecutor deals with petitions and complaints concerning breaches of rights of citizens and legal entities, except complaints which are within the competence of the courts.

Section 12(4) - Стаття 12 (частина 4)

“Прийняте прокурором рішення може бути оскаржене вищестоячому прокурору, а в передбачених законом випадках - до суду.”

The prosecutor's decision is open to an appeal to the supervising prosecutor and, in certain cases, to the court.

Section 12(5) - Стаття 12 (частина 5)

“Рішення, винесене Генеральним Прокурором, є остаточним.”

The decision of the Prosecutor General is final.

Section 38 - Стаття 38

“Прокурор, його заступник мають право в межах своєї компетенції витребувати із суду будь-яку справу або категорію справ, по яких вирок, рішення, ухвали або постанови набрали законної сили. За наявності підстав для перегляду справи в порядку судового нагляду прокурор приносить протест на вирок, рішення, ухвалу або постанову суду.”

It falls within the competence of the prosecutor or his deputy to make a request to a court for any materials in a case where a judgement or other decision has come into force. If there are any grounds for reopening of the procedure, the prosecutor files a protest against the court judgement or any other decision.

Section 44(1) - Стаття 44 (частина 1)

“Предметом нагляду є додержання законності під час перебування осіб у місцях позбавлення волі, попереднього ув'язнення, виправно-трудовах та інших установах, що виконують покарання, або заходи примусового характеру, які призначаються судом, додержання встановленого кримінально-виконавчим законодавством порядку та умов тримання або відбування покарання особами у цих установах, їх прав і виконання ними своїх обов'язків.

Прокурор має право:

(1) у будь-який час відвідувати місця тримання затриманих, попереднього ув'язнення, установи, в яких засуджені відбувають покарання, установи для примусового лікування і перевиховання, опитувати осіб, що там перебувають, знайомитись з документами, на підставі яких ці особи затримані, заарештовані, засуджені або до них застосовано заходи примусового характеру;

(2) перевіряти законність наказів, розпоряджень і постанов адміністрації цих установ, зупиняти виконання таких актів, опротестовувати або скасовувати їх у разі невідповідності законодавству, вимагати від посадових осіб пояснень з приводу допущених порушень.”

The matters subject to the public prosecutor's supervision are adherence to the legislation governing the stay of persons in detention, in imprisonment before trial or in corrective labour or other establishments for the execution of sentences or coercive actions ordered by a court; adherence to the procedures and conditions for holding or administering punishment to persons in those establishments; the rights of such persons and the manner of carrying out their duties under the criminal law and legislation on the enforcement of sentences.

The public prosecutor can

- (1) at any time visit places of detention or imprisonment before trial, establishments where sentenced persons are serving sentences or establishments for compulsory treatment or reform in order to question persons or peruse documents on the basis of which persons have been detained, arrested or sentenced or compulsory measures have been applied to them.
- (2) examine the legality of orders, resolutions and decrees issued by the administrative authorities of such establishments, terminate the implementation of such acts, appeal against them or cancel them where they do not comply with the law and can request officials to give explanations concerning breaches which have occurred.

COMPLAINTS

1. Under Article 5 §§ 1(c) and 3 and Article 13 of the Convention the applicant complains about the arbitrary nature of his arrests. He claims that he was arrested on 27 February, 1 and 10 March 1995, but the decision ordering his detention on remand was given only on 13 March 1995.
2. Under Articles 8 § 1 and 13 of the Convention he complains that when he was detained on 10 March 1995, for ten days his mother was not informed about the place of his detention.
3. The applicant invokes Article 6 § 3(c) and (d) of the Convention claiming that the criminal proceedings brought against him were unfair and that he was compelled to plead guilty. He maintains that the court refused to examine a witness proposed by him. He further submits that he was deprived of any legal representation between 10 March and 25 July 1995.
4. Under Articles 3 and 13 of the Convention the applicant complains that since 10 March 1995 he has been tortured: he was beaten at the moment of his arrest, his hands were squeezed with shackles, he was strangled and so he was forced to plead guilty. He was refused leave to bring any criminal procedure in relation to these tortures.
5. Invoking Article 13 of the Convention the applicant complains that he was sentenced to death for a crime which, he says, he did not commit.
6. The applicant further complains under Article 14 of the Convention that the request by his lawyer and his mother for psychiatric examination justified by the applicant's mental illness was refused by the court as well as their request to complete the applicant's court file with already existing medical documents on his mental health.
7. He further complains under Article 3 of the Convention about the conditions to which he is subjected on death row in Khmelnytsky prison. He was placed in a cell with a man suffering from tuberculosis of advanced level: the applicant became infected and his health has deteriorated. He is prevented from having outdoor walks and receiving extra parcels of food from his mother. He complains about having been placed in a single cell for more than six months. His lawyer has been refused any information about the regime applied to the applicant.

8. Invoking Articles 3, 6 § 3(c), 8 § 1 and 13 of the Convention, the applicant complains that for more than eight months he was not allowed the visit of a notary for the purposes of certification of his power of attorney.

PROCEDURE

The application was introduced before the European Commission of Human Rights on 17 September 1996 and registered on 22 January 1998.

On 7 September 1998 the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 28 December 1998, after an extension of the time-limit fixed for that purpose. The applicant replied on 7 February 1999. On 2 April 1999 the Government submitted their supplementary observations.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

1. Under Article 5 §§ 1(c) and 3 and Article 13 of the Convention the applicant complains about the arbitrary nature of his arrests. He claims that he was arrested on 27 February, 1 and 10 March 1995, but that the decision ordering his detention on remand was given only on 13 March 1995. Under Article 8 § 1 and Article 13 of the Convention he complains that when he was detained on 10 March 1995, for ten days his mother was not informed about the place of his detention. Invoking Article 6 § 3(c) and (d) of the Convention the applicant claims that the criminal proceedings brought against him were unfair and that he was compelled to plead guilty. He maintains that the court refused to examine a witness proposed by him. He further submits that he was deprived of any legal representation between 10 March and 25 July 1995. The applicant further complains, under Articles 3 and 13 of the Convention, that he was beaten at the moment of his arrest and forced to plead guilty. He was refused leave to bring any criminal procedure in relation to these tortures. Invoking Article 13 of the Convention, the applicant also claims that he was sentenced to death for a crime which, he says, he did not commit. The applicant further complains under Article 14 of the Convention that the request by his lawyer and his mother for psychiatric examination justified by the applicant's mental illness was refused by the court as well as their request to complete the applicant's court file with already existing medical documents on his mental health.

The Government submit that the applicant was apprehended as a suspect by the Khmeltnisky Prosecutor's Office investigator on 10 March 1995 of which his mother was informed on the same day. He was detained on 13 March 1995 of which his mother was informed on the same day. On 10 March 1995 he was informed about his right to have a defence counsel, but he refused to accept legal assistance. During the pre-trial investigation and at the trial, the applicant gave evidence and pleaded guilty stating that he gave evidence of his own free will and that no unlawful methods of investigation had been applied to him. During the investigation and court proceedings the applicant was legally represented.

The Government further submit that following the appeals made by the applicant's parents and the applicant himself alleging unlawful methods applied to him, namely torture, beating, cruel inhuman treatment, receiving evidence under threats, falsification of the criminal case and violation of the criminal procedure law by the investigation authorities and the court and unreasonable conviction, the prosecution and other judicial authorities examined the applicant's allegations and found them unsubstantiated. The Government also state that the applicant did not lodge any complaint concerning the conditions of his pre-trial detention. They finally state that the applicant's mental health was examined by the investigation authorities and by the court. A forensic psychiatric expertise showed that he could be brought to the court.

The applicant contests the Government's arguments.

The Court observes that the applicant's complaints concerning his arrest, the pre-trial detention and the criminal proceedings brought against him relate to the period prior to 11 September 1997, which is the date of the entry into force of the Convention with respect to Ukraine. The Convention only governs, for each Contracting Party, facts subsequent to its entry into force with respect to that Party.

It follows that this part of the application is incompatible *ratione temporis* and with the provisions of the Convention, within the meaning of Article 35 § 3 of the Convention, and must be rejected pursuant to Article 35 § and 4 of the Convention.

2. The applicant further complains under Article 3 of the Convention about the conditions to which he is subjected on death row in Khmelnytsky prison. He says that he was confined in a cell with a man suffering from tuberculosis of advanced level: the applicant became infected and his health has deteriorated. He is prevented from having outdoor walks and receiving extra parcels of food from his mother. He complains about having been placed in a single cell for more than six months. His lawyer has been refused any information about the regime applied to the applicant.

The Government submit that all the relevant detention rules applied to the applicant, including the cell facilities, medical treatment, visits and correspondence, are governed by Sections 1, 8, 9, 11, 12 and 13 of the Imprisonment Before Trial Act of 30 June 1993 ("the 1993 Act"), Sections 43, 43(1), 44, 45, 61, 155, 345, 397, 399 of the Code of Criminal Procedure and Sections 28, 37, 38, 40, 41 and 42 of the Correctional Labour Code.

According to Section 8(4) of the 1993 Act, a person sentenced to capital punishment is kept in custody, separated from other prisoners. In certain cases, two inmates may share one cell. On 9 February 1997 the applicant has been confined in a cell which satisfied the requirements of these provisions. The cell facilities comply with the requirements for sanitary and hygiene standards: it measures 9.75m² or 29.2m³, it has a radio, bed, table, sufficient natural and electrical lighting, heating, water supply and a toilet facility. The cell is heated during the fall and winter. Currently, there is no other inmate placed in the applicant's cell.

The Government further submit that the applicant is provided with three meals a day as prescribed by Section 11(3) of the 1993 Act, and with clothing, footwear, bedclothes and articles for personal hygiene. Since April 1998 he has been allowed to have daily outdoor walks of one hour and to do physical exercises.

The Government also submit that medical assistance, treatment and prophylactic and anti-epidemic measures for persons sentenced to capital punishment are arranged and provided in accordance with the health protection legislation. They add that on 13 March and 19 August 1995, the applicant and another inmate respectively underwent a general examination including an X-ray which showed that neither of them were suffering from tuberculosis. The applicant and the other inmate were placed in the same cell on 3 February 1997. On 4 July 1997 a general medical examination of the other inmate showed that he was suffering from tuberculosis of the lungs without emission of microbacteria. The applicant and his cell-mate were moved separately to different cells. The same day the applicant underwent a medical examination which showed that he was also suffering from tuberculosis of the lungs. According to the Government, the applicant could not have contracted the disease from his cell-mate as they both got ill at the same time. The applicant and the other inmate were again in the same cell between 29 October and 14 November 1997 and between 20 February and 14 October 1998.

The Government submit that the applicant's allegations that he is not allowed to receive parcels from his mother are untrue. They state that persons sentenced to death may receive 2 parcels of up to 8 kg each per month before the sentence comes into effect and 2 parcels up to 8 kg per year after the sentence comes into effect. According to the prison records, the applicant has received 15 parcels and packages from his relatives and has never made any complaint about the arrival of food parcels. Besides, inmates may purchase food and toiletries twice a month in a prison shop up to the amount of the minimum monthly salary, and newspapers and books without limitation. The quality of food complies with the national law. The Government note that between October 1997 and October 1998 the applicant purchased food and toiletries on a regular basis. Moreover, between March 1996 and October 1998 his relatives made 28 requests to visit him, all of which were granted.

The Government contest the applicant's allegation that the prison authorities refused to inform his lawyer about the regime of detention under which he is being held. On 6 January 1998 his lawyer was informed that the applicant's regime was regulated by the 1993 Act, the Correctional Labour Code and the Instruction of the Ministry of the Interior, as approved by the Prosecutor General, the Ministry of Justice and the Supreme Court. He could not examine the Instruction as it is classified as restricted, but he was given detailed information as to its contents. The Government add that the applicant's lawyer has not complained that the prison authorities have refused to provide information on this issue.

Finally, the Government submit that the applicant's allegations about violations of the rules on detention conditions have been examined and found unsubstantiated. The applicant has not lodged any complaint with the prosecution authorities in this respect.

The applicant contests the Government's arguments and states that they contain "obvious untruths", e.g. that he had already been sentenced, that his allegations concerning a prohibition on receiving food parcels from his mother had not been substantiated, and that he is allowed to have two-hour visits from his relatives as provided for by law. He also states that the information provided by the Government concerning the legal basis for the conditions of detention on death row is not complete.

In their further observations the Government state that there have been no complaints from the applicant's relatives in connection with any prohibition on sending him food parcels. They note that between 2 February 1996 and 14 April 1998 the applicant received 15 parcels

and that between 16 April 1996 to 4 February 1998 he had 20 one-hour meetings with his relatives. The Government also state that the applicant's allegations about torture are untrue. On 25 February, 29 April and 27 October 1998 the applicant made a written statement that he had no complaints concerning violations of his rights, the conditions of his detention, medical treatment or torture, inhuman or degrading treatment during his detention on death row.

The Government finally state that the applicant's previous sentence to three years' imprisonment was lifted in accordance with the Order of the President of 1 August 1994.

The Court considers, in the light of the parties' submissions, that this part of the case raises complex and serious issues of law and facts under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

3. The applicant finally complains under Articles 3, 6 § 3(c), 8 § 1 and 13 of the Convention that for more than eight months he was not allowed a visit of a notary for the purposes of certification of his power of attorney.

The Government submit that during 1997 the applicant's mother repeatedly requested the Director of the Investigation Isolation Ward to certify a power of attorney from her son in favour of his lawyer so that he could act for him in the criminal proceedings which had led to his detention. As the Director was not competent to deal with her requests, the case was remitted to the Khmel'nitsky Regional Court which, on 10 December 1997, permitted a notary to visit the applicant. The visit took place on 10 February 1998.

The applicant claims that the problems which arose in connection with his request to the Director of the prison to certify his representative were all artificial because directors of other prisons do certify letters of authority by persons sentenced to death.

The Court considers, in the light of the parties' submissions, that this part of the case raises complex and serious issues of law and facts under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the applicant's complaints concerning the conditions to which he is subjected on death row in Khmel'nitsky prison; and

DECLARES INADMISSIBLE the remainder of the application.

Vincent Berger
Registrar

Matti Pellonpää
President