

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

FIRST SECTION

DECISION

Application no. 29597/10
Zdravko BUČKAL
against Croatia

The European Court of Human Rights (First Section), sitting on 3 April 2012 as a Chamber composed of:

Anatoly Kovler, President,
Nina Vajić,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges*,

and Søren Nielsen, *Section Registrar,*

Having regard to the above application lodged on 6 May 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Zdravko Bučkal, is a Croatian national who was born in 1968 and is currently serving a prison term in Lepoglava State Prison. The Croatian Government ("the Government") were represented by their Agent, Ms Š. Stažnik.

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

A. The circumstances of the case

3. On an unspecified date criminal proceedings were instituted against the applicant on charges of theft. He was detained in the Zagreb Prison Hospital (*Bolnica za osobe lišene slobode*; hereinafter "the ZPH") in the period between 28 September 2009 and 27 November 2009 when he was transferred to the Zagreb Prison (*Zatvor u Zagrebu*). On 29 December 2009, following several convictions for theft, the applicant was transferred to the Lepoglava State Prison (*Kaznionica u Lepoglavi*; hereinafter: the "LSP") where he is serving his prison term and is expected to remain until 30 April 2013.

1. The applicant's stay in the Zagreb Prison Hospital

4. In the period between 28 September 2009 and 27 November 2009 the applicant was placed in the ZPH, in a room measuring 21 square metres, with five other inmates.

5. According to the applicant, there were no sanitary facilities in the room and it was locked during the night. For that reason, to urinate at night the inmates had to use a plastic bottle. When they needed to defecate at night they had to ring for a guard to be able to go to the toilet. However, the guards would not always answer these calls and then the inmates had to use a plastic bag, in full view of the other inmates in the same room. These bags of faeces were then thrown out of the window.

According to the Government, the sanitary conditions in the ZPH were good. The room where the applicant was accommodated did not have sanitary facilities but whenever an inmate had a need for personal hygiene he was able to call the security guards, who then escorted him to the sanitary facilities. Other general conditions of the accommodation were also good. The room had windows which provided fresh air and natural light; the inmates were served regular meals and they had the opportunity to walk around in the hospital hallways and in the fresh air for two hours during the day.

2. The applicant's stay in Lepoglava State Prison

6. On 29 December 2009 the applicant was transferred to the LSP, where he has been an inmate ever since. He was first placed in a cell measuring 16 square metres, with six other inmates, where he remained until 1 February 2010, when he was transferred to another cell, measuring 33 square metres, with eleven other inmates.

7. On 16 June 2010 the applicant complained to the sentence-execution judge of the Varaždin County Court (*Županijski sud u Varaždinu*) about the conditions of his detention in the LSP. He alleged that his cell was inadequate and contrary to the guarantees offered by the Enforcement of Prison Sentences Act.

8. On 15 March 2011 the sentence-execution judge of the Varaždin County Court found that the conditions of the applicant's detention in the LSP were inadequate as regards the individual space offered to the applicant in a cell measuring 33 square metres and accommodating twelve inmates, and ordered the LSP to take the necessary measures to remedy the situation.

9. On an unspecified date in March 2011 the LSP lodged an appeal against that decision with a three-judge panel of the Varaždin County Court.

10. On 19 March 2011 a three-judge panel of the Varaždin County Court dismissed the LSP's appeal and upheld the decision of the sentence-execution judge.

11. On 13 April 2011 the LSP authorities offered the applicant a move to another cell. The applicant informed a security guard that he did not want to move from his current cell. He also provided a handwritten statement in which he reiterated that he did not want to leave his cell, because it had never been locked and he was satisfied with the accommodation there. He asked to be placed in a semi-open prison regime, which was refused.

B. Relevant domestic law and practice

Relevant domestic law

12. The relevant provisions of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, Official Gazette nos. 128/1999 and 190/2003), read as follows:

JUDICIAL PROTECTION AGAINST ACTS AND DECISIONS OF PRISON ADMINISTRATIONS

Section 17

"(1) An inmate may lodge a request for judicial protection against any acts or decisions unlawfully refusing him, or limiting, any of the rights guaranteed by this Act.

(2) Requests for judicial protection shall be decided by a sentence-execution judge."

Section 42

(1) A sentence-execution judge protects the rights of prisoners, supervises lawfulness in respect of the execution of a prison term and ensures equality of prisoners before the law.

(2) A sentence-execution judge takes actions and decisions in respect of:

2. judicial protection of those rights by deciding on appeals lodged against a decision by a prison governor in cases prescribed by this Act...

PROCEEDINGS BEFORE A JUDGE RESPONSIBLE FOR THE EXECUTION OF SENTENCES

Section 44

"(1) Proceedings before a sentence-execution judge are initiated in the first instance at the request of a party or a judge and in the second instance upon an appeal.

(2) A sentence-execution judge acts so as to, according to the basic principles, ensure effective protection of the rights and interests of the prisoner concerned. ... The judge shall allow the parties to submit observations about the facts [presented by] and allegations put forward by the opponent, and to present new facts and call for evidence.

(3) Parties to proceedings are a prisoner and a prison or other penal institutions.

(4) A prisoner has the right to a lawyer of his or her own choice. Such a lawyer shall have qualifications required for a defence lawyer in criminal proceedings. When a prisoner does not ensure legal representation within twenty-four hours, the proceedings shall continue without legal representation.

(5) A prisoner may ask for a legal-aid lawyer when he does not have sufficient means to pay for legal representation and is not able to represent his own interests.

(6) A sentence-execution judge may consult all official documents concerning a prisoner, pay a visit to the prison or other penal institution concerned, and establish the relevant facts in any other manner.

(7) A sentence-execution judge may hold a hearing within appropriate and adequate premises in a prison or other penal institution."

PROCEEDINGS UPON AN APPEAL AGAINST A DECISION BY A PRISON GOVERNOR

Section 45

"A prisoner may lodge an appeal to a sentence-execution judge against decisions of a prison governor within eight days ..."

Appeal against a decision of a sentence-execution judge

Section 46

(1) Parties to the proceedings, a representative of a prisoner and persons listed in Article 380 §§ 1 and 2 of the Code on Criminal Procedure may lodge an appeal against a decision of a sentence-execution judge adopted in the first instance ...

(2) The appeal shall be lodged with a sentence-execution judge, who shall immediately forward it to a judicial panel of a county court. That panel shall decide within eight days ...”

COMPLAINT

13. The applicant complained under Article 3 of the Convention about the conditions of his detention, both in the Zagreb Prison Hospital and in the LSP.

THE LAW

14. The applicant made dual complaints, about the conditions in the Zagreb Prison Hospital where he was placed between 28 September and 27 November 2009, as well as his conditions in the LSP where he has been an inmate since 29 December 2009. He relied on Article 3 of the Convention, which reads:

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

A. The complaint concerning the conditions in the Zagreb Prison Hospital

1. The parties' arguments

15. The Government argued that the applicant had not exhausted domestic remedies, since he had failed to use any of the remedies available in the domestic legal system. The Government particularly emphasised that the applicant had failed to bring his complaints before the Constitutional Court, although he had been able to do so under the domestic law.

16. The applicant made no comments in this respect.

2. The Court's assessment

(a) General principles

17. The Court reiterates that the machinery for the protection of fundamental rights established by the Convention is subsidiary to national systems safeguarding human rights. The Convention does not lay down for the Contracting States any given manner for ensuring within their internal

law the effective implementation of the Convention. The choice as to the most appropriate means of achieving this is in principle a matter for the domestic authorities, who are in continuous contact with the functioning authorities of their countries and are better placed to assess the opportunities and resources afforded by their respective domestic legal systems (see *Swedish Engine Drivers' Union v. Sweden*, 6 February 1976, § 50, Series A no. 20; *Chapman v. the United Kingdom* [GC], no. 27238/95, § 91, ECHR 2001-I; and *Sisojeva and Others v. Latvia* [GC], no. 60654/00, § 90, ECHR 2007-II).

18. As to the exhaustion of domestic remedies, the Court reiterates that, in accordance with Article 35 § 1 of the Convention, it may only deal with an issue after all domestic remedies have been exhausted. The purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court (see, for example, *Hentrich v. France*, 22 September 1994, § 33, Series A no. 296-A, and *Remli v. France*, 23 April 1996, § 33, *Reports* 1996-II). Thus, the complaint submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time-limits. To hold otherwise would be to duplicate the domestic process with proceedings before the Court, which would hardly be compatible with the subsidiary character of the Convention (see *Gavril Yosifov v. Bulgaria*, no. 74012/01, § 42, 6 November 2008). Nevertheless, the obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *John Sammut and Visa Investments Limited v. Malta* (dec.), no. 27023/03, 28 June 2005).

(b) Application of these principles in the present case

19. As regards the remedies available in connection with the conditions of detention in Croatia and other rights of detained persons, under the Enforcement of Prison Sentences Act, the Court notes that section 5 (2) of that Act provides that complaints shall be lodged orally or in writing with a prison governor, a sentence-execution judge or the Head Office of the Prison Administration of the Ministry of Justice. However, only a complaint to a competent sentence-execution judge entails judicial protection and is susceptible to a further appeal with a three-judge panel of a competent County Court and a constitutional complaint (see *Šimunovski v. Croatia* (dec.), no. 42550/08, 21 June 2011, *Srbić v. Croatia* (dec.), no. 4464/09, 21 June 2011, *Peša v. Croatia*, no. 40523/08, §§ 78-80, 8 April 2010, and *Šebalj v. Croatia*, no. 4429/09, §§ 173-177, 28 June 2011).

20. In order to comply with the principles of subsidiarity the applicants, before brining their complaints to the Court, have first to afford the Croatian

Constitutional Court, as the highest Court in Croatia, the opportunity of remedying their situation and addressing the issues they wish to bring before the Court (see *Šimunovski*, cited above; *Srbić*, cited above; and *Šebalj v. Croatia*, cited above, § 177).

21. The Court notes that the applicant never complained about the conditions of his detention in the Zagreb Prison Hospital before any of the competent domestic authorities, including to a sentence-execution judge of the relevant county court, although he was able to do so under the domestic law.

22. Therefore the Court notes that the applicant failed to comply with the principle of subsidiarity before bringing his complaint to the Court.

23. It follows that this complaint must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. The complaint concerning the applicant's conditions in Lepoglava State Prison

1. The parties' arguments

24. The Government argued that the applicant had lost his victim status in that the sentence-execution judge of the Varaždin County Court had found a violation in respect of the conditions of the applicant's detention and ordered the LSP to remedy the situation. However, when the LSP authorities had offered the applicant accommodation in another cell he had expressly refused to move. The Government also argued that the applicant had failed to exhaust all domestic legal remedies, since he had not lodged a constitutional complaint before the Constitutional Court.

25. The applicant made no comments in this respect.

2. The Court's assessment

26. The Court notes that the applicant made use of remedies available in the domestic legal system by lodging a complaint with the sentence-execution judge of the Varaždin County Court. This remedy was successful, since the sentence-execution judge found a violation of his right for an appropriate accommodation in detention and ordered the LSP to take necessary measures to remedy the situation.

27. However, when the LSP authorities, in execution of the order of the sentence-execution judge, offered the applicant a move to another cell, the applicant expressly waived that right, noting that he was satisfied with his accommodation. He also asked to be placed in a semi-open prison regime, which was refused. In this connection the Court considers that the protection afforded under Article 3 of the Convention cannot be understood to guarantee placement in a specific prison regime, save on medical or other

strong grounds, the existence of which the applicant failed to demonstrate either before the national authorities or before the Court.

28. In these circumstances, the Court considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Søren Nielsen Registrar	Anatoly Kovler President