

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

FIFTH SECTION

CASE OF ĒCIS v. LATVIA

(Application no. 12879/09)

JUDGMENT

STRASBOURG

10 January 2019

FINAL

24/06/2019

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



In the case of Ēcis v. Latvia,

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

Angelika Nußberger, *President,*
Yonko Grozev,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lado Chanturia, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 20 November 2018,

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

PROCEDURE

1. The case originated in an application (no. 12879/09) against the Republic of Latvia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Latvian national, Mr Mārtiņš Ēcis ("the applicant"), on 12 December 2008.

2. The applicant, who was granted legal aid, was represented by Mr A. Alliks, a lawyer practising in Rīga. The Latvian Government ("the Government") were represented by their Agent, Ms K. Līce.

3. The applicant alleged, in particular, that he was discriminated against on the grounds of his sex with respect to the applicable prison regime that had led to a refusal to attend his father's funeral. He complained of breach of Article 14 of the Convention, in essence, read in conjunction with Article 8 of the Convention.

4. On 25 March 2015 the complaint concerning alleged discrimination was communicated to the Government and the remainder of the application was declared inadmissible, pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981 and lives in the Ventspils district.

A. The applicant's imprisonment and the applicable prison regime

6. On 6 December 2001 the applicant was convicted of kidnapping, aggravated murder and aggravated extortion and sentenced to twenty years' imprisonment. This judgment was upheld at two levels of appeal and took effect in 2002.

7. In accordance with section 50^4(1) of the Sentence Enforcement Code (*Latvijas Sodu izpildes kodekss*), the applicant was placed at the maximum-security level in a closed prison.

8. On an unspecified date the applicant was transferred to the medium-security level of that closed prison.

9. According to the applicant, in 2008 he realised that there was a difference in the respective treatment of male and female inmates with regard to the execution of custodial sentences. Male inmates who had been convicted of serious crimes started serving their sentences in closed prisons, while female inmates who had been convicted of the same crimes started serving their sentence in partly-closed prisons. As the applicant considered that this had a notable impact on restrictions of various prisoners' rights, he lodged complaints about this issue with several State institutions.

10. On 30 September 2008 the applicant was informed that his father had died. On 2 October 2008 he requested permission to leave prison in order to attend his father's funeral. On the same day the prison director replied that he had no authority to allow the request, as the applicant was serving his sentence at the medium-security level of a closed prison. Under the Sentence Enforcement Code only prisoners serving their sentence at the medium- or minimum- security level in partly-closed prisons were eligible for such leave.

11. In the years 2012-2015 the applicant was granted one prison-leave day per year. The case file contains no information as to the type of prison and security level in which the applicant served his sentence during this time.

12. On 11 September 2015 the applicant was conditionally released.

B. Review of the applicant's complaints

1. Ministry of Justice

13. On 1 July 2008 the Ministry of Justice examined the applicant's complaint about the difference in treatment between convicted men and women. It referred to sections 50^4(1) and 50^5(1) of the Sentence Enforcement Code and observed that the legislature had chosen to create different legal frameworks in respect of sentence execution for men and women. The Ministry of Justice concluded that there was no discrimination on the grounds of sex because the rights of both male and female inmates were restricted, and both sexes were deprived of their liberty.

2. The Ombudsperson

14. On 25 October 2010 the Ombudsperson concluded the examination of the applicant's complaint about the refusal to allow him to attend his father's funeral. He observed that closed prisons hosted male convicts who had been sentenced to deprivation of liberty for having committed serious or especially serious crimes, as well as convicts who had been moved from partly-closed prisons for grave or systematic breaches of the regime under which they had been held. In closed prisons convicts were subjected to tightened security and maximum surveillance. It followed that the persons placed in those prisons were particularly dangerous to the society. Hence, the restriction imposed on the applicant was proportionate and necessary in a democratic society.

3. The Constitutional Court

15. On 9 July 2008 the applicant lodged a constitutional complaint, arguing that section 50^4(1) of the Sentence Enforcement Code was discriminatory on the grounds of sex, in breach of Article 91 of the Constitution. As women convicted of the same crimes started serving their sentence in partly-closed prisons, they were entitled to more and longer visits, more phone calls and could progress to more lenient security levels more rapidly. In addition, women could be granted leave from prison for up to seven days per year, whereas no such right was provided for men.

16. On 29 July 2008 the Constitutional Court, relying on section 20(6) of the Law on the Constitutional Court, declined to institute proceedings. It stated that the legal reasoning included in the complaint was evidently insufficient for the claim to be allowed (*acīmredzami nepietiekams prasījuma apmierināšanai*). In particular, the applicant had failed to specify why the difference in treatment between men and women should not be acceptable.

17. On 7 August 2008 the applicant lodged a second constitutional complaint, adding that men and women who were convicted of serious and especially serious crimes were in the same circumstances in that they were both imprisoned. Yet, despite the prohibition of discrimination requiring men and women to be treated equally, their rights were restricted to a different extent. The applicant also pointed out that within the context of discrimination the burden of proof was shifted – namely, after a person had demonstrated a difference in treatment, it fell for the respondent to show that this difference had not amounted to discrimination.

18. On 5 September 2008 the Constitutional Court again declined to institute proceedings. With respect to the first sentence of Article 91 of the Constitution, which addressed the principle of equality, the Constitutional Court pointed out that the following criteria had to be examined – the existence of comparable groups, a difference in treatment between those

groups, and a lack of objective and reasonable justification for that difference in treatment. As the legal reasoning advanced by the applicant was based on the assumption that men and women who had committed similarly grave crimes were in comparable situations, the Constitutional Court considered this reasoning evidently insufficient for the claim to be allowed. With respect to the prohibition of discrimination enshrined in the second sentence of Article 91 of the Constitution, the Constitutional Court pointed out that the applicant had failed to specify the human right in conjunction with which the discrimination complaint had been made. Thus, in relation to this part of the application, legal reasoning had not been provided (*nav sniegts juridiskais pamatojums*) and the formal requirements of a constitutional complaint had not been met. In so far as relevant, the Constitutional Court relied on sections 20(5)(3) and 20(6) of the Law on the Constitutional Court.

19. In a third constitutional complaint of 20 October 2008, the applicant added that on 2 October 2008 he had been refused permission to leave prison to attend his father's funeral. He had thereby been discriminated against on the basis of sex, as women in his situation would have been able to attend the funeral. In support of his discrimination-related complaint the applicant referred to the right to private life, right to family life, and freedom of expression.

20. On 21 November 2008 the Constitutional Court declined to institute proceedings, invoking section 20(6) of the Law on the Constitutional Court. It noted that the application contained no reasoning as to why men and women who had been convicted of serious and especially serious crimes and given prison sentences would need to be subjected to the same rules of sentence enforcement – namely, how men and women were in comparable situations. On those grounds, the legal reasoning included in the constitutional complaint was held to be evidently insufficient for the claim to be allowed.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution

21. The relevant provision of the Constitution of the Republic of Latvia (*Satversme*), reads:

Article 91

> "All persons in Latvia shall be equal before the law and the courts. Human rights shall be exercised without discrimination of any kind."

B. The Sentence Enforcement Code

22. Section 50^3 at the material time provided that both closed and partly-closed prisons had three security levels (regimes under which sentences were to be served) – maximum, medium and minimum. Under section 50^1, both at the material time and at the time of adoption of this judgment, all prisoners who are to serve their sentence in closed or partly-closed prisons start serving their sentence at the maximum-security level of the respective prison. They are all subjected to the "progressive sentence execution" system, under which prisoners can be transferred to more lenient prison regimes following an individual assessment, but only after having served a certain pre-set proportion of their sentence under the stricter regimes.

23. Section 50^4(1) sets out two groups of convicts who serve their sentence in closed prisons: men sentenced to deprivation of liberty for the commission of serious or especially serious crimes and convicts who have been transferred from partly-closed prisons owing to gross or systematic regime violations. Prisoners placed in closed prisons have to serve no less than one fourth of the adjudged sentence at the maximum-security level. Following this time they may be transferred to the medium-security level, where they have to serve no less than another fourth of the adjudged sentence before becoming eligible for a transfer to the minimum security level. From the minimum security level prisoners may be transferred to a partly-closed prison or conditionally released before the completion of the sentence.

24. Section 50^5(1) lists ten different groups of convicts who serve their sentence in partly-closed prisons, including women serving sentences for intentionally committed crimes. At the relevant time this provision provided that when beginning a sentence a convicted person had to serve no less than one fifth of the adjudged sentence at the maximum-security level. Subsequently, he or she had to serve no less than a further fifth at the medium-security level but the remaining part could be served at the minimum security level. From the minimum security level a convicted person could be transferred to an open prison or conditionally released before the completion of the sentence.

25. Prisoners serving their sentence in closed prisons, regardless of the applicable prison regime, as well as prisoners serving their sentence in partly-closed prisons at the maximum-security level, were not eligible for prison leave. With respect to prisoners held at the medium- and minimum-security level in partly-closed prisons, section 50^5 stated that they had the right, with the permission of their prison governor, to temporarily leave the prison for up to seven days a year, or up to five days on account of the death or life-threatening illness of a close relative.

C. The Criminal Law

26. Section 7(1) of the Criminal Law (*Krimināllikums*) provides that on the basis of their degree of severity criminal offences are divided into misdemeanours, less serious crimes, serious crimes and especially serious crimes.

27. At the relevant time section 7(4) provided that serious crimes were intentional offences for which the punishment provided in the Criminal Law was deprivation of liberty for a period of between five and ten years. Section 7(5) stated that especially serious crimes were intentional offences for which the punishment was deprivation of liberty for more than ten years, life imprisonment or the death penalty.

D. Law on the Constitutional Court

28. Section 17(1)(11) of the Law on the Constitutional Court provides that any person who considers that his or her fundamental rights have been breached has the right to submit an application to the Constitutional Court.

29. Section 18(1) lists the elements that have to be included in an application to the Constitutional Court. "Legal reasoning" is listed as one of such elements.

30. Section 19^2 of the Law on the Constitutional Court provides:

> "(1) Any person who considers that a legal provision that is not in compliance with a provision of a superior legal force has infringed his or her fundamental rights under the Constitution may lodge a constitutional complaint (an application) with the Constitutional Court.
>
> ...
>
> (6) In addition to the elements required under section 18(1) of the present Law, a constitutional complaint (an application) must contain reasoning concerning:
>
> (i) the violation of the applicant's fundamental rights, [as] provided in the Constitution, and;
>
> (ii) the exhaustion of all ordinary remedies or the fact that no such remedies exist. ..."

31. Section 20 at the relevant time provided:

> "(1) An application shall be examined and the decision to institute proceedings or to decline to institute proceedings shall be taken by a panel comprising three judges.
>
> ...
>
> (5) In examining applications, the panel shall have the right to decline to institute proceedings if: ...
>
> 3) the application does not comply with the requirements specified in section 18 or sections 19-19^2 of this Law;
>
> ...

(6) When examining a constitutional complaint (an application) the panel may also decline to institute proceedings when the legal reasoning included in the complaint is evidently insufficient [to justify] allowing the claim."

E. Practice of the Constitutional Court concerning institution of constitutional proceedings

32. In the judgment of 22 February 2002 (case no. 2001-06-03) the Constitutional Court held:

"2.2. In accordance with section 19^2(1) of the Law on the Constitutional Court a constitutional complaint may be lodged by a person who "considers" [that a legal provision has infringed his or her fundamental rights]. The law gives prominence to the view of the person, and not that of the court, about the violation of the fundamental rights. The law requires the person to be of the view that the fundamental rights granted to him or her under the Constitution have been breached. However, this requirement has to be seen together with section 19^2(6) of the Law on the Constitutional Court, which requires this view to be substantiated. Hence, in order to institute proceedings on the basis of the constitutional complaint it has to be established that the application contains sufficient legal reasoning substantiating this "view"; nonetheless, the Panel of the Constitutional Court is not required to carry out a full assessment of this "view". The Panel of the Constitutional Court has a right to decline to institute proceedings only if the "legal reasoning substantiating the view" is evidently insufficient for the claim to be allowed; however, it has the obligation to do so only when the legal reasoning has not been provided at all.

...

The purpose of section 20(6) of the Law on the Constitutional Court is to save the Constitutional Court the "idle work" of dealing with manifestly unsubstantiated complaints. In situations when some legal reasoning is included but there are doubts as to whether it is not evidently insufficient for allowing the claim, the said provision has to be interpreted in accordance with its purpose."

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. United Nations

33. The set of norms and principles established within the United Nations concerning the treatment and protection of detainees is summarised in *Khoroshenko v. Russia* ([GC], no. 41418/04, §§ 69-75, ECHR 2015). International standards on the protection of women prisoners are described in *Khamtokhu and Aksenchik v. Russia* ([GC], nos. 60367/08 and 961/11, §§ 27-31, 24 January, 2017).

34. In addition, the relevant parts of the UN Standard Minimum Rules for the Treatment of Prisoners, as revised by the General Assembly on 17 December 2015 ("the Nelson Mandela Rules"), provide:

"**I. Rules of general application**

Basic principles

...

Rule 2

1. The present rules shall be applied impartially. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. The religious beliefs and moral precepts of prisoners shall be respected.

2. In order for the principle of non-discrimination to be put into practice, prison administrations shall take account of the individual needs of prisoners, in particular the most vulnerable categories in prison settings. Measures to protect and promote the rights of prisoners with special needs are required and shall not be regarded as discriminatory.

...

Separation of categories

Rule 11

The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment; thus:

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate;

...

Notifications

...

Rule 70

The prison administration shall inform a prisoner at once of the serious illness or death of a near relative or any significant other. Whenever circumstances allow, the prisoner should be authorized to go, either under escort or alone, to the bedside of a near relative or significant other who is critically ill, or to attend the funeral of a near relative or significant other.

...

II. Rules applicable to special categories

A. Prisoners under sentence

Guiding principles

...

Rule 89

1. The fulfilment of these [guiding] principles requires individualization of treatment and for this purpose a flexible system of classifying prisoners in groups. It is therefore desirable that such groups should be distributed in separate prisons suitable for the treatment of each group.

2. These prisons do not need to provide the same degree of security for every group. It is desirable to provide varying degrees of security according to the needs of different groups. ...”

35. The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, adopted by the General Assembly on 21 December 2010 (“the Bangkok Rules”), supplement the Standard Minimum Rules for the Treatment of Prisoners by addressing the distinctive needs of women prisoners. The relevant parts of the Bangkok Rules provide:

“**I. Rules of general application**

1. Basic principle

[*Supplements rule 2 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*]

Rule 1

In order for the principle of non-discrimination, embodied in rule 6 of the Standard Minimum Rules for the Treatment of Prisoners to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of the Rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.

...

II. Rules applicable to special categories

A. Prisoners under sentence

1. Classification and individualization

[Supplements rules 93 and 94 of the Nelson Mandela Rules]

...

Rule 41

The gender-sensitive risk assessment and classification of prisoners shall:

(a) Take into account the generally lower risk posed by women prisoners to others, as well as the particularly harmful effects that high security measures and increased levels of isolation can have on women prisoners;

...

Social relations and aftercare

[Supplements rules 106 to 108 of the Nelson Mandela Rules]

...

Rule 45

Prison authorities shall utilize options such as home leave, open prisons, halfway houses and community-based programmes and services to the maximum possible extent for women prisoners, to ease their transition from prison to liberty, to reduce stigma and to re-establish their contact with their families at the earliest possible stage.”

B. Council of Europe

36. On 11 January 2006 the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2006)2 to member States on the European Prison Rules (which replaced Recommendation No. R (87) 3 on the European Prison Rules), which took into account the developments in penal policy, sentencing practice and the overall management of prisons in Europe. The relevant parts of the amended European Prison Rules read as follows:

"**Part I**

Basic principles

1. All persons deprived of their liberty shall be treated with respect for their human rights.

2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.

3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.

...

Scope and application

...

13. These rules shall be applied impartially, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

...

Part II

Conditions of imprisonment

Allocation and accommodation

...

18.10 Accommodation of all prisoners shall be in conditions with the least restrictive security arrangements compatible with the risk of their escaping or harming themselves or others.

...

Contact with the outside world

...

24.5 Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so.

24.6 Any information received of the death or serious illness of any near relative shall be promptly communicated to the prisoner.

24.7 Whenever circumstances allow, the prisoner should be authorised to leave prison either under escort or alone in order to visit a sick relative, attend a funeral or for other humanitarian reasons.

...

Women

34.1 In addition to the specific provisions in these rules dealing with women prisoners, the authorities shall pay particular attention to the requirements of women such as their physical, vocational, social and psychological needs when making decisions that affect any aspect of their detention.

...

Part IV

Good order

...

Security

51.1 The security measures applied to individual prisoners shall be the minimum necessary to achieve their secure custody.

...

51.3 As soon as possible after admission, prisoners shall be assessed to determine:

a. the risk that they would present to the community if they were to escape;

b. the risk that they will try to escape either on their own or with external assistance.

51.4 Each prisoner shall then be held in security conditions appropriate to these levels of risk.

51.5 The level of security necessary shall be reviewed at regular intervals throughout a person's imprisonment.

...

Part VIII

Objective of the regime for sentenced prisoners

102.2 Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment.

Implementation of the regime for sentenced prisoners

...

103.6 There shall be a system of prison leave as an integral part of the overall regime for sentenced prisoners."

37. The relevant parts of the Commentary on Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules read:

"Rule 24.5 places a positive duty on the prison authorities to facilitate links with the outside world. One way in which this can be done is to consider allowing all prisoners leave from prison in terms of Rule 24.7 for humanitarian purposes. The ECtHR has

held that this must be done for the funeral of a close relative, where there is no risk of the prisoner absconding (*Ploski v. Poland*, No. 26761/95, judgment of 12/11/2002). Humanitarian reasons for leave may include family matters such as the birth of a child."

38. The relevant parts of Recommendation No. R (82) 16 of the Committee of Ministers to member States on prison leave, adopted on 24 September 1982, read:

"The Committee of Ministers ...

Considering that prison leave contributes towards making prisons more humane and improving the conditions of detention;

Considering that prison leave is one of the means of facilitating the social reintegration of the prisoner;

...

Recommends the governments of member states:

1. to grant prison leave to the greatest extent possible on medical, educational, occupational, family and other social grounds;

2. to take into consideration for the granting of leave:

- the nature and seriousness of the offence, the length of the sentence passed and the period of detention already completed,

- the personality and behaviour of the prisoner and the risk, if any, he may present to society,

- the prisoner's family and social situation, which may have changed during his detention,

- the purpose of leave, its duration and its terms and conditions;

3. to grant prison leave as soon and as frequently as possible having regard to the aforementioned factors;

4. to grant prison leave not only to prisoners in open prisons but also to prisoners in closed prisons, provided that it is not incompatible with public safety;

...

9. to inform the prisoner, to the greatest extent possible, of the reasons for a refusal of prison leave; ..."

39. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter "the CPT") following a visit to Latvia that took place from 5 to 15 September 2011 published a report to the Latvian Government, dated 27 August 2013. The relevant parts of that report read:

"47. Before setting out the delegation's findings regarding the establishments visited, the CPT would like to raise one issue of a more general nature concerning the regime applied to prisoners.

> The Latvian Code of Execution of Sentences provides that all prisoners in closed and semi-closed prisons shall be subject to the *progressive sentence execution regime*, irrespective of the duration of the sentence imposed. Prisoners held in closed prisons serve their sentences in three consecutive regime levels: low, medium and high. The law requires that such prisoners serve at least a quarter of their sentence on the low regime level and demonstrate good behaviour in order to qualify for the medium level. After having served at least a quarter of their sentence on the medium regime level, they may be further transferred to the high regime level ... It is noteworthy that prisoners on the low regime level inter alia have generally limited work opportunities and fewer possibilities for maintaining contact with the outside world ...
>
> The CPT recalls that "imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment." Moreover, although it is for the judicial authority to determine the appropriate length of sentence for a given offence, prison authorities should be responsible for determining security and regime requirements, on the basis of professionally agreed criteria and individual assessments of prisoners. In this context, it is difficult to justify a prisoner being required to serve a minimum part of the prison sentence in a specific regime level (low or medium). In the CPT's view, progression from one regime level to another should be based on the prisoner's attitude, behaviour, participation in activities (educational, vocational, or work-related), and in general adherence to reasonable pre-established targets set out in a sentence plan. For this purpose, regular individual reviews should be carried out.
>
> The CPT invites the Latvian authorities to review the relevant legislation and practice in the light of the above remarks." [emphasis and footnotes omitted]

40. Following the next visit to Latvia that took place from 12 to 22 April 2016 the CPT in its report to the Latvian Government, dated 29 June 2017, referred back to the findings it had made during the visit of 2011. It reiterated its reservations about the "progressive sentence execution" system and emphasised that the progression from one regime level to another should be determined by prison authorities, based on professionally agreed criteria and individual assessments.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, READ IN CONJUNCTION WITH ARTICLE 8

41. The applicant complained about difference in treatment between men and women convicted of the same crimes in relation to the respective applicable prison regimes, in particular, with regard to the right to prison leave, which had led to a refusal to attend his father's funeral. He argued that this was contrary to Article 14 of the Convention, read in conjunction with Articles 5, 8 and 10 of the Convention.

42. Having regard to the circumstances of the case and bearing in mind that it has the power to decide on the characterisation to be given in law to

the facts of a complaint (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, 20 March 2018), the Court considers it appropriate to examine the applicant's grievances from the standpoint of Article 14 of the Convention, taken in conjunction with Article 8. Those provisions read as follows:

Article 8

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

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

Article 14

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

43. In addition, the Court notes that in cases arising from individual applications it is not the Court's task to examine the domestic legislation in the abstract, but it must examine the manner in which that legislation was applied to the applicant in the particular circumstances (see, for example, *Sommerfeld v. Germany* [GC], no. 31871/96, § 86, ECHR 2003-VIII, compare also *Van der Ven v. the Netherlands*, no. 50901/99, § 53, ECHR 2003-II). Accordingly, in the present case the Court is not called upon to compare the entirety of the prison regime under which the applicant was serving his sentence with the prison regime that was applicable to women convicted of the same crimes. Instead, it has to address the issue that has affected the applicant directly and personally and has to determine whether the refusal to entertain his request to attend his father's funeral constituted discrimination on the basis of sex prohibited under Article 14 of the Convention, read in conjunction with Article 8 of the Convention.

A. The Government's preliminary objection

1. Arguments of the parties

44. The Government submitted that the Court could not examine the case before the Constitutional Court had made an assessment as to whether section 50^4 of the Sentence Enforcement Code complied with the Convention. The Constitutional Court was the effective domestic remedy created for this particular purpose, was capable of providing redress and was available to the applicant both in law and in practice. Even so, the

applicant's constitutional complaints had been rejected for lack of sufficient legal reasoning. The applicant had been aware of the mandatory requirements of a constitutional complaint and could not bypass the obligation to exhaust the available domestic remedies by deliberately and consistently submitting incomplete and insufficiently reasoned constitutional complaints. Moreover, the applicant had not been precluded from remedying the deficiencies identified by the Constitutional Court and lodging another constitutional complaint.

45. Furthermore, the applicant had not challenged before the Constitutional Court the fact that the Sentence Enforcement Code did not allow compassionate leave for inmates serving their sentence in closed prisons. In particular, the applicant had failed to challenge the provision specifying the differences in rights and obligations between convicts serving their sentences in different regimes.

46. The applicant submitted that he had tried, within the limits of his resources and abilities, to defend his rights before the Constitutional Court. He asserted that an ordinary citizen could not enjoy the protection of the Constitutional Court, its standards being enormously high for a person without a legal education. Drafting a constitutional complaint was a difficult task even for legal professionals; thus, it was not fair to blame the applicant for his inability to properly perform in this sophisticated legal field.

2. The Court

47. The Court reiterates that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The rule of exhaustion of domestic remedies is therefore a fundamental part of the functioning of this system of protection. States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal systems, and those who wish to invoke the supervisory jurisdiction of the Court as concerns complaints against a State are thus obliged to use first the remedies provided by the national legal system (see *Chiragov and Others v. Armenia* [GC], no. 13216/05, § 115, ECHR 2015).

48. While Article 35 § 1 of the Convention must be applied with some degree of flexibility and without excessive formalism, it normally requires that complaints intended to be subsequently brought before the Court should have been made to the appropriate domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Akdivar and Others v. Turkey*, 16 September 1996, §§ 66 and 69, *Reports of Judgments and Decisions* 1996-IV). Non-exhaustion of domestic remedies cannot be held against the applicant if, in spite of his or her failure to observe the forms prescribed by law, the competent authority has nevertheless examined the substance of the appeal (see *Gäfgen v. Germany* [GC], no. 22978/05, § 143, ECHR 2010).

49. In the present case the parties agree that the alleged interference with the applicant's rights emanated from a domestic legal provision. As the Court has consistently held, where the source of the alleged breach of a Convention right is a provision of Latvian legislation, proceedings should, in principle, be brought before the Constitutional Court prior to being brought before the Court (see, for example, *Grišankova and Grišankovs v. Latvia* (dec.), no. 36117/02, ECHR 2003-II (extracts), and *Larionovs and Tess v. Latvia* (dec.), no. 45520/04, §§ 142-143 and 167, 25 November 2014).

50. The Court observes that the applicant lodged three constitutional complaints challenging section 50^4(1) of the Sentence Enforcement Code. In his third constitutional complaint the applicant emphasised that this provision had resulted in his inability to attend his father's funeral. Hence, in relation to the complaint under the Court's review (see paragraph 43 above) it is the applicant's third constitutional complaint that is relevant for the purposes of exhaustion of domestic remedies. The Constitutional Court declined to institute proceedings, stating that his complaint lacked legal reasoning. Accordingly, it falls to be determined whether the applicant discharged the obligation to exhaust the pertinent domestic remedy.

51. Firstly, the Court observes that under the Law on the Constitutional Court there are two possible grounds for declining to institute proceedings when the required legal reasoning is considered to be lacking. The Constitutional Court may conclude that an applicant has not complied with the formal requirements for submitting a constitutional complaint (including the obligation to provide legal reasoning) and invoke section 20(5)(3) of that Law. Alternatively, it may find that the legal reasoning submitted is evidently insufficient for the claim in question to be allowed and rely on section 20(6) (see paragraph 31 above) – a rejection ground that appears to have a discretionary element (see paragraph 32 above). In light of the above, the Court attaches importance to the fact that the third constitutional complaint, just like the previous two, was rejected on the second ground (see paragraphs 16, 18 and 20 above). By contrast, in those cases where the Court has accepted a Government's non-exhaustion plea owing to insufficiently reasoned constitutional complaints, the Constitutional Court had concluded that the relevant complaint had been incompatible with section 19^2 of the Law on the Constitutional Court (see *Gubenko v. Latvia* (dec.), no. 6674/06, §§ 9 and 25, 3 November 2015, and *Svārpstons and Others v. Latvia* (dec.), no. 14976/05, §§ 26 and 51, 6 December 2016).

52. Secondly, in his third constitutional complaint the applicant expressly complained of discrimination on the grounds of sex in that men were subjected to a stricter prison regime and greater limitation of their rights than women. He emphasised that this distinction applied to men and women who had been convicted of the same crimes and given the same punishment and therefore concerned groups of people who were in

"comparable situations". He argued that this resulted in unjustified difference with respect to men and women's respective right to prison leave on compassionate grounds, as owing to the prison regime they were subjected to male prisoners were not even eligible for such leave (see paragraphs 15, 17 and 19 above). Thus, the Court considers that in his third constitutional complaint the applicant expressly and in substance raised the discrimination complaint that he has now brought before the Court (compare *Schwarzenberger v. Germany*, no. 75737/01, § 31, 10 August 2006, and *Luig v. Germany* (dec.), no. 28782/04, 25 September 2007).

53. Thirdly, with regard to the Government's argument that the applicant could have lodged another complaint after remedying the deficiencies, the Court notes that in relation to all three complaints the Constitutional Court considered that the applicant had failed to sufficiently substantiate his claim that men and women prisoners were in comparable situations, also after he emphasised that the difference in treatment concerned men and women who had been convicted of the same crimes and had been given the same sentences. Thus, the Court considers that through the reasons given in its decisions, notably, when rejecting the third constitutional complaint, the Constitutional Court, at least partly, expressed its position on the substance of the applicant's discrimination complaint (compare *Gäfgen*, cited above, § 145, and *Jalloh v. Germany* (dec.), no. 54810/00, 26 October 2004).

54. Lastly, in relation to the Government's argument that the applicant had failed to challenge before the Constitutional Court the provision specifying the differences in rights and obligations between convicts serving their sentences in different regimes, the Court observes that the applicant does not complain about the fact that under different prison regimes prisoners' rights are restricted to a varied extent. Likewise, he does not complain that prisoners serving their sentence under a specific prison regime do not have a right to prison leave. Instead, his complaint concerns the fact that men and women who are convicted of the same crimes start serving their sentences under different prison regimes, leading to differences in the restrictions placed on their rights, particularly, a blanket ban on the male prisoner's right to request prison leave. Hence, the Court is not convinced that challenging before the Constitutional Court the provision setting out the rights and obligations applicable to certain prison regimes would have been an effective remedy for the specific complaint that the applicant has brought before the Court.

55. In the light of the above, the Court concludes that the applicant provided the national authorities with the opportunity, which is in principle intended to be afforded to Contracting States under Article 35 § 1 of the Convention, to put right the violations alleged against them (compare *Muršić v. Croatia* [GC], no. 7334/13, § 72, 20 October 2016). Hence, the Government's objection of non-exhaustion of domestic remedies must be dismissed.

B. Admissibility and merits of the complaint

1. Arguments of the parties

(a) The applicant

56. The applicant argued that he had been discriminated against on the grounds of his sex because he, as a man convicted of serious and particularly serious crimes, started serving his sentence in a closed prison. Women convicted of the same crimes started serving their sentence in partly-closed prisons. Accordingly, male and female prisoners who had been convicted of the same crimes and given the same sentences were subjected to different prison regimes, and the rights of these two groups of prisoners were restricted to a different extent. Most notably, prisoners serving their sentence in closed prisons were not eligible for prison leave, while prisoners in partly-closed prisons, like female prisoners in a situation similar to the applicant's, did have such a right.

57. Further to the Government's observations, the applicant argued that the fact women generally committed fewer crimes could not justify stricter prison conditions for men. Likewise, there was no justification for concluding that he, as a man, would be less willing or should be less entitled to meet his family members and other relatives. Every person's attitude to family values was individual and by no means dependent upon their sex. Besides, more opportunities of meeting family members and other relatives were conducive to prisoners' social reintegration.

58. The applicant emphasised that his sex had been the only reason for his not being allowed to attend his father's funeral, as the refusal had been based solely on the prison regime under which he had been serving his sentence. No other ground had played any role whatsoever, since he had committed no breaches of that regime that could have affected this decision. This was demonstrated by the fact that later, when he had been subjected to a different prison regime, he had been granted short-term prison leave four times. On those occasions he had returned to the prison in due time and had caused no harm to society or any of its members.

59. The applicant submitted that no restitution was possible for the fact he had been unable to attend his father's funeral and comfort his relatives. Women prisoners, by contrast, were allowed short-term prison leave not only to attend relatives' funerals but also to visit family members in the event of a terminal illness. The applicant submitted that, had he been a woman, he would have been able to visit his father while he had still been in hospital.

60. Lastly, the applicant argued that Latvia had taken no steps to implement Committee of Ministers Recommendation No. R (82) 16 on prison leave (see paragraph 38 above).

(b) The Government

61. The Government agreed that the refusal to grant the applicant prison leave in order for him to attend his father's funeral had interfered with his right to family life, as guaranteed under Article 8 of the Convention. This interference had, nonetheless, been based on law and had pursued the aim of furthering the interests of public safety, preventing crime and protecting the rights or freedoms of others. According to the Government, this restriction had been based on an individual assessment, as after an inmate had served a certain proportion of the sentence, a special body could decide to transfer him to a lower-security prison. It also drew the Court's attention to the opinion of the Ombudsperson emphasising the dangerous nature of the inmates to whom this restriction applied (see paragraph 14 above). Furthermore, in the light of the cases of *Laduna v. Slovakia* (no. 31827/02, ECHR 2011) and *Dickson v. the United Kingdom* ([GC], no. 44362/04, ECHR 2007-V) a wide margin of appreciation applied in questions of prisoners, penal policy and social strategy and, according to *Khoroshenko v. Russia* ([GC], no. 41418/04, ECHR 2015), the gravity of a sentence could be tied, a least to some extent, to a type of a prison regime. Hence, the Government considered that this interference had corresponded to a pressing social need and had been proportionate to the legitimate aim, thereby being justified under Article 8 § 2 of the Convention.

62. With respect to Article 14 of the Convention the Government submitted that the situation of male and female convicts serving a sentence for having committed serious or especially serious crimes was not sufficiently similar for them to be compared with each other. Moreover, the Bangkok Rules recognised women prisoners as one of the vulnerable groups that had specific needs and requirements. The principle of equality did not negate the possibility or the necessity to organise different regimes in respect of the execution of criminal sentences which would fully take into account the differences among various groups of convicts.

63. The Government argued that there was unanimity between penal researchers, scientists and national policy makers that male and female convicts were different in most aspects and that identically tailored approaches did not facilitate the resocialisation of female convicts. Prison regimes which were designed to accommodate a male prison population were, in general, much stricter owing to potential risks and threats to prison security and staff, as well as the risk of inter-prisoner violence and escape attempts. All those risks were sufficiently lower or absent in the case of the female inmate population. Female convicts, in general, were less violent and less prone to aggression towards other inmates or prison staff. Hence, there was no objective need to subject female inmates to conditions which were inherently stricter, yet completely unnecessary.

64. In Latvia this issue historically had been addressed by creating three different and distinct prison regimes, as well as a separate prison facility - a

partly-closed prison, accommodating only female convicts. A mixed approach whereby male and female convicts were held separately within the same facility had been proved to be harmful towards female convicts because, as a result, they served their sentences under a stricter regime than it would be objectively necessary.

65. The Government argued that differences in prison regimes allowed gender distinctions in the statistical structure of crimes to be taken into account. In Latvia, female convicts made up 6.2% of the total number of convicts. Approximately 70% of the crimes committed by females were non-violent, and only approximately 10% of violent crimes were committed by women. As in Europe in general, in Latvia the majority of women sent to prison were convicted of relatively minor offences and did not represent a danger to the community.

66. The Government also contended that the Latvian penal system treated in a similar fashion male and female inmates that fell within comparable groups. In particular, male and female inmates serving their sentences at the medium-security level were both granted the same privileges. This was confirmed by the fact that following the applicant's transfer to a medium prison level he had been granted prison leave four times.

67. Lastly, the Government submitted that the key issue in the present case was not the alleged discrimination on the grounds of sex but rather the fact that the Sentence Enforcement Code did not envisage a possibility of granting compassionate prison leaves for inmates serving their sentence in closed prisons at the maximum-security level. Even so, such a complaint had not been communicated to the Government. Simultaneously, the Government argued that in his reply to the Government's observations the applicant had tried to present his complaint from the perspective of Article 8 of the Convention. In the Government's view, that constituted an attempt to arbitrarily expand the scope of the applicant's complaint, as communicated to the Government.

2. The Court

(a) The scope of the case

68. The Court has held that the scope of a case "referred to" the Court in the exercise of the right of individual application is determined by the applicant's complaint or "claim" (see *Radomilja and Others*, cited above, §§ 108-09 and 120-22). Allegations made after the communication of the case to the respondent Government can only be examined by the Court if they constitute an elaboration of the applicant's original complaint to the Court (see *Piryanik v. Ukraine*, no. 75788/01, § 20, 19 April 2005).

69. The Court observes that in his application form the applicant complained of discrimination on the grounds of sex with regard to the

applicable prison regime, as a consequence of which he was not allowed to attend his father's funeral. In his reply to the Government's observations the applicant submitted further considerations concerning the allegedly discriminatory nature of the lack of the right to prison leave and the resulting refusal to attend his father's funeral. The Court considers that the applicant's submissions further elaborate his complaint raised under Article 14 of the Convention, read in conjunction with Article 8, as it was communicated to the Government, and do not constitute an attempt to raise a new complaint.

(b) Admissibility

(i) Whether the facts of the case fall "within the ambit" of Article 8

70. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. For Article 14 to become applicable, it suffices that the facts of the case fall "within the ambit" of another substantive provision of the Convention or its Protocols. Hence, the Court must determine at the outset whether the facts of the case fall within the general scope of Article 8 (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 124, ECHR 2012 (extracts)).

71. The Court has already considered complaints about refusals to allow a detainee's request to visit an ailing relative or attend a relatives' funeral in a number of cases and has invariably found such refusals to constitute an interference in the right to family life guaranteed under Article 8 of the Convention (see *Lind v. Russia*, no. 25664/05, § 92, 6 December 2007; *Schemkamper v. France*, no. 75833/01, § 31, 18 October 2005; *Płoski v. Poland*, no. 26761/95, § 32, 12 November 2002; and *Giszczak v. Poland*, no. 40195/08, §§ 36-37, 29 November 2011).

72. Accordingly, the Court finds that the applicant's complaint about the alleged discrimination in the applicable prison regime resulting in a refusal to attend his father's funeral falls within the ambit of Article 8 of the Convention.

(ii) Whether the alleged difference in treatment related to any of the grounds in Article 14

73. Article 14 does not prohibit all differences in treatment, but only those differences based on an identifiable, objective or personal characteristic, or "status", by which individuals or groups are distinguishable from one another. It lists specific grounds which constitute "status;" however, the list is illustrative and not exhaustive (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 61, 24 January 2017).

74. The applicant contends that he has been discriminated against on the grounds of sex, as male and female inmates are subjected to different prison regimes resulting in a differentiation on the basis of sex with regard to the right to prison leave. The Court notes that "sex" is explicitly mentioned in Article 14 as a prohibited ground of discrimination.

(iii) Conclusion

75. Hence, Article 14 of the Convention taken in conjunction with Article 8 is applicable in the present case.

76. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It furthermore notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

(c) Merits

(i) Whether the applicant was in an analogous or relevantly similar position to female convicts

77. The Government's position before the Court was based on an assertion that men and women prisoners were not sufficiently similar to be compared with each other.

78. The Court has consistently held that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. The requirement to demonstrate an analogous position does not require that the comparator groups be identical. An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently (see, for example, *Fábián v. Hungary* [GC], no. 78117/13, § 113, ECHR 2017 (extracts)).

79. In the case of *Khamtokhu and Aksenchik* (cited above) the male applicants, *inter alia,* complained about discrimination on the grounds of sex, as life imprisonment could not be imposed on women. The Court found that the applicants were in an analogous situation to that of all other offenders, including female offenders, who had been convicted of the same or comparable offences (see *Khamtokhu and Aksenchik*, cited above, § 68; compare also *Laduna*, cited above, §§ 56-58 and *Clift v. the United Kingdom*, no. 7205/07, §§ 67-68, 13 July 2010).

80. In the present case the difference in treatment concerns men and women who were convicted of serious or especially serious crimes. Thus, as in *Khamtokhu and Aksenchik*, it relates to persons who committed the same or comparable offences and were all sentenced to deprivation of liberty (contrast *Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999, where the Court found that unfavourable treatment of persons convicted of terrorist offences was a distinction made not between different groups of people, but

between different types of offence). As to the nature of the complaint the Court observes that it relates to the manner in which the applicable prison regime affects the restrictions on prisoners' family life, in particular, with regard to their right to prison leave on compassionate grounds. Accordingly, the complaint concerns an issue that is of equal relevance to all prisoners (compare *Varnas v. Lithuania*, no. 42615/06, § 113, 9 July 2013).

81. Thus, the Court finds that in the light of the nature of the particular complaint the applicant can claim to be in an analogous position to that of women prisoners convicted of the same or comparable offences.

(ii) Whether the difference in treatment was objectively justified

82. Not every difference in treatment will amount to a violation of Article 14. The Court has consistently held that a difference in treatment is discriminatory if it has no objective and reasonable justification – in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, for example, *Konstantin Markin*, cited above, § 125).

83. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of that margin of appreciation will vary according to the circumstances, the subject matter and the background of the case (see *Khamtokhu and Aksenchik*, cited above, § 77). The national authorities, whose duty it is also to consider the interests of society as a whole, should enjoy broad discretion when they are asked to make rulings on sensitive matters such as penal policy (ibid., § 85). As pointed out by the Government, the Court has indeed accepted that, in principle, a wide margin of appreciation applies in questions of prisoners and penal policy (see *Alexandru Enache v. Romania*, no. 16986/12, § 78, 3 October 2017, and *Varnas*, cited above, § 115).

84. On the other hand, the Court has repeatedly held that the advancement of gender equality is today a major goal in the member States of the Council of Europe, and very weighty reasons would have to be put forward before such a difference in treatment could be regarded as compatible with the Convention. In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation (see *Konstantin Markin*, cited above, § 127; *Khamtokhu and Aksenchik*, cited above; § 78, and *Carvalho Pinto de Sousa Morais v. Portugal*, no.17484/15, § 46, ECHR 2017).

85. From the arguments they put forward it can be seen that, according to the Government, the difference in treatment pursued the aim of protecting women prisoners from being adversely affected by identically tailored

approaches that would not sufficiently take the specific needs of women prisoners into account.

86. The Court agrees that a difference in treatment that is aimed at ensuring substantive equality may be justified under Article 14 of the Convention. The Court is mindful of the various European and international instruments drafted to ensure that the distinctive needs of women prisoners are adequately taken into account (see paragraphs 33-37 above). Also the Court has acknowledged that providing for the distinctive needs of women prisoners, particularly in relation to maternity, in order to accomplish substantial gender equality should not be regarded as discriminatory (see *Alexandru Enache*, cited above, § 77). Accordingly, certain differences in the prison regimes that are applicable to men and women are acceptable and may even be necessary in order for substantive gender equality to be ensured. Nonetheless, also within the context of the penitentiary system and prison regimes a difference in treatment that is based on sex has to have a reasonable relationship of proportionality between the means employed and the aim sought to be realised (ibid., § 70).

87. The Court turns to the Government's claim that the Latvian penitentiary system treats comparable groups similarly, as male and female prisoners who serve their sentences at the medium-security level are granted the same privileges (see paragraph 66 above). The Court notes that this claim disregards the fact that the gravity of the regime is determined not only by the security level but also by the type of the prison. Male and female prisoners start serving their sentences in different types of prison, resulting in varied degrees of restrictions of their rights at the medium-security level. In particular, the Sentence Enforcement Code provides that all male prisoners convicted of serious and particularly serious crimes must be placed in closed prisons at the maximum-security level (see paragraphs 22-23 above). Furthermore, no prisoner serving his sentence in a closed prison is entitled to prison leave (see paragraph 25 above). They would acquire such a right only after being moved to a partly-closed prison - a transfer they may become eligible for only after serving one half of the imposed sentence (see paragraph 23 above). In contrast, women prisoners who have been convicted of the same crimes are placed in this type of prison from the very beginning of their sentence (see paragraph 24 above).

88. The aforementioned is confirmed by the applicant's experience, as at the time that he submitted his request for prison leave to attend his father's funeral he had already been moved to the medium-security level of the closed prison (see paragraphs 8 and 10 above). His request was not entertained exactly on the grounds of being placed at the medium-security level of the closed prison. Neither the domestic authorities, nor the Government have suggested that there was any other consideration that had informed this decision. Meanwhile, women prisoners in analogous circumstances, that is to say, convicted of the same crimes, given the same

sentence, having served the same proportion of the sentence, and having progressed to the medium-security level, would have been eligible for such prison leave.

89. In justifying this distinction the Government argued that women prisoners, in general, were less violent and less prone to aggression towards other inmates or prison staff, whereas men prisoners were more predisposed to inter-prisoner violence and attempted prison-breaks and they posed higher threats to prison security and staff. The Government have not, however, submitted any data supporting this claim. In particular, the Court lacks information concerning the conduct of the relevant groups of prisoners, namely, men and women convicted of serious or especially serious crimes, with regard to the compliance with prison regime and, even more importantly, their conduct when released on prison leave.

90. Be it as it may, the Court is not persuaded that even if this claim had been supported by data, it would be sufficient to justify this distinction. Finding otherwise would be tantamount to concluding that all male prisoners, when compared to women who have committed exactly the same offences, are so much more dangerous that no individualised assessment is even purposeful. Such an approach would be incompatible with the case-law of the Court emphasising the need for an individualised risk assessment of all detainees with regard to prison leave (see paragraph 91 below). The Court also refers here to CPT's repeated criticism of the Latvian "progressive sentence execution" system under which all prisoners are required to spend a predetermined minimum amount of time at both the maximum- and the medium-security level since it is the prison authorities who should be responsible for determining security and regime requirements, on the basis of professionally agreed criteria and individual assessments of prisoners (see paragraphs 39 and 40 above).

91. The Court fully shares the Government's proposition that there is no objective need to subject women prisoners to conditions that are stricter than necessary. It emphasises, however, that this principle is equally applicable to male prisoners. The Court notes that while Article 8 of the Convention does not guarantee a detained person an unconditional right to leave prison in order to attend the funeral of a relative, the domestic authorities are called upon to assess each such request on its merits (see *Giszczak*, cited above, § 36, and *Płoski*, cited above, § 38). The Court has found a violation of that Article where the domestic authorities had failed to carry out a balancing exercise between the competing interests or had based their refusal solely on the grounds that the domestic law did not provide for such a right (see *Császy v. Hungary*, no. 14447/11, § 20, 21 October 2014, and *Feldman v. Ukraine (no. 2)*, no. 42921/09, § 35, 12 January 2012).

92. Finally, the Court emphasises that, although there may be several legitimate penological grounds for a person's detention, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment (see

Vinter and Others v. the United Kingdom [GC], nos. 66069/09 and 2 others, §§ 111 and 115, ECHR 2013 (extracts)). While this principle applies regardless of the crime committed or the duration of the sentence imposed (ibid., §§ 111-18), it also applies irrespective of the prisoner's sex. The Court underlines that maintenance of family ties is an essential means of aiding social reintegration and rehabilitation of all prisoners, regardless of their sex (compare *Khoroshenko*, cited above, § 144). Furthermore, also prison leave is one of the means of facilitating social reintegration of all prisoners (see *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, ECHR 2002-VIII, and *Schemkamper*, cited above, § 31).

93. In the light of that, and not discounting a possibility that certain divergences in the approaches towards male and female prisoners may be justified, the Court does not consider that a blanket ban for men to leave the prison, even for attending a funeral of a family member, was conducive to the goal of ensuring that the distinctive needs of women prisoners are taken into account.

(iii) Conclusion

94. Having found that the refusal to entertain the applicant's request to attend his father's funeral on the basis of the prison regime to which he was subjected owing to his sex had no objective and reasonable justification, the Court concludes that this treatment was discriminatory.

95. There has accordingly been a violation of Article 14 of the Convention, read in conjunction with Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

96. 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

97. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage. He submitted no claim with respect to pecuniary damage.

98. The Government argued that the applicant had failed to prove existence of a non-pecuniary damage and a causal link between the damage claimed and the violation of the Convention alleged. They also considered that a finding of a violation would constitute a sufficient compensation. In any event, the Government considered that the cases of *Płoski* (cited above),

Watros v. Poland ((dec.), no. 13384/10, 31 January 2012) and *Pielak v. Poland* ((dec.) [Committee], no. 9409/09, 25 September 2012) could serve a reference to determine the right amount of the compensation.

99. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

100. The applicant claimed no costs or expenses.

101. Hence, the Court makes no award under this head.

C. Default interest

102. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 of the Convention;

3. *Holds*, by five votes to two,
   (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 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 10 January 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint dissenting opinion of Judges Grozev and O'Leary is annexed to this judgment.

A.N.
M.B.

JOINT DISSENTING OPINION OF JUDGES GROZEV AND O'LEARY

1. It is clear in the present case that the applicant's request to attend his father's funeral was not subject to an individual assessment on the merits before being refused. Given the case-law of the Court on Article 8 of the Convention in relation to requests for prison leave, we would have voted in favour of a violation of this article had that complaint been before the Chamber on the merits.

2. However, because of the manner in which the applicant litigated his complaint at national level, we are compelled to examine it, as the majority did, *only* with reference to Article 14 of the Convention, in conjunction with Article 8. For the reasons outlined below, we find ourselves unable to join the majority in finding a violation of those two articles of the Convention combined.

A. Violation of Article 8 of the Convention

3. The Convention does not guarantee prisoners an unconditional right to leave to attend the funeral of a relative.[1] What Article 8 requires domestic authorities to do is to assess each individual request for leave on its merits.[2] Prisoners thus have a right to a process and the Court's review will be focussed on that process and on whether relevant and sufficient reasons were provided to support any refusal.

4. Leave to attend a funeral can be refused for compelling reasons, with the Court recognising the wide margin of appreciation enjoyed by States in this regard, as well as the financial and logistical difficulties which arranging for a prisoner to be escorted may entail.[3] The highly circumscribed nature of the right to prison leave under Article 8 is logical given the purpose of detention – which is precisely to deprive someone of their liberty.[4] It is also recognition that national authorities, whose duty it is

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[1] See, for example, *Marincola and Sestito v. Italy*, no. 42662/98, 25 November 1999, unreported; *Georgiou v. Greece*, no. 45138/98, 13 January 2000, unreported, and *Sannino v. Italy* (dec.), no. 72639/01, 3 May 2005.

[2] See, for example, *Feldman v. Ukraine* (no. 2), no. 42921/09, 12 January 2012, § 35; *Kanalas v. Romania*, no. 20323/14, 6 December 2016, § 66.

[3] See, *Płoski v. Poland*, no. 26761/95, 12 November 2002.

[4] The Court has held that detention, similarly to any other measure depriving a person of his or her liberty, entails inherent limitations on private and family life. Restrictions such as limitations on the number of family visits and the supervision of those visits constitute an interference with a detained person's rights under Article 8 of the Convention but are not, of themselves, in breach of that provision (see, among other authorities, *Laduna v.*

to consider, within the limits of their jurisdiction, the interests of society as a whole, enjoy broad discretion when they are asked to make rulings on sensitive matters such as penal policy.[5]

5. Where the possibility of escorted leave was afforded by domestic law, the Court has criticised the domestic authorities' failure to even consider it.[6] In its assessment of the proportionality of the refusal of leave by domestic authorities, the Court has considered the violent nature of the crime committed by the detainee, when he or she was eligible for release, whether or not family relations have otherwise been respected and communication made possible in some other form, the need to defend the public order and protect the security of the general public, the examination by the authorities of different possible solutions in order to accommodate the prisoner's request and the margin of appreciation just referred to.[7]

The Latvian Sentence Enforcement Code provides that:

- Closed and partly-closed prisons operate three security regimes - maximum, medium and minimum – under which prison sentences are served.

- All prisoners convicted of "serious or especially serious crimes"[8] start serving their sentences in closed or partly-closed prisons at the maximum-security level.

- The Latvian progressive sentence execution system means that prisoners can be transferred to more lenient prison regimes following an individual assessment but this can only occur after a set proportion of their sentence has been served under the stricter regime.

Slovakia, no. 31827/02, § 52, 13 December 2011; *Bogusław Krawczak v. Poland*, no. 24205/06, §§ 107-08, 31 May 2011, and *Moiseyev v. Russia*, no. 62936/00, §§ 207-08, 9 October 2008).

[5] See *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 85, 24 January 2017; see also *Clift v. the United Kingdom*, no. 7205/07, § 73, 13 July 2010, and the cases referred to therein, and *Costel Gaciu v. Romania*, no. 39633/10, § 56, 23 June 2015.

[6] *Płoski v. Poland*, cited above, § 36.

[7] It should be pointed out that § 71 of the majority judgment represents only partially the case-law of the Court just outlined. There it is stated that the Court has already considered "complaints about refusals to allow a detainee's request […] to attend a relative[']s funeral […] and has invariably found such refusals to constitute an interference in the right to family life guaranteed under Article 8". On the one hand, it is the absence of an individual assessment which has often been problematic, a prisoner not having an unconditional right to leave. On the other, while the Court has recognised the existence of an interference, it has also found, in the specific circumstances of several cases, that it was a justified and proportionate one, reference being had to the factors just listed.

[8] The terms used in the Code as regards the crimes committed by men and women differ but we have had to accept as given, on the basis of the information available, that the same or similar crimes are being referred to.

- Men convicted of serious or especially serious crimes and prisoners transferred from partly-closed prisons owing to gross or systematic regime violations are detained in closed prisons.[9]

- Ten different groups of prisoners serve their sentences in partly-closed prisons, including women convicted of "intentionally committed crimes" and men convicted of serious or especially serious crimes if they had not attained the age of eighteen years when the crime was committed.[10]

- Prisoners serving their sentences in closed prisons, regardless of the applicable security regime, as well as prisoners serving their sentence in partly-closed prisons at the maximum-security level, are not eligible for prison leave.

- Prisoners, including women who had already served a proportion of their sentence at the maximum security level in a partly-closed prison, can apply for temporary leave on account of the death or life-threatening illness of a close relative.

6. This legislation excludes an individual assessment of requests for leave by male prisoners held in closed prisons and by female prisoners held in partly-closed prisons at the maximum security level. As a result, when the applicant applied for leave to attend the funeral of his father his request was refused by the prison governor due to the fact that he was serving his sentence in a closed prison albeit, at that stage, under the medium security regime.

7. It is clear that the exclusion of any assessment on the merits of the applicant's request for leave falls foul of Article 8 of the Convention as interpreted by the Court in the case-law outlined above. Hence, we would have had no difficulty finding a violation of that provision in a case such as the applicant's.

B. The sole complaint which the applicant exhausted

8. However, the applicant did not challenge the individual administrative decision refusing him leave despite the fact that he could have complained to the Prison Administration and thereafter to the administrative courts.[11] Nor, crucially, did he complain about the lack of an individual assessment of his request before the Latvian Constitutional Court.

9. To understand the applicant's complaint and one of the reasons for our dissent, it is important to pay attention to the manner in which it was

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[9] Section 50^4 (1) of the Sentence Enforcement Code.

[10] Ibid, Section 50^5 (1).

[11] See Article 49^2 of the Sentence Enforcement Code and, for an example, *Bannikov v. Latvia*, no. 19279/03, 11 June 2013.

brought before the Latvian Constitutional Court and compare that to how it has been formulated subsequently by the majority in the judgment.[12]

10. Having been convicted of serious crimes in 2001 the applicant claims to have realised in 2008 that there was a difference in the treatment in Latvia of male and female prisoners with regard to the execution of their sentences. While men convicted of serious crimes were always placed in closed prisons, female prisoners who had been convicted of similar crimes were placed in partly-closed prisons. Since this affected the rights of male prisoners, the applicant lodged several and different complaints with the Ministry of Justice, the Ombudsman and the Constitutional Court. Before the latter the applicant claimed that section 50^4 (1) of the Sentence Enforcement Code was discriminatory on grounds of gender contrary to the relevant provision of the Latvian Constitution. Prior to the death of the applicant's father – the event which led to his request for prison leave – the applicant had introduced two constitutional complaints challenging the Latvian legislation on this general ground. Both complaints were deemed inadmissible due to, in the first instance, the applicant's failure to properly substantiate the reasons for his complaint (§ 15 of the majority judgment) and, in the second instance, the insufficiency of the legal reasoning presented on the question of comparability combined with the failure to specify the human right in conjunction with which the discrimination complained of had been made (§§ 17-18 of the majority judgment).

11. The rejection of these two complaints, which predated the request for funeral leave, is clearly not relevant for the purposes of determining whether the applicant had exhausted domestic remedies. However, they do highlight the essential and general nature of the applicant's domestic discrimination complaint and demonstrate a pitfall which the majority has advertently or inadvertently not avoided.

12. The applicant, at domestic level and before the Court, thus complained about the allegedly discriminatory nature of the applicable Latvian prison regime writ large. However, the only complaint which this Court could consider on the merits was the specific complaint as formulated in the domestic proceedings and before this Court, namely that when refused permission to attend his father's funeral *"he had [...] been discriminated against on the basis of sex*, as women in his situation *would have been able to attend the funeral*."[13]

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[12] § 41 of the majority judgment formulates the complaint as follows: "The applicant complained about difference in treatment between men and women convicted of the same crimes in relation to the respective applicable prison regimes, *in particular*, with the right to regard to prison leave, which led to a refusal to attend his father's funeral" (emphasis added); a formula repeated in § 80. See also the generality of the applicant's complaint as it appears in § 56 of the majority judgment, with, once again, the strategic addition of "most notably".

[13] See § 19 of the majority judgment (emphasis added).

13. The applicant pointed to this aspect of the discriminatory nature of the Latvian Sentence Enforcement Code before the Constitutional Court in his third complaint. The latter, on the basis of the relevant provisions of the Law on the Constitutional Court, rejected it on the grounds that the legal reasoning in the complaint was insufficient. The majority concludes, and we can accept, that in his third complaint the applicant raised "expressly and in substance" the discrimination complaint which he subsequently brought before this Court.[14]

14. The applicant had argued that, but for his gender, he would have been authorised to attend his father's funeral. In considering the applicant's complaint on the merits, the majority reformulated the discriminatory treatment of which he complained. It no longer considered the difference in treatment as defined by the applicant, namely refusal of leave, and turned its attention instead to the denial of an individual assessment of his request for such leave. We consider this a significant change, which renders the complaint different for the purposes of an Article 14 analysis. While the comparator group remains the same, namely women convicted of "intentionally committed crimes", the difference in treatment is not the same. Being granted permission to leave and being allowed access to a procedure involving an individual assessment are not one and the same thing. The Latvian Constitutional Court not having been given the opportunity to address the complaint reformulated by the majority, we consider it inadmissible.

15. The exhaustion point in the present case is an important one, as this is the first time the Court addresses the specific procedure used in the present case before the Latvian Constitutional Court. The Court has previously examined non-exhaustion pleas in relation to constitutional complaints in Latvia. In those cases, it held that it is not the Court's "task to take the place of the Constitutional Court and to review its conclusion in relation to the quality of the applicant's complaint".[15] In the present case the majority has distinguished between the two grounds on which a Latvian constitutional complaint can be declined: a) failure to comply with formal requirements and b) insufficient reasoning (see § 51 of the majority judgment). As a result, in future cases the Court will differentiate between the two grounds on which the Latvian Constitutional Court declines complaints, reviewing the conclusion of the domestic court in one case but not in the other. In view of the shifting nature of the complaint in the present case, the domestic implications of this are unclear.

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[14] See § 52 of the majority judgment.

[15] See, for example, *Gubenko v. Latvia* (dec.), no. 6674/06, §§ 9 and 25, 3 November 2015, and *Svārpstons and Others v. Latvia* (dec.), no. 14976/05, §§ 26 and 51, 6 December 2016.

C. Analysis of the discrimination claim under Article 14 combined with Article 8 of the Convention

16. Article 14 does not prohibit every difference in treatment in the exercise of rights and freedoms: "competent national authorities are frequently confronted with situations and problems which, on account of the differences inherent therein, call for different legal solutions; moreover certain legal inequalities tend only to correct factual inequalities."[16] Thus, in order for an issue to arise under Article 14, "there must be a difference in the treatment of persons in analogous, or relevantly similar, situations."[17] If that is the case, the difference in treatment in question shall be considered discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship or proportionality between the means employed and the aim sought to be realized.[18]

17. As indicated previously, the difference in treatment alleged by the applicant both before the domestic Constitutional Court and our Court was that he was not able to attend his father's funeral. He argued that had he been a female prisoner he would have been granted permission to attend the funeral. This, however, is simply not correct. Even if the applicant had been a female prisoner he would not have enjoyed an automatic and unconditional right to attend a relative's funeral. Those belonging to the comparator group indicated by the applicant, namely women convicted of "intentionally committed crimes", would merely have been entitled to an individual assessment of their request because of the prison regime to which they were subject pursuant to Latvian law. In addition, they would only have been entitled to such an assessment once they were no longer detained at the maximum security level. However, the outcome of such an assessment is not clear and it is in no way certain that the requests of female prisoners in the comparator group would necessarily have been granted. As members of the suggested comparator group have no automatic right to leave, the difference in treatment alleged by the applicant has not been established and no violation of Article 14 combined with Article 8 can be found.

18. In cases where discrimination is alleged it is of crucial importance to adopt and then apply a sufficiently well elaborated and rigorous analytical framework.[19] We are concerned about the implications of the majority

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[16] See *"the Belgian linguistic case" (merits)*, judgment of 23 July 1968, Series A no. 6, § 10.

[17] See the authorities cited in § 113 of the majority judgment.

[18] See, for example, *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, 12 April 2006.

[19] See, in the same vein, the concurring opinion of Judges O'Leary and Koskelo in *Fabian v. Hungary* [GC], no. 78117/13, 5 September 2017.

finding a violation of Article 14 given the reasoning employed and the circumstances of the case.

19. The first, critical question in an Article 14 analysis is whether two persons or groups of persons are in an analogous or relevantly similar situation. As indicated above, it is only where this condition is fulfilled that an issue arises under Article 14. In § 121 of its judgment in *Fabian v. Hungary*, the Grand Chamber indicated that:

> "a difference in treatment may raise an issue from the point of view of the prohibition of discrimination as provided for in Article 14 of the Convention only if the persons subjected to different treatment are in a relevantly similar situation, taking into account the elements that characterise their circumstances in the particular context. The Court notes that the elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject-matter and purpose of the measure which makes the distinction in question".

20. In the present case, the majority's analysis constantly flits between the individual decision refusing leave (see paragraphs 43, 54, 87 – 88, 90 - 91) and the Latvian sentencing and prison regimes, which the applicant alleges are discriminatory at a general level (see paragraphs 41, 52, 54, 80, 85 – 87, 89 - 91). However, the broadening of the complaint and the finding of a violation risk ruling out gender as a factor in risk assessment in the prison context, whether at a regulatory or individual assessment level, despite clear evidence that men and women present different security risks.[20] In their admirable pursuit of substantive equality, the reasoning in the judgment ignores research which points to the fact that:

"Screening processes tend to take too little account of specific issues affecting a large proportion of female prisoners [...] and of the actual security risk women present, all of which should influence their placement within the prison system. Consequently, women are routinely over-classified in terms of the requisite level of security, and insufficient programmes and services appropriate for their needs are provided".[21]

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[20] See, variously, UNODC, *Handbook on Women and Imprisonment*, 2nd ed., 2014, pp. 33-35, referring to "the generally lower risk posed by women prisoners to others", as stated in Rule 41 of the United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women (the Bangkok Rules); A. Coyle and H. Fair, *A Human Rights Approach to Prison Management: Handbook for Prison Staff*, 3rd ed., Institute for Criminal Policy Research at Birkbeck, University of London, 2018, pp. 152-53, and the discussion in M. Krabbe and P.H. van Kempen, "Women in Prison: a Transnational Perspective" in P.H. van Kempen and M. Krabbe, *Women in Prison. The Bangkok Rules and Beyond*, Intersentia, 2017, pp. 3-34, at p.3: "Research on women in prison demonstrates, however, that female prisoners diverge from their male counterparts in that (i) they generally end up in prison for different reasons and, once in prison (ii) they have other needs". Crimonological factors – the causes of criminal behaviour, the types of crime prevalent and the sentences imposed – may differ between men and women.

[21] See J. Ashdown and M. James, "Women in Detention" (2010) 92 *International Review of the Red Cross* 123-141, 130.

21. The majority concludes a) that the complaint relates to the manner in which the applicable prison regime affects restrictions on prisoners' rights, "in particular", with regard to the right to prison leave; b) that, as such, the complaint concerns an issue of equal relevance to all prisoners and c) that the applicant can claim to be in an analogous position to that of female prisoners convicted of the same or comparable offences (see §§ 80-81 of the majority judgment). Reliance is placed on the Grand Chamber judgment in *Khamtokhu and Aksenchik* in which the complaint under Article 14 in conjunction with Article 5 related to "the sentencing of offenders who have been found guilty of particularly serious crimes punishable with imprisonment for life". Whereas the applicants in that case were given life sentences, female offenders convicted of the same or comparable offences would not have been so sentenced due to a statutory prohibition. The Court in *Khamtokhu and Aksenchik* did not examine the question of comparability in any detail and simply held that the applicants, male prisoners, were in an analogous situation to all other offenders who had been convicted of the same or comparable offences.[22] This is a seductive but not entirely convincing approach and, when followed, it requires the Court to ensure that the next two stages of the discrimination assessment – justification and proportionality – are done with great rigour.

22. On the subject of justification and proportionality, the majority in the present case accepts that States enjoy a wide margin of appreciation in relation to questions of prisoners and penal policy and appears to accept that certain differences in the prison regimes applicable to male and female prisoners are acceptable and may be necessary in order for substantive gender equality to be ensured (see §§ 83 and 85 of the majority judgment). However, the refusal of leave to male prisoners in closed prisons generally and to the applicant in particular is considered disproportionate because it was determined by the prison regime in which he had been placed and by no other consideration. While the respondent government pointed to differences between male and female prisoners – with the latter generally convicted of less serious and violent crimes, proven to be less violent in prison and posing lower security risks – the majority both criticises the absence of data supporting these arguments and indicates that data would not in any event have sufficed as such a generalised approach would conflict with the need for an individual assessment (see §§ 89–90 of the majority judgment).

23. As indicated previously, as a result of the flawed exhaustion of domestic remedies, the majority switches between, on the one hand, the only and specific complaint in relation to which the applicant could be said to have exhausted domestic remedies – the complaint that he was not permitted to attend the funeral on discriminatory grounds – and, on the

[22] *Khamtokhu and Aksenchik*, cited above, §§ 67-68.

other, the absence of an individualised assessment of his request for prison leave and the much broader question of the justification and proportionality of a general prison regime which differentiates between male and female prisoners. This becomes particularly clear in § 90 of the majority judgment, where the analysis strays well beyond the question of prison leave to the CPT's criticism of the Latvian progressive sentence execution regime. However, the assessment which the Court must undertake in relation to an individual decision and a general legislative choice is qualitatively different.

24. In order to determine the proportionality of a general measure, the Court will primarily assess the legislative choices underlying it.[23] Had the legislature when adopting its general measure sought to weigh the competing interests or assess the proportionality of any restrictions placed?[24] Yet the chamber did not question the respondent government in this regard and nowhere in the majority judgment did it seek to present, explain or test the legislative choices lying behind the Latvian Sentence Enforcement Code which it had decided to tackle in quite a broad manner. Attempts by the respondent government to explain and justify its differentiated prison regime, the differences between male and female prisoners and the different nature of the crimes committed by men and women are all dismissed rather cursorily. While the quality of the data presented by the respondent Government may not have been exemplary,[25] it is surprising in a discrimination context to dismiss such data as being in any event insufficient.

25. Indeed it is difficult to read the majority judgment without questioning whether it sits easily with the acceptance in prior Article 14 cases of positive discrimination in prisons and in domestic penal policy as a possibly justified and proportionate means to accommodate the differences between male and female prisoners and their particular needs. In Khamtokhu and Aksenchik, for example, the Court pointed to the statistical data provided by the respondent government showing a considerable difference between the total number of male and female prison inmates and stated:

> "it is not for the Court to reassess the evaluation made by the domestic authorities of the data in their possession or of the penological rationale which such data purports to demonstrate. In the particular circumstances of the case, the available data [...] provide(s) a sufficient basis for the Court to conclude that there exists a public interest

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[23] See, for example, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, 22 April 2013.

[24] See, for example, *Dickson v. the United Kingdom* [GC], no. 44362/04, § 79, 4 December 2007, and also *Hirst v. the United Kingdom (no. 2)*, no. 74025/01, § 79, 6 October 2005.

[25] See, however, the concurring opinion of Judge Sajó in *Khamtokhu and Aksenchik*, cited above, explaining why such a poor defence should not necessarily be fatal.

underlying the exemption of female offenders from life imprisonment by way of a general rule".[26]

26. Rule 1 of the Bangkok Rules states that in order for the principle of non-discrimination to be put into practice, account shall be taken of the distinctive needs of women prisoners in the application of those rules. Providing for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory.[27] The reference to substantive equality in § 86 of the majority judgment is to be welcomed. However, it sits uneasily with elements of the discrimination analysis which then follow.

27. We do not mean to suggest that refusing prisoners – male or female – an individual assessment on the merits of a request for prison leave is Convention compatible. It is not. However, since the judges in the majority were not in a position to concentrate on that straightforward Article 8 question and since they did not limit themselves to the complaint which the applicant had actually exhausted, they extended their review to the Latvian Sentence Enforcement Code more generally, to differences in the treatment of male and female prisoners more generally (with the treatment of leave requests just one issue) and indeed to the progressive sentence execution system under which all prisoners are required to spend a predetermined minimum amount of time at both maximum and medium security levels. This was a mistake given that, as the majority recognises, it is not the task of this Court to examine domestic legislation in the abstract.

Conclusions

28. Had the applicant raised a complaint before the domestic courts about the lack of individual assessment of his request to attend the funeral of his father, this Court could have focused the present case on Article 8, finding a violation and thereby ensuring that detainees in Latvian prisons would be entitled to such individualised assessments of leave requests. A targeted finding of this nature would thereafter have required a targeted adjustment of Latvian penal legislation and practice. If the Latvian prison regime and Sentence Enforcement Code are vitiated by other problems, these could and should be raised in appropriate proceedings before the domestic courts in full compliance with the principle of exhaustion.

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[26] *Khamtokhu and Aksenchik*, cited above, § 82.

[27] See further UNODOC, *Handbook on Women and Imprisonment*, cited above. See also L. Paprzycki, "Protection of Women in Prison under the European Convention on Human Rights" in P.H. van Kempen and M. Krabbe (eds.), cited above.