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

FOURTH SECTION

DECISION

Application no. 5433/17
Csaba DOMJÁN
against Hungary

The European Court of Human Rights (Fourth Section), sitting on 14 November 2017 as a Chamber composed of:

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Faris Vehabović,
Egidijus Kūris,
Marko Bošnjak,
Péter Paczolay, *judges*
and Andrea Tamietti, *Deputy Section Registrar,*

Having regard to the above application lodged on 29 December 2016,

Having regard to the decision to apply the pilot-judgment procedure in the case of *Varga and Others v. Hungary* (nos. 14097/12 and 5 others, 10 March 2015),

Having regard to the decision of 8 November 2016 to suspend the examination of applications against Hungary concerning conditions of detention, including those of which notice has already been given to the Government, until 31 August 2017,

Having deliberated, decides as follows:

THE FACTS

1. The applicant is a Hungarian national who was born in Pécs and is detained in Szeged Prison.

A. The circumstances of the case and developments in the national legislation

1. The circumstances of the applicant's detention

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

3. On 12 December 2010 the applicant was placed in Pálhalma Prison. He alleged that during his time in Pálhalma Prison he had been kept in a cell measuring thirty square metres, which he had had to share with fourteen other inmates. Outdoor exercise had been limited to one hour a day and the applicant had spent the remainder of his time in the cell. Furthermore, the cell had been infected with bed bugs.

4. In March 2011 the applicant was transferred to the Prison of the Central Transdanubia Region, where he was first accommodated together with seventeen other inmates in a cell measuring forty-five square metres, then together with thirteen other inmates in a cell measuring twenty-five square metres. He claimed that in both cells the toilet had been separated from the living area only by a curtain. The applicant was allowed to take a five-minute shower once a week.

5. As of 11 January 2012, he was transferred to Baranya County Prison where he was held in a cell measuring sixty square metres and accommodating twenty eight inmates including him. Throughout this confinement he had outdoor stays for only an hour a day in a yard measuring twenty-five square metres. He spent the remainder of his time in the cell.

6. Between March 2015 and 15 July 2015 the applicant was detained in Veszprém County Prison. The cell where he was held measured seven square metres and accommodated three inmates. It was equipped with a separate toilet. The applicant was allowed to take a ten-minute-long shower once a week.

7. From 15 July 2015 to 9 July 2016 the applicant was detained in Szombathely Prison, where six persons were held in a cell measuring twelve square metres. Outdoor exercise was limited to one hour a day.

8. Since 9 July 2016 the applicant has been detained in Szeged Prison with eleven other detainees in a cell measuring twenty-five square metres. The applicant is allowed to move freely outside his cell.

2. Developments in the national legislation

9. On 25 October 2016 the Hungarian Parliament adopted Act No. CX of 2016, amending certain Acts on criminal matters in relation to the judgment adopted by the European Court of Human Rights in the case of *Varga and Others v. Hungary* (hereinafter, the "2016 Act" – see paragraph 15 below). This Act was promulgated on 4 November 2016 and

entered into force on 1 January 2017. It was aimed at introducing preventive and compensatory remedies in cases of inadequate conditions of detention.

10. On 15 September 2017, the Minister of Justice of Hungary addressed to the President of the Court a letter "concerning the implementation of the pilot judgment in the case of *Varga and Others v. Hungary*". The Minister noted that under the 2016 Act, a complaint alleging conditions of detention in violation of Article 3 of the Convention could be presented to the prison governor, who should, as far as practicable, take the necessary actions in order to improve the conditions or counterbalance the injury suffered (for instance: relocation, increasing the time allowed for visits or the time spent in the open air, and improvement of the sanitary facilities). According to the Minister, in view of the progress of the prison capacity expansion programme, there was a "real prospect" of finding penal institutions with sufficient capacity. A preventive remedy could, however, be used only while the detention was still ongoing. After release, and within six months of the termination of the prison sentence, only a compensatory claim could be submitted. This could lead to the granting of a sum calculated on the basis of the number of days spent in conditions contrary to Article 3 of the Convention, the daily tariff ranging from a minimum of 1,200 Hungarian forints (HUF – approximately 4 euros (EUR)) and a maximum of HUF 1,600 (approximately EUR 5.3). The judge must exercise his or her judicial discretion in order to award an amount proportionate to the gravity of the violation found, taking into account, for instance, the absence of toilets separated from the living space in the cell, in addition to a general situation of overcrowding, or to other inadequate conditions of detention. The sum thus determined must be paid within sixty days of the decision being served.

11. The Minister further stated that from 1 January to 7 August 2017, 5,447 applications for compensation had been lodged with the penal institutions, thus showing the accessibility of the new remedy. Referring to the strict time-limits provided for by the 2016 Act, the Minister argued that the remedy also satisfied the requirement of quick adjudication and underlined that the judge responsible for the execution of sentences must provide reasons for his or her decision. As to the amount of compensation, the Minister noted that the Italian legislation adopted following the pilot judgment in the case of *Torreggiani and Others v. Italy* (nos. 57875/09 and 6 others, 8 January 2013) fixed the sum to be granted at EUR 8 per day of detention in conditions incompatible with the requirements of Article 3 of the Convention. Having regard to the burden-bearing capacity and of the economic realities of the two countries, the choice of the Hungarian legislator to fix the daily tariff at between EUR 4 and 5 could be deemed to be reasonable.

12. The Minister lastly noted that out of 3,554 cases brought before the judges responsible for the execution of sentences, 248 claims had been

adjudicated by 14 July 2017, awarding a total amount of HUF 153,510,900 (approximately EUR 497,040). Moreover, due to the extension of the prison capacity achieved as part of the action plan, overcrowding in Hungarian prisons had significantly dropped: whereas in 2014 the occupancy level had been 413%, in 2016 and 2017 the respective figures were 131% and 129%.

13. In the light of the above, the Minister urged the Court to find that the preventive and compensatory remedies provided for by the 2016 Act were effective and needed to be exhausted in accordance with Article 35 § 1 of the Convention.

14. In a letter of 27 September 2017 the Registry of the Court asked the applicant to indicate whether he had used the remedies provided for by the 2016 Act or intended to do so. In his reply of 12 October, the applicant stated that he had lodged a claim under the relevant domestic legislation and the proceedings were still pending before the Szeged High Court.

B. Relevant domestic law

15. The 2016 Act introduced, *inter alia*, new sections into Act No. CCXL of 2013 on the enforcement of punishments, measures, certain coercive measures and confinement for regulatory offences. In so far as relevant, those sections read as follows:

Compensation for conditions of detention violating fundamental rights

Section 10/A

"(1) Convicts and persons detained on other grounds are entitled to compensation for not having been provided with the inmate living space specified in the law and for any other conditions of detention violating the prohibition of torture or cruel, inhuman or degrading treatment, in particular for violations caused by unseparated toilets, and lack of proper ventilation or lighting or heating and disinfection (henceforth together: conditions of detention violating fundamental rights). Compensation shall be awarded for the number of days spent in conditions of detention violating fundamental rights. Compensation shall be paid by the State.

(2) Under the head specified in subsection (1), no further indemnification or damages for infringement of personality rights shall be sought but convicts and persons detained on other grounds may apply to a civil court seeking additional damages exceeding the amount of compensation.

(3) The daily compensation tariff shall be a minimum of HUF 1,200 but a maximum of HUF 1,600.

(4) A compensation claim may be made within six months of the date on which the conditions of detention violating fundamental rights ceased to exist. This time-limit is absolute. For the purposes of this subsection, conditions of detention violating fundamental rights will not be considered to have ceased to exist where those conditions are interrupted for a short period, but for a maximum of thirty days, on account of the fact that within the term of imprisonment of the convict or person detained on other grounds the statutory living space has been provided.

(5) A compensation claim may be lodged by a convict or person detained on other grounds or by their counsel or, if the detainee has already been released, by his legal representative. The compensation claim shall be lodged in writing with the penal institution where the detention is being effected or, if the convict or person detained on other grounds has been released, with the penal institution which released him. In the application for compensation the convict or person detained on other grounds shall give a statement as to whether the European Court of Human Rights (henceforth: the ECHR) has obliged the State to pay damages to him on account of conditions of detention violating fundamental rights and whether a civil court has already awarded him indemnification or damages for infringement of personality rights. If the answer is yes, the detainee shall also state the name of the court and the case number in the application.

(6) Save for inmates undergoing involuntary treatment or temporary involuntary treatment, a further condition for the lodging of such an application for compensation is the prior submission by the convict or person detained on other grounds of a complaint under Section 144/B to the head of the organ responsible for the enforcement of the sentence about the conditions of detention violating fundamental rights. This condition shall be applicable where the number of days spent in conditions of detention violating fundamental rights has exceeded thirty (30). Where conditions of detention violating fundamental rights exist over a longer period of time, a further complaint does not need to be lodged within three months.. Where the convict or person detained on other grounds could not enforce his right of complaint for reasons beyond his control, it shall not be imputed to him.

(7) It will be possible to satisfy other claims from the compensation awarded only

(a) up to the amount of a civil claim or of an indemnification or damages for infringement of personality rights awarded under a final civil judgment in relation to the offence for the enforcement of which the compensation is awarded, and

(b) up to the amount of a child-support claim enforced in enforcement proceedings for the collection of child support.

(8) Where in the cases specified in subsection (7) the amount of compensation is not enough to satisfy all the claims, first the child-support claim, then the civil claim and the indemnification or damages for infringement of personality rights awarded on account of the offence shall be satisfied in equal proportion.

Section 10/B

(1) The minister responsible for justice shall make arrangements for the payment of the compensation awarded.

(2) In making the arrangements for the payment of the compensation, the minister responsible for justice shall, from the register kept by the office of the Hungarian Court Bailiffs' Organisation, request data on any child-support enforcement proceedings stayed or pending against the convict or person detained on other grounds, as well as the case number and the name of the bailiff with jurisdiction in the case.

(3) Where the data received under subsection (2) or from the penitentiary judge indicate that enforcement proceedings for the collection of child support or for the satisfaction of a civil claim or for the payment of indemnification or damages for infringement of personality rights awarded against the inmate on account of the commission of the offence have been instituted, the minister responsible for justice shall inform the bailiff of the amount of compensation awarded to the debtor and the

claims that may be satisfied from the compensation by way of debt collection. In such cases the compensation may, in line with Section 10/A(8), only be paid after the bailiff has taken the necessary enforcement measures for the attachment of the debt.

(4) Where in his decision the penitentiary judge orders that a partly or fully unpaid civil claim or indemnification or damages for infringement of personality rights awarded on account of the committed offence are to be deducted and paid to the beneficiaries of such claims, the remaining compensation is to be paid to the convict or person detained on other grounds. Where the available data indicate that enforcement proceedings for the collection of child support have been instituted, the compensation may only be paid after the bailiff has, in line with Section 10/A(8), taken the necessary enforcement measures for the attachment of the child support Child support shall be collected primarily from the compensation payable to the convict or person detained on other grounds.

(5) Payment may be effected via bank transfer to the bank account number given by the convict or person detained on other grounds or paid into the bank account of, or in cash to, the beneficiary of the indemnification or damages for infringement of personality rights awarded on account of the offence committed, in accordance with his or her request. Where the convict or person detained on other grounds is still detained, he may request that the compensation be transferred to a deposit account.

(6) The minister responsible for justice may process personal data obtained under subsections (2)-(4) and being related to the enforcement of a child support claim or civil claim or indemnification or damages for a violation of personality rights awarded on account of the offence committed, for thirty days from the date of payment of the compensation.

Compensation proceedings to redress damage resulting

from conditions of detention violating fundamental rights

Section 70/A

(1) A decision on whether compensation is payable to an inmate for damage resulting from conditions of detention violating fundamental rights shall be taken by the penitentiary judge at the request of the inmate or his counsel. A decision by the penitentiary judge may be taken also on the basis of documents.

(2) The penal institution shall transmit the application, together with its opinion on the application, to the penitentiary judge within fifteen days or, where several penal institutions are affected, within thirty days with the specification that if the inmate has lodged a complaint alleging conditions of detention violating fundamental rights, the penal institution's opinion may only be transmitted after the complaint, including an application for judicial review lodged against a decision on relocation, has been determined. A summary of the inmate's records containing data on the conditions of detention in the period complained of shall be appended to the opinion.

(3) The penitentiary judge shall, *ex officio*, examine whether the ECHR has obliged the State to pay damages to the inmate on account of the conditions of his detention violating fundamental rights or whether a civil court has awarded indemnification or damages for infringement of personality rights, and if the answer is yes, the penitentiary judge shall obtain the relevant decisions before taking a decision.

(4) The penitentiary judge shall evaluate the inmate's conditions of detention in their entirety and shall determine the daily compensation tariff on the basis of the extent of the injury caused. Thereafter, compensation shall be calculated by multiplying the

daily compensation tariff by the time spent in conditions of detention violating fundamental rights.

(5) The penitentiary judge shall reject the application on the basis of the documents, without an examination on the merits, where

(a) the application has been lodged belatedly

(b) the application has been lodged by a person not entitled to lodge such an application

(c) the inmate has failed to lodge the complaint as specified in Section 144/D, or

(d) in respect of the period indicated in the application, the ECHR has obliged the State to pay compensation, or a civil court has awarded indemnification or damages for infringement of personality rights on account of the conditions of the inmate's detention violating fundamental rights.

(6) Where the inmate has been released, proceedings shall be conducted by the penitentiary judge with jurisdiction for the location of the penal institution, but if a separate request to that effect has been made by the inmate or his defence counsel, the penitentiary judge with jurisdiction for the inmate's place of domicile or place of residence shall proceed.

...

Section 70/B

(1) Where the court that dealt with the criminal case against the inmate has awarded a civil claim to the injured party or his heir or referred the enforcement of the civil claim to another legal avenue, the penitentiary judge shall invite the injured party to submit, within a time-limit of fifteen days, a statement as to whether the inmate has paid the civil claim awarded to the injured party or has paid – if the injured party lodged an action seeking to recover the damage caused by the offence or seeking the payment of damages for infringement of personality rights – the indemnification or damages for infringement of personality rights awarded by the civil court. If full payment has not been made by the inmate, the statement shall also confirm whether the injured party requests the deduction of the outstanding claim from any compensation that may be awarded to the inmate.

(2) In the case specified in subsection (1), the penitentiary judge shall also invite the injured party to state the precise amount he is claiming and to append any documents in his possession in relation to the civil claim or the indemnification or damages for infringement of personality rights awarded to him on account of the committed offence. Where the penitentiary judge adjudicates the case on the basis of documents, he shall obtain a statement from the inmate on the payment of the indemnification or damages for infringement of personality rights awarded against him on account of the committed offence.

(3) If the injured party requests the payment of the outstanding part of the indemnification or damages for infringement of personality rights awarded to him on account of the committed offence, the penitentiary judge shall request data from the register kept by the office of the Hungarian Court Bailiffs' Organisation on any stayed or pending proceedings instituted for the collection of such claims, as well as the case number and the name of the bailiff with jurisdiction in the case.

(4) In the case specified in subsection (1), the time-limit specified in Section 50 subsection (1)(d) shall be extended by sixty days. Where the invitation to the injured party has not produced any result within sixty days, the penitentiary judge shall

adjudicate the case by ignoring any outstanding amount of indemnification or damages for infringement of personality rights awarded on account of the committed offence.

(5) The penitentiary judge shall make arrangements for the payment from the compensation amount to the beneficiary of any outstanding civil claim amount or indemnification or damages for infringement of personality rights awarded on account of the committed offence, where

(a) the civil claim or the indemnification or damages for infringement of personality rights awarded to the injured party on account of the committed offence has not yet or not fully been paid by the inmate,

(b) no enforcement proceedings have been instituted for the collection of the claims specified in point (a),

(c) in examining a defence statement to that effect filed by the inmate or his counsel, the penitentiary judge has established that the limitation period specified in the Civil Code has not yet elapsed.

(6) In the decision the penitentiary judge shall oblige the State to pay the compensation and shall invite the State to effect the payment within a time-limit of sixty days from the service of the decision.

Review of a decision on the measures taken following a complaint

about conditions of detention violating fundamental rights and on relocation

Section 75/A

(1) An application by the inmate or his counsel for the judicial review of a decision on the measures taken following a complaint about conditions of detention violating fundamental rights and on relocation shall be determined by the penitentiary judge within five working days of the receipt of the application.

(2) If in the review the penitentiary judge finds that the governor of the penal institution has failed to take a measure the penitentiary judge shall, by applying – *mutatis mutandis* – Section 72(1)(d), instruct the governor of the penal institution to conduct the proceedings.

(3) The costs of the criminal proceedings shall be borne by the State.

...

Complaint about conditions of detention violating fundamental rights

Section 144/B

(1) The inmate or his counsel may submit a written complaint alleging conditions of detention violating fundamental rights directly to the governor of the penal institution.

(2) The complaint shall be determined within fifteen days of its submission. Upon receipt of the complaint, the governor of the penal institution shall, in the event of conditions of detention violating fundamental rights, take the necessary actions to improve the conditions or to counterbalance the injury suffered. With the exceptions specified in subsection (3) below, the governor of the penal institution shall issue a decision setting out the actions to be taken.

(3) Where the conditions of detention violating fundamental rights on account of the lack of statutory inmate living space cannot be terminated in the penal institution in issue, the governor of the penal institution shall, with urgency, contact the National

Prison Administration's department responsible for detention matters and shall request the inmate's relocation to another penal institution capable of guaranteeing the statutory inmate living space.

(4) The head of the National Prison Administration's department responsible for detention matters shall decide on the request within eight days, in a reasoned decision. If the statutory inmate living space can be guaranteed in another penal institution, the head of the National Prison Administration's department responsible for detention matters will designate such a penal institution for serving the term of imprisonment; otherwise, it shall not issue any decision and shall inform the governor of the penal institution accordingly. In deciding on the inmate's relocation, the inmate's contact rights shall be taken into consideration.

(5) Where the conditions of detention violating fundamental rights on account of the lack of the statutory inmate living space can be terminated neither within the penal institution in issue, nor by relocating the inmate to another penal institution, the governor of the penal institution shall take action to counterbalance the injury, provided that no such action has yet been taken by him and that the taking of such action does not hamper the performance of tasks, and provided that the conditions thereof are ensured.

(6) The inmate and his defence counsel may apply to the penitentiary judge for a review against action taken under subsections (2) and (5) above, or for a failure to take action, and if relocation violates the inmate's contact rights. The application for review shall have a suspensive effect on the relocation.

Section 187/A

(1) Where the purposes of the incarceration may be achieved in this way as well, if conditional release is imminent or if conditional release has been excluded, before the prospective date of his release the inmate may be placed in reintegration custody if he consents to being placed in such custody and if he has been sentenced to imprisonment for an offence committed with criminal negligence. The same applies to a person sentenced for an intentional offence, provided that he

(a) was not convicted for a violent crime committed against another person specified in Article 459(1) point 26 of the Criminal Code,

(b) was sentenced to enforceable imprisonment for the first time or is a repeat offender without being a recidivist, and

(c) is serving a term of imprisonment not exceeding five years.

(1a) Reintegration custody shall last

(a) for a maximum of one year if the inmate was sentenced to a term of imprisonment for an offence committed with criminal negligence,

(b) in cases other than the one specified in point (a), for a maximum of ten months.

...

Section 390

(8) Where a pre-trial detainee or his counsel has lodged a complaint alleging conditions of detention violating fundamental rights, the governor of the penal institution shall also append a consent statement by the person authorised to make decisions in respect of the pre-trial detainee to the request made under Section 144/B(3) for the relocation of the pre-trial detainee to another penal institution. In such cases the complaint shall be determined and a decision made within thirty days.

Section 436

...

(10) A compensation claim under Section 10/A, enacted by Section 22 of Act No. CX of 2016, may also be submitted by a convict or person detained on other grounds

(a) in respect of whom the injury having resulted from conditions of detention violating fundamental rights ceased to exist within one year preceding the entry into force of the amendment,

(b) who submitted an application to the ECHR alleging conditions of detention violating fundamental rights and the application was registered by the ECHR before the entry into force of the amendment, except where the inmate submitted his application to the ECHR after 10 June 2015 and by the date of receipt of the application, more than six months have elapsed since the termination of the violation.

(11) For the purposes of subsection (10) the absolute time-limit specified in Section 10/A (4) shall start to run on the date of the entry into force of this provision. In determining claims submitted under subsection (10), Section 10/A(6) shall not be applicable and the time-limit specified for the proceedings before the penitentiary judge under Section 50(1)d) shall be extended by thirty days.

(12) Where data are obtained indicating that before the entry into force of the compensation claim provided for in Section 10/A of Act No. CX of 2016, on account of conditions of detention violating fundamental rights

(a) proceedings were instituted before a civil court, or

(b) an application was submitted to the ECHR and the application was registered by the ECHR before the date of the entry into force of the amendment

the penitentiary judge shall suspend the proceedings until the completion of these proceedings or, if there are proceedings pending before the ECHR, until notification by the ECHR of the referral of the case to national adjudication has been received."

C. Relevant Council of Europe documents

16. At its 1288th meeting held on 6-7 June 2017, in the ambit of the execution of the judgments *Varga and Others* and *István Gábor Kovács v. Hungary*, the Committee of Ministers of the Council of Europe adopted the following decision (CM/Del/Dec(2017)1288/H46-16; hereinafter, the "decision of June 2017"):

"The Deputies

1. welcomed the authorities' commitment to resolve the problem of prison overcrowding in Hungary and noted with interest that the substantive measures taken appear to be showing the first concrete results, in particular a decrease in the rate of overcrowding and a drop in the shortage of prison places;

As regards individual measures

2. noted that a number of applicants are still detained in conditions not meeting the minimum standards for personal living space and reminded the authorities of their

obligation to rectify the situation by ensuring that all applicants' conditions of detention are in line with the Convention; invited them to provide the outstanding information, in particular, on other relevant aspects of the material conditions of detention where the available living space is between 3 and 4 m² per inmate;

As regards general measures

3. noted with interest the further extension of the application of "reintegration custody", the facilitation of an increase in the use of house arrest, and the slight decrease in the number of defendants placed in pre-trial detention; strongly encouraged the authorities further to pursue their efforts in this regard and to find all possible means "to encourage prosecutors and judges to use as widely as possible alternatives to detention and redirect their criminal policy towards reduced use of imprisonment"; invited them to submit updated statistical information on the impact and further promotion of alternative sanctions and the reduction of overcrowding;

4. welcomed the fact that, in response to the *Varga and Others* pilot judgment, the authorities have introduced both a preventive and a compensatory remedy aimed at guaranteeing genuinely effective redress for Convention violations arising from poor material conditions of detention, which took effect on 1 January 2017; invited them to provide further detailed information (including statistical data) on the implementation and functioning of these newly introduced remedies, notably in the light of the monitoring they will undertake in this context, and more concretely on the impact of the preventive remedy on the general problem of prison overcrowding;

5. welcomed the information received as regards the other violations concerned by this group and invited the authorities to submit the outstanding information;

6. in view of the European Court's decision to suspend the examination of the similar pending applications until 31 August 2017, invited the authorities to provide the information expected by that date, at the latest."

COMPLAINTS

17. The applicant complained under Article 3 of the Convention about his conditions of detention. He also submitted under Article 13 of the Convention that he did not have an effective domestic remedy in respect of his complaint under Article 3.

THE LAW

A. Complaint under Article 3 of the Convention

18. The applicant submitted that the conditions of his detention had fallen short of standards compatible with Article 3 of the Convention. In particular, he complained that he had been detained in overcrowded cells.

Article 3 reads as follows:

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

1. The pilot judgment

19. On 10 March 2015 the Court adopted a pilot judgment regarding conditions of detention in Hungary (see *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, 10 March 2015). It found a breach of Articles 3 and 13 of the Convention, considered that those violations originated "in a widespread problem resulting from a malfunctioning of the Hungarian penitentiary system" and held that Hungary "should produce, under the supervision of the Committee of Ministers ... a time frame in which to make appropriate arrangements and to put in practice preventive and compensatory remedies in respect of alleged violations of Article 3 of the Convention on account of inhuman and degrading conditions of detention" (ibid., §§ 110 and 113 and point 9 of the operative part). The Court has also adopted pilot judgments addressing the question of prison overcrowding in respect of further States: Romania (see *Rezmiveș and Others v. Romania*, nos. 61467/12 and 3 others, 25 April 2017); Bulgaria (see *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015); Italy (see *Torreggiani and Others v. Italy*, nos. 43517/09 and 6 others, 8 January 2013); Poland (see *Orchowski v. Poland*, no. 17885/04, 22 October 2009; and *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009); and Russia (see *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012). Furthermore, it summarised the standards applicable for the assessment of prison overcrowding in the Grand Chamber case of *Muršić v. Croatia* ([GC], no. 7334/13, §§ 102-141, ECHR 2016).

20. In the present case, the Court will examine whether, in the light, *inter alia*, of the principles stated in its pilot judgment, the entry into force of 2016 Act has provided an effective remedy or a combination of remedies, both preventive and compensatory in nature, guaranteeing genuine redress for Convention violations originating in prison overcrowding and other unsuitable conditions of detention and, if so, whether the applicant has exhausted such remedies.

2. The 2016 Act

(a) The preventive remedy

21. The Court observes that under new section 144/B, inmates or their counsels can submit to the governor of the penal institution a complaint alleging that the conditions of their detention are violating their fundamental rights. If he or she finds the complaint to be well-founded, the governor should, within fifteen days, issue a decision indicating the actions necessary to improve the conditions. Those actions may include relocation within the

same penal institution or to another institution, which can be ordered by taking into consideration the inmate's contact rights (see new section 144/B(3) and (4)). In the event that relocation is not possible or sufficient, the governor must take action to counterbalance the injury suffered (see new section 144/B(5)).

22. In the Court's view, nothing proves that the new "complaint about conditions of detention violating fundamental rights" will not offer realistic perspectives of improving unsuitable conditions of detention, and will not be capable of providing inmates with an effective possibility of bringing those conditions in line with the requirements of Article 3 of the Convention. Although the complaint will first be examined by a non-judicial authority – the prison governor – a further judicial review before the judge responsible for the execution of sentences to examine the actions taken by the governor, or the failure to take action, is explicitly provided for by new section 144/B (6).

23. The Court also observes that in its decision of June 2017 (see paragraph 16 above), the Committee of Ministers of the Council of Europe welcomed the authorities' commitment to resolve the problem of prison overcrowding in Hungary and noted (a) that the substantive measures taken appeared to be showing the first concrete results, in particular a decrease in the rate of overcrowding and a drop in the shortage of prison places; and (b) the further extension of the application of "reintegration custody", the facilitation of, and increase in, the use of house arrest, and a slight decrease in the number of defendants placed in pre-trial detention. Those improvements, and the ones that might be achieved in the future, might help the Hungarian authorities in adopting, also on a case-by-case basis, concrete and effective actions to further tackle the systemic problem of prison overcrowding.

(b) The compensatory remedy

24. As to the application for financial compensation, it can be made both by convicts and by persons detained on grounds other than serving a prison sentence. An applicant could allege not only that he or she had not been provided with the living space provided for by law, but also that any other conditions of his or her detention (in particular, unseparated toilets, lack of proper ventilation or lighting or heating and disinfection) violated the prohibition of torture or cruel, inhuman or degrading treatment (see new Section 10/A(1)).

25. The lodging of an application for financial compensation is subjected to two pre-conditions: the previous lodging of a complaint alleging conditions of detention violating fundamental rights under new section 144/B (see paragraph 16 above); and compliance with the six-month time-limit running from the day on which the conditions of detention violating fundamental rights have ceased to exist (see new section 10/A(4)

and (6)) or, for those who had already been released at the date of entry into force of the 2016 Act, from 1 January 2017 (see new section 436(10)(a) and (11)). The Court is of the opinion that neither of those two conditions seem to be unreasonable obstacles to the accessibility of the remedy. It notes that transitional provisions (notably, new section 436(10)(b) and (11)) were introduced in order to allow applicants who had introduced an application to the Court to seek compensation at the domestic level.

26. An application for compensation has to be forwarded, within a maximum of thirty days (see new section 70/A(2)), to the judge responsible for the execution of sentences, who must evaluate the inmate's conditions of detention in their entirety and determine the daily compensation tariff on the basis of the extent of the injury caused (see new section 70/A(4)). The amount of compensation will be calculated by multiplying the daily tariff (between HUF 1,200 (approximately EUR 4) and HUF 1,600 (approximately EUR 5.3)) by the time spent in conditions of detention violating fundamental rights (see also new section 10/A(1) and (4)).

27. The Court has held on a number of occasions that, in accordance with the principle of subsidiarity, a wider margin of appreciation should be left to the domestic authorities in respect of the implementation of a pilot judgment and in assessing the amount of compensation to be paid. Such an assessment should be carried out in a manner consistent with their own legal system and traditions and take into account the standard of living in the country concerned, even if that results in awards of amounts that are lower than those fixed by the Court in similar cases (see *Cocchiarella v. Italy* [GC], no. 64886/01, § 80, ECHR 2006-V; *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 141, ECHR 2014; *Bizjak v. Slovenia* (dec.), no. 25516/12, § 39, 8 July 2014; *Anastasov and Others v. Slovenia* (dec.), no. 65020/13, § 71, 18 October 2016; and *Hodžić v. Slovenia* (dec.), no. 3461/08, § 13, 4 April 2017).

28. The Court further reiterates that, within the context of prison overcrowding, in the case of *Bizjak* (decision cited above, §§ 37-43), it held that compensation awarded by a national court and representing approximately 30% of the award made by the Court in the pilot judgment *Mandić and Jović v. Slovenia* (nos. 5774/10 and 5985/10, § 132, 20 October 2011) did not appear to be unreasonable or disproportionate. The Court took a similar stance in *Stella and Others v. Italy* ((dec.), nos. 49169/09 and 10 others, §§ 19 and 62, 16 September 2014), where the level of compensation available domestically was EUR 8 per day of detention in conditions incompatible with Article 3 of the Convention. Having regard to economic realities, as suggested by the Government (see paragraph 11 above), the Court reaches the same conclusion as concerns an award comprised of between EUR 4 and EUR 5.3 per day of unsuitable conditions of detention in the Hungarian context. Furthermore, the Court emphasises in this connection that the object of the present decision is the

potential compatibility of the domestic *ad hoc* compensation scheme, and not the question whether, in view of the sums awarded at the domestic level, the applicant has lost his victim status. This second type of assessment can be made, in every individual case, only after the relevant national remedy has been tried (see *Bizjak*, decision cited above, § 43; *Anastasov and Others*, decision cited above, § 72; and *Hodžić*, decision cited above, § 15).

29. It is also worth noting that under new section 70/B(6), if compensation is awarded, the judge responsible for the execution of sentences must invite the State to effect the payment within a time-limit of sixty days from the date on which the decision was served. Lastly, the Court cannot overlook that in its decision of June 2017 (see paragraph 16 above), the Committee of Ministers of the Council of Europe has "welcomed the fact that, in response to the *Varga and Others* pilot-judgment, [Hungary] ha[d] introduced ... a compensatory remedy aimed at guaranteeing genuinely effective redress for Convention violations arising from poor material conditions of detention".

(c) Conclusion

30. In the light of the above, the Court is satisfied that the 2016 Act has provided a combination of remedies, both preventive and compensatory in nature, guaranteeing in principle genuine redress for Convention violations originating in prison overcrowding and other unsuitable conditions of detention in Hungary.

3. Exhaustion of domestic remedies

(a) General principles

31. According to the Court's settled case-law, it is a fundamental feature of the machinery of protection established by the Convention that it is subsidiary to the national systems safeguarding human rights. This Court is concerned with supervision of the implementation by Contracting States of their obligations under the Convention. It should not take on the role of Contracting States, whose responsibility it is to ensure that the fundamental rights and freedoms enshrined therein are respected and protected on a domestic level. The rule of exhaustion of domestic remedies is based on the assumption – reflected in Article 13 of the Convention, with which it has close affinity – that there is an effective remedy available in respect of the alleged breach. The rule is therefore an indispensable part of the functioning of this system of protection (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 69, 25 March 2014).

32. States do not have to answer before an international body for their acts before they have had an opportunity to put matters right through their

own legal system, 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 *Vučković and Others*, cited above, § 70, and *Mozer v. the Republic of Moldova and Russia* [GC], no. 11138/10, § 115, ECHR 2016). The Court cannot emphasise enough that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of basic facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions (see *Demopoulos and Others v. Turkey* [GC] (dec.), nos. 46113/99 and 7 others, § 69, ECHR 2010).

33. Nevertheless, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198; *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV; and *Dalia v. France*, 19 February 1998, § 38, *Reports* 1998-I). In addition, in accordance with the "generally recognised principles of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his or her disposal (see *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999-V). However, the Court points out that the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see *Akdivar and Others*, cited above, § 71; *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX; *Grzinčič v. Slovenia*, no. 26867/02, § 84, 3 May 2007; *Hodžić*, decision cited above, § 18; and *Muratović v. Serbia* (dec.), no. 41698/06, § 15, 21 March 2017). Indeed, where legal systems provide protection of fundamental human rights and freedoms, it is in principle incumbent on the aggrieved individual to test the extent of that protection and allow the domestic courts to develop those rights by way of interpretation (see *Vučković and Others*, cited above, § 84; for specific applications of this principle, see *Köksal v. Turkey* (dec.), no. 70478/16, § 28, 6 June 2017; *Hasan Uzun v. Turkey* (dec.), no. 10755/13, § 69, 30 April 2013; and *Şefik Demir* v. *Turkey* (dec.), no. 51770/07, § 32, 16 October 2012, where the Court underlined that when a new legal provision was adopted with the specific aim of creating a remedy capable of redressing the type of complaint brought by the applicant, there was an interest in introducing a case before the domestic courts in order to allow them to apply the provision at issue).

34. An assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the Court. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Demopoulos and Others*, decision cited above, § 87, with further references therein). Among such exceptions are situations where, following a pilot judgment on the merits in which the Court found a systemic violation of the Convention, the respondent State has made available a specific remedy to redress at the domestic level grievances of persons in a similar situation (see *Łatak v. Poland*, no. 52070/08, § 79, 12 October 2010; *Stella and Others*, decision cited above, § 41; *Muratović*, decision cited above, § 16; and *Hodžić*, decision cited above, § 19; see also *Köksal*, decision cited above, §§ 24-30, where, at the time of the adoption of the Court's decision, the legislation of the respondent State provided for the future establishment of a commission charged with examining complaints similar to that of the applicant, with the further possibility of judicial review before the administrative jurisdictions and before the Constitutional Court).

(b) Application of those principles to the present case

35. The Court has found above that the 2016 Act meets in principle the criteria set out in the pilot judgment given in the case of *Varga and Others v. Hungary* (see paragraphs 21-30 above). Consequently, as the Court finds it justified to apply the exception to the principle on exhaustion of domestic remedies (see paragraph 34 above), the present applicant and all others in his position must use the remedies introduced by that Act, namely, a complaint about conditions of detention (see new section 144/B) and/or an application for compensation for conditions of detention violating fundamental rights (see new section 10/A).

36. In reply to a request by the Registry for additional information, the applicant stated, in a letter of 12 October 2017, that he had made use of those remedies but the ensuing proceedings were still pending before the national courts.

37. The Court consequently notes that, on the one hand, the outcome of the applicant's case is uncertain at present. On the other hand, if his application to the national courts proves unsuccessful, it is open for him to lodge a fresh application with the Court within a period of six months after the exhaustion of all effective domestic remedies.

38. The Court also points out that it is ready to change its approach as to the potential effectiveness of the remedies in question, should the practice of the domestic authorities show, in the long run, that detainees are being refused relocation and/or compensation on formalistic grounds, that the domestic proceedings are excessively long or that domestic case-law is not in compliance with the requirements of the Convention (see, for example

and *mutatis mutandis*, *Bizjak*, decision cited above, § 44; *Uzun v. Turkey* (dec.), no. 10755/13, § 41, 30 April 2013; *Muratović*, decision cited above, § 19; and *Hodžić*, decision cited above, § 22). Any such future review will involve determining whether the national authorities have applied the 2016 Act in a manner that is in conformity with the pilot judgment and the Convention standards in general. The Court's ultimate supervisory jurisdiction remains in respect of any complaints lodged by applicants who, in conformity with the principle of subsidiarity, have exhausted available avenues of redress (see *Köksal*, decision cited above, § 29).

39. Having regard to the foregoing, the Court considers that this complaint is inadmissible as being premature and must be rejected under Article 35 §§ 1 and 4 of the Convention.

B. Complaint under Article 13 of the Convention

40. The applicant also complained that he did not have an effective domestic remedy in relation to his complaint under Article 3, in breach of Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

41. The Court has already found that the two new remedies are in principle effective for the purposes of Article 35 § 1 of the Convention (see paragraph 30 above). In view of the close link between that provision and Article 13, this finding is equally valid in the context of this complaint (see *Atanasov and Apostolov v. Bulgaria* ((dec.), nos. 65540/16 and 22368/17, § 72, 27 June 2017).

42. It follows that the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 23 November 2017.

Andrea Tamietti
Deputy Registrar

Ganna Yudkivska
President