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

THIRD SECTION

DECISION

Application no. 27683/13
Jozef KOKY
against Slovakia

The European Court of Human Rights (Third Section), sitting on 16 May 2017 as a Chamber composed of:

Helena Jäderblom, *President,*
Branko Lubarda,
Luis López Guerra,
Helen Keller,
Pere Pastor Vilanova,
Alena Poláčková,
Jolien Schukking, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 18 April 2013,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Jozef Koky, is a Slovak national who was born in 1977 and is detained in Ilava. Having been granted legal aid, he was represented before the Court by Mr M. Kuzma, a lawyer practising in Košice.

The Government of the Slovak Republic ("the Government") were represented by their Agent, Ms M. Pirošíková.

A. The circumstances of the case

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

3. On 3 February 2009 the Dolný Kubín District Court found the applicant guilty of armed robbery and theft and sentenced him to twenty-five years' imprisonment. Following an appeal by the Public Prosecution Service, the ruling on the sentence was quashed and a new sentence of life imprisonment was imposed by the Žilina Regional Court on 30 April 2009. On that day the ruling became final and binding.

4. The relevant part of the appellate judgment may be summarised as follows.

The applicant was found guilty of an offence specified in Article 47 § 2 of the Criminal Code (Law no. 300/2005 Coll., as amended) after having already in the past twice been found guilty of offences specified in that provision, with unconditional prison sentences being imposed on him. Thus, pursuant to the "three strikes" rule embodied in that provision, he had to be sentenced to imprisonment for life.

At the same time, none of the conditions stipulated in Article 39 §§ 1 and 2 of the Criminal Code were met, which might otherwise have enabled a prison sentence of twenty-five years to be imposed. Such conditions related to the circumstances of the case, the applicant's situation, and other factors, such as the level of his involvement in the preparation of and attempt to commit the offence in question and his cooperation in uncovering the offence, as well as his reduced sanity and plea bargain.

In that respect, the court of appeal found that the trial court had erred when it had accepted as fulfilling one of the conditions stipulated by Article 39 § 1 of the Criminal Code for the imposition of a twenty-five-year prison sentence the fact that the applicant had used a firearm exclusively as a threat and that neither the offence in issue nor the two earlier similar offences had attained a high degree of gravity.

More specifically, the court of appeal observed that the fact that the applicant had committed the offence while armed constituted an element of the offence in question and held that this excluded the possibility of accepting as a mitigating circumstance the fact that the firearm had only been used as a threat.

5. Nevertheless, the applicant twice availed himself of an extraordinary remedy – lodging an appeal on points of law with the Supreme Court. His first appeal of 3 June 2009 was declared inadmissible on 28 August 2009. His second appeal was lodged on his behalf by a legal-aid lawyer after being appointed on 2 May 2012.

6. In his second appeal, the applicant relied in particular on Law no. 576/2009 Coll., amending Article 47 § 2 of the Criminal Code as of 1 January 2010. In its amended form, this provision only allowed for the

imposition of a life sentence in a situation such as his if it was necessary to ensure the effective protection of society and there was no hope that a prison sentence of twenty-five years would sufficiently ensure the convict's rehabilitation.

7. On 26 September 2012 the Supreme Court rejected the applicant's second appeal, upholding the reasoning of the Regional Court. As amendment no. 576/2009 Coll. had only entered into force once the applicant's trial had been completed with final effect, it could not be relied on to improve his situation.

8. On 16 January 2013 the applicant challenged the judgments of the Supreme Court and the Regional Court before the Constitutional Court by lodging what he considered to constitute a complaint under Article 127 of the Constitution.

He invoked mainly his right to a fair trial and the prohibition of torture, arguing that imprisonment for life was clearly a disproportionate sentence, given the circumstances of his case.

Moreover, he contended that the higher courts' conclusions regarding the presence of any circumstances justifying the imposition of a twenty-five-year sentence had been arbitrary, partly because they had assessed some of the relevant facts erroneously and partly because they had failed to assess some of them at all.

9. In a letter of 25 January 2013 a single Constitutional Court judge informed the applicant under Section 23a of the Constitutional Court Act that his submission could not be dealt with as it clearly fell short of the requirements for a constitutional complaint.

10. The applicant's subsequent request for the re-opening of his proceedings was dismissed by the District Court on 13 November 2014 and, following the applicant's interlocutory appeal, by the Regional Court on 13 January 2015.

B. Relevant domestic law and practice

11. Release on parole is governed by the provisions of Articles 66 *et seq.* of the Criminal Code.

12. Article 66 § 1 allows for release on parole where a convicted prisoner's behaviour and compliance with the obligations imposed demonstrate his or her rehabilitation and where that prisoner can be expected to behave properly.

13. Under Article 67 § 2, a whole-life prisoner can be released on parole after having served at least twenty-five years of the sentence.

14. Article 67 § 3, as in force until 31 December 2009, prohibited the conditional release of persons (i) repeatedly sentenced to life imprisonment, or (ii) who were sentenced to life imprisonment under Article 47 § 2 of the Criminal Code.

15. As from 1 January 2010, reference to the latter category of convicts was deleted from that provision by virtue of the above-mentioned Law no 576/2009 Coll. (see paragraph 6 above).

16. In proceedings brought under file no. PL. ÚS 6/09 on 3 November 2008, the Pezinok District Court asked the Constitutional Court to examine whether Articles 47 § 2 and 67 § 3 of the Criminal Code (as in force at that time) were in conformity with the Constitution and Articles 3 and 5 § 4 of the Convention.

17. On 2 November 2011 the Constitutional Court discontinued the proceedings in respect of the latter provision with reference to amendment no. 576/2009 Coll.

A majority of judges then concluded that Article 47 § 2 of the Criminal Code was not contrary to Article 3 of the Convention. It was admitted that in a small number of cases the effects of that provision reached the limits of conformity with Constitution from the viewpoint of their proportionality. Emphasis was put on the fact that the amendment which had taken effect on 1 January 2010 gave judges wide discretion to take into account the particular circumstances of each case.

In separate opinions three judges disagreed with that conclusion. Views were expressed that Article 47 § 2 of the Criminal Code provided for disproportionate penalties. The offence of less serious robbery was referred to by way of example.

COMPLAINTS

The applicant complained under Articles 3 and 13 of the Convention about the imposition of a life sentence on him and that he had had no effective remedy at his disposal in that respect.

THE LAW

18. The applicant alleged a violation of Articles 3 and 13 of the Convention. The former provision reads:

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

The latter 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."

A. Parties' arguments

19. In his application, the applicant argued in particular that the imposition on him of a life sentence under the "three strikes" rule, pursuant to Article 47 § 2 of the Criminal Code, had been disproportionate, that the lawmaker had acknowledged the excessive nature of that rule by amending it through Law no. 576/2009 Coll., and that he had been unable to obtain a proper examination of the specific features of his situation which in his view had justified the imposition of a lesser sentence than that of life imprisonment.

20. In reply, the Government argued that the applicants' complaints were belated because they related to the application by the domestic authorities of the laws valid until 31 December 2009, which was more than six months before the introduction of the application in 2013. Moreover, they pleaded non-exhaustion of domestic remedies, arguing that the applicant had failed properly to assert his rights before the Constitutional Court.

21. As to the substance, the Government considered the application manifestly ill-founded. In that regard, they admitted that, at the time of the applicants' conviction, there had been no possibility for him to apply for release on parole. However, that situation had changed as early as on 1 January 2010 by means of the amendment no. 576/2009 Coll. allowing the applicant to seek release on parole after having served twenty-five years of his sentence.

In addition, the Government maintained that Article 39 of the Criminal Code had provided the courts adjudicating on the applicant's sentence with an adequate framework for considering all mitigating and aggravating circumstances, which the higher courts had properly done, albeit not concluding in the applicant's favour.

22. The applicant responded by filing a submission dated 6 October 2014 in which he advanced just-satisfaction claims but made no observations at all on the admissibility and merits of the application.

B. The Court's assessment

23. The Court observes that the Government have challenged the admissibility of the case under Article 35 § 1 of the Convention. However, it considers that this challenge needs no separate examination because the application is in any event inadmissible on other grounds, as specified below.

24. The Court observes first of all that the lawfulness of the applicant's conviction was established by the Supreme Court and as such does not constitute the core of the present application. Its main focus may rather be summarised as proposing that the applicant's sentence was too harsh and

that it had been reached without a proper examination of his individual circumstances.

25. In that regard, the Court summarised the relevant principles in its judgment in the case of *László Magyar v. Hungary* (no. 73593/10, §§ 46 and 47, 20 May 2014, with further references) as follows:

- A State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision that the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention.

- Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes.

- It is not the Court's role to decide what the appropriate term of detention applicable to a particular offence is or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court.

- Contracting States must remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention. This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case.

26. Moreover, the Court reiterates that a violation of Article 3 of the Convention may also result from a sentence being grossly disproportionate (see *Murray v. the Netherlands* [GC], no. 10511/10, § 99, ECHR 2016); however, the test for determining whether a sentence is indeed grossly disproportionate will only be met on rare and unique occasions (see *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, §102, ECHR 2013 (extracts)).

27. As regards the allegedly excessive harshness of the applicant's sentence, the Court notes that the applicant's life sentence was imposed on him by the Regional Court, in application of Article 47 § 2 of the Criminal Code, as in force until 31 December 2009. Under that provision, a life sentence was to be imposed on persons convicted for the third time of certain serious offences specified in that provision – including armed robbery, as in the applicant's case – provided that the previous two convictions had entailed unconditional prison sentences.

28. The Court also notes that, as the Government have argued, under the statutory regime in force at that time, and in particular under Article 39 §§ 1 and 2 of the Criminal Code, the imposition of a life sentence in situations such as that of the applicant was not mandatory if a judge concluded that there were any circumstances envisaged by that provision justifying the imposition of a prison term of twenty-five years. Whether or not such

circumstances applied in respect of the instant case, the question of the applicant's situation, and other factors was actually addressed by the Regional Court in its judgment of 30 April 2009 (see paragraph 4 above).

29. At the same time, the Court observes that, despite being represented by a lawyer and having been granted legal aid (see paragraph 1 above), the applicant has submitted no observations regarding the admissibility and merits of the case (see paragraph 22 above) and has thus not advanced any arguments in reply to those of the Government on these and other aspects of the case. Under Rule 44C § 1 of the Rules of Court, it may draw such inferences from the absence of any such observations as it deems appropriate.

30. Accordingly, the Court finds that, to the extent that the application has been substantiated, mitigating and aggravating factors within the meaning of its case-law (see *Vinter and Others*, cited above, § 106) were reviewable and were in fact reviewed in the applicant's case by a judge. However, this in and of itself does not exclude the possibility that the imposition of a life sentence may still not be compatible with the standards set by Article 3 of the Convention.

31. In particular, the Court has recently reiterated in its judgments in the case of *Murray* (cited above, § 99, with further references) and *Hutchinson v. the United Kingdom* ([GC], no. 57592/08, § 42, 17 January 2017), *inter alia*, that a life sentence can remain compatible with Article 3 of the Convention only if there is both a prospect of release and a possibility of review, both of which must exist from the moment of the imposition of the sentence.

32. Regarding the facts of the present case, the Court observes that the legal regime under which the applicant's life sentence was imposed on him with final effect on 30 April 2009 (see paragraph 3 above) changed on 1 January 2010 (see paragraphs 6 and 16 above).

33. In that respect, the Court considers that the crux of the present case lies precisely in the legal regime in force at the time of the imposition of the sentence. This is so because the subsequent legal regime as such does not pose Article 3 problems.

In particular, the Court has already found in its judgment in the case of *Čačko v. Slovakia* (no. 49905/08, §§ 77 and 78, 22 July 2014) that since 1 January 2010 both national law (Article 67 § 2 of the Criminal Code) and practice afforded the possibility of a dedicated judicial review of life sentences imposed in situations such as those of Mr Čačko and that this review mechanism satisfied the criteria set out in *Vinter and Others* (cited above, §§ 119-122). The Court considers that this finding applies *mutatis mutandis* to the present case and that it is unaffected by the Court's subsequent jurisprudence, such as *Murray* and *Hutchinson* (both cited above).

34. Going back to the legal regime at the time of the imposition of the applicant's sentence, the Court notes the Government's admission (see paragraph 21 above) that it excluded any possibility for the applicant to seek release on parole (Article 67 § 3 of the Criminal Code, as in force until 31 December 2009). The applicant's situation must accordingly be examined under the requirement stemming from the Court's findings in *Vinter and Others* (cited above, § 122) that the prospect of release and possibility of review inherent in the guarantees of Article 3 must exist from the moment of the imposition of the whole life sentence.

35. The Court recalls that in *Čačko* it dealt with essentially the same situation as in the present case in that Mr Čačko's life sentence had been upheld by a court of appeal on 27 February 2008 and he had benefited from the regime that entered into force on 1 January 2010 under Law no. 576/2009 Coll. In paragraph 79 of its judgment (*Čačko*, cited above), the Court did not discern any issue under Article 3 of the Convention. It went on to reason as follows:

> "In particular, it is relevant that a judicial review mechanism was introduced on 1 January 2010 – that is to say a relatively short time after the applicant's conviction and the introduction of the application – and that during a substantial part of that period the applicant continued his attempts to obtain redress before the national courts by lodging an appeal on points of law and a complaint under Article 127 of the Constitution ..."

36. The Court notes that the *Čačko* judgment post-dated and relied on *Vinter and Others* and preceded those in *Murray and Hutchinson* (both cited above). It considers that there is nothing in the two judgments last mentioned invalidating its approach in *Čačko*, although the Grand Chamber in *Hutchinson* expressly referred to *Čačko* on several occasions.

37. The Court accordingly discerns no reasons in the present case for departing from the approach in *Čačko*. On the contrary, it considers that its findings in *Čačko* apply to the present case *a fortiori*, in particular in that the period between the imposition of the applicant's sentence and the entry into force of Law no. 576/2009 Coll. (less than eight months) was shorter than in the case of Mr Čačko (one year and ten months) and in that, unlike in the case of Mr Čačko, the present application was introduced after the entry into force of the amendment in question.

38. Moreover, as in the case of Mr Čačko, during the whole eight-month period specified above, the applicant continued his attempts to obtain redress by way of an extraordinary remedy before the Supreme Court (see paragraph 6 above) and could have done so before the Constitutional Court.

39. For the above reasons, the applicant's Article 3 complaint is manifestly ill-founded, and so – in the absence of an "arguable basis" under the former provision (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52) – is his complaint under Article 13 of the Convention.

40. In sum, the application 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 8 June 2017.

Stephen Phillips
Registrar

Helena Jäderblom
President