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

FIFTH SECTION

DECISION

Application no. 64531/16
Yuriy Mykhaylovych KONOVALOV
against Ukraine

The European Court of Human Rights (Fifth Section), sitting on 5 October 2021 as a Chamber composed of:

Síofra O'Leary, *President,*
Ganna Yudkivska,
Jovan Ilievski,
Lado Chanturia,
Ivana Jelić,
Arnfinn Bårdsen,
Mattias Guyomar, *judges,*

and Victor Soloveytchik, *Section Registrar*,

Having regard to the above application lodged on 26 October 2016,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Yuriy Mykhaylovych Konovalov, is a Ukrainian national, who was born in 1981. He is currently serving a life sentence in Dnipro Prison. He was represented before the Court by Mr A.V. Perekryostov, a lawyer practising in Shevchenkove, Kharkiv Region.

A. The circumstances of the case

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

3. On 14 February 2003 the applicant was arrested on charges of particularly grave crimes and then held in pre-trial detention. On 19 July 2005 the Dnipropetrovsk Regional Court of Appeal found him guilty as charged and sentenced him to life imprisonment. It held that the applicant's

term of imprisonment should be calculated starting from the date of his arrest, pursuant to the rule set forth at the time in Article 72 § 5 of the Criminal Code whereby one day of pre-trial detention was equal to one day of imprisonment. On 18 October 2005 the Supreme Court of Ukraine upheld the applicant's conviction in its part relevant to the present case.

4. On 26 November 2015 Parliament introduced amendments to Article 72 § 5 of the Criminal Code ("the 2015 Law", in force from 24 December 2015) to the effect that one day of pre-trial detention was equal to two days of imprisonment. The 2015 Law stated that it was applicable to all persons whose conviction had become final but whose sentence had not been served in full by the date on which that Law came into force. The explanatory note to the Law stated that one of its aims was to ensure justice, and specifically to restore the rights and legitimate interests of persons who had been sentenced to imprisonment and whose rights had been significantly restricted during their pre-trial detention, in particular on account of inadequate and degrading conditions of detention.

5. In February 2016 the applicant, represented by a lawyer, submitted a request to the domestic courts for the application of the 2015 Law in his case. He argued that the above-mentioned Law did not contain any qualification as regards life prisoners, and that its application in his case would allow him to become eligible for certain rights earlier, in particular the right to apply for presidential clemency after having served twenty years of imprisonment.

6. On 10 March and 26 April 2016 respectively the Romny District Court and the Sumy Regional Court of Appeal rejected his request. The courts held that the 2015 Law concerned only prisoners sentenced to fixed-term imprisonment, and that life imprisonment was not such a sentence.

7. The ruling of 26 April 2016 stated that it was final and not subject to a cassation appeal under domestic law. The applicant nevertheless lodged a cassation appeal with the Higher Specialised Civil and Criminal Court. Among other arguments, the applicant submitted before the Higher Specialised Court (as he had done before the Sumy Regional Court of Appeal), that courts of appeal in other regions had decided to apply the 2015 Law following similar requests by other life prisoners. On 29 August 2016 that court refused to grant him leave to appeal on the grounds that the ruling of 26 April 2016 was not subject to a cassation appeal.

8. On 18 May 2017 Parliament repealed the 2015 Law (with effect from 21 June 2017) and restored the wording of Article 72 § 5 of the Criminal Code which had existed before the introduction of the Law.

9. It appears from the Unified State Register of Court Decisions that on 27 October 2017 the Supreme Court examined a request submitted by the Deputy Prosecutor General in a similar case (no. 344/7495/16-к) under the criminal procedural provisions empowering the Supreme Court to review

lower-court decisions in the event of non-uniform application of the criminal law ("the 2017 ruling").

10. In the above-mentioned case, the Supreme Court concluded as follows. The law provided for distinct time periods following which the legal status of life prisoners changed; notably, after having served twenty years of imprisonment, they became entitled to file a petition for presidential clemency which, if allowed, would result in the commutation of their life sentence to twenty-five years' imprisonment. They could also be granted certain other detention-related rights after having served other periods. The 2015 Law did not state the type of imprisonment in respect of which it was applicable (fixed-term or life imprisonment). Its final provisions stated that the Law was applicable to all persons whose convictions had become final but whose sentences had not been served in full by the date on which the Law became effective. The establishment of different rules for fixed-term and life prisoners would be discriminatory under the Convention; and the application of the 2015 Law to life prisoners could not be restricted, because the rules provided for in it directly affected the exercise by life prisoners of various detention-related rights, including the right to apply for clemency. The Supreme Court thus quashed the lower courts' decisions and remitted the case to the first-instance court for a fresh examination, instructing it that Article 72 § 5 of the Criminal Code, as amended by the 2015 Law, had to be interpreted as applicable both to fixed-term and to life prisoners. After a fresh examination of the case, on 23 April 2018 the lower court allowed the life prisoner's request and applied the 2015 Law in his case.

11. In his most recent submissions to the Court in February 2021, the applicant stated that he had not instituted any further court proceedings after those which ended on 29 August 2016 (see paragraph 7 above).

B. Relevant domestic law and practice

1. Domestic law

12. Article 151 of the 2003 Code of Enforcement of Criminal Sentences provides that a convicted person sentenced to life imprisonment may apply for clemency after having served at least twenty years of the sentence imposed.

13. Article 72 § 5 of the Criminal Code sets out rules for counting the periods of pre-trial detention towards the final sentence of detention to be served. Prior to the amendments introduced by the 2015 Law (see paragraph 4 above) and after those amendments were repealed (that is before 24 December 2015 and after 20 June 2017), it provided and currently provides that, when calculating the final time to be served, one day of pre-trial detention counts for one day of the sentence of imprisonment. While the amendments remained in force, however, Article 72 § 5 provided that one

day of pre-trial detention counted for two days' imprisonment. The Law applied to all persons whose convictions had become final (upheld on appeal) but whose sentences had not been served in full by the date on which the Law came into force.

Article 87 of the 2001 Criminal Code provides that the President of Ukraine may grant clemency to particular individuals. This may consist in replacing a life sentence by imprisonment for a term of not less than twenty-five years.

The 2015 Clemency Regulations specify further details of the clemency procedure. They provide that life prisoners may submit a request for clemency through the administration of the prison in which they are serving their sentence. The prison administration must register it and forward it to the Administration of the President of Ukraine. The Presidential Clemency Commission must carry out a preliminary examination of the request and of the supporting material prepared by the Presidential Clemency Department. The Clemency Commission makes its proposal to the President of Ukraine on granting a request for clemency or informs the President of applications which it considers should not be granted. Clemency is awarded by means of a presidential decree (for more details, see *Petukhov v. Ukraine (no. 2)*, no. 41216/13, §§ 85-90, 12 March 2019).

14. Article 459 § 2 (4) of the 2012 Code of Criminal Procedure provides that final court decisions can be reviewed upon the discovery of new circumstances. These include, inter alia, circumstances which had not been known to a court during the examination of a case and the adoption of a court decision, and which prove that the court's decision was incorrect.

2. Domestic case-law

15. It appears from similar applications lodged before the Court and from the Unified State Register of Court Decisions that, after the adoption of the 2017 ruling, the domestic courts allowed new or repeated requests by life prisoners for the application of the 2015 Law, for instance in the following domestic cases: no. 585/4587/17 (final decision of the Romny District Court of 28 December 2017); no. 205/934/18 (final decision of the Leninskyy District Court of Dnipro of 1 June 2018); no. 127/4865/18 (final decision of the Vinnytsya District Court of 23 April 2018); and nos. 274/4893/17 and 274/5149/17 (decisions of the Zhytomyr Regional Court of Appeal of 23 March 2018). Some of the courts expressly referred to the 2017 ruling in their decisions allowing life prisoners' requests.

16. As regards Article 459 § 2 (4) of the Code of Criminal Procedure, the domestic courts have applied the above-mentioned provision in various criminal cases. For instance, in a ruling of 12 September 2017 adopted in criminal case no. 755/11308/16-к (which became final on 22 November 2017), the Dniprovskyy District Court of Kyiv allowed a request for the review of a court decision of 9 June 2017 granting temporary access to

objects and documents covered by banking secrecy, and applied Article 459 § 2 (5) of the Code, which at the material time contained the same wording as Article 459 § 2 (4).

COMPLAINTS

17. Relying on Article 5 § 1 of the Convention, the applicant complained that the 2015 Law had been imprecise and had been interpreted differently by the domestic courts, and that the courts had refused to apply it in his case.

18. The applicant also complained under Article 14 of the Convention taken in conjunction with Article 5 § 1 that, in refusing to apply the above-mentioned law, the domestic courts had discriminated against him on the basis of his status as a life prisoner.

19. Lastly, the applicant complained, relying on Article 6 § 1 of the Convention, that the domestic courts' refusal to apply the 2015 Law in his case had also affected his other detention-related rights (notably, the right to participate in group events of an educational, cultural and recreational nature after having served fifteen years of imprisonment) and about the refusal of the Higher Specialised Court to review the lower courts' decisions in his case.

THE LAW

A. Alleged violation of Article 5 § 1 of the Convention and Article 14 taken in conjunction with Article 5 § 1

20. The relevant provisions read as follows:

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court ..."

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."

21. The Court first notes that the applicant was deprived of liberty after being convicted by a competent court, a situation expressly covered by Article 5 § 1 (a) of the Convention. It also notes that the applicant does not complain about the lawfulness of his conviction or the severity or length of

his punishment. Instead, he complained, in essence, that his right under Article 5 had been breached because the domestic courts had refused to apply the 2015 Law in his case, the application of which would have brought forward the date on which he would have become eligible to apply for presidential clemency, a right to which a life prisoner became entitled after having served twenty years of imprisonment.

22. In this connection, the Court reiterates that Article 5 § 1 (a) does not guarantee a prisoner's right to early release. However, the situation may differ when the competent authorities, having no discretionary power, are obliged to apply such a measure to any individual who meets the statutory conditions of entitlement (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 126, ECHR 2013). Furthermore, measures relating to the execution of a sentence or to its adjustment can affect the right to liberty protected by Article 5 § 1, as the actual duration of deprivation of liberty depends on their application, among other things (ibid., § 127; see also *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 56, 24 January 2017).

23. The Court further notes that under domestic law, the competent authority (the President of Ukraine) is required to examine a life prisoner's application for clemency, which the prisoner is entitled to lodge after having served twenty years of imprisonment (see paragraphs 12 and 13 above), but is not required to adopt a favourable decision. In other words, the application of the 2015 Law in the applicant's case would have only brought forward the date on which he would have become entitled to lodge an application for presidential clemency, but would not have guaranteed his early release. The Court does not consider it necessary to decide whether the above has an impact on the applicability of Article 5 § 1 (a) of the Convention to the circumstances of the present case, as the complaint under that provision is in any event inadmissible for the following reasons.

24. The Court notes that, in the ruling of 27 October 2017 (see paragraph 9 above), the Supreme Court interpreted the 2015 Law as also applicable in respect of life prisoners. Therefore, even though there may have been a temporary uncertainty in the domestic lower courts' practice as regards the applicability of the above-mentioned Law in respect of life prisoners, which was manifested in their refusal to apply it (as in the present case) and in the adoption of divergent decisions (see paragraph 9 above), in the above-mentioned ruling the higher judicial body put an end to that uncertainty and to any divergent practice in this regard (see *Ştefănică and Others v. Romania*, no. 38155/02, § 30, 2 November 2010).

25. Moreover, the Court notes that, since the adoption of the 2017 ruling, the domestic courts have allowed new or repeated applications by life prisoners and have applied the 2015 Law in their cases, some of those courts having expressly referred to the above-mentioned ruling (see paragraph 15 above). It thus clearly follows both from the 2017 ruling and

from the subsequent court practice that the 2015 Law also concerned life prisoners.

26. Accordingly, following the adoption of the 2017 ruling, it was open to the applicant – and is still open to him – either to lodge a new application with the domestic courts, as some other life prisoners had done, or to lodge an application under Article 459 § 2 (4) of the Code of Criminal Procedure (see paragraph 14 above) for a review of the unfavourable court decisions adopted in his case. However, it does not appear that the applicant, who was represented by a lawyer in the domestic proceedings, lodged any such application (see paragraph 11 above).

27. In this connection the Court reiterates that Article 35 requires that an applicant should have normal recourse to the remedies that are likely to be effective, adequate and accessible (see *Sejdovic v. Italy* [GC], no. 56581/00, § 45, ECHR 2006-II). To be effective, a remedy must be capable of remedying directly the impugned state of affairs and must offer reasonable prospects of success. 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 make use of it (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 74, 25 March 2014). There is no indication, and nor did the applicant argue, that the remedies in question, still open to the applicant, would not be effective ones for the purposes of the applicant's complaint, or that there are special circumstances absolving him from the requirement to exhaust those remedies.

28. The Court would also stress that it was and still remains open for the applicant, following the exhaustion of the relevant domestic remedies, to bring his complaints before the Court if he still considers himself to be a victim of a violation of the Convention in this respect.

29. It follows that the complaint under Article 5 § 1 (a) of the Convention is inadmissible for non-exhaustion of domestic remedies and that it must be rejected in accordance with Article 35 §§ 1 and 4. For the same reasons, the Court also rejects the applicant's complaint under Article 14 taken in conjunction with Article 5 § 1 (a).

B. Other alleged violations

30. As to the applicant's complaints under Article 6 § 1 of the Convention (see paragraph 19 above), in the light of the material in its possession and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with the 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 4 November 2021.

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Victor Soloveytchik
Registrar

Síofra O'Leary
President