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

FIFTH SECTION

DECISION

Application no. 58169/13
Miroslav MASLÁK
against the Czech Republic

The European Court of Human Rights (Fifth Section), sitting on 5 April 2022 as a Chamber composed of:

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

and Martina Keller, *Deputy Section Registrar,*

Having regard to the above application lodged on 12 September 2013,

Having regard to the decision of 13 November 2014 to give notice of the application to the respondent Government,

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 application concerns complaints under Articles 3 and 8 of the Convention concerning the alleged ill-treatment and interference with physical integrity to which police officers subjected the applicant when collecting biological material from him.

2. The applicant, Mr Miroslav Maslák, is a Slovak national who was born in 1979 and is now detained in Slovakia. He was represented before the Court by Mr R. Toman, a lawyer practising in Bratislava.

3. The Czech Government ("the Government") were represented by their Agent, Mr V.A. Schorm, of the Ministry of Justice.

The circumstances of the case

4. The applicant was subject to prosecution in both the Czech Republic and Slovakia for a number of serious offences. He lodged more than forty applications before this Court, mainly challenging evidence obtained through different investigative measures carried out in the course of those criminal proceedings.

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

6. In November 2012, the applicant was arrested and placed in pre-trial detention in the Czech Republic.

7. The applicant refused to undergo the collection of biological material (saliva and scent samples) and fingerprints voluntarily, and on 28 November 2012 the Brno Regional Prosecutor granted a request by the police under Article 114 § 4 of the Code of Criminal Procedure for permission to overcome the applicant's resistance in order to perform that act.

8. According to the official record, the collection process took place on the same day from 5.15 p.m. to 7 p.m. The Government observed that because of the applicant's robust stature and violent nature, the authorities expected to encounter problems; thus, the decision was taken to make a video recording of the whole process, and the prosecutor had also been present.

The applicant indeed refused to cooperate or comply with police orders, and therefore force was used to overcome his resistance. The Government noted that the taking of a saliva sample and fingerprints had lasted only a few minutes in each case, but that for the taking of a scent sample, it had been necessary to hold the applicant on the floor for twenty minutes.

9. It appears from the official record that when the applicant returned to his cell, he did not show any sign of injury. A few minutes later, however, he began to complain of headaches and pain in the left knee and ankle and the wrists. The police called for an examination by a doctor, who noted that the applicant had "a bruised knee, ankle and neck" but did not require hospitalisation. Photographs were taken and a medical report was drawn up, which was signed by the applicant. According to the medical report, the applicant suffered bruises and contusions in the lumbar area and around wrists but was not impaired in his movements, his knee was without edema, palpations did not reveal anything abnormal.

10. On 23 January 2013 the applicant, by means of a constitutional appeal in which he relied mainly on Articles 3 and 8 of the Convention, challenged the prosecutor's approval of measures to overcome his resistance, as well as the conduct of the police officers during the collection of the biological material from him. He contended that the samples should have been collected by professionally competent medical personnel and that the police officers had used physical force whose intensity had been disproportionate to his passive resistance.

11. By decision no. I. ÚS 357/13 of 6 March 2013, the Constitutional Court dismissed the applicant's constitutional appeal as manifestly ill-founded. Referring to the principle of subsidiarity, it considered it premature to examine the objections arising from the alleged failure to comply with the requirements of Article 114 of the Code of Criminal Procedure, on account of a risk of predetermining the outcome of the criminal proceedings against the applicant, which had to be viewed as a continuing process.

The Constitutional Court also referred to its decision no. I. ÚS 1641/17 of 20 November 2007 rejecting as inadmissible a similar appeal in respect of a prosecutor's approval of measures to overcome the appellant's resistance and in respect of the subsequent conduct of the police, finding, *inter alia*, that the appellant had failed to make use of the remedy provided by Article 157a of the Code of Criminal Procedure.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Code of Criminal Procedure (Law no. 141/1961)

12. Article 114 § 4 of the Code provides that if biological samples could not be taken from the person concerned because of his or her resistance, and where the taking of blood or another act amounting to an interference with physical integrity is not required, the competent authority in criminal matters is authorised, after having sought the prior approval of a prosecutor, to overcome that person's resistance. The means employed to that end must be proportionate to the intensity of the resistance.

13. Article 157a § 1 provides as follows:

> "The person who is the subject of the criminal proceedings and the victim shall be entitled, at any time during the pre-trial proceedings, to ask the prosecutor to put an end to delays or to remove any shortcomings in the actions taken by the police. There shall be no time-limit for such requests. The request must be immediately referred to the prosecutor, who must deal with it promptly. The requesting person shall be notified of the result of the review."

B. State Prosecution Act (Law no. 283/1993)

14. Section 12d of the Act provides that a higher prosecutor's office supervises the acts of the lower prosecutors' offices under its territorial jurisdiction and is entitled to give them written and binding instructions on the actions to be followed.

C. General Inspectorate of Security Forces Act (Law no. 341/2011)

15. Section 2 of the Act provides that the General Inspectorate of the Security Forces is tasked with searching for, revealing and verifying facts

showing that a criminal offence has been committed by a police officer, and with investigating such offences.

D. Police Act (Law no. 273/2008)

16. Section 95 of the Act provides that the State is liable for any damage caused by the police when performing their tasks, unless the damage was caused to a person who by his or her own conduct had triggered an interference by the police which was lawful and proportionate.

E. State Liability Act (Law no. 82/1998)

17. Pursuant to section 13 of the Act, the State is liable for any damage caused by irregular official conduct. Anyone who has suffered damage caused by irregular official conduct is entitled to compensation.

F. Relevant case-law of the Supreme and the Constitutional Courts

18. By judgment no. 30 Cdo 2778/2011 of 28 February 2013, the Supreme Court quashed a judgment delivered by an appellate court in proceedings under the State Liability Act in which the plaintiff had sought compensation for non-pecuniary damage caused by the police when collecting a DNA sample from him. Although both the lower courts had concluded that the actions of the police had amounted to irregular official conduct and to an interference with the plaintiff's physical integrity due to the degrading character of the collection of the sample through the use of threats, the appellate court considered that the non-pecuniary damage caused was not of such intensity as to require financial compensation. The Supreme Court was of the view that the impugned act had not reached the threshold of degrading treatment as required by Article 3 of the Convention but amounted to an interference with the plaintiff's physical integrity under Article 8; consequently, it had to be examined whether the interference was lawful, pursued a legitimate aim and was necessary in a democratic society. Such an examination was necessary to determine whether there had been irregular official conduct and to decide on the type and amount of compensation, it being understood that financial compensation was the rule, whereas the finding of a violation could only exceptionally be considered sufficient in itself.

19. By decision no. I. ÚS 1641/07 of 20 November 2007, the Constitutional Court rejected for lack of exhaustion of available remedies a constitutional appeal in respect of the conduct of police officers while they were obtaining a photograph of the appellant, as well as in respect of the prosecutor's approval, under Article 114 § 4 of the Code of Criminal Procedure, of measures to overcome the appellant's resistance. It noted, in particular, that a constitutional appeal was usually to be lodged only after the

closure of a case, that is, against the decision on the merits, and not against individual procedural, although *per se* final, decisions or acts. On an exceptional basis it was possible to challenge before the Constitutional Court decisions that were capable of immediately interfering with the appellant's fundamental rights and represented self-standing, closed parts of the proceedings, even though the proceedings on the merits had not yet ended.

The Constitutional Court further observed that criminal proceedings constituted a continuous process of finding and assessing facts underlying the decision on the merits. In the pre-trial phase, this process was subject to an ongoing review by the prosecutor's office and, following a decision on the merits, also to a judicial review. In a process that was ongoing or had just been initiated, any defects could therefore be remedied in a manner customary in criminal proceedings and envisaged by the law, that is, first of all by the prosecuting authorities themselves or by the ordinary courts. In this particular case, the appellant had failed to request, under Article 157a of the Code of Criminal Procedure, a review by the prosecutor of the actions of the police when obtaining his photograph, and a review by the supervising prosecutor, under section 12d of the State Prosecution Act, of the prosecutor's approval of measures to overcome his resistance. Thus, the Constitutional Court concluded that the appellant had at his disposal a procedural remedy to protect his rights other than a constitutional appeal.

20. By decision no. II. ÚS 2166/14 of 28 August 2014, the Constitutional Court rejected for non-exhaustion of available remedies a constitutional appeal lodged by a religious association in respect of searches, within the context of a criminal case concerning a third person, which had been carried out in two places of worship. Holding that it had to respect the existing system of remedies and thus could not intervene earlier than other competent authorities, it found that before bringing the case before the Constitutional Court, the appellant should have sought the protection provided under Article 174 § 2 (b) of the Code of Criminal Procedure. Similarly to Article 157a of the same Code, that provision allowed the prosecutor to supervise the conduct of the police. Under both those provisions, the prosecutor was called upon to examine whether the conduct of the police was flawed and to inform the requesting person about the outcome of the review and the measures taken to redress the shortcomings found. For the purposes of the review, the prosecutor was entitled, *inter alia*, to carry out checks in respect of the police authority concerned, to enquire about the planning and the current state of the investigation and to review the official records of procedural acts. In terms of redress, the prosecutor was entitled to impose corrective measures, to declare a procedural act unlawful and to reject the evidence obtained or, ultimately, to inform the General Inspectorate of the Security Forces that an offence might have been committed. If the requesting person was not satisfied with the outcome of the review, he or she could ask the higher prosecutor to remove any shortcomings in the lower prosecutor's course of action and could request supervision, as provided by section 12d of

the State Prosecution Act, which entitled the higher prosecutor to give written and binding instructions on the procedures to be followed by the lower prosecutor.

21. In judgment no. II. ÚS 3173/16 of 14 March 2017, the Constitutional Court held that the competence of a prosecutor's office in the framework of its supervisory activities was so broad that it included the possibility of properly investigating all the errors allegedly made during the criminal proceedings. Indeed, under Article 157a and Article 174 § 2 (b) of the Code of Criminal Procedure, the prosecutor was entitled to impose corrective measures, declare police conduct unlawful, reject evidence obtained or submit the case to the General Inspectorate of the Security Forces. At the same time, the person concerned was entitled to claim damages either under section 95 of the Police Act (Law no. 273/2008), which provided for the liability of the police for damage caused by any (lawful or unlawful) actions carried out by the police when performing their tasks and constituted *lex specialis vis-à-vis* the general liability provisions of the Civil Code, or under the State Liability Act. In the Constitutional Court's view, it was thus not possible to conclude that the legal framework of protection by the prosecutor's office was inadequate or ineffective.

COMPLAINTS

22. The applicant complained under Article 3 of the Convention that he had been subjected to inhuman or degrading treatment on account of the disproportionate intensity of the police intervention while overcoming his resistance to the collection of biological material from him.

23. Relying on Article 8 of the Convention, the applicant further complained that the collection of biological material had been unlawful since it should have been performed by a health professional and that it had also been disproportionate, since the facts which formed the basis of his criminal prosecution had not required such interference with his physical integrity.

24. The applicant also complained under Article 13 of the Convention that he had not had at his disposal any effective domestic remedy for his Convention complaints other than the constitutional appeal.

THE LAW

25. The applicant complained under Articles 3 and 8 of the Convention about the use of force and coercive measures against him by the police during the collection of biological material from him, and under Article 13 of the Convention about the lack of effective remedies.

26. The Government pleaded non-exhaustion of domestic remedies, arguing that the applicant should have lodged a criminal complaint against the police officers under Law no. 341/2011 (see paragraph 15 above), which

would have allowed the General Inspectorate of the Security Forces to carry out an effective investigation.

Referring to the Constitutional Court's case-law (see paragraphs 16-17 above) and that court's decision in the present case (see paragraph 11 above), the Government further submitted that the applicant had had at his disposal a request for a prosecutor's review under Article 157a of the Code of Criminal Procedure, which could have led to a review of the police officers' conduct and to the removal of any shortcomings. He could also have asked for supervision by a higher prosecutor under section 12d of the State Prosecution Act.

Lastly, the Government submitted that the applicant could have sought compensation from the Ministry of the Interior on account of the police officers' irregular official conduct, in accordance with section 13 of the State Liability Act. They referred in particular to the Supreme Court's judgment no. 30 Cdo 2778/2011 of 28 February 2013 (see paragraph 18 above), in which that court had found that if the conditions of lawfulness, legitimate aim and proportionality had not been observed during the collection of biological material, this amounted to irregular official conduct within the meaning of section 13 of the State Liability Act. The Government also noted in that connection that a similar action for damages had been successfully brought by the applicant in the case of *Kummer v. the Czech Republic* ((just satisfaction – striking out), no. 32133/11, § 5, 27 March 2014).

27. The applicant maintained that the remedies referred to by the Government were not effective for the purposes of Article 35 § 1 of the Convention. He observed that the examination of his potential criminal complaint would have been supervised, and a request under Article 157a of the Code of Criminal Procedure dealt with, by the same prosecutor who had approved the interference, and that he would have had to prove intent on the part of the perpetrators.

The applicant also noted that the Government had failed to submit any examples of complainants having successfully made use of those remedies and that they had referred to decisions adopted by the Constitutional Court after the facts of the present case.

28. The Court observes that the question whether the applicant has exhausted domestic remedies in respect of his complaints under Articles 3 and 8 of the Convention, as required by Article 35 § 1, and the question whether there was a breach of his right under Article 13 of the Convention are closely related. It will first proceed to examine the Government's non-exhaustion objection.

29. The relevant part of Article 35 § 1 of the Convention reads as follows:

> "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ..."

30. The obligation to exhaust domestic remedies requires an applicant to make normal use of remedies which are available and sufficient in respect of

his or her Convention grievances. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness. Article 35 § 1 also requires that the complaints intended to be made subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law, and further, that any procedural means that might prevent a breach of the Convention should have been used. Where an applicant has failed to comply with these requirements, his or her application should in principle be declared inadmissible for failure to exhaust domestic remedies (see, *inter alia*, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 71-72, 25 March 2014).

31. The Court observes, however, that where an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention, requires by implication that there should be an effective official investigation (see, for example, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 182, ECHR 2012, with further references). Article 3 of the Convention additionally requires that an official investigation be conducted even in the absence of an express complaint, if there are sufficiently clear indications that ill-treatment might have occurred (see, for example, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, no. 71156/01, § 97, 3 May 2007, and *Gjini v. Serbia*, no.1128/16, § 93, 15 January 2019).

32. In previous cases, such an obligation has arisen on the basis of various explicit or implicit indications, such as facts implied in complaints made by an applicant during criminal or civil proceedings against him (see *Gjini*, cited above, § 94, with further references).

33. In the instant case, the Court observes that the applicant was subjected to a regular procedural act foreseen by Article 114 of the Code of Criminal Procedure, in respect of which the prosecutor had granted the police permission to overcome the applicant's resistance. It is noteworthy, as observed by the Government (see paragraph 8 above), that the authorities expected the applicant to oppose resistance and to create problems; thus, the decision was taken to make a video recording of the whole collection process and to secure the presence of the prosecutor, in order to prevent any suspicion of arbitrary or unlawful use of force. The Court notes in this respect that the applicant's procedural strategy seems to be to challenge any investigative measure against him (see paragraph 4 above).

34. After the biological material had been collected from him, the applicant did not show any visible sign of injury; however, a doctor who was later called because of the applicant's complaining of pain found bruises on the applicant's knee, ankle and neck (see paragraph 9 above). Thereafter, the applicant drew the attention of the authorities to the alleged ill-treatment but

did so by filing a constitutional appeal instead of a criminal complaint, as provided for by the Czech law.

35. Thus, in the context of the specific circumstances of the present case, the Court does not consider that by declaring the applicant's constitutional appeal inadmissible and directing him to the filing of a criminal complaint the Constitutional Court put any obstacle to the investigation of the alleged ill-treatment or acted in a manner incompatible with the respondent State's duty to investigate complaints of such ill-treatment. The applicant has never submitted that there were any impediments against him addressing his complaint to the proper authority – the police and the prosecution – and he never did that even after the decision of the Constitutional Court. Respondent States' duty to investigate allegations of ill-treatment by the police is not incompatible with requiring the alleged victim to take a simple freely accessible procedural step and formulate his allegations before the competent authority.

36. It remains to be examined, therefore, whether the remedies which the Constitutional Court considered that the applicant should have exhausted were to be seen as effective remedies to be exhausted also in the light of the requirement of Article 35§ 1 of the Convention.

37. Under the Czech law, a criminal complaint can be lodged against police officers, a remedy which the Court has already considered adequate in cases of ill-treatment (see *Bureš v. the Czech Republic*, no. 37679/08, § 82, 18 October 2012). Had the applicant in the present case lodged such a complaint, it would have been examined by the General Inspectorate of the Security Forces, a special body which was under a duty to investigate whether an offence had been committed by police officers (see paragraph 15 above).

38. Second, the Court observes that under Article 157a of the Code of Criminal Procedure (see paragraph 13 above), a person who is the subject of criminal proceedings and the victim have the right to ask the prosecutor, at any time during the pre-trial procedure, to put an end to delays or to remove any shortcomings in the actions taken by the police. The wording of that provision indicates that such a request for a review by the prosecutor could lead to addressing the issues complained of by the applicant in the case at hand, which relate to the conduct of police officers during acts performed in the course of pre-trial proceedings.

39. Reiterating that it is primarily for the domestic courts to interpret the domestic law, the Court must also have regard to the considerations set forth with regard to that remedy by the Czech Constitutional Court (see paragraphs 19-21 above and paragraph 40 below). In accordance with that case-law, the prosecutor's office is obliged, following a request for review submitted under Article 157a of the Code of Criminal Procedure, to examine the conduct of the police in terms of its shortcomings. For that purpose, the prosecutor is entitled, *inter alia*, to carry out checks in respect of the police authority concerned and to review the official records of procedural acts. The requesting person must then be notified of the result of the review and of the

measures taken to redress the shortcomings found, which may include imposing corrective measures, declaring a procedural act unlawful and rejecting the evidence obtained or, ultimately, submitting the matter to the General Inspectorate of the Security Forces. If the requesting person is not satisfied with the review, he or she may ask the higher prosecutor's office to supervise the acts of a lower prosecutor's office, in accordance with section 12(d) of the State Prosecution Act. In accordance with the latter provision, the higher prosecutor's office is entitled to give the lower prosecutor's office written and binding instructions on the procedures to be followed.

40. Admittedly, the Constitutional Court's decision no. II. ÚS 2166/14 and judgment no. II. ÚS 3173/16 were not delivered until after the facts of the applicant's case, and at the material time the Constitutional Court did not in each and every case require the appellants to use the above-mentioned remedies. However, even at the time when the applicant's constitutional appeal was lodged, there had already been a significant number of decisions delivered by the Constitutional Court in which the latter had emphasised the obligation to make use of the remedy provided for by Article 157a of the Code of Criminal Procedure (see, for example, decisions nos. I. ÚS 510/04 of 22 February 2006; I. ÚS 448/06 of 29 August 2006; I. ÚS 1641/07 of 20 November 2007; IV. ÚS 826/08 of 29 April 2008; I. ÚS 1277/08 of 29 July 2008; III. ÚS 1132/08 of 25 June 2009; III. ÚS 2982/09 of 3 December 2009; III. ÚS 2997/09 of 9 December 2009; and IV. ÚS 2436/10 of 26 October 2010).

41. Thus, individuals have at their disposal legal remedies enabling them to seek protection against violations by the police of their fundamental rights and freedoms and to turn to the prosecuting authorities to vindicate those rights, by means of a review of whether the conduct of the police was lawful and free from any shortcomings or whether it was flawed and amounted to a criminal offence, which would then be subject to examination by the General Inspectorate of the Security Forces and, in the event of an indictment, by the criminal courts. If, following that procedure, the persons concerned still consider that there has been an interference with their fundamental rights and freedoms, they have the right to lodge a constitutional appeal.

42. In the light of the foregoing, the Court considers that the applicant in the present case was required, for the purposes of Article 35 § 1 of the Convention, to lodge a criminal complaint and/or to request a review by the prosecutor as provided for by Article 157a of the Code of Criminal Procedure. Using those remedies would have permitted the applicant to seek directly and specifically an investigation of the conduct of the police and not only a review of the prosecutor's approval of the measures to overcome his resistance, which he challenged in his constitutional appeal. Moreover, the applicant had at his disposal a civil action under the State Liability Act, through which he could have claimed compensation in respect of the conduct of the police during the collection of the biological material from him.

43. The Court observes that the applicant failed to show that those remedies could not ensure proper scrutiny of the police's actions and afford adequate redress for any violation that might have occurred. Furthermore, it finds no exceptional circumstances capable of exempting the applicant from the obligation to exhaust domestic remedies, and emphasises that the Constitutional Court also explicitly referred in the applicant's case (see paragraph 11 above) to the reasoning adopted in its previous case-law, according to which appellants were to follow the procedure under Article 157a of the Code of Criminal Procedure before lodging a constitutional appeal (compare *Maslák and Michálková v. the Czech Republic*, no. 52028/13, § 96, 14 January 2016). Although the applicant had such an opportunity, he did not take advantage of it.

44. In this connection, the Court reiterates 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 that avenue of redress (see, among many other authorities, *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, § 206, 22 December 2020) and that the "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see, among many other authorities, *Mugemangango v. Belgium* [GC], no . 310/15, § 131, 10 July 2020).

45. It follows that, in so far as it concerns the complaints raised under Articles 3 and 8 of the Convention, the application must be rejected for non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention and, in so far as it concerns the complaint under Article 13 of the Convention, it must be rejected as being manifestly ill-founded pursuant to 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 12 May 2022.

Martina Keller Deputy Registrar	Síofra O'Leary President