

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

FIRST SECTION

DECISION

Application no. 13796/09
Valentin MICHAJLOV
against Austria

The European Court of Human Rights (First Section), sitting on 27 March 2012 as a Chamber composed of:

Nina Vajić, *President,*
Anatoly Kovler,
Peer Lorenzen,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque, *judges,*

and André Wampach, *Deputy Section Registrar,*

Having regard to the above application lodged on 25 February 2009,

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 Valentin Michajlov, is an Austrian national who was born in 1952 and lives in Krems. He is represented before the Court by Mr H. Blum, a lawyer practising in Linz. The Austrian Government ("the Government") are represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

A. The circumstances of the case

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

1. Background

3. On 4 May 2005 the Vienna Regional Criminal Court (*Landesgericht*) convicted the applicant of various offences under the Drugs Act and sentenced him to eight years' imprisonment. It found him guilty of having commissioned various persons between May and November 2001 to import cocaine to Austria and to have sold some seven kilos of cocaine to various individuals in Austria. In fixing the sentence, the court had regard to the fact that the applicant had four previous convictions two of which also concerned offences under the Drugs Act. It also revoked the suspension of a term of three months' imprisonment resulting from a previous conviction. The applicant's imprisonment was due to be terminated on 14 November 2011.

4. The applicant was detained at Sonnberg Prison when he was diagnosed with multiple sclerosis in December 2006. Subsequently, he was regularly taken to the public hospital in St. Pölten, which has an out-patient department specialised in the treatment of multiple sclerosis. Examinations took place on 11 January, 14 March and 25 September 2007 and on 23 January 2008.

5. By decision of 28 January 2008 the Korneuburg Regional Court, noting that the applicant required more intensive medical treatment and care, ordered his transfer to Stein Prison for the further execution of his sentence, as that prison centre was equipped with a hospital of its own. However, the Regional Court refused the applicant's request for a suspension of the execution of his sentence pursuant to section 5 § 3 taken together with section 133 § 1 of the Execution of Sentences Act (*Strafvollzugsgesetz*).

6. The Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal on 3 March 2008. It noted on the basis of a medical expert opinion that the applicant, suffering from multiple sclerosis, was unfit for detention. However, he was to be considered dangerous within the meaning of section 5 § 3 of the Execution of Sentences Act. He had been convicted five times. His last conviction for importing and selling seven kilos of cocaine concerned a particularly serious crime. Although the applicant's mobility was reduced by his illness, he could use his contacts within the criminal scene to commit or instigate further crimes.

2. The applicant's placement in the hospital of Stein prison and the medical treatment provided to him

7. On 3 April 2008 the applicant was transferred to Stein prison. From that date he was detained in the hospital of Stein prison. The Government submitted a statement of the head doctor of the Stein prison: The hospital has its own medical and nursing staff. Doctors carry out daily visits and medical and nursing assistance is available 24 hours per day. All sanitary facilities in the prison hospital are suitable for persons with disabilities. The preparation of food takes special needs into account.

8. Until 20 January 2009 the applicant was placed in room no. 117 of the prison hospital, which is equipped with sanitary facilities (shower and toilet) suitable for persons with disabilities. Subsequently, he was placed in two other rooms of the prison hospital, namely room no. 129 until 9 May 2009 and room no. 134 until his release. While staying in these rooms the applicant could use the hospital's common shower room with the assistance of prison staff.

9. The applicant continued to receive treatment at the multiple sclerosis department at the St. Pölten public hospital. An examination scheduled for 22 April 2008 was refused by the applicant. Further examinations took place on 27 May and 26 November 2008 and on 17 February and 18 June 2009. The applicant's therapy was fixed and continuously adapted by the specialists of the multiple sclerosis department and was carried out at the prison hospital. Moreover, the applicant was treated by the prison hospital's pain specialist several times.

10. In addition to medication, the applicant received physiotherapy from 2009. This was available in the prison hospital. A first set of ten therapy units was prescribed. The applicant underwent five units between 2 and 17 March 2009 but renounced to make use of the remaining units. Subsequently, physiotherapy was resumed and the applicant received eleven therapy units between 4 and 29 May 2009.

3. The applicant's request for release of 10 June 2008

11. On 10 June 2008 the applicant, represented by counsel, requested anew that the execution of his sentence be suspended due to his illness pursuant to section 5 § 3 taken together with section 133 § 1 of the Execution of Sentences Act and that he be released.

12. He joined an opinion by an expert on neurology and psychiatry, Dr. K. According to the expert's opinion dated 8 January 2008 the applicant was unfit for detention. Since he had been diagnosed with multiple sclerosis in December 2006 his state of health had deteriorated considerably. In particular, the mobility of his arms and hands was restricted and he could no longer perform simple gestures necessary for everyday life, such as handling cutlery for instance. His general mobility on the EDSS scale was 4

(0 being full mobility, 7 meaning dependency on a wheel-chair). He received medication, however this was not sufficient as according to medical opinion a multidisciplinary approach, encompassing neurology, physiotherapy and psychology, was necessary for treating multiple sclerosis. The support by close relatives was also crucial.

13. As to the question whether there was still a danger that he would commit further offences, the applicant submitted that all his energy was devoted to combating his illness. Should the court have doubts in respect of his dangerousness, he requested that the opinion of an expert be taken.

14. On 23 July 2008 the Krems Regional Court dismissed the applicant's request. It noted that according to the prison administration, the applicant's conduct was good. According to the prison doctor, the applicant's condition was stable for the time being but could deteriorate at any time. Referring to the expert opinion, the court acknowledged that the applicant was unfit for detention due to his illness. However, he was to be considered particularly dangerous. In that respect, the court referred to the decision by the Vienna Court of Appeal of 3 March 2008, which had found that even if his mobility was reduced there was a danger that the applicant might use his contacts to organise further drug trafficking. Therefore the conditions for suspending the execution of his prison term as laid down in section 133 § 1 taken in conjunction with section 5 § 3 of the Execution of Sentences Act were not met.

15. The applicant appealed, claiming in particular that his illness had weakened him substantially and all remaining energy was required to cope with the illness. Consequently, it could no longer be assumed that he would commit further offences. In that connection he complained that the Regional Court had assumed that his dangerousness persisted without having taken a further expert opinion.

16. By decision of 25 August 2008 the Vienna Court of Appeal dismissed the applicant's appeal. It noted that the applicant suffered from multiple sclerosis and was unfit for detention. However, it confirmed the Regional Court's view regarding the applicant's dangerousness. It observed that he had been convicted five times. The prison term he was serving related to the trafficking of a substantial amount of drugs, namely seven kilos of cocaine which he had imported though third persons and sold in Austria. Pursuant to section 5 § 3 of the Execution of Sentences Act, the sentence had to be executed even where the detainee was unfit for detention if he presented a danger to the security of others having regard to the nature of his offences or the motive for which they were committed or in view of his prior conduct. The court referred to the applicant's recidivism and the large amount of drugs which he had sold, and found that his dangerousness was not offset by the effects of his illness.

17. In sum, the Court of Appeal found that despite the fact that the applicant was unfit for detention, his substitute confinement (*Ersatzhaft*) – if need be in a public hospital – was required for the protection of others.

4. The applicant's request for release of 1 April 2009

18. By application of 1 April 2009 the applicant again requested that the execution of his sentence be suspended pursuant to section 5 § 3 taken together with section 133 § 1 of the Execution of Sentences Act and that he be released.

19. He submitted a private expert opinion by Dr. H, a neurologist, psychiatrist and physiotherapist. The opinion, dated 26 March 2009, stated that the danger that the applicant would commit further offences had considerably decreased. While his prior convictions indicated a certain risk, all other relevant factors rather allowed a positive prognosis. His severe and progressive illness required all his energy and had led to a profound change. Moreover, the applicant's age, his reduced mobility, the need of constant medical treatment and his dependency on help from others made it unlikely that he would commit further offences.

20. The Krems Regional Court appointed a psychiatric expert Dr. B. In his opinion, dated 15 September 2009, Dr. B. noted that the applicant was detained in the prison hospital and that according to the prison doctor his state of health had deteriorated over the last months. By now he was able to walk only with great difficulty. The expert confirmed that the applicant was unfit for detention due to his illness. Regarding his dangerousness, the expert found that the applicant still made an astonishingly energetic impression. Although his progressive illness and his age could be considered as a factor reducing the probability of a relapse into crime, his personality did not necessarily indicate that he would refrain from committing further offences. In sum, the remaining danger had to be compensated by stabilising factors such as assistance by a probation officer (*Bewährungshelfer*).

21. On 12 October 2009 the Krems Regional Court ordered the applicant's release. It noted that the applicant was detained in the prison hospital. The hospital's head doctor had submitted comments in favour of release. Furthermore, expert Dr. B. had found that the applicant's inclination to commit further offences had decreased but not totally disappeared and had recommended that a probation officer be appointed in case of release.

22. Referring to its previous decision, the Regional Court noted that the applicant suffered from multiple sclerosis and was unfit for detention. While that decision had refused the applicant's release on account of his dangerousness, the applicant's good conduct in the meantime and Dr. B.'s expert opinion led to the conclusion that the applicant's dangerousness had decreased. On the condition that he would reside with his mother and be assisted by a probation officer it could be assumed that he would not

commit further offences. The execution of his sentence was therefore suspended pursuant to section 133 § 1 of the Execution of Sentences Act.

23. In order to allow for the necessary preparations, the court ordered that the applicant be released on 20 October 2009.

24. The applicant was released on that day.

B. Relevant domestic law

25. Section 5 § 1 of the 1969 Execution of Sentences Act provides that the execution of a prison term is to be suspended if the convict is unfit for detention due to invalidity or a physical or mental illness. Pursuant to section 5 § 3 of the said Act a convict who is unfit for detention may nevertheless be deprived of his liberty if he presents a danger to the security of the State or to the security of third persons, having regard to the nature or the motive of the offence committed by him, or in view of his prior conduct. If need be, confinement is to be carried out at a public hospital.

26. Pursuant to section 133 § 1 the execution of a sentence has to be suspended if a prisoner becomes unfit for detention while serving his prison term. The conditions set out in section 5 apply.

COMPLAINTS

27. The applicant complained about his continued imprisonment despite the fact that he was unfit for detention due to his illness. He claimed in particular that in prison no adequate treatment was available. Furthermore he pointed out that the courts had based their refusal to release him on his alleged dangerousness without having taken relevant evidence in that respect. He relied on Articles 3, 5 and 6 of the Convention.

THE LAW

28. The applicant, who suffers from multiple sclerosis, complained about his continued imprisonment and the alleged lack of adequate medical treatment. He relied on Article 3 of the Convention which provides as follows:

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

29. The Government referring to the Court's case-law, argued that there was no general obligation under Article 3 to release detainees on health grounds. They explained that health care provided to prisoners corresponded

in essence to health care provided under the General Social Security Act. Furthermore, they asserted that contrary to the applicant's general allegation of lack of medical care, he had received the necessary medical treatment from the beginning. When his state of health deteriorated he had been transferred to Stein prison and had been placed in the prison hospital there from 3 April 2008 onwards. The treatment he received was comprehensive and in accordance with modern standards. He had been detained in specially equipped rooms and/or had been given the necessary assistance by the prison hospital's staff. In sum, no issue under Article 3 arose.

30. The applicant maintained that he was severely ill and that the medical treatment he received in prison was inadequate and led to a deterioration of his state of health.

31. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI, and *Peers v. Greece*, no. 28524/95, § 67, ECHR 2001-III).

32. While Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The Court has also emphasised the right of all prisoners to conditions of detention which are compatible with human dignity, so as to ensure that the manner and method of execution of the measures imposed do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention; in addition, besides the health of prisoners, their well-being also has to be adequately secured, given the practical demands of imprisonment (see *Mouisel v. France*, no. 67263/01, § 40, ECHR 2002-IX; *Kudła*, cited above, §§ 93-94).

33. The Court notes that the applicant was diagnosed with multiple sclerosis in December 2006. He was held in the prison hospital of Stein prison from 3 April 2008, after the Korneuburg Regional Court had found that he was unfit for detention on account of a deterioration of his illness. Under Austrian law a convict who is unfit for regular detention can be held in substitute confinement, in an adequately equipped prison centre or, if need be, in a public hospital. In its decision of 3 March 2008, the Vienna Court of Appeal had confirmed the Regional Court's assessment, namely that the applicant was unfit for detention, but presented a danger to others due to his convictions of drug trafficking and his contacts in the criminal scene. It therefore ordered him to be kept in substitute confinement.

34. The Court notes that the present application, lodged on 25 February 2009 relates to the applicant's request for release of 10 June 2008 which was dismissed by the Krems Regional Court on 23 July 2008 and by the Vienna Court of Appeal on 25 August 2008. The applicant's subsequent request was successful and led to his release on 20 October 2009. Throughout his entire stay at Stein prison the applicant was held in the prison hospital.

35. The applicant's main allegation is that he received inadequate medical treatment. The Court has taken note of the detailed information provided by the Government. The applicant alleged in general terms that he received insufficient medical treatment which led to a deterioration of his illness. However, he has not contested the correctness of the information provided by the Government nor has he submitted any arguments or evidence to support his allegation of insufficient treatment. The Court will therefore base its assessment on the information provided by the Government. It follows from that information that the hospital at Stein prison disposed of medical and nursing staff carrying out daily visits and being available to provide medical and nursing assistance around the clock. Moreover, the applicant was regularly taken for examinations at St. Pölten public hospital, which has an out-patient department specialised in the treatment of multiple sclerosis. His treatment was determined and adapted when necessary, by the specialists at that hospital and was then administered at the prison hospital. In addition to medication, physiotherapy and pain therapy were available to him at the prison hospital. In these circumstances, the Court sees no reason to find that the health care and medical treatment provided to the applicant were insufficient.

36. Turning to the prison conditions the Court notes that at the prison hospital the applicant was kept in a room specially equipped for persons with disabilities from 3 April 2008 until 20 January 2009. From that date he was kept in two other rooms of the prison hospital where he could use the common showers of the prison hospital with the help of the staff. The applicant has not contested the information provided by the Government. In sum, there is no indication that the prison conditions had failed to take account of the applicant's reduced mobility or otherwise amounted to inhuman or degrading treatment.

37. Having regard to all the circumstances established above, the Court does not find that the applicant's detention in the prison hospital until his release on 20 October 2009 amounted to treatment contrary to Article 3 of the Convention.

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

39. The applicant also alleged that his continued detention despite his illness violated Article 5 of the Convention. Moreover he claimed under Article 6 that the proceedings relating to his request for release of 10 June

2008 had been unfair, as the courts had based their refusal to release him on his alleged dangerousness without taking an expert opinion in that respect.

40. The Court notes that the applicant has not substantiated his complaint under Article 5. Moreover, it is not called upon to decide whether Article 6 applies to the proceedings relating to the applicant's request for release, as the complaint is in any case inadmissible for the following reasons. When refusing the applicant's request for release the courts had particular regard to the decision of the Vienna Court of Appeal of 3 March 2008 which had made an assessment of the applicant's dangerousness, having a medical expert opinion before it. As there was only a short interval between the respective decisions and there was no indication that any relevant circumstances had changed, there is no indication that the refusal to take a further expert opinion was arbitrary or that the proceedings were otherwise unfair.

41. It follows that this part of the application 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.

André Wampach	Nina Vajić
Deputy Registrar	President