

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

FIFTH SECTION

DECISION

Application no. 56347/10
Roman MILER
against the Czech Republic

The European Court of Human Rights (Fifth Section), sitting on 25 September 2012 as a Chamber composed of:

Dean Spielmann, *President,*
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki,
Paul Lemmens, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having regard to the above application lodged on 15 September 2010,

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 Roman Miler, is a Czech national who was born in 1964. He is represented before the Court by Ms K. Samková, a lawyer practising in Prague. The respondent Government are represented by their Agent, Mr V.A. Schorm, from the Ministry of Justice.

A. The circumstances of the case

2. The applicant lived in Warsaw, Poland from 1993 onwards. He lived there with his wife and two children, who are all Polish nationals. The children are attending school there.

3. In 2000 he was extradited from Poland to the Czech Republic for a criminal prosecution. On 19 March 2004 the Prague Regional Court found the applicant guilty of attempted murder and sentenced him to fifteen years' imprisonment. He is serving his prison sentence in Mírov Prison in the Czech Republic.

4. The applicant has been trying to be transferred to a Polish prison so he can be closer to his family who, he states, are living in impoverished conditions and do not have means to travel to the Czech Republic. Also, his son's mental health has been damaged by his not being able to see his father.

5. He sent several requests in that regard to the Ministry of Justice. On 6 May 2004, 17 July 2007 and 17 May and 2 August 2010 the Ministry replied by letter, giving negative responses. It firstly reasoned that the applicant was a Czech national and thus it would not be possible to transfer him to Poland. In another letter, on 14 December 2010, the Ministry reasoned that Czech law allowed such a transfer only exceptionally and that the fact that the applicant's family was living in Poland was not such an exceptional circumstance.

6. The applicant is in contact with his family by regular telephone calls, allowed for ten minutes once a week, and unrestricted written correspondence. The family has not been able to visit him yet, according to the applicant, mainly because of the distance, poor health and lack of funds.

7. On an unspecified date the applicant applied for Polish nationality and simultaneous revocation of his Czech nationality. It seems that these proceedings are pending.

8. The applicant approached various other bodies, including the ombudsman, the Parliament and numerous non-governmental organisations, about his situation.

B. Relevant domestic law and practice

1. Constitutional Court Act (no. 182/1993)

9. Under section 72(1)(a), a constitutional appeal may be lodged by any natural or legal person who claims that a final decision given in proceedings to which he or she was a party, or a measure or any other action taken by a public authority, has infringed his or her fundamental rights or freedoms as guaranteed by a constitutional law.

10. Section 82(3) provides that when the Constitutional Court upholds a constitutional appeal it must either set aside the impugned decision by a public authority or, where the infringement of a right guaranteed by the Constitution is the result of an interference other than a decision, forbid the authority concerned to continue to infringe the right and order it to re-establish the status quo if that is possible.

2. Practice of the Constitutional Court

11. In a judgment no. III. ÚS 62/95 of 30 November 1995 it defined an "other action taken by a public authority" in section 72 of the Act on the Constitutional Court largely as a one-off, illegal and unconstitutional attack by such an authority on constitutionally guaranteed fundamental rights (freedoms) that, at the time of the attack, posed a continuous threat to an existing legal situation, while such an attack itself was not an expression (result) of a decision-making power of the authority, and as such fell outside the usual review proceedings.

12. In a decision no. I. ÚS 690/2000 of 11 April 2001 it held that a primary feature of "other action taken by a public authority" in section 72 of the Constitutional Court Act must be that the interference was still going on at the time of the decision of the Constitutional Court.

13. In its judgment no. III. ÚS 16/96 of 6 January 1997 it held that for admissibility of a constitutional appeal under section 72(1)(a) it was immaterial how the challenged act of an administrative authority had been labelled. What mattered was only if the administrative authority had by that act interfered with an individual's legal standing in an authoritative and possibly final way. The substantive content of an act was always decisive, rather than its formal designation.

14. In its judgment no. Pl. ÚS 36/01 of 25 June 2002 it held that the ratified and promulgated international agreements on human rights and fundamental freedoms, including the Convention, were part of Czech constitutional law.

COMPLAINTS

15. The applicant complained under Articles 3 and 8 of the Convention that the Government were not prepared to transfer him to a Polish prison and therefore he could not maintain contacts with his family, which constituted degrading treatment and also violated his right to a private and family life. He also complained that there was no legislative framework regulating his situation.

16. Relying on Article 14 of the Convention, he further complained that he was being discriminated against on the basis of his nationality by being denied the opportunity to serve his sentence close to his place of residence.

17. Lastly, relying on Article 6 of the Convention, he complained that he had no access to court and no remedy regarding his complaints.

THE LAW

18. The Government raised an objection of non-exhaustion of domestic remedies regarding all the applicant's complaints. They maintained that the applicant could have asked the administrative courts for judicial review of the acts of the Ministry of Justice and he could have also lodged a constitutional appeal.

19. The applicant argued that since the letters of the Ministry of Justice did not constitute formal decisions he could not have challenged them before the courts. Furthermore, the Ministry never informed him about any possibility of going to court, as it should have under the Code of Administrative Procedure. He also maintained that a request for judicial review was not possible because there was no act of a public authority that would establish, change or cancel his rights or obligations.

20. The Court reiterates that under Article 35 § 1 it may only deal with a matter after all domestic remedies have been exhausted. Applicants must have provided the domestic courts with the opportunity, in principle intended to be afforded to Contracting States that have the primary responsibility for implementing and enforcing the guaranteed rights, of preventing or putting right the violations alleged against them. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see *McFarlane v. Ireland* [GC], no. 31333/06, § 112, 10 September 2010; *Kudła v. Poland* [GC], no. 30210/96, § 152, ECHR 2000-XI; and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

21. An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail (see *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI, and *Keegan v. Ireland*, 26 May 1994, § 39, Series A no. 290). However, 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 *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009).

22. Furthermore, as regards legal systems, such as that of the Czech Republic, which provide constitutional protection for human rights, it is incumbent on the aggrieved individual to test the extent of that protection (see *Mirazović v. Bosnia and Herzegovina* (dec.), no. 13628/03, 16 May 2006, and *Vinčić and Others v. Serbia*, nos. 44698/06, et seq., § 51, 1 December 2009). The Court has also held previously that the Czech constitutional review, as a rule, satisfies the requirements of Article 35 § 1 of the Convention (see *Choc v. the Czech Republic* (dec.), no. 25213/03, 29 November 2005).

23. Turning to the present case, the Court firstly observes that what the applicant has been seeking from the Government is for them to give their consent to his transfer and to liaise with the appropriate Polish authorities to that effect. It must ascertain whether a constitutional appeal would be an effective remedy, within the meaning of its case-law, for the applicant's claims.

24. The Court observes that the Czech Constitutional Court is empowered to receive appeals from any individual who claims that a final decision given in proceedings to which he or she was a party, or a measure or any other action taken by a public authority, has infringed his or her fundamental rights or freedoms as guaranteed by a constitutional law. The Constitutional Court also has the power to order a public authority to stop infringing an appellant's rights. Moreover, the Convention is a part of the constitutional law, and the Constitutional Court makes frequent references in its decisions to the Court's case-law. Consequently, the Court will require cogent reasons to conclude that an applicant was not required to lodge a constitutional appeal before lodging an application with the Court.

25. The Court considers that, in principle, a constitutional appeal could have provided redress in respect of the applicant's complaints and offered him reasonable prospects of success. The Government referred to the case-law of the Constitutional Court, which interprets the term "decision" which can be reviewed at this level of jurisdiction very broadly, demonstrating that the form of the administrative measure, which in the present case was not labelled as a decision, is not important. What is important is rather its substantive content and effects.

26. Moreover, even accepting the applicant's argument that no decision had ever been rendered in his case, thus making it impossible for the Constitutional Court to quash it, the Court observes that the constitutional jurisdiction is empowered also to rule on a measure or any other action taken by a public authority and that it can issue an injunction to forbid an authority concerned to continue to infringe the right (see paragraphs 9 and 10 above). Therefore even assuming that the applicant were correct, he has still not been denied access to the Constitutional Court.

27. Furthermore, when the Constitutional Court upholds a constitutional appeal, it must either set aside the impugned decision by a public authority

or, where the infringement of a right guaranteed by the Constitution is the result of an interference other than a decision, forbid the authority concerned to continue to infringe the right. The Ministry of Justice would then be legally obliged to comply with such an order and stop breaching the applicant's rights in the way indicated. The Constitutional Court could thus address, and also redress, both parts of the applicant's complaint concerning a continuing situation, which in the applicant's view constitutes a violation of the Convention (see, *a contrario*, *Diallo v. the Czech Republic*, no. 20493/07, § 83, 23 June 2011, where a constitutional appeal was not considered an effective remedy, because it would have no bearing on the applicant's situation that he was liable to deportation at any time).

28. The Court does not have any indication that the Constitutional Court, if an action was brought to it by the applicant in compliance with the procedural requirements, would not have reviewed his case, taking into account his Convention rights and the relevant case-law of the Court, and that if it had found a violation of the applicant's rights it would not have awarded an appropriate remedy (see, *a contrario*, *Eremiášová and Pechová v. the Czech Republic*, no. 23944/04, § 95-100, 16 February 2012). A constitutional appeal is thus an effective remedy within the meaning of Article 35 § 1 of the Convention for the applicant's complaints. Any doubts that could remain in that regard do not dispense the applicant from trying such a remedy (see paragraph 21 above; *T.A. v. Germany* (dec.), no. 44911/98, 19 January 1999; and *Kane v. Cyprus* (dec.), no. 33655/06, 13 September 2011).

29. The application must therefore be rejected pursuant to Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Dean Spielmann
President