Prison Litigation Network

Newsletter n. 2 – April 20th 2015

Follow-up of the ECHR case-law (March 23th – April 12th)

- **Stettner v. Poland** (*exhaustion of domestic remedies, suitability for detention, health care, pre-trial detention*)
- **Antonio Messina v. Italy** (*reduction in sentence granted tardily*)
- **Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania** (*standing of NGO to lodge an application on behalf of deceased mentally-ill detainee*)
- **Constancia v. the Netherlands** (*deprivation of liberty on medical grounds, margin of appreciation*)
- **Davtyan v. Armenia** (*health care*)
- **Orlovskiy v. Ukraine** (*excessive length of pre-trial detention*)
- **Veretco v. the Republic of Moldova** (*health care, lawfulness of detention*)
- **Adrian Radu v. Romania** (*material conditions of detention, overcrowding*)
- **O'Donnell v. the United Kingdom** (*right to a fair trial*)

Stettner v. Poland, 24 March 2015 (no. 38510/06)

Exhaustion of domestic remedies, suitability for detention, level of health care, pre-trial detention

The applicant alleged that his detention on remand amounted to an inhuman and degrading treatment in view of his sleep disorder and the lack of adequate medical care while in detention (Article 3). He further alleged that his detention on remand had not been justified by "relevant and sufficient" grounds and that his appeal against a decision prolonging his detention had not been heard speedily (Articles 5 §3 and 5§4).

1) Complaint under Article 3

As regards the applicant's alleged inaptness for detention the Court considered that "the number of medical opinions obtained in the course of six months of the applicant's detention shows that **the courts were attentive to the issue of the applicant's suitability for detention**" (§51). Moreover "The applicant was regularly treated by general practitioners of the remand centre and consulted by specialists, including outside his penitentiary establishment" (§53). As a result, and "in view of these consistent medical findings throughout the whole relevant period, the Court [found] that there were no grounds to consider that the applicant's detention was excluded on medical grounds" (§51 – cf. *contra Rokosz v. Poland*, no. 15952/09, §§ 39-40, 27 July 2010, where the medical state of the applicant had been obviously neglected by the authorities), and that there was no "indication

that the medical care provided to the applicant was deficient or below the standard level of health care available to the population generally" (§53 – see *Nitecki v. Poland*, no. 65653/01, 21 March 2002). Therefore this part of the complaint under Article 3 was found manifestly ill-founded.

2) Complaint under Article 5

The Court firstly found that there had been no violation of Article 5 § 3. Unlike in many cases against Poland were the national courts based their decision only the gravity of the charges – which is legitimate but insufficient "by itself" (§80 – see *i. a.* Kankowski v. Poland, no.10268/03, § 54, 4 October 2005 and the *Trzaska group of cases*), in the present case these courts "clearly stated that […it] was not a sufficient ground for application of detention on remand unless it was connected with a substantiated risk of obstruction of the proceeding" (§84). The Court considered that "this approach [was] compatible with the principles established in its case-law" and therefore dismissed the applicant's complaint.

However, the Court found a violation of Article 5 § 4 because the national court "failed to decide the lawfulness of the applicant's detention on remand "speedily"" (§96)

Antonio Messina v. Italy, 24 March 2015 (no. 39824/07)

Reduction in sentence granted tardily

The case concerned a reduction in sentence which had been granted to the applicant tardily, with the effect of extending the duration of the sentence he had to serve. This delay resulted from an administrative mistake in the applicant's criminal record indicating that he committed offenses until 1998 instead of 1989. As a result, this mistake deprived him of the right to benefit from a reduction in sentence for the period before 1998.

The Court recalled that although Article 5 § 1 (a) of the Convention does not guarantee, in itself, a prisoner's right to early release, be it conditional or final, 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 conditions of entitlement laid down by law (§45 – see *Şahin Karataş v. Turkey*, no. 16110/03, § 37, 17 June 2008). Although Italian judges enjoy a margin of discretion when determining whether an inmate has met the criteria of good behavior and participation in rehabilitation programs, they must grant him with remission of sentence when the criteria are met (§31).

As a result the Court considered that since the applicant had met these criteria when he applied for a reduction in sentence, he served a longer sentence because of this material error in his criminal record. Therefore is detention was not regular and amounted to a violation of Article 5 § 1 a) of the Convention (§49).

Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania, 24 April 2015 (no. 2959/11)

Standing of NGO to lodge an application on behalf of deceased mentally-ill detainee

The case concerned access to proper medical treatment for a prisoner whilst in detention and the difficulties faced by a NGO to lodge an effective complaint following his death.

The applicant, the APADOR-CH, is a Romanian NGO, which lodged the application on behalf of Ionel Garcea, died on 19 July 2007 in Rahova prison hospital, without known relatives. Mr Garcea was diagnosed with a mental illness as well as other health. He complained to APADOR-CH that he had been beaten by the prison guards on several occasions. The prison authorities, who denied using physical force, claimed that any restraint had only been in response to Mr Garcea's aggression and served merely to prevent Mr Garcea harming himself or prison staff. In 2007, Mr Garcea inserted a nail into his head. He was operated on in a civilian hospital and sent to Rahova prison hospital suffering from post-operative symptoms, sepsis and acute bronchopneumonia. Mr Garcea died in Rahova prison hospital just over a month after the operation. The official investigations following his death are still pending.

The Government invoked Article 34 and submitted that the applicant association did not have *locus standi* as it did not fulfil the *ratione personae* criteria and was not able to show a strong link with Mr Garcea.

The Court recalled its recent judgment in the case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* in which it had established that in exceptional circumstances and in cases of allegations of a serious nature, it should be open to associations to represent victims, in the absence of a power of attorney and notwithstanding that the victim may have died before the application was lodged under the Convention. As in that case, serious allegations of violations of Articles 2, 3 and 13 of the Convention had been made in respect of a person with no known relatives and suffering from mental illness. **Even though, unlike Mr Câmpeanu, Mr Garcea could have lodged a complaint during his lifetime and had a relatively close connection with the association that represented him, the Court nevertheless considered that the applicant association had standing as his *de facto* representative (§45).**

Article 2 (*procedural aspect*): The pending domestic proceedings into Mr Garcea's death had already lasted for more than seven years. Furthermore, the court of appeal had found that the investigation had not been thorough since essential questions had not been answered by the prosecutor. The prosecutor's office itself had failed to deal with the complaint of ill-treatment in detention lodged by the applicant association. The ineffectiveness of the investigation and the time it had taken the authorities to establish the circumstances of Mr Garcea's death thus amounted to a procedural breach of Article 2.

Article 2 (*substantive aspect*): the Court found no violation under the substantive aspect of Article 2 owing to a lack of medical evidence establishing the responsibility of the State "beyond reasonable doubt".

Constancia v. the Netherlands, 26 March2015 (no. 73560/12)

Deprivation of liberty on medical grounds, margin of appreciation

The applicant was found guilty of the violent manslaughter of an eight-year old boy and sentenced to 12 years' imprisonment that should be followed by detention in a custodial clinic ("TBS order"), because the crime he committed was considered "not compatible with a human being with a healthy mental development" by the Netherlands' trial court (§6).

The applicant, who refused to cooperate in any medical examination, alleged that the "TBS order" had been imposed without objective medical expertise to support it, and that it therefore breached the Convention (Article 5 § 1).

The Court rejected the application as manifestly ill-founded. In doing so, it allowed *for the first time* other existing information (former psychologists' and psychiatrists' reports, audio-visual recordings of the applicant's interrogations, the trial court's own investigation) "to be substituted for a medical examination of the applicant's mental state" (press release), and to be used as a basis for depriving him from his liberty.

The Court made therefore an exception to its established case-law concerning deprivation of liberty of "persons of unsound mind", that is allowed on three conditions: "firstly, he or she must reliably be shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder" (§25, see i. a. Winterwerp v. the Netherlands, 24 October 1979, § 39, Series A no. 33).

The Court considered that given "the applicant's complete refusal to cooperate in any examination of his mental state at any relevant time" (§31), the applicant's trial Court was entitled to conclude from the information obtained *and submitted to medical experts* (see Varbanov v. Bulgaria, 5 October 2000, no. 31365/96, §47) "that the applicant was suffering from a genuine mental disorder which, whatever its precise nature might be, was of a kind or degree warranting compulsory confinement" (§30).

It is worth noting that the Court's reasoning is based on its will to limit its own role to "review under the Convention" the national authorities' decision, because the latter should be "recognised as having a certain discretion since it is in the first place for them to evaluate the evidence adduced before them in a particular case" (§27). Such a position, known as the "margin of appreciation" theory, had been recalled on several occasions before the present case (see i.a. the founding case Handyside v. the United Kingdom, §§48 - 50). But since then it has had "a very limited role in relation to Article 5" (see Steven Greer, *The margin of appreciation : interpretation and discretion under the European Convention on Human Rights*, Council of Europe Publishing, 2000, p.6).

Davtyan v. Armenia, 31 March 2015 (no. 29736/06)

Health care

The case principally concerned the applicant's complaint about inadequate medical care in detention over a prolonged period of time.

Arrested in March 2003, Mr Davtyan was found guilty in November 2005 and sentenced to six years' imprisonment. This judgment was later upheld on appeal, and Mr Davtyan's appeal on points of law was ultimately dismissed by the Court of Cassation in June 2006. He was released on parole in June 2006.

Less than a month after he was placed in detention, doctors recommended that he have a biopsy of a tumor on his vocal chords as well as further examinations and treatment. Similar recommendations were made in January and April 2005. None of these recommendations were apparently followed up and, in March 2006 following a drastic deterioration in his health (which included him coughing blood, having asphyxia attacks and losing consciousness), he was transferred to an outside hospital for urgent surgery. He thus had two operations in March and April 2006 which improved his condition.

The Court noted that the applicant "was in need of specialised examinations and treatment which were, however, denied to him over a prolonged period of time" (§89) of about three years. Instead of the specialised treatment that had been recommended by the doctors, he received treatment "only of a symptomatic nature" (§86).

No matter if the authorities' failure to provide the applicant with his treatment is responsible for the evident deterioration of his health since "the fact that a detainee needed and requested such assistance but it was unavailable to him may, in certain circumstances, suffice to conclude that such treatment was degrading within the meaning of that Article" (§88 – see Ashot Harutyunyan v. Armenia, no. 34334/04, § 114, 15 June 2010).

Accordingly, the Court found a violation of Article 3 of the Convention (inhuman and degrading treatment).

Orlovskiy v. Ukraine, 2 April 2015 (no. 12222/09)

Excessive length of pre-trial detention

The ECHR has condemned Ukraine for the excessive length, more than five years and two months, of the applicant´s pre-trial detention and the lack of an effective procedure for the review of the lawfulness of his detention.

The applicant, Sergey Orlovskiy, is a Ukrainian national who was born in 1968 and is apparently currently detained in Odessa (Ukraine). His detention was repeatedly extended – despite Mr Orlovskiy's objections – until his conviction in October 2011 of murder, kidnapping and banditry and sentencing to 14 years' imprisonment.

Relying in particular on Article 5 § 1 (right to liberty and security), Mr Orlovskiy complained about the unlawfulness of his detention between 28 July and 1 August 2006, which he alleged had gone unrecorded, as well as of his detention between 19 February and 18 March 2009, which he alleged had been based solely on the fact that the case file had been submitted to the trial court for examination.

Concerning the first disputed period of pre-trial detention, the Court rejected the complaint for non-exhaustion of domestic remedies. It considered that "in this case the Government satisfied their burden of proof" (§60) and noted that "[g]iven that the applicant did not attempt to use the remedy, the Court is not prepared to evaluate in the abstract the applicant's argument that the remedy would have been unacceptably slow" (*idem*) – and insisted on the fact 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 domestic remedies" (*idem* – see *contra* Lopatin and Medvedskiy v. Ukraine nos. 2278/03 and 6222/03, §§ 76 and 77, 20 May 2010)

Concerning the second period of pre-trial detention, the Court found a violation of Article 5 §1 of the Convention. This detention "was justified solely on the basis of the fact that the case file was being transmitted to the court for examination" (§65). It is worth noting that the Court has already examined a founded a violation in numerous similar cases – and that this problem "has been found to be of a structural nature in Ukraine at the relevant time" (§66 – see Kharchenko v. Ukraine, no. 40107/02, § 98, 10 February 2011).

Furthermore, the Court found a violation of Article 5 §3 because the domestic courts decided to extend the applicant's pre-trial detention "employing stereotyped language without addressing specific facts of the applicant's case" (§78).

Lastly, the Court considered that the fact that the domestic courts "did not produce a reasoned decision justifying the extension of the applicant's detention following his committal for trial and assessing his arguments to the effect that his continuing detention was not warranted" (§88) amounted to a violation of Article 5 §4. Again, the Court recalled that it is a recurrent problem in Ukraine (§88 – see Molodorych v. Ukraine, no. 2161/02, § 108, 28 October 2010; Tsygoniy v. Ukraine, no. 19213/04, § 78, 24 November 2011)

Veretco v. the Republic of Moldova, 7 April 2015 (no. 679/13)

Health care, lawfulness of detention

The applicant, Fiodor Veretco, is a Moldovan national who was born in 1963 and lives in Seliște (the Republic of Moldova). His case concerns the lawfulness of his detention and his access to medical treatment whilst in detention.

Mr Veretco was arrested in 2012, charged with child trafficking and detained. At the Prosecutor's request he spent approximately two months in custody based on an assessment of the risk of him absconding, interfering with the investigation or reoffending. Mr Veretco and his lawyer objected to this decision but their request to see any evidence or documents supporting the prosecutor's request was denied.

1) Complaint under Article 3

Mr Veretco submitted medical records to the domestic courts explaining that he needed hospitalisation for pre-existing broken ribs and pneumonia, this requirement being confirmed by a doctor. However Mr Veretco claims that he received no medical treatment whilst he was in detention.

Noting that the authorities "possessed a record of [the applicant's] medical history and were aware of the recommendation made by civilian doctors regarding the medical treatment required" (§44), the Court considered that the applicant has not received the requisite medical assistance during his detention. Therefore the applicant was subjected to inhuman and degrading treatment within the meaning of Article 3 of the Convention (§46).

2) Complaint under Article 5

At the Prosecutor's request the applicant spent approximately two months in custody based on an assessment of the risk of him absconding, interfering with the investigation or reoffending. Mr Veretco and his lawyer objected to this decision but their request to see any evidence or documents supporting the prosecutor's request was denied.

The Court recalled that if "the need for criminal investigation to be conducted efficiently […] may imply that some of the information collected during them is to be kept secret […] this legitimate goal cannot be pursued at the expense of substantial restriction on the rights of the defence" (§58). In the particular case "no reasons were given by the district court or by the appellate court for withholding this information, and that the applicant was unable to challenge properly the reasons for his detention. In such circumstances, it cannot be said that the principle of "equality of arms", within the meaning of Article 5 of the Convention, was observed in the present case" (§60). Accordingly the Court found that there had been a violation of Article 5 § 4 of the Convention.

Lastly the Court considered that the applicant could not enjoy the right to compensation guaranteed by Article 5 §5 at the domestic level (§67) and ruled that it breaches the mentioned article.

Adrian Radu v. Romania, 7 April 2015 (no. 26089/13)

Material conditions of detention

The applicant, Adrian Radu, is a Romanian national who was born in 1971 and is currently imprisoned in Jilava prison. The case concerns the conditions of Mr Radu's detention in Giurgiu prison where he was held from 21 January 2009, before being recently transferred to Jilava.

The applicant complained about the material conditions of his detention in Giurgiu prison – in particular the lack of sufficient space, overcrowding, and a lack of food and drinking water. The Court firstly estimated that the applicant had lived during several years in an overcrowded cell were he endured promiscuity (§27). Moreover the Court noted that it had examined and condemned on several occasions the disastrous detention conditions in the Giurgiu prison (§29 – see Bădilă v. Romania, no. 31725/04, § 76, 4 October 2011). Accordingly the Court found a violation of violation of Article 3 on account of prison overcrowding (on prison overcrowding see *contra* Muršić v. Croatia, no. 7334/13, 12 March 2015).

O'Donnell v. the United Kingdom, 7 April 2015 (no. 16667/10)

Right to a fair trial

The applicant is an Irish national currently serving a sentence of life imprisonment for a murder committed in 2004.

During his trial and at the request of the defence lawyer, the videotapes of the interviews conducted by the police were excluded from evidence "*inter alia* on the ground that the proper procedures for interviewing a suspect with a mental handicap had not been followed" (§13).

The defence asked the judge to rule that it was undesirable for the applicant to give evidence because of his mental condition arguing that "the effect of a favourable ruling would have been that the jury would not be permitted to draw an adverse inference from any failure of the applicant to give evidence in his own defence" (§15). The judge refused, stating that he could manage the process in such a way that no unfairness would result. He added that "in the event that the applicant chose not to give evidence the judge informed the parties that he would give an adverse inference direction to the jury".

The applicant decided not to testify but a clinical psychologist was permitted to give evidence to the jury as to his vulnerability and the difficulties he would have faced if he had testified. However, the psychologist was not allowed to share conclusions he had drawn from watching the videotaped interviews as these had been excluded from the evidence. Mr O'Donnell was convicted by the jury and his requests for an appeal have been dismissed.

Relying on Article 6 § 1 (right to a fair trial), the applicant complained that his trial was unfair because the judge did not allow the clinical psychologist to share his observations on the videotaped interviews and because of the judge's direction to the jury about drawing adverse inferences from his decision not to give evidence without regard to whether there was a case to answer.

Concerning the use of videotapes, the Court stated that "while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law" (§53) – and that anyway "since the portion of the videotape on which the applicant wished to rely did not touch on suggestibility, the omission of the evidence would not have had any material effect on the trial judge's decision" (*idem*).

The main point of the case therefore concerned the trial judge's decision to allow the jury to draw adverse inferences from the applicant's failure to testify since "the right to silence lies at the heart of the notion of a fair procedure under Article 6 of the Convention" (§50 – see Averill v. the United Kingdom, no. 36408/97, § 45, ECHR 2000-VI).

The Court considered however that "the trial judge gave appropriate weight in his direction to the explanation from the expert as to the applicant's decision not to testify" (§57 – see *contra* Beckles v. the United Kingdom, no. 44652/98, § 57, 8 October 2002). As a result "taking all the circumstances of the case into account, including the weight of the circumstantial evidence against the applicant calling for an explanation, the competing medical evidence and trial judge's clear and detailed direction to the jury, the Court finds that there has been no violation of Article 6 §1 regarding the adverse inference instruction in this case" (§58).