



COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

WORKSHOP ON THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS CONCERNING CONDITIONS OF DETENTION AND EFFECTIVE REMEDIES TO CHALLENGE THESE CONDITIONS

Sofia, 18 - 19 December 2014¹

CONCLUDING REMARKS

a) *Introduction*

1. The participants stressed the necessity of viewing the problem of detention conditions as part of a coherent criminal system, with good cooperation between all actors involved, notably policy makers, prison administrations, probation services, social services, prosecutors and judges. The ongoing efforts to put in place such a system were noted and encouraged. The participants recalled in this context the guidance provided by the case-law of the European Court for Human Rights (the European Court), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and other European standards.

b) *Addressing structural problems*

2. All participants welcomed the recent action plan submitted, on 8 December 2014, by the Government to the Committee of Ministers of the Council of Europe in the context of the supervision of the *Kehayov* group of judgments of the European Court. The participants noted in particular the positive developments achieved since 2012 as regards the reduction in prison population, although the underlying reasons for this decrease were subject to discussions. The necessity of continuous monitoring of the situation was underlined.
3. There was agreement that the most immediate problem in Bulgaria relates to the poor material detention conditions. The urgent need to thoroughly refurbish a number of existing detention facilities, or in the alternative to construe new ones, was stressed and this in the interest of both detainees and prison staff. Existing

¹ The document should not be regarded as placing on the legal instruments mentioned therein any official interpretation capable of binding the governments of Member States, the Council of Europe's statutory organs or any organ set up by virtue of the European Convention on Human Rights.

proposals, including the construction of a new prison, made by the Director of the Chief Directorate for the Execution of Punishments were noted, as were also different initiatives of modernisation of prison facilities (including construction of new prisons) in neighbouring states. The need to seek solutions which will allow the authorities to rapidly improve the material conditions of detention, if necessary by continuing to explore all possibilities of support and cooperation at national and European level was also raised.

4. As regards the long term solution to the overcrowding problem, a number of considerations were addressed, notably the necessity to resort to preventive detention only when recourse to all other alternative security measures were fully exhausted, the decriminalisation of certain petty offences, better dealt with in an administrative form, special educational arrangements for minors, the necessity of a revision of sentencing and prisoner allocation policies as many persons in closed wards were kept there for offences of limited gravity, the criteria for risk assessments of those undergoing closed ward prison sentences in order to decide on transfers to semi open or open prisons, the appropriateness of compulsory closed ward detention for recidivists, the practices used for plea bargaining to avoid prison sentences, the acceptance of only one suspension of sentence, the possibilities offered by new practices of electronic bracelets (and the necessity of keeping the duration controlled and combining these practices with the necessary supportive measures) and community service. Especially, the need to make better use of alternative measures to imprisonment and conditional release was stressed, including the accompanying need to strengthen and develop probation services.
5. The participants also underlined the importance of further developing out of cell activities, as well as education and work opportunities.
6. The necessity of providing information and explanations to the public about choices made in the criminal justice field was considered of great importance.
7. The Italian and Scottish experiences in all the above areas, notably in order to limit detention in closed wards to situations where this is strictly necessary, to develop out of cells activities, education and work opportunities and to provide adequate resocialisation activities, including family contacts, were noted with great interest.
8. The instauration of a national preventive mechanism within the Ombudsman's Office since 2012 was welcomed and the information provided as to the results of the first years of activity noted with interest. The importance of rapid publication (including over the internet) of reports and statistics was underlined, both in the interest of the prison administrations, the administrative courts and the prosecutors responsible for providing effective remedies.

c) Setting up effective preventive and compensatory remedies

9. The basis for the discussions about the possibilities to set up effective compensatory and preventive remedies was the Bulgarian Constitution's incorporation of the

European Convention on Human Rights as domestic law, with priority over ordinary national legislation.² It was stressed that the Convention had to be interpreted in the light of the case-law of the European Court of Human Rights, in particular that developed through judgments against Bulgaria. The unconditional obligation to secure the existence of effective remedies was also underlined.

10. The participants considered that, as a result of the developments in the case-law of the Supreme Administrative Court, Article 1 of the State and Municipalities Liability for Damage Act 1988 had, in principle, laid the basis for an effective compensatory remedy for the purposes of Article 13 of the Convention, even if certain adjustments of practice were still required, to fully incorporate all requirements emerging from the European Court's case-law (burden of proof of the detained person limited to provide a prima face case, thereafter up to authorities to prove that detention conditions conform with the Convention, acceptance of a presumption in favour of the existence of moral damages, ensuring a level of such damages bearing a reasonable relationship with awards made by the Court itself).
11. The participants also noted that there existed a legal framework, which read in the light of the Convention requirements as regards detention conditions, was capable of providing the basis for an efficient preventive remedy in case of alleged violations of these requirements (also largely reproduced in Article 36§2 of the Criminal Code), and that the first cases brought appeared to confirm the capacity of the framework to provide speedy and effective preventive redress in such situations (actions under Articles 250, 256-257 of the Code of Administrative Procedure or the specific provisions regarding transfers in Articles 62-64 of the Execution of Punishments and Pre-Trial Detention Act 2009), if developed into a consistent Convention compatible judicial practice. The possibility of combining remedial preventive orders with monetary penalties was noted (Article 290 of the Code of Administrative Procedure).

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² Article 5 § 4 of the Constitution of Bulgaria stipulates that international treaties which have been ratified in accordance with the constitutionally established procedure and promulgated, and have entered into force with respect to the Republic of Bulgaria, are part of the country's domestic law. They shall have precedence over any provisions of domestic legislation which contravene them.

³ Article 250 § 1 of the Code of Administrative Procedure 2006, which came into effect on 1 March 2007, provides that any person who has the requisite legal interest may request the cessation of actions carried out by an administrative authority or a public official that have no basis in the law or in an administrative decision. The request is to be made to the competent administrative court (Article 251 § 1), which has to deal with it immediately (Article 252 § 1) and, having made the necessary inquiries (Article 252(2)-(4)), rule forthwith (Article 253 § 1). The court's decision is subject to appeal, which does not have suspensive effect (Article 254 §§ 1 and 2). Articles 256 and 257 of the same Code, which likewise came into force on 1 March 2007, provide that a person may bring proceedings to enjoin an administrative authority to carry out an action that it has the duty to carry out under a legal provision. If the court allows the claim, it must order the authority to carry out the action within a fixed time-limit.

12. The complex interactions between the preventive and compensatory remedies were noted, including the question of whether or not to require the exhaustion of preventive remedies before allowing recourse to the compensatory remedy. It was felt that the complex issues raised required further consideration.
13. The Italian experience in setting up effective remedies in the wake of the pilot judgment of *Torreggiani v. Italy* (43517/09, 22635/03) was noted with great interest, notably the option of ensuring compensation for poor detention conditions not by a sum of money but through a reduction of sentence at a rate of 1 day's reduction for 10 days of detention where a judge found that the detention conditions had violated the European Convention on Human Rights; this system allowed to reserve monetary compensation to situations where such reduction of sentence could not take place (in principle the last periods of detention before release).
14. All participants underlined that recourse to judicial remedies should be exceptional in that the major responsibility for ensuring Convention conform prison conditions and ensuring speedy procedures for the handling of complaints rested with the prison administration (notably through improved training of prison staff and the provision of adequate resources) and the ordinary supervision mechanisms, including the prosecutor services.
15. All actors involved agreed that all the means available should be used to ensure Convention conform detention conditions and the effectiveness of the preventive and compensatory remedy, whilst also taking into account the immediate practical problems manifested through the legislation postponing to 2019 the imposition of a general obligation to meet the 4 m² requirement for minimum living space per prisoner in collective cells. Particularly as regards this last issue, the participants stressed the necessity to take all relevant measures to nevertheless avoid violations of the Convention, taking into account the Court's case-law in general (notably as regards the relevance of out of cell, educational and work activities or other arrangements capable of alleviating minor shortcomings in cell space) and possible specific additional indications provided by the Court in judgments against Bulgaria or by the Committee of Ministers when supervising the execution of these judgments.⁴

⁴ The cases regarding detention conditions in Bulgaria are presently regrouped in the *Kehayov* group of cases – see § 2.