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Meeting: 1164 DH meeting (5-7 March 2013)

Item reference: Action report (05/02/13)

Communication from Bulgaria concerning the case of Kashavelov against Bulgaria (Application No. 891/05).

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Réunion : 1164 réunion DH (5-7 mars 2013)

Référence du point : Bilan d'action

Communication de la Bulgarie relative à l'affaire Kashavelov contre Bulgarie (requête n° 891/05)
(anglais uniquement)



ACTION REPORT

on the implementation of the judgment of the ECtHR in the case of

Kashavelov v. BULGARIA

Application no. 891/05
Judgment of 20 January 2011
Final on 20 April 2011

THE FACTS

The applicant, Ivo Kashavelov, is a Bulgarian national born in 1964 and currently serving a sentence of life imprisonment in the Sofia Prison for, among other offences, the murder of three policemen. The case relates to the systematic handcuffing of the applicant when taken out of his cell (violation of Art. 3), excessive length of judicial proceedings against him (violation of art. 6, § 1) and lack of an effective remedy to challenge the excessive length of criminal proceedings (violation of Art. 13 in conjunction with Art. 6).

As concerns the use of handcuffs, the Court found that the applicant had been handcuffed “each time when taken out of his cell, even when taking his daily walk”. The Court noted that such “routine handcuffing of a prisoner in a secure environment cannot be considered justified”.

INDIVIDUAL MEASURES

a) The compensation was duly transferred to the applicant’s account in 28 September 2011. Later on, it was seized for payment of private debt, namely for the payment of compensation awarded to the families of the persons killed by the applicant

b) Additional individual measures

1. Information on the current security measures imposed on the applicant related to the use of handcuffs

On 13.02.2012 and 18.05.2012 in compliance with the national legislation the Director of the Sofia Prison issued orders according to which in the applicant’s case the use of handcuffs could be warranted on specific occasions (hereinafter “the Orders”).¹ The legal basis for the Order is Article 118 (1) of the Execution of Punishments and Detention in Custody Act (hereinafter “EPDCA”) in conjunction with Article 114 (1), points 4 and 5 and Article 115 (2)².

¹ A copy of the first order was enclosed with the Action Report from 17.02.2012. A copy of the second order was sent to the Secretariat by e-mail on 23.10.2012

² EPDCA, Article 114. (1) Use of auxiliary means shall be admissible if the result cannot be achieved by use of physical force:

According to these Orders, Mr. Kashavelov is no longer subject to routine handcuffing. As per the information provided by the General Directorate "Execution of Punishments" (hereinafter "GDEP") concerning the applicant's status there is no systematic use of handcuffs when he is taken out of the cell. In case of special circumstances and immediate necessity handcuffs are used only outside the premises of his group, during the escort of the applicant to some destinations on separate occasions - outdoors, visits, etc. Once he has been escorted to a certain destination, the handcuffs are removed. The applicant is never handcuffed within the territory of his group or in his cell and he is not handcuffed during his daily walk.

2. Updated characterisation of the personality of Mr. Kashavelov and information about his behaviour

Mr. Kashavelov is accommodated in Group I at the Sofia Prison in a separate cell in execution of his punishment "life imprisonment without the possibility for substitution". Since the beginning of his stay – 05 August 1996, a special regime was applicable in his case. The last assessment of the prisoner's personality and behavioral risks was made on 2 August 2012 by the "Social Activities and Educational Work" Sector (hereinafter "SAEWS").

a) Characterisation of Mr. Kashavelov's personality

As per the assessment made by the penitentiary psychologists Mr. Kashavelov is characterized with a phenomenal memory, he is combinatory, calculating, with an extremely heightened self-esteem, authoritative, cold, cruel, distrustful, and reticent. He keeps his distance from everyone and everything. Mr. Kashavelov shows extreme hostility towards the judicial and executive powers. He still does not accept his verdict and claims to be innocent and not sentenced, with a fixation to prove it to everybody. He is disparaging, incredulous and hostile to both the employees and other prisoners. His irascibility, reluctance to accept somebody else's opinion, rules and restrictions, his accumulated hatred and proverbial cruelty make him unpredictable and prone to revenge at any cost. He is unable to discharge pressure and thus disperses aggression inadequately. Any attempt for a contact by the administration is regarded by him as hostile and he blocks it.

Concerning Mr. Kashavelov's attitude to other inmates, relationships within his group are based on acts of verbal and physical aggression. His contacts with other prisoners are very limited because of his arrogant and imperious behaviour and attitude towards them.

...

4. when escorting or apprehending a person deprived of his or her liberty;

5. where, as a result of a mental disorder or depression, there is a risk of a person deprived of his or her liberty attempting to commit suicide or to kill or injure another person.

...

Article 115. ...

(2) When using physical force and auxiliary means, the civil servants of the places of deprivation of liberty shall be obligated, as far as possible, to safeguard the health and to take all measures for the protection of the life of the persons targeted.

...

Article 118. (1) Auxiliary means and arms shall be used after direction by the director of the prison, reformatory, prison hostel or detention facility. Out of hours, any such direction shall be given by the commanding officer of the on-duty unit. Upon a surprise attack and in circumstances which have occurred suddenly, the decision shall be made by the personnel member.

Mr. Kashavelov permanently demonstrates hostility to the administration officials. He is predisposed to accumulate enormous amounts of tension which is usually diluted through verbal threats for assaults and physical destruction of the members of the prison staff whom he has to communicate with.

Since the beginning of 2012 up to the present moment Mr. Kashavelov refuses to use his right to outdoors stay. He has not expressed a desire to make phone calls as well.

b) behaviour, breaches of the discipline and misdemeanors.

Mr. Kashavelov has been administratively punished twice during his imprisonment (in 2001 and 2005), once for threats against the supervisory and security staff and once for physical assault against another prisoner. Since he was informed of his final verdict in November 2004 he opposes to any attempt for contact made by the administration and social workers.

The last identified case is from 09.02.2012 when the prison psychologist Mr. Kurtev tried to conduct a meeting with the prisoner who responded with verbal aggression. An identical case was registered on 08.06.2011, when he was served by a bailiff with documents ordering to pay compensation to the relatives of the victims of his crimes. Mr. Kashavelov fell into affective arousal and threatened the SAEWS inspector and the prison administration with an assault.

3. Information on the number and frequency of the planned and extraordinary meetings between Mr. Kashavelov and SAEWS officers

According to the Internal Rules for Application of a System for Risk Assessment on Offenders Serving "Deprivation of Liberty" Punishment in Penitentiary Institutions³ applicable in the penitentiary institutions in Bulgaria and the current practice applied the assessment reports and the plans for the execution of the sentences and individual measures to be taken concerning the inmates are prepared at least once a year. In case the prisoner has higher values of recidivism risk or otherwise represents danger to the public, assessments are made at least every six months. These rules are applicable for the case of the applicant and even sometimes assessment is made at shorter intervals. Moreover, in his order of 18.05.2012, the prison governor indicated that he should receive reports on the prisoner's behaviour and on his situation on a monthly basis.

In the applicant's case the regular assessment of the risk of recidivism is made mostly on the basis of the available documentation, side observations and reports and information provided by the security staff due to the reluctance of the prisoner to conduct a conversation with a SAEWS inspector and a psychologist. It has average values of 65 points. Thus the assessment of the risk of harm to the public, prison staff and other inmates is with high values that remain unchanged in time. There is lack of motivation and desire for changes.

The prisoner has never sought psychiatric or psychological help. As mentioned above due to the fact that he refuses to communicate and the high risk of incidents upon direct contacts Mr. Kashavelov is mainly subject to daily observation by the SAEWS inspector, the psychologist and the security staff. These observations are regularly reported to the prison governor and are taken in consideration when applying individual security measures on the applicant.

³ Document sent to the Secretariat in Bulgarian.

The last assessment reports of the individual risk of the applicant were made on 10 February 2012 and 2 August 2012 by the SAEWS inspector supervising his group. No improvement in his personality or the risk rates was observed and the inspector suggested the continuation of the use of enhanced precautionary measures upon convoying Mr. Kashavelov out of the high security zone. On the basis of the report of 10 February 2012 the head of Sofia prison issued the order No P-12/13.02.2012 establishing the individual measures concerning Mr. Kashavelov. A new order providing for similar individual measures concerning the applicant was issued on 18.05.2012. The two documents have been sent to the Department for the Execution of Judgments of the Court on 17.02.2012 and on 11.10.2012

4. Information about the intervals at which the measures imposed on the applicant are reviewed by the Head of the Sofia Prison.

It should be noted that this particular case is closely observed by both the prison governor and the General Director of GDEP.

As mentioned in the previous point reassessment of the applicant's behaviour is performed at least every six months and the head of the prison is immediately acquainted with it. The domestic law and practice do not oblige the head of the prison to confirm or invalidate his initial decision following the periodical assessments of the prisoners' behaviour. However, the management of the prison will amend the order upon any signs of positive development in Mr. Kashavelov's behaviour.

When issuing orders with regard to security measures the prison governor acts in the conditions of operative independence, however he is obliged to take into account any and all facts and circumstances of the case, including the assessment of the prisoner's behaviour.

Furthermore it should be noted that the applicant has at his disposal all the remedies mentioned in point 5 below.

5. Remedies available to the applicant to contest the security measures taken against him.

Mr. Kashavelov was expressly notified for the Orders of 13.02.2012 and 18.05.2012⁴ upon their issuance but he did not take action to appeal against it within the time-limit set in the Administrative Procedure Code (hereafter "the APC"), i.e. 14 days after its notification. The Order is an individual administrative act of the prison governor which may be appealed following the procedure provided in APC. APC provides for a two-instance administrative appeal procedure. Chapter VI of APC (art. 81) states that the individual administrative act (the Order in this case) may be contested in front of the higher administrative organ (i.e. the Director General of EPGD) and then in front of the competent administrative court, in this case the Sofia Administrative Court. Its first-instance court decision may be appealed within 14 days in front of the Supreme Administrative Court as a cassation instance.

Moreover, as the Order is an individual administrative act, the applicant may at any time request that a new order be issued by the head of the prison and may contest either his tacit or express refusal to do so. According to APC the express or tacit refusal to issue an administrative act

⁴ The notifications were performed following the rule of Art. 61 of the Administrative Procedure Code which states in its paragraph 1 that the administrative act and, respectively, the refusal to issue an act, shall be communicated within three days after the issuance thereof to all persons concerned, including those who did not participate in the proceeding.

is subject to judicial review before the administrative courts. The contestation of tacit refusals is regulated in Article 149(2) of APC⁵ and the contestation of express refusals – in Chapter 10, Section III (Articles 197 – 202). The Bulgarian authorities do not have knowledge of case-law concerning requests by prisoners to issue a new order regarding the use of security measures, however they consider that this legal avenue can be used in such situations.

Furthermore, it should be mentioned that Mr. Kashavelov is entitled to submit complaints with regard to his regime and conditions for detention to the supervising prosecutor as well as to the General Director of GDEP to the Ministry of Justice (under art.90 (1) of EPDCA). By now he has not used any of these options.

Mr. Kashavelov may also seek compensation under Article 1 of the State and Municipalities Responsibility for Damages Act (hereinafter “SMRDA”).

GENERAL MEASURES

I. Violation of Art. 3

a) Publication and dissemination of the judgment.

A summary of the judgment was published on the web-site of the National Institute of Justice in February 2011 in its monthly bulletin “Court Practice in Human Rights”, issue 5⁶.

The translation of the entire judgment in Bulgarian is available on the Ministry of Justice website at <http://www.justice.government.bg/new/Pages/Verdicts/Default.aspx>.

b) Current situation concerning the use of handcuffs in respect of life-sentenced prisoners

i. analysis of the current relevant legal framework

The use of auxiliary means such as handcuffs is regulated in chapter 9, section III of EPDCA⁷. The matter is also developed with regard to life-sentenced prisoners in the National Standards for Treatment of Prisoners Sentenced to Life Imprisonment, particularly Section III, p.7 of the Standards⁸.

ii. current practice concerning the use of handcuffs as compared to the general situation referred to in the European Court's judgment

EPGD has been duly informed of the Court's findings in the Kashavelov case and has taken them into account in its work. Each case of use of auxiliary means is considered with regard to the individual features of the respective prisoner, his or her behaviour and the assessment of the risk to

⁵ Article 149. (1) Administrative acts shall be contestable within fourteen days after the communication thereof.

(2) A tacit refusal or a tacit consent shall be contestable within one month after the expiry of the time limit wherewithin the administrative authority was obligated to pronounce.

⁶ <http://www.nij.bg/Articles/Articles.aspx?lang=bg-BG&pageid=548>

⁷ An extract from EPDCA is enclosed as Appendix herewith.

⁸ The National Standards for Treatment of Prisoners Sentenced to Life Imprisonment have been sent to the Secretariat in Bulgarian.

harm others (for the frequency of assessments please see point 3, last paragraph of the individual measures above).

The use of routine handcuffing in Bulgarian detention facilities is not a common practice and all such cases are based on particular facts and circumstances which necessitate the taking of additional security measures in order to preserve the life and health of others. This was confirmed during the last CPT visit in 2010 when only a single case was spotted during the inspection of the Lovech Prison Hospital psychiatric ward. In its comments on the CPT report Bulgaria noted that in this isolated case there was sufficient data that the prisoner “repeatedly behaved violently, both towards prisoners and staff, each time impulsively, unexpectedly, and brutally” and was “rated as posing the highest risk of harm to other persons” (see the comments on paragraph 134 of the Bulgarian response). In any case we would like to underline that CPT’s particular findings during their visits should not be used as means for generalization of isolated issues.

The Supreme Administrative Court (“SAC”) was informed about the findings in the Kashavelov’s judgment and it is in its powers to forward them to all administrative judges throughout the country. It is a well established practice of SAC to conform its final decisions to the Strasbourg Court case-law.

Regarding the domestic case-law, there is a judgment of the Kiustendil Administrative Court where the claim of a plaintiff - prisoner from the Bobov dol prison concerning unauthorized use of handcuffs has been granted. Another claim from the same prisoner was rejected, but the appeal is currently pending before SAC.⁹

iii. remedies which could be used to contest routine handcuffing

The remedies available to other life-sentenced prisoners are the same as the remedies available to the applicant. A decision to use security measures is subject to judicial review, the prisoner can request the prison governor to take a new decision on the necessity to use security measures, there is a possibility to complain to the prosecutor and there is also a possibility to request compensation under Article 1 of SMRDA. Therefore, the domestic law provides for a set of remedies which is sufficient to address complaints concerning routine handcuffing.

c) Additional general measures envisaged by the authorities

As mentioned above a letter has been sent to GDEP with regard to the findings of the Court under the case of Mr. Kashavelov. A similar notification was sent to SAC as well.

II. Violation of Articles 6 and 13

The general measures concerning length of criminal proceedings and lack of effective remedy in this respect are examined in the groups of cases Kitov and Dimitov and Hamanov.

⁹ See Decision No 176 from 16.11.2011 of the Kiustendil Administrative Court under a.c. No 94/2011