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MINISTERS' DEPUTIES

Notes on the Agenda

CM/Notes/1459/H46-13

9 March 2023

1459th meeting, 7-9 March 2023 (DH)

Human rights

H46-13 Marcello Viola v. Italy (No. 2) (Application No. 77633/16)

Supervision of the execution of the European Court's judgments

Reference documents:

DH-DD(2023)91, DH-DD(2023)211, CM/Del/Dec(2021)1406/H46-16

Application	Case	Judgment of	Final on	Indicator for the classification
77633/16	MARCELLO VIOLA (No. 2)	13/06/2019	07/10/2019	Structural problem

Case description

This case concerns a violation of Article 3 of the Convention on account of the irreducibility of the applicant's whole life sentence imposed for membership of a mafia-type criminal organisation.

The European Court found that the irrebuttable presumption enshrined in domestic law, that the applicant's failure to cooperate with the judicial authorities^[1] automatically meant that he was still dangerous and therefore ineligible for release on licence,^[2] meant that any real progress made by him towards rehabilitation could not be taken into account, restricting the possibility of review of his sentence to an excessive degree (§§ 128 and 137).

Under Article 46, the Court found that the case disclosed a structural problem which had already resulted in several pending applications and could lead to many more. It indicated that the authorities should ensure, preferably by introducing legislation, for the possibility to review whole life sentences in cases where the prisoner failed to cooperate with the justice system. It stressed, however, that the procedural possibility of applying for such a review did not mean that the prisoner would be released if found still to constitute a danger to society (§§ 141-144).

Status of execution**A) First examination by the Committee of Ministers**

The Committee of Ministers first examined this case at its 1406th meeting (June 2021) (DH).

With regards to the *individual measures*, the Committee noted with concern that the applicant remained ineligible for release on parole. It noted also that a change in this situation was linked to and dependent on the adoption of the general measures which are necessary to ensure the possibility to review his prison sentence.

With regards to the *general measures*, the Committee called upon the authorities to adopt without further delay the necessary legislative measures to bring the current legislative framework into compliance with the requirements of the Convention, as laid down in this judgment.

B) Developments since the Committee's first examination

The authorities provided an action report on 20 January 2023 (DH-DD(2023)91) and additional information on 14 February 2023 (DH-DD(2023)211). The Committee also received communications from civil society (*Hands off Cain*) on 17 January 2023 (DH-DD(2023)115) and the applicant on 19 January 2023 (DH-DD(2023)92).

The information provided and that available in the public domain can be summarised as follows:

Individual measures:

The applicant indicated that he intends to apply for conditional release. Meanwhile, the L'Aquila court responsible for the execution of sentences granted his application for prison leave, on 7 February 2023.

General measures:

On 31 October 2022, the Government adopted Law Decree No. 162^[3] which amended Article 4 *bis* of the Prison Administration Act introducing the possibility for whole life prisoners who failed to cooperate with the justice system to be eligible for release on parole under stringent and concomitant conditions.^[4]

Whole life prisoners for mafia related crimes (like the applicant) may now apply for release on licence before the judge for the execution of sentences, after serving 30 years. To support their application, they must demonstrate the fulfilment of the civil and pecuniary obligations resulting from their conviction or the absolute impossibility of such fulfilment. Moreover, they must adduce specific elements able to rule out

the persistence of links with organised crime and the context in which the offence was committed and also the danger that such links may be restored, considering, *inter alia*, the reasons adduced in support of non-cooperation, the critical review of the criminal conduct and any initiative in favour of the victims. The elements put forward by the prisoners must be different from and additional to regular prison conduct, participation in the re-educational process and a mere declaration of dissociation from the criminal organisation at stake (for more details see DH-DD(2023)91).

To assess the application, the supervisory judge requests information^[5] and opinions^[6] from different State agencies and bodies which must be provided within 60 days (90 in particularly complex cases). If the elements gathered reveal indications of the persistence of links with organised crime,^[7] the prisoner must provide, within an appropriate time limit, suitable evidence to the contrary. The judge then issues a motivated decision indicating the specific reasons for granting or rejecting the application.

The reform is also applicable to prisoners convicted for crimes committed before its entry into force and to those detained under the restrictive special prison regime provided for by section 41 *bis* of the Prison Administration Act if such regime is lifted or not renewed.^[8]

On 8 October 2022, the Italian Constitutional Court, which following this judgment had called for a reform of the system of review of whole life sentences,^[9] noted that this legislative intervention had changed the core of the relevant framework and invited the Court of Cassation to assess whether the question of constitutionality previously raised by it had now been superseded.^[10] The Court of Cassation scheduled a hearing on 8 March 2023.

The NGO Hands off Cain in its submission of 17 January 2023, while reserving a more informed assessment of the reform based on the first judicial decisions applying it, raised some concerns notably with regards to the heavy burden of proof required which it considers almost impossible to meet, thus hindering the effectiveness of the review mechanism (for more details see DH-DD(2023)115).

Analysis by the Secretariat

Individual measures:

It can be noted with interest that the legislative reform allows the applicant to apply for release on licence. As a change in his situation is dependent on the effectiveness of the adopted general measures (see analysis below), the authorities could be invited to provide updated information on his situation and any relevant judicial decisions.

General measures:

It is recalled that the execution of this judgment requires securing the possibility for the domestic courts to review whole life sentences to determine whether, in the light of a comprehensive assessment of the individual's rehabilitation process and even when cooperation with the justice system is lacking, detention is still justified on legitimate penological grounds.

Against this backdrop, the recent legislative reform of Article 4*bis* of the Prison Administration Act is an essential development which can be noted with satisfaction as it responds to the European Court's indications and the Committee of Ministers' call and reflects the efforts of the Italian authorities to address the structural problem raised by this judgment.

For prisoners convicted of mafia-related offences (and other offences listed in Article 4*bis* of the Prison Administration Act), the previously irrefutable presumption that their failure to cooperate with the judicial authorities (e.g. by providing information on associates) demonstrated that they were still dangerous to society and therefore ineligible for release on parole, has now been transformed into a rebuttable one.

Domestic courts are now empowered to perform a comprehensive assessment of the situation of the prisoners, including their progress towards rehabilitation. This is in contrast to the previous system in which the scope was limited to ascertaining whether the prisoner had cooperated with the judicial authorities.

It remains however essential to ensure that the established review mechanism is an effective one, as required by the Convention under Article 46, that is available in theory and in practice, and offers a genuine reassessment of the prisoners' relevant changes and reasonable prospects of meeting the rigorous conditions required for granting release on licence.

The recent entry into force of the legislative reform does not allow at this stage to carry out a comprehensive assessment of these central aspects. The Committee may therefore wish to invite the authorities to provide information on the functioning of the review mechanism and examples of relevant judicial decisions, addressing also the concerns expressed by civil society notably with regards to the high burden of proof established by the new provisions.

In this context, it seems important to emphasise the great attention showed by the Italian higher Courts, and in particular the Constitutional Court, to the implications of this judgment and the need to secure a Convention compliant system of review.^[11] It appears therefore possible to express confidence that the new legislative provisions will be interpreted and applied by domestic courts in conformity with the requirements of the Convention.

It is recalled in this connection, as also highlighted by the Court (§ 113), that providing a procedural possibility to apply for a judicial review of eligibility for release on parole is an obligation of means, not result and a life sentence does not become irreducible by the mere fact that in practice it may be served in full if the prisoner continues to pose a danger to society.

Financing assured: YES

^[11] The applicant refused to cooperate, citing his genuine belief in his innocence and the fear of reprisals against himself or his family. As a result, despite having built up entitlement to a potential five-year remission of his sentence by participating in a rehabilitation programme, he was deprived of that remission in practice.

[2] The regime of life imprisonment (known as “*ergastolo ostativo*”) is based on a combined reading of Articles 4 *bis* and 58 *ter* of the Prison Administration Act (Law No. 354 of 1975) and Article 22 of the Criminal Code. According to these provisions, as in force at the time, any prospect of release for prisoners convicted, among others, for mafia type offences is conditional on their cooperating with the justice system which is defined as taking steps to prevent the criminal activity from having further consequences, or concretely helping to establish the facts and identify or capture the perpetrators.

[3] Law Decree No. 162 of 31 October 2022, transformed into Law No. 199 of 30 December 2022 which entered into force on 31 December 2022.

[4] These conditions differ according to the offences concerned. Mafia related crimes are subject to the most stringent provisions.

[5] Notably on the continued operation of the criminal organisation to which the prisoner belonged, on the position held by him/her within such organisation, on the criminal context in which the offence was committed, on new charges or preventive and disciplinary measures taken against the prisoner and on the income, assets and standard of living of his/her relatives

[6] Of the public prosecutor at the court which delivered the first instance sentence and the National Anti-Mafia and Counterterrorism Prosecution Office.

[7] Or with the context in which the offence was committed or they indicate the existence of the danger of re-establishment of such links.

[8] Section 41 *bis* of the Prison Administration Act gives the Minister of Justice the power to suspend the application of the ordinary prison regime on grounds of public order and security.

[9] In its decision No. 97 of 15 April 2021, the Constitutional Court stated that the legislative framework, in force at the time, was in breach of the Constitution and the European Convention on Human Rights insofar as it established cooperation as the only means for a person convicted of mafia-type offences to regain his or her freedom. However, it decided to postpone giving a final ruling on this matter until May 2022 (later postponed to November 2022), to give time to Parliament to enact legislation to rectify this situation.

[10] Decision of the Constitutional Court No. 227 of 8 November 2022. On 8 February 2023, the Constitutional Court adopted the same approach with regards to other questions of constitutionality concerning the previous legislative framework.

[11] Decision No. 97 of 15 April 2021.

Related documents

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www.coe.int/en/web/cm/-/1459th-meeting-dh-7-9-march-2023

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