GIURISPRUDENZA PENALE

ECtHR Kondrulin v. Russia, 20 September 2016. Inadequate medical assistance for detainees and non-compliance with interim measures violate the European Convention on Human Rights

di ***Martina Elvira Salerno***

Summary 1. Introduction - **2.** Relevant facts - **2.1.** The applicant's health and medical treatment in detention - **2.2.** Rule 39 - **3.** Application to the ECtHR - **3.1.** Decision of the Court - **4.** The vital role of *interim* measures in the Convention system - **5.** The right of prisoners to medical care: an overview - **5.1.** The approach of the European Court: a dynamic interpretation of Article 3 ECHR.

1. Introduction

The human rights discourse has persuaded the regulation of health across jurisdictions regardless of a person's legal status. In fact, a significant development of the jurisprudence of the European Court of Human Rights (hereafter referred as to the European Court, the Strasbourg Court or ECtHR) has concerned both the right to live in appropriate conditions and the right to healthcare of applicants under the full authority of the state, due to detention. In this regard, it must be observed that the protection of the right to health of detainees has been of great consideration in several cases decided by the European Court. Among these, it is worth examining the decision *Kondrulin v Russia* [2016] ECHR 772 recently ruled by the third section of the Court. As seen below, this case deals with the two legal issues.

At the outset, the Court addressed the failure of the Russian authorities to comply with an *interim* measure indicated by the Court under Rule 39 of Court. Such lack of compliance results in a substantive breach of Article 34 of the European Convention on Human Rights (ECHR). This is not of little importance, considering the reputation of Russia as being one of those countries well-known not to adopt *interim* measures, as reported by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly (PACE) of the Council of Europe, Russia.[1]

However, the importance and resonance of the case is to be attributed to the second issue, concerning the inadequate medical assistance while in detention, in relation to Article 3 of the Convention. It is noteworthy that the present judgment has enriched

[1] ECRE-ELENA, Research on ECHR – Rule 39 Interim Measures (European Council on Refugees and Exiles, April 2012) accessed 28 October 2016 available <http://www.ecre.org/wp-content/uploads/2016/05/RULE-39-RESEARCH_FINAL.pdf>
See also, Committee on Legal Affairs and Human Rights, 'Urgent need to deal with new failures to co-operate with the European Court of Human Rights' Report Doc. 13435 (28 February 2014) accessed 28 October 2016 available <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20348&lang=en>

the jurisprudential trend on the quality of medical assistance of seriously ill detainees. Indeed, it has condemned a situation of gross violation of prisoners' human rights of the Russian prison system.
To put it briefly, this case is of particular interest, since it concerns Russia, namely a country considered to be problematic in terms of compliance with provisional measures of the Strasbourg Court. Moreover, it is a state where the protection of prisoners' human rights falls short of what is universally established by human rights instruments. It can be argued that this ruling is part of a wider process of consolidation of a minimum standard of protection of fundamental rights of detainees established on the international plane.

2. Relevant facts

2.1. The applicant's health and medical treatment in detention

The applicant, Vladimir Kondrulin, now deceased, was a Russian national sentenced to 13-year and 10-month imprisonment for a criminal offence. In February 2014, following a biopsy of prostate tissue, Mr Kondrulin was diagnosed with terminal prostate cancer, which had spread to his liver and inguinal lymph nodes. His condition was aggravated by both a wasting and paraneoplastic syndromes. Few months later, this diagnosis was confirmed by a medical panel, concluding that the applicant's medical condition was severe enough to make him eligible for early release.
In January 2015 an hearing was held before the District Court, in order to examine the applicant's request for early release on health grounds. In this context, the physician testified that the lack of effective medical treatment significantly deteriorated his health condition. Nonetheless, this request was rejected on the ground that the applicant failed to reform and rehabilitate himself while in detention. Furthermore, the District Court found that his medical condition did not preclude further detention, since the applicant could receive appropriate medical treatment within the prison system, by being transferred to another hospital. This decision was upheld on appeal.

2.2. Rule 39

In order to obtain adequate medical treatment or early release from detention, in March 2015 the applicant sought *interim* measures from the European Court under Rule 39. By applying this Rule, the Court indicated to the Government that:

> '*It was desirable, in the interests of the proper conduct of the proceedings, that the applicant should be immediately examined by medical experts who were independent of the prison system, with a view to determining: (1) whether the treatment he was receiving in the prison hospital was adequate with regard to his condition; (2) whether his state of health was compatible with detention in prison hospital conditions; and (3) whether his condition required his placement in a specialist, possibly civilian, hospital.*

Furthermore, the Government were also to ensure his transfer to a specialist hospital, should the medical experts conclude that he required it'.[2]

Relying on a number of documents, such as medical files, certificates from detention facilities and reports by a medical panel confirming the eligibility for an early release, the Russian government stated that the quality of medical treatment provided in the prison hospital was adequate to meet the applicant's needs. For this reason, it did not make any arrangements to carry out an independent medical examination, as requested by the Strasbourg Court.
As a consequence, an assessment of the quality of the medical treatment Mr Kondrulin was receiving in detention together with the compatibility of his state of health with further detention was carried out by two independent doctors summoned by the applicant's lawyer. These experts concluded not only that the prison hospital did not provide adequate active treatment, for instance glandular therapy and radiation therapy, but also that this failure was due to the lack in such hospital of a licence for inpatient treatment of cancer and urological diseases. Accordingly, the detention in that facility amounted a threat to his life. Due to further detention, Mr Kondrulin's health kept on deteriorating, to the extent that he died of cancer on 15 September 2015 while in custody, leaving no known relatives.

3. Application to the ECtHR

An application of a serious breach of core human rights was lodged by AGORA, Interregional Association of Human Rights Organisations, a Russian non-governmental organisation (NGO) on behalf of the applicant. In particular, it was alleged the violation of Article 3 ECHR (prohibition of inhuman or degrading treatment) on account of the Russian authorities' failure to provide Mr Kondrulin with the medical care he had needed, in so exposing him to severe physical and mental suffering. In addition, it was claimed the violation of Article 34 ECHR (right of individual petition) on account of the failure of such state to comply with an *interim* measure indicated by the European Court.

3.1. Decision of the Court

A preliminary consideration concerns the *locus standi* of AGORA. The Court has been called upon to assess whether the NGO, whose lawyers represented the applicant in the domestic proceedings, had legal standing to continue his case. In this regard, the Court found that, considering both the exceptional circumstances of the case and the serious nature of the allegations, AGORA had legal standing to pursue the application. It also took into account the fact that the Russian authorities have never expressed any objections to that effect. Moreover, the Court considered that '*to find otherwise would amount to preventing such serious allegations of a violation*

[2] *Kondrulin v Russia,* para 21

of the Convention from being examined at an international level, with the risk that a respondent State might escape accountability under the Convention'.[3]
With reference to Article 34 ECHR, the Court concluded that the State has failed to comply with the *interim* measure indicated in the present case under Rule 39. It is noteworthy that the formulation of an *interim* measure is one of the elements that the Court must take into account, when analysing whether a State has complied with its obligations under Article 34 of the Convention. In this assessment, '*the Court must have regard not only to the letter, but also to the spirit of the* interim *measure indicated and indeed to its very purpose*'.[4] In this context, the Strasbourg Court restated that the goal of the interim measure was to obtain an independent medical opinion on the state of the applicant's health, the quality of the treatment he was receiving, as well as the adequacy of the conditions of his detention in view of his medical needs. This was necessary to effectively respond to and, if need be, prevent the possible continued exposure of Mr Kondrulin to physical and mental suffering. In the present case, by replacing expert medical opinion with their own assessment of an applicant's situation, Russian authorities have frustrated the aim of the *interim* measure, in so breaching of its obligation not to hinder in any way the effective exercise of the right to bring an application before the European Court of Human Rights.[5]
As anticipated above, the Strasbourg Court unanimously held that there has been a violation of Article 3 ECHR, which is definitely related to its findings under Article 34 of the Convention. In fact, the non-compliance with the *interim* measure exposed the applicant to continued physical and mental suffering. As a consequence, it laid the basis for the Court to also declare a violation of Article 3 of the European Convention.[6] The Court drew this conclusion, considering that the evidence submitted by the Russian government that the applicant received effective medical treatment for his illnesses while in detention was unconvincing and insufficient. Furthermore, it was particularly concerned about the fact that, despite the acknowledgment in open court that the applicant's serious state of health was incompatible with the detention conditions, a transfer to an appropriate facility was not arranged. In the light of the above, the Court found a violation of the prohibition of torture and inhuman and degrading treatment on the grounds that the authorities failed to provide Mr Kondrulin with the essential medical care he needed. This failure thus amounted to inhuman and degrading treatment for the purposes of Article 3 of the Convention.

[3] *Kondrulin* para 31. See also *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [2014] ECHR 972 para 112; *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v Romania* [2015] ECHR 309 para 42
[4] *Kondrulin* para 44. *Paladi v Moldova* [2009] ECHR 450 para 91
[5] *Kondrulin* para 47. See also *Khloyev v Russia* [2015] ECHR 129 para 67; *Salakhov and Islyamova v Ukraine* [2013] ECHR 221 para 222
[6] *Kondrulin* para 58

4. The vital role of *interim* measures in the Convention system

On many occasions, the jurisprudence of the European Court has referred to the fundamental role of *interim* measures in the Convention system. For this reason, this matter is worth being briefly considered.

With reference to the present judgment, the scope of application of *interim* measures must be clarified. In practice, *interim* measures are applied only in a limited number of areas and most concern expulsion and extradition. However, they often concerned the applicants' medical treatment while in detention, the transfer from prison to hospital or the continued treatment in a specialised medical facility.[7]

But, what are *interim* measures? According to the well-established practice of the European Court, they amount to '*urgent measures which apply only where there is an imminent risk of irreparable harm*'.[8] This is to say that they aim to protect anyone who proves to be in a situation of extreme gravity and urgency and who is the potential victim of a violation of a right set forth in the European Convention on Human Rights. This mechanism is not contemplated in the Convention itself, but only in the Rule 39 of the Court. As stated above, this Rule is linked to Article 34 of the Convention, by which the Contracting states '*undertake not to hinder in any way the effective exercise of the right of individual application to the Court*'.

In relation to their purpose, in a recent judgment, *Savriddin Dzhurayev v Russia* [2013] ECHR 375, the Court explicitly affirmed that 'interim *measures are not limited to facilitating effective examination of applications, but they also aim to ensure effectiveness of the protection afforded to the applicant by the Convention.*[9] *In other words, [...] when there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an* interim *measure is to preserve and protect the rights and interests of the parties*'.[10]

When it comes to examine the compliance by member states with the obligations under Article 34 ECHR, the European Court takes in great consideration the formulation of the *interim* measure. Particular regard is paid to its rationale. In *Kondrulin*, there was no doubt about the purpose of the *interim* measure. Nonetheless, the national authorities circumvented such measure, by limiting the scope of the medical examination on 30 October 2014 '*to checking the applicant's*

[7] *Paladi; Salakhov and Islyamova; Aleksanyan v Russia* [2008] ECHR 1903*; Grori v Albania* [2009] ECHR 1076; *Prezec v Croatia* [2011] ECHR 1268; *Bamouhammad v Belgium* [2015] ECHR 1023

[8] B Elger, C Ritter and H Stöver, *Emerging issues in prison health* (Springer 2016), 238. See also *Mamatkulov and Askarov v Turkey* [2005] ECHR 64 para 104

[9] *Savriddin Dzhurayev* para 212. The same arguments are articulated by the Court in its earlier judgments in the cases, such as *Mamatkulov and Askarov* para 125; *Shamayev and Others v Georgia and Russia* [2005] ECHR 233 para 473; *Aoulmi v France* [2006] ECHR 33 para 108

[10] *Paladi* para 89; *Ben Khemais v Italy* [2010] ECHR 859 para 81

medical condition against an exhaustive list of illnesses provided for by Government decree, which could have warranted his release'.[11]

The European organs have worked in the area of prevention of violations of human rights through the application of interim measures, in particular in relation to detainees. As seen above, compliance with Rule 39 is essential to ensure the practical and effective protection of Convention rights. In this regard, it is necessary to establish the legal consequences of *interim* measures and, more precisely, whether such measures are legally binding on the state to which they are indicated. In the *Kondrulin* case, the respondent government argued that '*it could not be inferred from Article 34 of the Convention or 'from any other source' that that the interim measure indicated under Rule 39 was legally binding*'. [12]

However, the most relevant case-law of the Strasbourg Court has demonstrated the opposite. In fact, the binding nature of Rule 39 has been established by the Court since February 2005.[13] Moreover, the Court has taken a firm position on the absolute and utmost importance of States' compliance with interim measures, by stating that their non-respect can result in a violation of the right of individual petition guaranteed by Article 34 of the Convention. Once this rule has been applied, it is for the state to demonstrated that they complied with the *interim* measure in question.[14] However, the Court has specified that no violation occurs '*if the respondent State has demonstrated that an objective impediment prevented compliance and that it took all reasonable steps to remove the impediment, and to keep the Court informed about the situation*'.[15]

Are *interim* measure an effective instrument to prevent violation of Convention rights, and in particular of the right to an individual petition? Given the above, it must be argued that the effectiveness of Rule 39 measures lies in the compliance of member states with these measures. Is goes without saying that member states voluntarily undertook legal obligations, such as to allow the Court to discharge its functions, or to ensure the most effective protection of the Convention rights to anyone within their jurisdiction. However, a number of countries, including Russia and Italy, have repeatedly failed to comply with such measures. Non-compliance seems to be mostly a political issue, rather than just a specifically legal one and it provides reasons for serious concern.

---

[11] ibid para 46

[12] ibid para 37

[13] See, by way of example, *Mamatkulov and Askarov* paras 100 ss

[14] UN High Commissioner for Refugees, *Toolkit on how to request interim measures under Rule 39 of the Rules of the European Court of Human Rights for persons in need of international protection*, February 2012, available <http://www.refworld.org/docid/4f8e8f982.html> accessed 02 November 2016

[15] Report of the Committee on Legal Affairs and Human Rights, *Urgent need to deal with new failures to co-operate with the European Court of Human Rights,* Doc 13435 (February 2014) available <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20348&lang=en> accessed 2 November 2016. See also, *Muminov v Russia* [2010] ECHR 1733*; Sivanathan v the United Kingdom*, [2009] ECHR 327; *Hamidovic v Italy* [2012] ECHR 2013

5. The right of prisoners to medical care: an overview

The European Court has examined a large number of cases against Russia concerning complaints of inadequate medical services afforded to inmates.[16] The *Kondrulin* decision falls within the jurisprudence of the European Court on detention conditions, more specifically, the compatibility of the prisoners' state of health with detention and the ability of national authorities to provide them with adequate medical care while imprisoned. According to the principle of equivalence of treatment and care, '*prisoners are entitled to the same level of medical care as persons living in the community at large*'.[17] However, Senior and Shaw pointed out that, although the prison population is integral part of the general population, health needs of prisoners are different. Detainees are in a special situation, due to their dependence on the authorities when it comes to their living conditions, including access to medical care.[18] Moreover, the prison environment does not always take into account specific needs of prisoners.

The right to care for health is recognised in several human rights instruments and it applies regardless of a person's legal status.[19] Abbing highlighted that prisoners retain their individual rights when in prison. In fact, imprisonment constitutes the punishment for a crime, while the deprivation of needed medical treatment is added to imprisonment. It results is additional suffering, which amount to cruel and unusual punishment in excess of that imposed by the sentencing court.[20]

It has been argued that when states deprive people from their liberty, they have a duty of care, namely the responsibility to look after their health and to ensure that detainees are held in conditions which are compatible with respect for human dignity.[21] Care for health of prisoners is a prerequisite for the preservation of human dignity. While the latter is a fundamental value and, indeed, the core of positive European Human Rights Law under the European Convention, healthcare is in turn

[16] See, for example, *Ivko v Russia* [2015] ECHR 1095; *Reshetnyak v Russia* [2013] ECHR 9; *Koryak v Russia* [2012] ECHR 1918; *Dirdizov v Russia* [2012] ECHR 1973

[17] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT standards - "Substantive" sections of the CPT's General Reports*, (October 2006) available <http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf> accessed 2 November 2016, para 31

[18] J Senior and J Shaw, 'Prison healthcare' (ed) Y Jewkes, *Handbook of prisons* (Willan, 2007)

[19] Article 12 of the International Covenant on Economic, Social and Cultural Rights, Articles 11- 13 of the European Social Charter, Article 3 of the Convention on Human Rights and Biomedicine, Articles 34 and 35 of the Charter of Fundamental Rights

[20] H R Abbing, 'Prisoners right to healthcare, A European perspective' (2013) 20 *European Journal of Health Law* 5; M H Slutsky, 'The rights of prisoners to medical care and the implications for drug-dependent prisoners and pretrial detainees' (1975) 42 *The University of Chicago Law Review* 705

[21] *Kudla v Poland* [2000] ECHR 512 para 94. See also, Case-law research reports, *Health-related issues in the case-law of the European Court of Human Rights* (June 2015) available <http://www.echr.coe.int/Documents/Research_report_health.pdf> accessed 1 November 2016

a prerequisite for the preservation of human dignity. For this reason, essential elements of prisoners' right to care for health are protected through the positive obligations individual human rights impose on States. This is what happens in the case of the European Convention on Human Rights.

5.1. The approach of the European Court: a dynamic interpretation of Article 3 ECHR

No reference to healthcare rights is contained in the European Convention. However, important principles for healthcare in prison can be derived from the case-law of the ECtHR, mainly in relation to Articles 3.[22] It has been noted that, originally, the Court's approach to the applicability of Article 3 ECHR in prison-related complaints focused on violence and mistreatment of prisoners. Subsequently, the Court broadened the application of this provision, by giving a dynamic interpretation in the light of present days' conditions. According to this interpretation, detention conditions and their effect on the health of prisoners, as well as the prison healthcare itself has to be included under Article 3 of the Convention.

That said, the Court in its jurisprudence has repeatedly reaffirmed that the lack of appropriate medical care and detention of a sick person in inadequate conditions may amount to cruel and inhuman treatment contrary to Article 3.[23]

For example, in *Vasyukov v Russia* [2011] ECHR 595 the Court found that a delay in correctly diagnosing a detainee's tuberculosis amounted to inhuman and degrading treatment within the meaning of Article 3. Similarly, in *Paladi v Moldova* it found a violation of Article 3 on account of the lack of proper medical assistance and the abrupt interruption of neurological treatment that was being administered to a remand detainee. In the case *Amirov v Russia* [2014] ECHR 1330 the applicant, a paraplegic wheelchair-bound detainee, was denied the access to medical experts of his choice.

Moreover, the failure of the national authorities to demonstrate that the applicant had been receiving effective medical treatment for his illnesses, led the Court to conclude to a violation of Article 3 of the Convention. However, it must be observed that, according to the Court, the mere fact that a prisoner's health deteriorates while in prison, is not *per se* sufficient to declare a violation under the Convention if the authorities have promptly done everything they could to treat the prisoner.[24]

It is worth noting that in deciding whether or not the detention of a seriously ill person raises an issue under Article 3, the Court takes into account several factors, such as the medical condition of the prisoner, the adequacy of the medical assistance and care provided in detention and the desirability of further detention given the state of health of the applicant. In other words, the Court defines the required standard of

[22] M Marochini, 'Council of Europe and the right to healthcare – Is the European Convention on Human Rights appropriate instrument for protecting the right to healthcare?' (1991) 34 (2) *Zb Prav fak Sveuč Rij* 729

[23] Abbing (n 21) 9

[24] *Goginashvili v Georgia* [2011] ECHR 1510; *Pakhomov v Russia* [2010] ECHR 1368

healthcare for prisoners on a case-by-case basis, having as points of departure the compatibility with human dignity and the practical demands of imprisonment.
At present, although healthcare needs of prisoners have always been of important consideration, health problems in prison are complex, more than is common in the outside population. From the European jurisprudence follows that prisoners' right to care for health continues to fall short of what is required, resulting in serious violations of fundamental human rights. Concerns about the lack of quality of healthcare for, and the delays in treatment of prisoners remain.