

Judgment

On Behalf of the Republic of Latvia

Riga, 29 September 2009

Case No. 2008-48-01

The Constitutional Court of the Republic of Latvia composed of the Chief Justice of the Court session Gunārs Kūtris, and a panel of judges Kaspars Balodis, Aija Branta, Juris Jelāgins, Kristīne Krūma, Viktors Skudra

Having regard to Roberts Mutulis constitutional claim

Based on Article 85 of the Constitution of the Republic of Latvia and Clause 1 of Section 16, Clause 1 of the First Part of Section 17, Section 19.² and 28.¹ of the Constitutional Court Law

On 8 September 2009 the Court heard the matter by way of written procedure

On conformity to Article 111 of the Constitution of the Republic of Latvia of the Second Part of Section 74 of the Sentence Execution Code of Latvia.

Procedure and facts:

1. On 23 December 1970, the Supreme Council of the Latvian SSR (Soviet Socialist Republic) adopted the Corrective Labour Code. The Decision of the Supreme Council of the Republic of Latvia On Application of the Latvian SSR Legislative Acts in Latvia adopted on 29 August 1991 provided that the SSR Corrective Labour Code of Latvia shall be regarded as the Corrective Labour Code of Latvia until a new code is elaborated. On 30 December 1994, Amendments of the Corrective Labour Code of Latvia, a law adopted on 15 December 1994, came into force, declaring the current title of that law - the Sentence Execution Code of Latvia (hereinafter – the Code).

The current version of the Second Part of the Code states: “Convicted persons, who are placed in solitary confinement, shall be prohibited from having walks” (hereinafter – impugned regulation).

On 30 April 2009, the *Saeima* (the Parliament) of the Republic of Latvia (hereinafter – the *Saeima*) adopted the law amending the Sentence Execution Code of Latvia. By the aforementioned law, the Second Part of Section 74 of the Code was declared as follows: “Convicted persons, who are placed in solitary confinement, shall be allowed one hour long daily walks”. At the same

time, the Transitional Provisions of the Code were supplemented with Clause 10, declaring: “The amendment of the second part of Section 74 of the Code, which allows convicted placed in solitary confinement, to have one hour long daily walks, shall come into force on 1 January 2011”.

2. The claimant Roberts Mutulis (hereinafter – the Plaintiff) claims that the impugned regulation is in contradiction to Article 111 of the Constitution of the Republic of Latvia.

The Plaintiff implies that at least one hour long daily outdoor walks should be allowed to all convicted persons, including convicted persons placed in solitary confinement, because a long-term stay in solitary confinement without the possibility to have a walk puts a person’s health at risk. Daylight and fresh air are basic elements of a person’s life and a lack of these elements may promote the spread of diseases. Other restrictions of Section 74 of the Code are enough to inflict penalty on a convicted person. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter – the Committee for the Prevention of Torture) has indicated that all convicted persons require at least one hour long daily walks.

The Plaintiff states that the rights established in Article 111 of the Constitution are absolute and cannot be restricted. The State is obligated to take supplementary care of health of convicted persons, because convicted persons’ options to take care of themselves are limited.

3. The Institution that issued the impugned regulation (the *Saeima*) on 5 February 2009 submitted a letter to the Constitutional Court which was a Reply in Case No. 2008-48-01. The letter indicated that at the *Saeima* session on 5 February 2009 the Defence, Internal Affairs and Corruption Prevention Committee was introduced to the bill, Amendments to the Sentence Execution Code, (Reg. No. 1005/Lp9), including Law No. 1099/Lp9. The new version of the impugned regulation declares an allowance for one hour long daily walks for convicted persons placed in solitary confinements. The amendment shall come into force from 1 January 2011. This was due to the need to substantially improve the existing technical and managerial facilities of the prisons in order to be able to provide convicted persons with daily walks. For this reason funds are required. Since the impugned regulation has been altered by a legislative procedure, the *Saeima* appeals for an assessment as to whether court proceeding of this case should be continued.
4. The invited person - The Ombudsman of the Republic of Latvia (hereinafter – the Ombudsman) – states that health is a significant precondition of an individual’s

well being and dignity. The State cannot guarantee a good state of health for everyone. The State is, however, responsible for creating such conditions that would protect every individual's health and even improve it. The right to health as a human right is established both in the UN Universal Declaration of Human Rights and the UN International Covenant on Economic, Social and Cultural Rights.

The Ombudsman points out that the right to health shall be considered as the right to certain conditions, services and goods, which are required to attain the highest standard of health. From the words of Article 111 of the Constitution it emerges that subject to its economic conditions, not only is the State obligated to prevent people's health from deteriorating, but also to refrain from actions which might restrict people's ability to take care of themselves.

The Ombudsman considers that in this particular case the right to health should be reviewed in connection with the prohibition of inhuman treatment that is included in Article 95 of the Constitution, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the European Convention on Human Rights). The Ombudsman, with a reference to the judgment of European Court of Human Rights in *Poltoratsky v. Ukraine*, points out that a 24 hour long stay in solitary confinement, where fresh air and daylight are not available, space for each convicted person is limited and daily walks are not provided, shall be regarded as inhuman treatment and a violation of Article 3 of the European Convention on Human Rights.

Likewise the Committee for the Prevention of Torture, founded by the Council of Europe, during its first visit to Latvia drew attention to the State's obligation to provide convicted persons placed in solitary confinement with one hour long daily walks. This recommendation was also repeated during later visits. Latvia has, however, not taken into consideration the aforementioned recommendation. Personnel in the Ombudsman office have observed that violations of the above mentioned recommendations have not been reduced in prisons.

The Ombudsman came to the conclusion that rights guaranteed under Article 111 and 95 of the Constitution are violated when convicted persons placed in solitary confinement are not provided with one hour long daily outdoor walks. The State cannot claim lack of funds or other resources to justify a violation of these rights as they are the elements of prohibition of inhuman treatment.

5. The invited person – the former State agency the State Public Health agency (hereinafter – the Public Health Agency) in its letter points out possible emergence of serious health disorders in a person, who has stayed for a long period of time in solitary confinement without natural lighting and air circulation.

As quality of the air decreases, a person feels discomfort and his/her working abilities lower, tiredness, headaches and heart disorders appear, the risk of catching respiratory and infectious diseases increases. By inhaling impure air, vital functions and immunity decreases and accordingly, the risk of catching infectious diseases increase.

6. The invited person – the Ministry of Justice of the Republic of Latvia – has proposed an answer for why the new version of the Second Part of Section 74 of the Code should come into force on 1 January 2011.

On 28 January 2009, the Minister of Justice proposed a motion for the third reading of the draft law On Amendments to the Sentence Execution Code of Latvia (Reg. No. 1005/Lp9) by suggesting to state the second Part of Section 74 of the Code as follows: “Convicted persons placed in solitary confinements shall be allowed to have a long walk for an hour per two days”. The Latvian Prison Administration objected to the aforementioned motion. On 18 March 2009, the aforementioned suggestion was reviewed at the sitting of the *Saeima* Defence, Internal Affairs and Corruption Prevention Committee. The Director of the Latvian Prison Administration indicated that the suggestion cannot be implemented due to lack of walking areas and because building new walking areas would require considerable amount of the State funds. The representatives of the Ombudsman during the sitting pointed out that convicted persons placed in solitary confinements should be ensured one hour long daily walks.

Taking into consideration statements expressed at the sitting of 18 March 2009 and the letter marked 18 March 2009 No. 9/6-2-n/113-(9/09) submitted by the *Saeima* Committee, the Minister of Justice on 27 March 2009 withdrew his suggestion regarding the amendment to the Second Part of Section 74 of the Code. At the same time the Minister of Justice proposed a new motion suggesting to state the Second Part of Section 74 of the Code as follows: “Convicted persons placed in solitary confinements shall be allowed to have one hour long daily walks”. The Transitional Provisions supplementing Clause 10 stated: “The Amendment of the Second Part of Section 74 of the Code shall come into force on 1 January 2011”.

The transitional period until 1 January 2011 has been set in order to plan the expenditure of the State budget so prisons could provide with walking areas and the Latvian Prison Administration could carry out managerial activities.

7. The Latvian Prison Administration informed the Constitutional Court of the Republic of Latvia of options for providing convicted persons placed in solitary confinements with walks. Moreover, it included facts about probable number of

convicted persons in isolation cells in every prison, as well as facts about number of walking areas and the working capacity of every prison.

The Latvian Prison Administration also indicates to specific actions that could be carried out to provide convicted persons with walks. For example, the repair of walking areas is required in *Rīga* Central prison, *Jelgava* prison, *Jēkabpils* prison and *Šķirotava* prison. However, in *Brasa* prison two prison guard positions are required in order to ensure walks for convicted persons. In *Iļģuciema* prison and in *Daugavgrīva* prison five walking areas are not used due to their dangerous condition.

Considerations:

8. The new version of the Second Part of Section 74 of the Code, which shall come into force on 1 January 2011, states: “Convicted persons placed in solitary confinements shall be allowed to have one hour long daily walks”. The *Saeima* appeals for assessment as to whether the court proceedings in this case should be continued since the impugned regulation has been altered by a legislative procedure. Thus the *Saeima* contends that the legislative issue of the claim is resolved.
 - 8.1. The Second Clause of the First Part of Section 29 of the Constitutional Court Law establishes that if the impugned regulation has ceased to be in force, judicial proceedings of a matter may be terminated before pronouncement of the judgment by the Constitutional Court. The aforementioned provision ensures an efficient way of legal proceeding, and the Constitutional Court may not render a judgement in cases, where a dispute no more exists (see Paragraph 4 of the Constitutional Court judgment in Case No. 2007-15-01 of 12 February 2008). The Constitutional Court has concluded that the area of application of the Second Clause of the First Part of Section 29 of the Constitutional Court Law is more comprehensive than its literal formulation suggests. The aforementioned regulation is applicable also in cases when a regulation is set to be invalidated at a future date. In such a case judicial proceedings regarding that regulation, if any, will be suspended as the regulation in question is in any case going to be invalidated. (see Paragraph 7 of the Constitutional Court judgment in Case No. 2005-01-01 of 23 May 2005 on the termination of legal procedure and Clause 7.2 of the judgment in Case no. 2008-06-0 of 5 November 2008 on the termination of legal procedure).

The *Saeima* has altered the impugned regulation with a purpose to resolve the dispute in the particular case. In accordance with the First Part of Section 29 of the Constitutional Court Law, in such cases the Constitutional Court is not obligated to terminate a legal proceeding. It, however, obtains the right to do so (see Paragraph 11 of the Constitutional Court judgment in Case No. 2007-06-03

of 12 June 2007 on the termination of legal proceeding). Therefore, the Constitutional Court must evaluate whether such circumstances exist which require the continuation of legal proceedings.

- 8.2. In the particular case an essential condition is that the impugned regulation becomes null and void on 1 January 2011, when, in accordance with Clause 10 of the Transitional Provisions, the new version of the Second Part of Section 74 of the Code shall come into force.

The Committee for the Prevention of Torture was founded in accordance with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereinafter – the Convention for the Prevention of Torture). In compliance with Section 1 of the Convention for the Prevention of Torture, treatment of persons deprived of liberty shall be inspected for the purpose of protection against torture and inhuman or degrading treatment or punishment. Since 1 June 1998 the Convention for the Prevention of Torture is legally binding on the Republic of Latvia.

In the second report by the Committee for the Prevention of Torture for the period from 1 January 1991 to 31 December 1991, it is stated that all convicted persons without exception shall be allowed one hour long daily outdoor physical activities and this shall be considered as the minimum guarantee (see Pages 27 and 29 of the Case file, <http://www.cpt.coe.int/en/annual/rep-02.htm>).

From 5 May 2004 to 12 May 2005 the Committee for the Prevention of Torture visited Latvia for the third time and on 13 March 2008 it issued a report. In the aforementioned report concerns are expressed that the Republic of Latvia has not managed to implement several suggestions recommended after the visits of 1999 and 2002. In accordance with statements of the Committee for the Prevention of Torture, convicted persons placed in solitary confinements are still prohibited from having outdoor physical activities. In the report, the position of the State is stated that it is not possible to ensure outdoor walks for convicted persons placed in solitary confinements because walking areas are placed outside confinement facilities. For this reason, more walking areas are required to be built, which depends on available funding. In reply to the statement of the Republic of Latvia, the Committee for the Prevention of Torture states that the reasons mentioned by the State authorities for not implementing suggestions are unfounded. The Committee for the Prevention of Torture requested taking immediate actions to implement all suggestions (see Pages 33 – 36 of the Case file, <http://www.cpt.coe.int/documents/lva/2008-15-inf-eng.htm>).

- 8.3. From the aforementioned it can be concluded that for more than ten years the Government of Latvia and the Legislators have been aware of the fact that convicted persons placed in solitary confinement should be allowed daily walks

outdoor for an hour in order to prevent violation of prohibition of torture mentioned in Section 3 of the European Convention on Human Rights. The Committee has indicated to this issue several times, however the State authority has not responded to its instructions.

The Constitutional Court holds that the Government of Latvia and the Legislators have had enough time to implement Latvia's international obligations and ensure convicted persons placed in solitary confinement daily walks outdoors for one hour long. Taking into consideration the international obligations of the Republic of Latvia and suggestions by the Committee for the Prevention of Torture, as well as the *Saeima* adopted amendments whereby the impugned regulation of Section 74 of the Code shall be repealed only on 1 January 2011, the Constitutional Court holds that it is required to adjudicate the matter based on the conformity of impugned regulation with Article 111 of the Constitution of the Republic of Latvia. If the Constitutional Court declares that the impugned regulation does not comply with the Constitution, a continuation of this violation would not be allowed until a new version of Second Part of Section 74 of the Code shall come into force.

Hereby it is required to continue the legal proceedings in this matter.

9. Article 111 of the Constitution states: "The State shall protect human health and guarantee a basic level of medical assistance for everyone".

The right to health shall be regarded as a social right. The Constitutional Court has concluded that the framework of Article 111 of the Constitution should be interpreted within the context of international documents and the practice of its application, which are legally binding on the Republic of Latvia. Pursuant to Article 111 of the Constitution, the State is obligated, subject to circumstances, closely related to the State's economic options, to carry out activities for protection of human health (see Paragraph 1 for the considerations of the Constitutional Court judgment in Case No. 2002-04-03 of 22 October 2002).

A person's health is influenced by several factors, including air quality because air is vital for a person's life. In accordance with the statement by the Public Health Agency, as the quality of air decreases a person feels discomfort and his/her working abilities lower, tiredness, headaches and heart disorders appear, and the risk of catching respiratory and infection diseases increases. Being in fresh air ensures the positive impact of sunlight on the human body; makes a person feel better, strengthens the immune system and provides protection from infectious diseases (see Pages 89 and 90 of the Case file).

According to the First Part of Clause 6 of Section 70 of the Sentence Execution Code of Latvia, convicted persons shall be placed in solitary confinement up to fifteen days and nights. As the Ombudsman states a convicted person may stay in solitary confinement longer than fifteen days and nights. For instance, refusal by a convicted person to return to a particular prison cell shall be regarded as a serious violation of one's sentence serving regime and in this case a convicted person shall be placed in solitary confinement for another 15 days and nights. Furthermore, results from inspections carried out by the Ombudsman allege that in most cases conditions in solitary confinement are not suitable for long-term stay. Predominantly cells for solitary confinement are small with non-confined toilet facilities, without daylight and air-conditioning, as well as with insufficient natural lighting (see Page 88 of the Case file).

From the aforementioned it can be concluded that long-term stay in these facilities without having walks may seriously harm one's health.

Hereby the impugned regulation which restricts convicted persons placed in solitary confinement from having outdoor walks, confines the guaranteed right to health as stated in Article 111 of the Constitution of the Republic of Latvia.

10. Although Article 111 is not mentioned in Article 116 of the Constitution which states conditions when person's rights can be limited, the Constitutional Court has concluded that a person's basic rights declared in Article 111 of the Constitution can be limited in order to protect other values established in the Constitution (see Clause 2 of the considerations of the Constitutional Court judgment in Case No. Nr. 2002-04-0 of 22 October 2002 and Clause 7 of the judgement in Case No. 2003-15-01 of 23 April 2004).

Wherewith the Constitutional Court of the Republic of Latvia in case of a limitation of Article 111 of the Constitution shall inspect whether the restriction is declared by a law or it is justifiable with a legitimate cause and is commensurate with the particular cause.

In the particular case a dispute whether the impugned regulation is declared according to a proper procedure by an adopted and proclaimed law does not exist.

11. Placing in solitary confinement is one of the disciplinary penalties. A person is placed in solitary confinement only in the event of a serious or systematic violation of a sentence serving regime. The Constitutional Court holds that a limitation of convicted person's rights, including rights of convicted persons placed in solitary confinements, shall only be limited in order to execute a sentence and ensure the sentence serving regime (see Clause 7 of the Constitutional Court judgment in Case No. 2005-17-01 of 6 February 2006).

Placing a person in solitary confinement has a legitimate cause, so a person would not repeatedly violate the sentence serving regime. However, restrictions of rights, which are established for convicted persons placed in solitary confinements, has to be set to achieve a legitimate cause.

Section 74 of the Code declares the regime in solitary and disciplinary confinement and establishes various restrictions for convicted persons placed in such confinement. As the restriction of having walks is one of the aforementioned restrictions, it must ensure an implementation of sentence execution and sentence serving regime.

The Constitutional Court holds that a restriction on walks, which means long-term stay in limited space, therefore, putting a person's health at risk, does not ensure an implementation of sentence execution and sentence serving regime. Also, the *Saeima* has not indicated to a legitimate cause for the restriction included in the impugned regulation.

Hereby, the restriction included in the impugned regulation does not have a legitimate cause and does not comply with Article 111 of the Constitution.

12. The Constitutional Court within its limits must ensure that a situation, which hereinafter might arise, will not cause material injury to interests of other persons, while ruling on the moment at which the impugned regulation is declared invalid (see Clause 23 of the Constitutional Court judgment in Case No. 2005-25-01 of 6 June 2006). At the same time the Constitutional Court must have regard to facts and take into consideration that the State authorities may require a certain period of time to ensure observation of fundamental human rights.

12.1. The Plaintiff appealed to the Constitutional Court asking them to declare the impugned regulation invalid from the moment it came into effect, because it is the only way to eliminate any negative effect resulting from the impugned regulation.

In the particular case the Constitutional Court does not find a reasonable ground to declare invalid and antedate the impugned regulation. Also, the Plaintiff has not indicated how declaring the impugned regulation invalid and antedating it will eliminate a violation of his rights.

12.2. While ruling on the date from which the impugned regulation would be null and void, the Constitutional Court shall take into consideration the possibility that a person's health might be put at risk if the time period from the date the judgment is rendered until the above mentioned date is exceedingly long.

The Constitutional Court reasoned that the impugned regulation can be declared invalid only from 1 January 2011 since it is necessary to improve technical and

managerial facilities in prisons, as well as funding is required (see Page 95 of the Case file). The Ministry of Justice of the Republic of Latvia clarifies that, due to unsuitable infrastructure, it is not possible to allow daily walks immediately since walking areas are not built next to every solitary confinement. Consequently, extra personnel will be required to ensure the transfer and supervision of convicted persons, or the current personnel will have to be paid for overtime hours (see Page 107 of the Case file).

The Constitutional Court emphasizes one more time that the State authorities had more than ten years to carry out work necessary for providing convicted persons placed in solitary confinements with daily walks. During this period of time it was possible to adequately amend normative Acts, as well as find required funding.

The Latvian Prison Administration indicates that it is necessary to renovate walking areas and employ extra personnel. Only in *Jēkabpils* prison it is required to build additional walking areas (see Pages 108 – 111 of the Case file). From the information provided by the Latvian Prison Administration it emerges that taking into consideration the number of convicted persons placed in solitary confinements, the number of walking areas and working hours all convicted persons will be able to have daily walks. As the current condition of the prisons does not prohibit walks to other convicted persons, there is no reason to not provide convicted persons placed in solitary confinement with daily walks. Also, the rest of the information provided by the Latvian Prison Administration attests that work can begin soon in order to ensure daily walks to convicted persons placed in solitary confinements before 1 January 2011.

Adjudication:

Based on Sections 30 – 32 of the Constitutional Court law, the Constitutional Court rules:

The Second Part of Section 74 of the Sentence Execution Code of Latvia does not comply with Article 111 of the Constitution of the Republic of Latvia and shall become null and void from 1 May 2010.

The judgment is final and not subject to appeal.

The judgment comes into effect on the day it is published.

The Chief Justice

G. Kūtris