



**2011 EUROPEAN COURT OF HUMAN RIGHTS
MOOT COURT COMPETITION**

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STATEMENT OF FACTS

FINALS

FOURTH SECTION

20 March 2010

Application no. 9999/08
by Efi Altis, against VZN and the Plain of Phlegra
lodged on 20 December 2008

STATEMENT OF FACTS

The applicant, Mr. Efi Altis, is a national of the Kingdom of the Plain of Phlegra and a resident of VZN, born in 1970. Both the Kingdom of the Plain of Phlegra and VZN have acceded to the ECHR and Protocol No.1 thereto. All available domestic remedies in both countries have been exhausted.

A. The circumstances of the case:

The facts of the case, as submitted by the applicant, may be summarised as follows:

During an armed conflict that took place in VZN in 1993 between the applicant was, on one occasion, paid to act as a look-out so that a third party could abduct civilians in order to exchange them for members of the armed forces who at the time were in captivity.

On 20 September 2004 a Trial Chamber of the State Court of VZN found the applicant guilty of aiding and abetting war crimes against civilians and sentenced him to five years' imprisonment according to Articles 173§1, 31 and 50§1 of the Criminal Code of VZN, which entered into force on 1 December 2003. The relevant part of Article 173§1 of the Code provides that the war crime of taking of hostages is punishable by "*imprisonment for a minimum term of ten years or long-term imprisonment.*" Under Article 42 of the Code, "imprisonment" is defined as meaning a sentence of up to a maximum term of twenty years; "long-term imprisonment" is defined as meaning a maximum term of forty-five years. By Articles 31 and 50§1 (a) of the Code, whoever intentionally helps another to perpetrate war crimes against civilians will be punished as if he himself has perpetrated such offence, but the punishment can be reduced to five years' imprisonment.

Mr. Altis appealed against the 2004 judgment. While he admitted that his conduct constituted a criminal offence at the time of commission, he alleged that he should nonetheless have been convicted under the more lenient criminal law rather than under the 2003 Criminal Code, as he was. The applicant submitted that the Criminal Code of YGSL, which was in force at the time of the commission of the criminal offense and which *inter alia* prescribed a sentence of death penalty for the severest forms, is more lenient a law than the Criminal Code of VZN, which prescribes a punishment of a long term imprisonment for the severest forms of the criminal offense that the appellant was convicted of. In addition, the application of the 2003 Criminal Code in his case would violate not only his rights under Article 7 of the ECHR as described but also his rights under Article 14 of the ECHR.

Domestic war crimes cases in VZN are divided into two categories: i) those that were already pending before the Entity/District courts on 1 March 2003 (when the 2003 Code of Criminal Procedure entered into force) which remain with the Entity/District courts unless the State Court decides to take over any such case; and ii) the new cases (*i.e.* those reported after

1 March 2003) which fall under the exclusive jurisdiction of the State Court. The latter can, however, transfer less sensitive and complex cases to the competent Entity/District court. As a matter of a standard practice, in war crimes cases, the Entity/District courts apply the 1976 Criminal Code, whereas the State Court applies the 2003 Criminal Code. Furthermore, the Entity/District courts on average impose lighter sentences than the State, but this is often attributed to the fact that the State Court deals with more sensitive and complex cases.

The 1976 Criminal Code of YGSL, was in force throughout VZN during the 1992-95 war. The relevant part of Article 142§1 of the Code provides that the war crime of taking hostages is punishable by “*imprisonment for a minimum term of five years or the death penalty*”. Under Article 38 of the Code, imprisonment may be imposed for a maximum term of fifteen years and, instead of the death penalty, imprisonment for a term of twenty years. According to Articles 24 and 43§1 (1) of the Code, whoever intentionally helped another to perpetrate war crimes against civilians was to be punished as if he himself had perpetrated such offence, but the court was to have a discretion to reduce the punishment to one year's imprisonment. The death penalty could no longer be imposed after the entry into force of the General Framework Agreement for Peace in VZN on 14 December 1995 and the entry into force of Protocols Nos. 6 and 13 to the ECHR in respect of VZN on 1 August 2003 and 1 November 2004 respectively.

On 24 November 2004 an Appeals Chamber of the State Court quashed the first-instance judgment and ordered a new hearing. On 4 April 2005, however, the Appeals Chamber revived the original sentence under the 2003 Criminal Code. The applicant then lodged an appeal with the Constitutional Court, invoking once again Articles 7 and 14 of the ECHR, an appeal that was nonetheless rejected on 18 December 2005. The Constitutional Court held with respect to Article 7 ECHR that:

“68. [...] In the Court’s view, the concept of the YGSL Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law.

69. In this context, the Constitutional Court holds that it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned. [...].

70. In such situation, the Constitutional Court holds that §2 of Article 7 of the ECHR refers to 'the general principles of law recognized by civilized nations', and the provision of Article III(3)(b) of the Constitution of VZN establishes that 'the general principles of international law shall be an integral part of the law of VZN and the Entities.' [...]

76. In the Constitutional Court's opinion, the aforementioned would not be inconsistent with Article 7§1 of the ECHR as it clearly determines that war crimes are 'crimes according to international law' [...]. In *Naletilić v. the Republic of Croatia*, the applicant was charged by the Prosecutor's Office of the International Criminal Court for the former Yugoslavia (ICTY) with war crimes and he submitted identical complaints before the European Court of Human Rights to those of the appellant in the present case, i.e. he pointed to the application of 'more lenient law', i.e. the criminal Code of the Republic of Croatia instead of the ICTY Statute. In its Judgment, the European Court of Human Rights considered the application of Article 7 of the ECHR and underlined the following: 'As to the applicant's contention that he might receive a heavier punishment by the ICTY than he might have received by domestic courts if the latter exercised their jurisdiction to finalize the proceedings against him, the Court notes that, even assuming Article 7 of the ECHR to apply to the present case, the specific provision that could be applicable to it would be §2 rather than §1 of Article 7 of the ECHR. This

means that the second sentence of Article 7§1 of the ECHR invoked by the applicant could not apply. It follows that the application is manifestly ill-founded [...] and, therefore, must be rejected...'[...]

79'. Hence, there has been no violation of Article 7§1 of the ECHR."

As regards Article 14 of the ECHR the Constitutional Court went on to declare that:

"[...] 84'. However, courts are allowed to apply the law to similar cases differently if they have objective and reasonable justification for doing so. [...]

87. As to the related allegations of the appellant, the Constitutional Court underlines that the subject matter under consideration in the present case is the application of the constitutional rights and the rights safeguarded by the ECHR to the instant case in the light of the Criminal Code of VZN, and not the legal arrangements or the case-law applied at the level of the Entities.[...]

90. In the proceedings conducted before the Court of VZN based on the Criminal Code of VZN and Criminal Procedure Code of VZN, *i.e.* the laws which have not been determined as being in violation of the constitutional rights or the rights safeguarded by the ECHR, it is unfounded to refer to discrimination based on the courts' proceedings and legislation at the level of the Entities. Such practice of the courts in the proceedings at various levels is probably the result of lack of a court at the level of VZN, which would harmonise the case-law of all courts in VZN and contribute to the growth of the rule of law in VZN.[...] [D]ifferential treatment by the courts of the Entities does not necessarily constitute discrimination against the persons subject to the proceedings at the level of the State Court unless it is possibly established that the laws applied at the level of the State Court are in violation of the Constitution of VZN or the ECHR.[...]

91. [T]he verdict of the Court of VZN is based on the legal provisions which are in the view of the Constitutional Court undisputedly constitutional. In accordance with the aforementioned, the Constitutional Court concludes that the appellant lacks legal arguments to prove that he was discriminated against in the proceedings before the Court of VZN, and the Constitutional Court has already established that those proceedings were conducted in accordance with Articles II(3)(d) and II(3)(e) of the Constitution of VZN and Article 7 of the ECHR."

Shortly after Mr. Altis was convicted he was transferred from VZN to the Plain of Phlegra, pursuant to a bilateral prisoner transfer agreement between the two States. The government of the Plain of Phlegra had introduced several measures to improve the criminal justice system. Among them was a framework policy "of securing as far as possible the rehabilitation of prisoners", which was being vigorously implemented. As part of that policy, Mr. Altis was placed in a prison apprenticeship whose aim was the reintegration of prisoners into society upon release. These apprenticeships involved hard work, and were unpaid, although inmates were entitled to earn a small amount of money if they performed extra duties. These earnings were held by the prison authorities in a savings account, to which the prisoner would have access on his release. According to Article 259 bis of the Phlegrian Code of Criminal Procedure, the amount of savings inmates make through apprenticeships can be used by prison authorities as a criterion for various benefits such as early release, short leave, and permission for parliamentary voting. The Plain of Phlegra imposes a general ban on all prisoners' right to vote, however Prison Boards have discretion to allow prisoners to vote in parliamentary elections upon request, depending on, *inter alia*, their performance in the apprenticeship scheme.

The applicant was invited to work long hours in the construction of the new prison wing. Through this apprenticeship he was supposed to learn to co-operate and eventually master a craft that would allow him to make a living. However, Mr. Altis developed a phobic aversion to his superiors, something that one of his inmates attributes to the latter's spiteful attitude.

The applicant was expected to provide his services each day after his shift had ended, and to continue working in underground tunnels for five hours to earn ten pounds. Although scheduled for an early release in accordance with law, Mr. Altis was informed by the competent Board that “he had saved nothing during his detention and that he had no prospects of finding work outside prison. The Board cannot recommend his release unless and until he has saved 500 pounds through his prison work”.

On June 2007 Mr. Altis was further informed by the competent Prison Review Board¹ that his application to vote in the upcoming parliamentary elections was rejected in accordance with Article 259 bis of the Criminal Code of Procedure on the grounds that he had made no savings during his time in prison.

On September 2007, the applicant’s attorney brought legal action in the courts of the Plain of Phlegra, claiming violations of Articles 4 ECHR and 3 of Protocol No. 1 to the ECHR.

Having been unsuccessful at first instance, the applicant then appealed only to receive a rejection of his appeal in early 2008 by the Phlegrian Court of Appeals which held:

“In the Court’s view there has not been a violation of Article 4§2 as the Applicant was invited rather than forced to work. Moreover, Article 4, ECHR authorizes, in §3 (a) work required to be done in the ordinary course of detention which has been imposed. The present case falls indeed under this provision.

As to Article 3 Protocol No.1 two observations can be made: Firstly as a matter of national law, the State of Phlegra enjoys a wide margin of appreciation as to lawful restrictions it may impose on the aforementioned article. Secondly, while in any event the voting ban imposed on the applicant had a legal basis in Phlegrian law, the Review Board clearly did not apply this voting ban in an automatic way. On the contrary the Board took into consideration Mr. Altis circumstances in particular before imposing the ban therefore the appellant’s allegation that Article 3 Protocol No.1 has been violated cannot be sustained.”

B. COMPLAINTS:

#1 The applicant complains that the VZN violated his rights under Article 7 of the ECHR, taken alone (a) and in conjunction with Article 14 (b), in that he was not granted the benefit of the more lenient criminal law with regard to his sentence and in addition, he was treated differently from those who were tried before the Entity/District courts, which, as a matter of standard practice, apply the 1976 Criminal Code in war crimes cases and impose on average lighter sentences.

#2 The applicant complains that the Plain of Phlegra violated his rights under Article 4 of the ECHR, as his sentence was in essence transformed to one of forced labour, being made to work in order to secure release, even though this was not required in the ordinary course of detention (a). The applicant moreover complains that the Plain of Phlegra breached his right to vote as provided for in Article 3 of Protocol No.1 to the ECHR, in that the discretion that the Prison Review Board exercised in relation to his request to be allowed to vote was based on arbitrary grounds (b).

¹ The Review Prison Board is a permanent body, provided by Statute, which meets periodically and decides matters such as prisoners’ early release, fulfillment of conditions for release etc.