PWPM 2020, Vol. XVIII
REVIEW OF INTERNATIONAL, EUROPEAN AND COMPARATIVE LAW
PROBLEMY WSPÓŁCZESNEGO PRAWA MIĘDZYNARODOWEGO, EUROPEJSKIEGO I PORÓWNAWCZEGO
ISSN 1730-4504

GLOSSES / GLOSY

DOI: 10.26106/p8zt-k962

Petukhov v. Ukraine (No. 2): the human rights approach to life sentences in Strasbourg case law

Elżbieta H. Morawska
Associate Professor (dr. habil.), Cardinal Stefan Wyszynski University in Warsaw,
Faculty of Law and Administration
ORCID: 0000-0001-7299-0320, e-mail: e.morawska@uksw.edu.pl

Introduction

On 12 March 2019, the Chamber (Fourth Section) of the European Court of Human Rights delivered a judgment in the case of *Petukhov v. Ukraine* (No. 2).[1]

The Registrar of the European Court of Human Rights (hereinafter: the Court/ECtHR) classified the importance of the case as Level 2, therefore considering it did not make a significant contribution to Strasbourg case-law. However, the analysis of the judgment in question shows that the Court raised a number of important and timely issues in it which were at the same time disputed. These concerned human rights and fundamental freedoms, along with the obligations these entail as guaranteed by the European Convention on Human Rights (hereinafter: the ECHR, the Convention),[2] and binding for the States-Parties.

These issues are generally linked to the ECtHR's approach to life imprisonment, especially the rules of serving it and the possibility of release (*prospect of release*).

[1] Application no. 41216/13. As the vast majority of the Court's judgments are available in the HUDOC database, there are no references to printed publications in the paper.

[2] *Convention for the Protection of Human Rights and Fundamental Freedoms/fr. Convention de sauvegarde des Droits de l'Homme et des Libertés Fondamentales*, European Treaty Series No. 005; the Convention was opened for signature in Rome on 4 November 1950, and after obtaining the required number of ratifications, it entered into force on 3 September 1953.

The analysis of the case-law shows that the Court's approach to the life sentence system has been developed in cases concerning this system in the United Kingdom (hereinafter: the UK).[3] It should be noted that the Court was very critical of this system. This was confirmed, inter alia, in the *Vinter* case (2013), which is considered to be the leading case in this regard.[4] However, in the case of *Hutchinson v. the United Kingdom* (2017), the Court found that the UK life sentence system does not violate Article 3.[5] Importantly, the Court did so even though the system has not been changed since the *Vinter* case. Hence, it was considered to express new, less high standards of compliance with the Convention for life imprisonment. However, in the cases after the *Hutchinson* case, the Court seemed to return to its original, stricter standards of compliance of the life sentence system with the Convention.[6] The literature therefore concludes that, as a general rule, the Court has not changed its strict approach to this penalty, and the positive assessment of the UK life sentence regime has been decided on for non-legal reasons.[7]

The question therefore arises as to whether the *Petukhov* case supports this trend. For these reasons, the judgment delivered in the *Petukhov* case undoubtedly deserves a comment regarding both the admissibility of the complaint and the substantive assessment of the allegations contained therein.

The factual and legal circumstances of the case

Volodymyr Petukhov, a citizen of Ukraine, lodged a complaint concerning this matter. In 2004 he was sentenced by the Court of Appeals in Kiev to life imprisonment in connection with the commission of a number of serious crimes and participation

[3] The line of case-law is set out by the case of *Kafkaris v. Cyprus*, application no. 21906/04, ECtHR (GC) judgment of 12 February 2008; it was consolidated in *Vinter and Others v. the United Kingdom*, application no. 66069/09 130/10, 3896/10, ECtHR (GC) judgment of 9 July 2013 and two key cases, namely *Murray v. the Netherlands*, application no. 10511/10, ECtHR (GC) judgment of 26 April 2016 and *Hutchinson v. the United Kingdom*, application no. 57592/08, ECtHR (GC) judgment of 17 January 2017.

[4] *Vinter and Others v. the United Kingdom*, application no. 66069/09 130/10, 3896/10, ECtHR (GC) judgment of 9 July 2013

[5] *Hutchinson v. the United Kingdom*, application no. 57592/08, ECtHR (GC) judgment of 17/01/2017.

[6] *Matioqaitis v. Lithuania*, application no. 22662/13 51059/13 58823/13, Court (Second Section), judgment of 23/05/2017.

[7] E. Celiksoy, "*UK exceptionalism" in the ECtHR's jurisprudence on irreducible life sentences,* "The International Journal of Human Rights" 2020, Vol. 24, Issue 10, https://doi.org/10.1080/13642987.2020.1743977.

in an organized criminal group.[8] Initially he was detained in Prison no. 47 in Sokal. During the examination of the complaint, he stayed in the Kiev Detention Center No. 13 ("the Kyiv SIZO"),[9] to which he had been transferred from Prison no. 61 in Kherson with the status of a prison tuberculosis hospital.[10]

This was because the applicant suffered from tuberculosis, with the recurrence of the disease reported in July 2010. At the time of diagnosis, on 2 February 2010, he was detained in Sokal Prison no. 47, from where he was transferred to the aforementioned prison tuberculosis hospital, although he was not permanently resident there. In total, he was there three times: for the first time from 3 June 2010 to 22 January 2014, for the second time from 24 March 2014 to 19 October 2014, and for the third time from 2 December 2014 to 19 January 2015.[11] In the meantime, from 22 January to 24 March 2014, he was held in the Kherson SIZO Detention Center. Initially he was detained in cell no. 392 and then in cell no. 394.[12]

Due to the recurrence of tuberculosis in 2010-2014, he was provided with regular medical care. Initially it was pulmonary tuberculosis, but despite screening tests and diagnostics, the disease spread beyond his lungs, including to the genitourinary system. This was primarily due to the fact he had developed resistance to the administered drugs, a fact which was only discovered later. Give the serious state of his health, he was prescribed palliative treatment. After some time, his health stabilized, although it was disputed whether or not it had deteriorated.[13]

Admissibility

In view of the specific nature of the case under consideration, in the context of admissibility it seems necessary to note at the outset that the examination of the admissibility of an application is, in fact, an examination of the admissibility of the allegations contained therein. Moreover, where there are a number of allegations, the inadmissibility of one of them does not mean the inadmissibility of the others

8 Para. 8 of the judgment under review (hereinafter: the judgment). The applicant was convicted of deliberate murders, armed robbery, illegal possession of weapons and kidnapping, as well as of attempted assassination of law enforcement officers. The Court of Appeals in Kiev, as the court of first instance, delivered a judgment of conviction on 3 December 2004. On 24 May 2005, the Supreme Court of Ukraine upheld this ruling. The applicant has remained in detention since August 2001.

9 Para. 8 of the judgment.

10 Para. 10 of the judgment.

11 Ibidem.

12 Para. 26 of the judgment.

13 See remarks below.

or the inadmissibility of the application as a whole in the light of the conditions of Article 35(3) of the Convention. Consequently, the Court examines the admissibility of each allegation separately. Since, in complaining about the violation by the Ukrainian authorities of Article 3 of the Convention and Article 8 of the Convention, V. Petukhova raised a number of allegations, the Court also used the above method in assessing the admissibility of his application.

Admissibility of allegations of violation of Article 3 of the Convention

With regard to Article 3 of the Convention, the applicant puts forward three allegations: firstly, a lack of 'adequate medical care',[14] secondly, poor detention conditions and, thirdly, a lack of legal and factual possibility to apply for release from life imprisonment and, therefore, the *de jure* or *de facto* non-reduction of life sentences.[15]

When examining the admissibility of the first allegation of violation of Article 3 of the Convention, the Court assumed that the allegation of violation of the duty to protect the health of a detained applicant should be assessed from the moment of the applicant transfer to Prison No 61 in Kherson, i.e., from 3 June 2010. The Court did so because the complaint under examination was the second one, which V. Petukhov submitted to the ECtHR. More importantly, in his first application, he also raised the allegation of a lack of adequate medical care during his detention, and the Court found a violation of Article 3 of the Convention in this regard.[16] As a result of this, in the case under consideration, the Court examined the V. Petukhov's detention conditions with a view to providing appropriate medical care during the period not covered by the first application.[17] Hence, in the case at hand, there was no requirement to consider it in accordance with Article 35(2)(b) of the Convention, i.e., the principle of substantive identity 'in substance'[18] a new complaint with the complaint already examined by the Court.[19]

---

14 Para. 3 of the judgment.

15 *Ibidem*. Selected contents of the judgment are quoted in Polish upon own translation. Their English counterparts are provided alongside, with English being one of the official languages of the Convention.

16 *Petukhov v. Ukraine*, application no. 43374/02, ECtHR judgment of 21 November 2010; in that judgment, the Court ruled, inter alia, that Article 3 (material aspect) and Article 5 were infringed as regards the legality and duration of the pre-trial detention. In finding that there had been such a breach, the Court determined, in accordance with Article 41 of the Convention, that the applicant should receive fair compensation.

17 Para. 113 of the judgment.

18 See *Practical guide on admissibility criteria*, para. 135; available at publishing@echr.coe.int. [access: 25.04.2019].

19 Para. 34 of the judgment.

On the other hand, the allegations of the infringement of Article 3 of the Convention due to poor detention conditions were rejected and the application in this respect was considered to be *'manifestly ill founded'* (Article 35(3)(a) of the Convention) because, in the Court's view, the applicant did not provide sufficient evidence of the infringement.[20] As in other cases, also this time the classification of the complaint as "manifestly ill-founded" was preceded by a limited but substantive assessment of merits. Two issues seem to be of relevance here.

First, the conditions set out by the applicant were known to the Court, as it had already examined them in the 2016 case of *Yarovenko v. Ukraine*.[21] Importantly, no violation of Article 3 of the Convention was then found. There was thus a premise to declare the current allegations "manifestly ill-founded", since according to the principle developed by the Court, this occurs, among others, "where there is settled and abundant case-law of the Court in identical or similar cases, on the basis of which it can conclude that there has been no violation of the Convention in the case before it".[22] As a result, it was up to V. Petukhov to prove that the conditions of detention assessed in the *Yarovenko* case deteriorated so much that they reasonably exceeded the minimum level of severity.[23] Looking at it from this perspective, two additional allegations become relevant, namely the constant video surveillance of the cell, including of the toilet, and the poor quality of the food and drinking water. These, however, did not convince the Court to change its stance. As regards the first allegation, the Court's finding that the applicant's subjective assessment requires credibility seems important, all the more so as, in its assessment, monitoring the prisoner's behavior, although certainly intrusive, is not in itself incompatible with Article 3 of the Convention. On the second allegation, although the Court did not question its legitimacy, it pointed out that it would have to deal with such poor-quality food or water, which could potentially cause a problem falling under Article 3 of the Convention and thus exceed the minimum level of severity.

Secondly, the requirements arising from the adversarial procedure before the Court and determining the applicant's obligation to prove the allegations turned out to be relevant. Although their formulation shifts the burden of proof onto the

[20] Para. 127-128 of the judgment.

[21] Application no. 24710/06, ECtHR judgment of 6 October 2016.

[22] *Practical guide on admissibility criteria*, Para. 398, available on the ECtHR website at: publishing@echr.coe.int. [access: 25.04.2019].

[23] *Costello-Roberts v. the UK*, application no. 13134/87, ECtHR judgment of 25 March 1993, para. 30; for more recent cases, see e.g. *Opuz v. Turkey*, application no. 33401/02, ECtHR judgment of 9 June 2009r., para. 158; *Staszewska v. Poland,* application no. 10049/04, ECtHR judgment of 3 November 2009, para. 54; *Eremia v. Moldavia*, application no. 3564/11, ECtHR judgment of 28 May 2013, para. 48; *Rumor v. Italy*, application no. 72964/10, ECtHR judgment of 27 May 2014, para. 57.

Government, the applicant must participate effectively in the proceedings, properly upholding his allegations and responding to information or factual or legal assessments submitted by the Government.[24] Failure to do so may result in the allegation being deemed as "manifestly ill-founded" on the grounds of a lack of evidence.[25]

In light of the foregoing observations, and the final conclusion of the Court that the allegations regarding the living material conditions of detention were not "properly substantiated" by the applicant, good knowledge of the case-law becomes a necessity, especially that the Court seems to take it for granted. In this context, attention should be drawn to the brief assessment of the third allegation of violation of Article 3 of the Convention, namely the lack the legal and factual possibility of applying for a reduction in the life sentence.[26] As the Court has provided justification for the admissibility of this allegation in one very short paragraph: the Court devoted only three sentences to this issue, stating that "[T]he Court notes that this complaint is not *manifestly illfounded* within the meaning of Article 35 § 3 (a) of the Convention. Neither it is inadmissible on any other grounds. The complaint must therefore be declared admissible".[27] This kind of practice by the Court may, on the one hand, be surprising and, on the other hand, may give rise to concern, especially as it was a key allegation in this case.

Admissibility of allegations of violation of Article 8 of the Convention

The last allegation concerned a breach of Article 8 of the Convention, in that it restricted the applicant's ability to exercise his right to family visits in prison. The Court addressed this allegation, after a substantive assessment of the allegations concerning violation of Article 3 of the Convention. It concluded that there was no need for a separate examination of their admissibility and legitimacy, because the main legal issues contained in this complaint were clarified in the framework of the allegations concerning Article 3 of the Convention. The reasons for this conclusion are extremely short and are limited to just one paragraph.[28]

Notwithstanding the above, the issue of family visits in prisons is neither secondary nor absent in case-law.[29] Rather, it was subjected to considerations of procedural economy and as such illustrates the specificity of building a standard of human

[24] See Rule 44C § 1 of the Rules of Court; see also para. 125-127 of the judgment.
[25] Para. 124 and 127 of the judgment.
[26] Para. 155 of the judgment.
[27] Ibidem.
[28] The decision was made by a majority of five to two. Para. 189 of the judgment.
[29] With regard to the right of persons deprived of liberty to family visits, see in particular *Khoroshenko v. Russia*, application no. 41418/04, ECtHR (GC) judgment of 30 June 2015.

rights and fundamental freedoms in the process of applying the Convention. Considering this standard, the question seems justified to what extent and whether Article 8 of the Convention regarding the right of persons deprived of liberty to family visits coincides with Article 3 of the Convention on adequate medical care and life imprisonment.[30]

In summary, the applicant's two allegations were referred by the Court for merits assessment,[31] both relate to violations of Article 3 of the Convention – one to providing palliative medical care, and the other to serving a life sentence.[32]

Merits

Palliative medical care

The first allegation on the merits of the Court's examination was the failure to provide the applicant with palliative medical care after his transfer to the Kherson Criminal Hospital for Tuberculosis 61 in July 2010. The Court found that the authorities failed to provide such palliative medical care and consequently violated Article 3 of the Convention.[33] The analysis of the Court's approach to this issue shows that its point of reference was the positive obligation to protect the physical condition of persons deprived of their liberty, inter alia by providing appropriate medical care.[34] It should be clarified that the above obligation, similar to the other positive obligations, adds a negative obligation and is implied. As such, it was explicitly defined for the first time in the 2000 case of *Kudła v. Poland*.[35]

Pending specific remarks, it should be added that, according to settled case-law, the obligations in question are those of due diligence. For this reason, the Court considered that, in order to rule their violation in the case at hand, it is not enough to just confirm "certain doubts concerning the adequacy of his or her treatment in prison". Rather, it is necessary to determine whether "the relevant domestic authorities have provided in a timely fashion all reasonably available medical care in a conscientious effort to hinder development of the disease in question".[36]

30 Cf. the partly dissenting opinion of Judge E. Kūris.
31 Para. 129 of the judgment.
32 Para. 154, 155 of the judgment.
33 Para. 153 of the judgment.
34 Para. 42 of the judgment.
35 The case of *Kudła v. Poland* of 2000, application no. 30210/96, ECtHR judgment (GC) of 26 October 2000.
36 Para. 142 of the judgment.

A 'prospect of release' and rehabilitation

The case at hand shows also that Ukrainian prisoners sentenced to life imprisonment currently have two possibilities to apply for release from prison: one is the result of an incurable illness and the other a pardon from the President. In the cases that have been dealt with so far, the Court has clearly stated that release from life imprisonment for serious illness is not in itself a legitimate mitigation of a sentence. Then, only a pardon from the President can be recognised for a real 'prospect of release'.[37] The Court therefore concentrated on evaluating this mechanism, it should be remembered that the pardon mechanism has already been assessed by the Court.[38]

Regarding said assessment, the ECtHR consistently stated that it should be made on the basis of penological grounds for continued incarceration referring to retribution, deterrence, public safety, and rehabilitation, where this last one requires special attention. Assessing the Ukrainian presidential clemency procedure against these criteria, The Court has expressed serious reservations both about its regulation and about its application in practice. First, it drew attention to the limitation of the use of this procedure in the case of life imprisonment to "exceptional cases and extraordinary circumstances", considering consequently that it is not based on "legitimate penological grounds". This in turn drastically broadens the interpretative discretion of the authorities, resulting in a lack of sufficient clarity and certainty.[39] As a result, prisoners receiving a life sentence "do not know from the outset what they must do in order to be considered for release and under what conditions".[40]

The Court drew attention in particular to the ambiguity concerning the length of sentence required to qualify for presidential clemency and the legal and factual decisions adopted by the authorities to apply clemency in a given case, since the relevant decisions do not have to be justified or made public.[41]

Given these shortcomings, the Court found that mechanism of presidential clemency in Ukraine does not result from clear rules, nor is it not sufficiently secured by procedural guarantees.[42] Moreover, it is "a modern-day equivalent of the royal prerogative of mercy, based on the principle of humanity, rather than a mechanism, based on penological grounds and with adequate procedural safeguards,

37 Para. 169-170 of the judgment. A similar stance was adopted by the Court in Öcalan *v. Turkey*, application no. 24069/03 *et. al*, ECtHR judgment of 18 March 2014.

38 See e.g., *Iorgov v. Bulgaria (No. 2)*, application no. 36295/02, ECtHR judgment of 2 September 2010.

39 Para. 175 of the judgment.

40 Para. 173-174 of the judgment.

41 Para. 178 of the judgment.

42 Para. 179 of the judgment.

for review of a prisoner's situation so that the adjustment of his or her life sentence could be obtained".[43]

Finally, the Court approved a principle it had set out clearly in *Murray v the Netherlands*, finding that prisoners "cannot be denied the possibility of rehabilitation" and thus the state has "a positive obligation to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and enable such prisoners to make progress towards their rehabilitation".[44] Although the Court explicitly stipulates that 'the Convention does not as such guarantee the right to rehabilitation', it also notes that 'persons sentenced, including those sentenced to life imprisonment, should be able to be rehabilitated'.[45] In other words, the penalty in question can only be considered as de facto reducible.[46] The obligation to provide the conditions for rehabilitation is therefore functionally linked to the requirement that the sentence be reduced: progress in rehabilitation increases the prisoner's chances of being exchanged, remitted, or terminated for life or release.

Comments

In commenting on the Court findings, three issues in particular need to be raised. The first is the definition of a positive obligation to provide medical care in prison, second, the principles which appear to serve as a framework for examining the mechanism behind a reduction of a life sentence and, last but not least, the principles of rehabilitation.

Positive obligations on prisoners' right to health protection

With regard to prison health protection, the Court, as we have already known, discussed the obligation to take measures to protect the physical condition of persons deprived of liberty, among others, by providing adequate medical care.[47] As I underlined, the State-Parties are bound by the above obligation, similar to the other positive obligations, in addition to negative obligations, which retain their primary nature and position.

It follows from the Court's arguments that it expects this obligation to be fulfilled through reasonably chosen measures and that this reasonableness leads it to due diligence. Consequently, imposing an obligation on the State to protect the

[43] Para. 180 of the judgment.

[44] *Murray v. the Netherlands*, application no. 10511/10, ECtHR judgment of 26 April 2016, para. 181.

[45] *Ibidem,* para. 88.

[46] *Ibidem,* para. 125.

[47] Para. 42 of the judgment.

prisoner's health, the Court does not expect his full improvement in health or recovery, and thus a specific result. It seems to understand that this is usually very difficult, and certainly cannot be completely guaranteed. In its assessment, the Court focused on determining whether, given the conditions of detention, the State "could have done more than it did"[48] to prevent the deterioration of the applicant's health. In essence, therefore, the Court seeks to establish whether the State has taken all possible measures which could reasonably be expected to be taken.[49]

In the Court's findings, both a protective and a preventive approach to the obligation to protect the applicant's health can be observed. Consequently, the point of departure here is the confirmation of the authorities' knowledge of the applicant's state of health, and in particular that this "state of health at that stage raised serious concerns and warranted particular medical attention".[50] Subsequently, the Court examined whether the authorities, knowing about the applicant's state of health, had indeed acted to prevent its deterioration.[51] The statement that such a deterioration had occurred allowed the Court to conclude that the authorities, knowing about the threat, had not prevented its materialization.[52]

In making the observations in respect of medical arrangements, the Court in a way embeds the obligation of due diligence into a new area of state activity. That is because, in international judicature, the concept of due diligence is primarily related to preventive and investigative measures of the State, required in the event of the violations of human rights by third parties,[53] whereas health protection pertains to social rights from which progressive obligations rather than immediate obligations have been derived.[54]

---

48 This aspect of the implementation of this obligation was crucial, inter alia, in the case of *Logvinenko v. Ukraine* of 2010, in which the Court found that the conditions of detention of the applicant, who had been diagnosed with pulmonary tuberculosis and late-stage HIV infection prior to his detention, caused a significant deterioration of his health. See *Logvinenko v. Ukraine*, application no. 44511/04, ECtHR judgment of 17 June 2010, para. 68. Note that the argument of the deterioration of a prisoner's health had already been raised by the Court in the case of *Kudła v. Poland* of 2000, para. 92-93; See also cases: *Farbthus v. Latvia*, application no. 4672/02, ECtHR judgment of 2 February 2004; *Kehayow v. Bulgaria*, application no. 41035/98, ECtHR judgment of 18 January 2005.

49 *Logvinenko v. Ukraine* of 2010, paras. 77-78.

50 Para. 140 of the judgment.

51 Para. 141 of the judgment.

52 Para. 141, 152 of the judgment.

53 R. Pisillo Mazzeschi, *Responsabilté de l'État pour violation des obligations positives relatives aux droits de l'homme*, Collected Courses of the Hague Academy of International Law – Recueil des cours, 2008, Vol. 333, p. 493.

54 For a typology of positive obligations under the ECHR, see E. H. Morawska, *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności*, Warsaw 2016, p. 141 et seq.

Life imprisonment as the ECHR issue

It seems that the findings of the Court in the *Petukhov* case allow the formulation of five general principles which can serve as a framework for examining the regime of life imprisonment.

The first of these is of paramount importance for the admissibility of the analyzed complaint, as it stems from it that the sentence of life imprisonment falls within the scope of Article 3 of the Convention, in particular the prohibition of inhuman and degrading treatment.[55] Meanwhile, the second principle sets out a constitutive element of the association of Article 3 of the Convention with the sentence of life imprisonment in the form of the legal and factual possibility of applying for early release by life prisoners. The next three principles are a logical extension of this second rule: the third states that persons sentenced to life imprisonment cannot be automatically excluded from social rehabilitation measures; the fourth provides for the obligation of the State-Party to establish an adequate mechanism for applying for release from prison in the event of serving a life sentence; while the last principle awards the States Parties the "margin of appreciation" as to the situation of this mechanism in the structures of their administrative bodies, that is either within judicial or executive power.[56]

Accordingly, the mere fact of imposing the sentence of life imprisonment does not mean the violation of this article.[57] A violation occurs if one of the above principles is found to have been infringed. The above principles have a complex and multidimensional subject scope. Therefore, their content consists of a number of detailed rules that result in specific obligations for the State-Party. This even applies to the procedural aspect of the mechanism for applying for release from prison in the event of serving a life sentence. It should be noted, first of all, that this is not about the procedural obligations which the Court derived from Articles 2 and 3 of the Convention, nor about the judicial procedural guarantees under Articles 5 and 6 of the Convention. In this case, the Court refers to the authorities'

---

[55] In the case under examination, the Court does not indicate *expressis verbis* which ill treatment is concerned, but it derives from the case-law. See *Harakchiev and Tolumov v. Bulgaria*, application nos. 15018/11 61199/12, ECtHR judgment of 8 July 2014. See also E.H.Morawska, *The complex structure of the absolute prohibition of torture. Comments in the light of the regulation of article 3 of the European Convention on Human Rights*, Espaço Jurídico: Journal of Law, 2016, Vol. 17, No. 3, pp. 767-778.

[56] Para. 68 of the judgment. The above principles come from the case of *Hutchinson v. the UK* of 2017, para. 42-45.

[57] This was clarified by the Court in more detail in the case of *Kafkaris v. Cyprus* of 2008, para. 95 et seq.

decision-making process, strongly underling that any decision relating to clemency must be surrounded by sufficient procedural guarantees.[58] As the Court found:

> in order to guarantee proper consideration of the changes and the progress towards rehabilitation made by a life prisoner, however significant they might be, the review should entail either the executive giving reasons or a judicial review, so that even the appearance of arbitrariness is avoided.[59]

In the context of procedural guarantees, attention should be paid to the obligation to state the reasons for a pardon decision and access to judicial review.[60] Furthermore, the Court underlined the need to ensure that every prisoner who is sentenced to life imprisonment has access to information on the conditions for applying for release, whereby this access must be provided from the outset and the information must be clear and accurate.[61]

Given the question raised in the introduction, it should be stressed that the approach in this case is in line with that taken by the Court in many previous cases, such as the *Vinter* case. Both the depth and severity of the assessment is much higher than in the *Hutchinson* case. So, L. Graham rightly points out that, after criticizing the *Hutchinson* case, the Court seems to apply its older, more rigorous standard, and the *Petukhov* case seems to support this trend.[62]

The principle of rehabilitation

It follows from the principles of the mechanism for applying for release from prison in the event of serving a life sentence formulated above that it is also based on the principle of rehabilitation. It should be stressed, therefore, that the reference to this principle should not come as a surprise to the State respondent, because this principle has a well-established position in the case-law, since in the *Dickson* case (2007) the Court stated that '[W]hile rehabilitation was recognised as a means of preventing recidivism, more recently and more positively it constitutes rather

58 Para. 179 of the judgment.

59 Para. 178 of the judgment.

60 Para. 177, 179 of the judgment.

61 In the Court's words: "prisoners who receive a whole life sentence do not know from the outset what they must do in order to be considered for release and under what conditions". Para. 177 of the judgment.

62 *Petukhov v. Ukraine No. 2: Life Sentences Incompatible with the Convention, but only in Eastern Europe?,* accessible to: https://strasbourgobservers.com/2019/03/26/petukhov-v-ukraine-no-2-life-sentences-incompatible-with-the-convention-but-only-in-eastern-europe/; [access: 29.12.2020].

the idea of resocialization through the fostering of personal responsibility".[63] However, the Court did not stop at the above findings. Indeed, it has developed them, linking the principle of rehabilitation to the positive obligation to ensure that a prisoner has a life sentence and the conditions of rehabilitation of the States parties to the ECHR.[64] In line with its practice, the Court has not indicated clearly the legal or factual justification for this link. This practice should be criticized because it significantly limits the scope for assessment of the Court's case-law and forces a kind of search and guessing of this justification. In the context of these positive obligations, therefore, the justification for imposing them on States-Parties seems to be based on the prohibition of degrading treatment or punishment, and precisely on respect for human dignity which lies at the heart of the European Convention system.[65] As S. Meijer correctly notes, the recognition of rehabilitation as a positive obligation based on human dignity is important, because it clearly indicates that rehabilitation should always be taken into account and cannot depend on, for example, the effectiveness of rehabilitation measures, the condition of prison staff or the financial situation.[66] States-Parties are therefore obliged to take measures to enable the convicted person to be rehabilitated.

Importantly, this is not about a specific solution but rather about creating a regime of life imprisonment that would be aimed at the rehabilitation of life prisoners and would allow for progress in their rehabilitation. Having said that, the State cannot be held accountable for the effectiveness of this social rehabilitation in individual cases, because it is – for obvious reasons and at least to some extent – random, meaning it carries a certain risk of non-achievement. It should be noted that this observation corresponds to the doctrine of positive obligations of States-Parties to the Convention.[67] Under this doctrine, a positive obligation must not entail an impracticable or disproportionate burden.[68] These observa-

[63] *Dickson v. the UK*, application no. 44362/04, ECtHR (GC), judgment of 4 December 2007, para. 28; see also A. Martufi, *The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?* Vol. 25 2017: Issue 2; https://doi.org/10.1177/1023263X18820678.

[64] The Court did so for the first time in the *Murray* case in 2016. See note 4.

[65] See: T. Jasudowicz, *Sprawa Kudła v. Poland z 2000 r.: zasada godności człowieka w porządku prawnym Europejskiej Konwencji Praw Człowieka*, in *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.*, red. E. H. Morawska, Warszawa 2019, s. 21-41.

[66] S. Meijer, *Rehabilitation as a Positive Obligation*, „European Journal of Crime, Criminal Law and Criminal Justice" Vol. 25: Issue 2, 2017; https://doi.org/10.1163/15718174-25022110

[67] See generally E. H. Morawska, *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności,* Warszawa 2016.

[68] See e.g., *Rantsev v. Cyprus and Russia,* application no. 25965/07, ECtHR judgment of July 2010, Para. 219.

tions explain the reasons why the Court concluded in the case at hand that this obligation should be regarded as an obligation of means and not of result.[69]

Another issue worth noting in the commentary on the concept of a positive obligation to take measures for the rehabilitation of a person sentenced to life imprisonment is the lack of a clear statement from the Court regarding the catalogue and definition of the measures. Therefore, on the basis of the Court's further comments, it can only be assumed that these are measures that must ensure decent detention conditions.[70] This concept covers the measures that ensure hygiene and sanitary conditions, adequate living space and cleanliness in prison cells and, moreover, appropriate cultural and sporting activities.[71] Ensuring the abovementioned living conditions in prison was considered a necessary precondition for carrying out appropriate rehabilitation treatment and ensuring the flexibility of the punishment at the stage of execution.[72] In other words, these conditions are intended to motivate prisons to work on themselves and to apply for a review of sentence. In the absence of the above detention conditions upholding minimum standards of decency, it would indeed prove hard to evaluate the progress of individual offenders as well as the outcomes of the treatment programs delivered during detention.[73]

Two issues remain to be discussed, i.e., the execution of the sentence passed in the *Petukhov* case and the prospects of reducing a life sentence in the Polish context.

---

[69] Para. 181 of the judgment. The dispute regarding the definition of the obligation of result and purpose begs the question about the Court's understanding of these obligations. For more, see E. H. Morawska, see note 40, pp. 160-178.

[70] It may be recalled that, according to well established case-law of the ECtHR "[T]he State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him or her to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his or her health and well-being are adequately secured". See *Kudła v. Poland* of 2000, paras. 92-94.

[71] The recognition that the life imprisonment system in Ukraine is not oriented towards the rehabilitation of prisoners was determined by the fact that these prisoners "are segregated from other prisoners and spend up to twenty-three hours per day in their cells, which are usually double or triple occupancy, with little in terms of organized activities and association". Para. 182 of the judgment.

[72] *Harakchiev and Tolumov v. Bulgaria*, applications no. 15018/11 61199/12, ECtHR judgment of 08 July 2014, para. 265; but see also *Khoroshenko v. Russia*, application no. 41418/04, ECtHR judgment of 30 June 2015, para. 122.

[73] See Council of Europe, *White Paper on prison Overcrowding*, Council of Europe (2016), available at: https://rm.coe.int/16806f9a8a, para. 33–39. [access: 05.01.2021].

Execution of the ECtHR judgment in *Petukhov v. Ukraine (No. 2)*

It should be noted at the outset that the Court invoked two grounds for enforcing the *Petukhov* judgment, namely Article 41 of the Convention and Article 46 of the Convention.

Article 41 of the Convention was applied to the "irreversible deterioration of the applicant's state of health", ruling "just satisfaction" in favor of the applicant.[74] Article 46 of the Convention was raised to recognize the fact that this case discloses a systemic problem whose resolution requires the respondent State to take measures of a general character.[75]

By clarifying the issue that lies at the core of the problem, the Court first declared a broad margin of appreciation in the area of criminal sanctions and subsequently confirmed that the eventual fact of serving a life sentence in full is not contrary to Article 3 of the Convention since a review of whole life sentences must not necessarily lead to the release of the prisoner in question.[76] It should be noted that the above measures were only discussed in the operative part of the judgment, having been ignored completely in the delivered sentence.

The institution of general measures cited by the Court has a well-established position in Strasbourg case-law, even if it derives from no particular treaty and its application raises justified doubts.[77] It was first used by the Court in the 2000 case of *Scozzari and Giunta v. Italy*, which clearly shows that the legal obligation to abide by a judgment cannot be reduced by State-Parties to awarding just satisfaction financially or to individual measures required "to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects".[78]

Through general measures, the Court seeks to prevent similar violations of the Convention in the future, which makes them preventive and "future-oriented". It can therefore be concluded that their formulation was due to concerns over the effectiveness of the Convention system.[79] Indeed, in one of the cases the Court found that:

---

74 Para. 196-200 of the judgment.

75 However, it also found that «the finding of a violation constitutes sufficient just satisfaction». See para. 194 and 201 of the judgment.

76 Para. 193 of the judgment. See also *László Magyar v. Hungary* of 2014, para. 72.

77 A. Bodnar, *Wykonywanie orzeczeń Europejskiego Trybunału Praw Człowieka*, Warsaw 2018, pp. 80-83.

78 *Scozzari and Giunta v. Italy*, application no. 39221/98 and 41963/98, ECtHR (GC) judgment of 13 July 2000, para. 249. This is even clearer in more recent cases. See e.g., *Ataykaya v. Turkey*, application no. 50275/08, ECtHR judgment of 22 July 2014, para. 68.

79 V. Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures*, "Human Rights Law Review", 2007, Vol. 7, pp. 396-411.

> it should at the same time be pointed out that the adoption of general measures requires the State concerned to prevent, with diligence, further violations similar to those found in the Court's judgments.[80]

The simplicity and obvious character of these claims is only apparent.

First and foremost, attention should be paid to their potential contradiction with the declarative nature of the Court's judgments and the freedom of the State to choose the means of their implementation. As far as international law is concerned, the choice of actions that the state deems necessary to properly enforce a judgment forms part of its executive autonomy.[81] In addition, the practice of indicating by the Court the means of executing a judgment by the respondent State conflicts with the competence of the Committee of Ministers of the Council of Europe in the scope of supervision over the execution of the Court's judgments. Typical of Strasbourg jurisprudence is that the Court generally does not explicitly deny the aforementioned discretion of States or the declarative nature of its judgments,[82] and even less of the Committee's supervisory functions in this respect.[83]

The Court's specific response to the above reservations can be found, among others, in the case *Volokitin and Others v. Russia* of 2018, where the following was stated:

> It is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order to discharge its obligation under Article 46 of the Convention. However, with a view to helping the respondent State to fulfil that obligation, the Court may seek to indicate the type of general measures that might be taken in order to put an end to the situation it has found to exist.[84]

---

80 The above findings come from *Fabris v. France*, application no. 16574/08, ECtHR judgment of 7 February 2013, para. 75.

81 I. C. Kamiński, *Ukraina w orzecznictwie Europejskiego Trybunału Praw Człowieka,* „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego", 2016, Vol. 12, p. 13.

82 *Zelenchuk and Tsytsyura v. Ukraine*, application no. 846/16 1075/16, ECtHR judgment of 22 May 2018, para. 150. However, in *Moreira Ferreira v. Portugal (No. 2)*, application no. 19867/12, ECtHR (GC) judgment of 11 July 201, para. 51 regarding individual measures the Court stated that "(...) In exceptional cases, the very nature of the violation found may be such as to leave no real choice as to the measures required to remedy it, and this will prompt the Court to indicate only one such measure".

83 See e.g., *Sejdovic v. Italy*, application no. 56581/00, ECtHR (GC) judgment of 1 March 2006, para. 119 *et seq.*

84 *Volokitin and Others v. Russia*, application nos. 74087/10 *et al*, ECtHR judgment of 3 July 2018, para. 46 et seq.

Once again, it is impossible to read this statement and not discuss the specific language through which the Court clearly seeks to level out any objections raised by the respondent State-Party as to its ruling regarding the means of enforcing judgments. However, the fact remains that the described practice of the ECtHR raises justified concerns both in the literature and among ECtHR judges themselves.[85]

The *Petukhov* case only allows us to refer to certain specific issues related to the enforcement of the Court's judgments. It does not provide the necessary grounds for addressing the procedure of pilot or quasi-pilot judgments, or to the practice of the Court indicating specific individual measures in the judgment or the procedure of interpretative sentences and sentences regarding the abiding of the respondent State-Party by the Court's final judgment. Over the past few years, the issue of executing the Court's judgments has become increasingly complex, and there is no doubt that the limited time frame does not allow for in-depth analysis.

The Polish context of the *de jure* and *de facto* reduction of life imprisonment

With regard to the last issue, i.e., the Polish context of the reduction of life imprisonment, the government's draft amendment to the Act amending the Penal Code and certain other laws of 2019 is crucial.[86]

In this draft, the government has proposed that, under strict conditions, a court may order a life sentence without the possibility of parole. The court may do so, firstly, by imposing life imprisonment on the perpetrator for an act committed by him after a final conviction for another offence to life imprisonment or a term of imprisonment of not less than 20 years. And secondly, when imposing the sentence of life imprisonment, the court finds that the nature and circumstances of the act and the personal characteristics of the perpetrator indicate that his or her stay at liberty will result in a lasting danger to the life, health, liberty, or sexual freedom of others.[87] Subsequently, the draft provided for an amendment to Article 78(3) of the Penal Code, extending from the current 25 to 35 years the period of entitlement

[85] See. partly concurring and partly dissenting opinion submitted by Judge P. Koskelo and Judge T. Eicke in *V.D. v. Croatia (No. 2)*, application no. 9421/15, ECtHR judgment of 15 November 2018.

[86] Sejm draft No. 3451. The submitted draft assumed an amendment to the laws: of 20 May 1971 – Code of Offences, of 6 June 1997 – Provisions introducing the Criminal Code, dated June 6, 1997. – Executive Criminal Code, of 6 June 1997 – Code of Criminal Procedure, of 20 June 1997. – Law on road traffic, of 29 July 2005 on preventing drug addiction, of 16 September 2011 amending the Act – Executive Criminal Code and certain other acts and of 20 February 2015 amending the Act – Criminal Code and certain other acts and of 13 May 2016 on preventing threats of sexual crime.

[87] Cf. respectively proposed amendments to Article 77 §§ 2, 3 and 4 of the Criminal Code.

to apply for release.[88] In addition, it introduced a lifetime probationary period for a conditionally released person sentenced to life imprisonment.[89] The above changes therefore assumed the *de jure* irreducibility of life imprisonment and, as a result, the exclusion of persons sentenced to life imprisonment from the chance to be released (*prospect of release*) and the possibility of verifying the appropriateness of its to serve the sentence in question (*possibility of review*).

Bearing in mind the issue in question, it is important to consider the justification of the project, in particular the objectives of the submitted amendments. As they make clear, they aim to "increase the severity of criminal sanctions" by "limiting the possibility of benefiting from a reduction in criminal sanctions" and by extending the possibility of "increasing criminal repression against offenders with a high conviction rate".[90]

The Act amending the Criminal Code and certain other laws was passed on 13 June 2019. Nevertheless, it has not entered into force because the President, due to doubts as to the constitutionality of the procedure for its adoption, referred it, in the course of preventive control, to the Constitutional Court.[91] He did, however, publicly point out that he had no objections to the government's proposed course of action on criminal law and expresses 'the legislator's understandable desire to make criminal laws that meet the requirements of justice'.[92]

The Constitutional Tribunal examined the motion of the President on 14 July 2020, ruling, by a majority of votes, that the Act in question is entirely inconsistent with Article 7 in conjunction with Article 112 and Article 119(1) of the Polish Constitution. Referring to this judgment, Deputy Minister of Justice Warchoł declared that work on the amendment of the Criminal Code would be continued "in a similar spirit" and promised to follow the procedures recommended by

88 See proposed amendments to Article 78 (3) of the Criminal Code.

89 See proposed amendments to Article 80 (3) of the Criminal Code.

90 The explanatory memorandum – Sejm draft No. 3451.

91 In his motion (No. Kp 1/19), the President requested that:
1. the whole Act of 13 June 2019 amending the Act – the Criminal Code and certain other acts under Article 7 and Article 112 in conjunction with Article 119(1) of the Constitution,
2. Article 3, Article 8(6) and Article 13 of the above Act from Article 7, Article 118(1), Article 119(1) and Article 121(2) of the Constitution, as the scope of the amendments adopted by the Senate went beyond the matter of the Act adopted by the Sejm,
3. Article 1(37)(c), in the part covering amended Article 115 § 19 of the Act of 6 June 1997. – The Criminal Code, in the scope concerning point 4 b of the above act from Article 32 paragraph 1 of the Constitution, 4. Article 1 point 37 c, in the part including the amended Article 115 § 19 of the act of 6 June 1997. – the Criminal Code, in the scope concerning point 4 letter d of the above-mentioned act from Article 42, paragraph 1 of the Constitution.

92 T. Gardocka, see note 97.

the Tribunal .[93] In line with this declaration, some of the provisions of the amendment to the Criminal Code of 19 June 2020 were introduced to the Criminal Code by the Act of 19 June 2020 on subsidised interest rates on bank loans granted to companies affected by COVID-19 and on a simplified procedure for the approval of the arrangement following COVID-19 [*o dopłatach do oprocentowania kredytów bankowych udzielanych przedsiębiorstwom dotkniętym skutkami COVID-19 oraz o uproszczonym postepowaniu o zatwierdzanie układu w związku z wystąpieniem COVID-19*].[94]

Fortunately, there is no provision here for life imprisonment, which, of course, does not mean that the Polish Government has completely abandoned the proposals made in 2019.

In the debate on the government's 2009 proposals to amend the Penal Code, it was rightly argued that, as regards the reduction of life imprisonment sentence, they had violated the minimum standard adopted in human rights treaties, both universal and regional,[95] binding on Poland.[96] The overly repressive and punitive nature of the proposed amendments has also been consistently and accurately highlighted.[97] Indeed, the government's proposals for a change to the life sentence of

[93] *Ministerstwo Sprawiedliwości ponownie szykuje zaostrzenie kar za niektóre przestępstwa*; available at: Prawo.pl:https://www.prawo.pl/prawnicy-sady/zaostrzenie-kar-za-niektore-przestepstwa-zmiany-w-2020-roku,502624.html [access: 9.11.2020].

[94] Journal of Laws Items. 1086.

[95] As far as the universal system of human rights protection is concerned, Article 10 International Covenant on Civil and Political Rights is crucial (International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, s. 171 and vol. 1057, s. 40) of 19 December 1966; Poland ratified the MPPOiP on 18 March 1977. (Journal of Laws No. 38, item 167); see also UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and Security of Person)*; UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)*; The above general comments of the UN Human Rights Committee are available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 [access: 23 March 2020]; The Standards Minimum Rules for the Treatment of Prisoners are also very important in the context of life imprisonment. As the reader know will be aware, they were adopted at the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders and approved on 31 July 1957 by the UN Economic and Social Council by Resolution 663 CI (XXIV) and the UN Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), adopted on 8 January 2016 by the UN General Assembly in Resolution A/RES/70/175. Cf. *Międzynarodowe standardy wykonywania kar*, red. T. Szymanowski, „Przegląd Więziennictwa Polskiego" vol. 72-73/2011 (numer specjalny); K. Mrozek, *Reguły Nelsona Mandeli*, „Nowa Kodyfikacja Prawa Karnego" vol. 68/2018, pp. 169-182.

[96] T. Gardocka. *Opinia zewnętrzna*; available at http://www.sejm.gov.pl/sejm8.nsf/opinieBAS.xsp?nr=3451 [access: 12.12.2019].

[97] This was rightly pointed out by the Ombudsman in his letters to the Minister of Justice, the

imprisonment have been a cause for concern, as they could have shifted the corrective function of punishment into the background, given primacy to its repressive and retaliatory functions, or focused on repayment (retaliation) for the wrong (crime) done. Although punishment is a multidimensional legal instrument and the social rehabilitation of the offender is its primary objective, it is not the only one. The idea of fair revenge, to which the authors of the aforementioned changes referred, leads to the social exclusion of the offender and his condemnation as a completely demoralized person.[98] In spite of the reference to Article 31 of the Constitution, it seems that the government's proposals fail to strike a balance between crime (punishment) and the treatment of a person who has committed a prohibited act, as referred to by the Court. By formulating the right to review the punishment and the right to hope for release, the Court excludes the permanent isolation and situation of those convicted outside society. Meanwhile, the governmental proposal for an absolute punishment of life imprisonment seems to be based on a kind of idealization of the effectiveness of imprisonment, while ignoring its significant drawbacks, such as inhumanity, ineffectiveness in terms of individual and general prevention, as well as the high financial and social costs.

There is no doubt that the Court, in making the findings described above with regard to the life imprisonment sentence, has entered the area of criminal justice and criminal policy of the States-Parties, an area which is traditionally considered to be an area of exclusive jurisdiction of the States-Parties[99] and is a fact recognized in the literature.[100] In addition, the findings of a breach of Article 3 ECHR in the con-

Prosecutor General, the Speaker of the Polish Senate and the President of the Republic of Poland. Cf. letters and expert opinions on the abovementioned amendments: https://www.rpo.gov.pl/pl/content/zmiany-w-prawie-karnym-2019-opinie-ekspertow-i-RPO [access: 03.12. 2019]; see also A. Barczak-Oplustil, W. Górowski, M. Iwański, M. Małecki, W. Zontek, S. Tarapata, and W. Wróbel*, Opinia do uchwały Senatu Rzeczypospolitej Polskiej z dnia 24 maja 2019 r. w sprawie ustawy o zmianie ustawy – Kodeks karny oraz niektórych innych ustaw, uchwalonej przez Sejm Rzeczypospolitej Polskiej na 81. posiedzeniu w dniu 16 maja 2019 r*. The opinion is published on the website of the Krakow Institute of Criminal Law Available at: https://kipk.pl/analizy/ekspertyzy [access: 03.12.2019].

98 See Ziobro: *Kara bezwzględnego dożywocia ma trwale eliminować najbardziej okrutnych morderców*, https://www.gazetaprawna.pl/wiadomosci/artykuly/1417901,ziobro-kara-bezwzglednego-dozywocia-ma-trwale-eliminowac-najbardziej-okrutnych-mordercow.html [access: 08.01.2001]; *Zero tolerancji dla sprawców okrutnych przestępstw* https://www.arch.ms.gov.pl/pl/archiwum-informacji/news,8311,10,zero-tolerancji-dla-sprawcow-okrutnych-przestepstw.html [access: 08.01.2001].

99 *Achour v. France*, application no. 67335/01, ECtHR judgment of 29.03.2006, para. 44; see also *Kafkaris v. Cyprus* of 2008, paras. 99, 104.

100 See C. Reus-Smit, *Individual Rights and Making of International System*, Cambridge 2013, p. 38.

text of life imprisonment were met with a very violent and unfavorable reaction by the defendant State.[101] Taking into account the *Hutchinson* case, it can be assumed that the Court has succumbed to this pressure, but subsequent cases, including the *Petukhov* case and the *Lopata and Others v. Ukraine* of 2020 case, prove that there is no question of further weakness. What is more, since the *Lopat* case was examined on merit by the Committee ECtHR, it can be assumed that the issue of the incompatibility of life imprisonment without *review/release* could be treated as well established in the case-law.[102] To be clear, the Court stated in it that:

> [t]he Convention does not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. Yet to be compatible with Article 3 such a sentence must be reducible de jure and de facto, meaning that there must be both a prospect of release for the prisoner and a possibility of review. The basis of such review must extend to assessing whether there are legitimate penological grounds for the continuing incarceration of the prisoner. These grounds include punishment, deterrence, public protection, and rehabilitation. The balance between them is not necessarily static and may shift in the course of a sentence, so that the primary justification for detention at the outset may not be so after a lengthy period of service of sentence. The importance of the ground of rehabilitation is underlined, since it is here that the emphasis of European penal policy now lies, as reflected in the practice of the Contracting States, in the relevant standards adopted by the Council of Europe, and in the relevant international materials.[103]

Does this judgment matter to Poland? The answer to this question is both obvious and unambiguous. Of course, according to the principle of subsidiarity, responsibility for ensuring the rights and fundamental freedoms guaranteed by the Convention is covered by the States Parties to the ECHR. The legal order of the Convention has a subsidiary role in this regard.[104] Nevertheless, the interpretation of national legislation, its subsequent application and its effects shall be subject to review by the Court as to its compatibility with the principles of the Convention, as

[101] For example, the 2013 *Vinter and Others v. the UK* judgment was heavily criticized by the UK authorities, led by the then Prime Minister D. Cameron. In this case, the Court, by 16 votes to 1, found a breach of Article 3 of the ECHR.

[102] *Lopata and Others v. Ukraine*, applications no. 84210/17 9511/18 21183/18..., ECtHR judgment of 10.12.2020.

[103] On this point, the Court makes reference to the case *Vinter and Others v. the UK* of 2013, paras. 59-81.

[104] This follows from Articles 13 and 35(1) ECHR; in this context, cf. e.g., *Scordino v. Italy*, No 36813/97, judgment of 26 March 2006, par. 140.

interpreted in the case law.[105] This is determined by Article 1 of the ECHR, which provides for an obligation on the States-Parties to the ECHR to secure to everyone the rights and freedoms defined in ECHR and reaffirms the international character of that obligation, followed by Article 19 of the ECHR, which sets out the purpose for which the Court was established, namely to ensure that the States Parties to the ECHR comply with their obligations under the Convention, and Article 46 of the ECHR, which provides for binding force and enforcement of judgments of the Court, whose jurisdiction in all cases concerning the interpretation and application of the ECHR was recognised by Poland in 1993.[106]

Summary

This commentary (gloss) was written due to the second case *Petukhov v. Ukraine*. It was adjudicated by the ECtHR Chamber in 2019. It shows that on the issue of the enforcement of absolute imprisonment, the ECtHR is clearly returning to the line of case law set out in *Vinter v. the United Kingdom* (2013). In turn, this makes it possible to consider the findings in *Hutchinson v. the United Kingdom (2017)* as an inappropriate recognition of the standard of execution of life imprisonment, which can be not so much justified as excused by the particular British context of the case. This commentary consists of five main parts. The first is an introduction, providing background material on the Strasbourg key cases on imprisonment. The second part is a summary of the case law of the ECtHR. In turn, this makes it possible to consider the findings in Hutchinson v. the United Kingdom (2017) as an inappropriate recognition of the standard of execution of life imprisonment, which can be not so much justified as justified by the particular British context of the case.

This commentary consists of five main parts. The first is an introduction, providing background material on the Strasbourg leading cases on imprisonment. The second part is a review of the factual and legal circumstances of Petukhov v. Ukraine (No. 2). The next part deals with the first stage of the proceedings before the ECtHR, namely the conditions of admissibility, covering the admissibility of the applicant's Article 3 ECHR and Article 8 ECHR allegations. The findings on admissibility made it possible to move on to the ECtHR's findings at the stage of the merits of the case. The last part of the commentary consists of the author's remarks. They can be divided into three main groups. The first group of remarks is clearly related to the Petukhov case. Thus, these are observations on the positive obligations of States in relation to the prisoners' right to health care, then on the recognition of life imprisonment as a human rights issue and on the recognition of rehabilitation as the primary objective of imprisonment. The second group of comments relates to the implementation

[105] *Ibidem,* para. 191.
[106] The Official Journal of Laws No. 61, item 285.

of judgments of the ECtHR, including pilot judgments. The last group of comments, i.e., the third one, is related to the Polish legal order, and in particular to the governmental project of introducing the absolute life imprisonment sentence into the Criminal Code (2019).

Key words: European Convention on Human Rights, *de facto* and *de jure* reducibility of life imprisonment, prospect of release, rehabilitation

Standardy ETPC w zakresie wykonywania kary dożywotniego pozbawienia wolności: komentarz do sprawy *Petukhov v. Ukraina (No. 2)*

Streszczenie

Przedmiotowy komentarz składa się z pięciu zasadniczych części. Pierwszą z nich jest wprowadzenie, zawierające podstawowe informacje odnośnie do strasburskich spraw wiodących w zakresie odbywania kary pozbawienia wolności. Drugą część stanowi prezentacja okoliczności faktycznych i prawnych sprawy *Petukhov v. Ukraine (No. 2)*. Następna część dotyczy pierwszego etapu postępowania przed ETPC, a więc warunków dopuszczalności, przy czym obejmuje ona dopuszczalność podniesionych przez skarżącego zarzutów na gruncie art. 3 EKPC oraz zarzutów na gruncie art. 8 EKPC. Ustalenia odnośnie do dopuszczalności pozwoliły przejść do przedstawienia głównych ustaleń, sformułowanych na etapie merytorycznego badania skargi. Ostania część komentarza to uwagi . Można podzielić je na trzy zasadnicze grupy. Pierwsza grupa uwag wiąże się wyraźnie z sprawą *Petukhov*. Są to więc spostrzeżenia dotyczące zobowiązań pozytywnych w związku z prawami więźniów do ochrony zdrowia, następnie uznania problematyki dożywotniego pozbawienia wolności za problematykę z zakresu praw człowieka i uznania resocjalizacji za wiodący cel kary pozbawienia wolności. Druga grupa uwag dotyczy kwestii wykonywania wyroków ETPC, w tym wyroków pilotażowych. Natomiast trzecia grupa uwag wiąże się z polskim porządkiem prawnym, a w szczególności projektem wprowadzenia do kodeksu karnego bezwzględnej kary dożywotniego pozbawienia wolności.

Słowa kluczowe: Europejska Konwencja Praw Człowieka, de facto i de iure redukowalność kary dożywotniego pozbawienia wolności, perspektywa zwolnienia, resocjalizacja