



**CIVIL COURT
FIRST HALL
(CONSTITUTIONAL JURISDICTION)**

**THE HON. MR. JUSTICE
ANTHONY ELLUL**

Sitting of the 14 th November, 2011

Referenza Kostituzzjonali Number. 48/2011

**The Police
(Inspector Sandro Zarb)**

Vs

Aleksei Kostin

By decree dated 21st July 2011 issued by the Court of Magistrates (Malta) in the extradition proceedings against Aleksei Kostin, the court ordered a reference to this court so as to determine whether the extradition of Kostin to Estonia will tantamount to a breach of Article 3 of the European Convention due to the prison conditions. On the 5th October 2010 a European Arrest Warrant was issued. Kostin is an Estonian citizen and his extradition is being sought by the Estonian authorities after he absconded from Estonia so as not to be imprisoned after a court

judgment whereby he was found guilty of the crime of theft aggravated by violence and condemned to two (2) years seven (7) months and twenty six (26) days in prison. In the extradition proceedings Kostin requested a reference to this court due to the fact that: *“illi l-kondizzjonijiet tad-detenui f’habsijiet (tal-Estonja) jistghu jinvolvu trattament inuman u degradanti fil-konfront tal-estradant u dan in vjolazzjoni tal-Artikolu 3 tal-Konvenzjoni Ewropea kif saret parti tal-ligi Maltija permezz tal-Kapitolu 319 tal-Ligijiet ta’ Malta.’*

Defence counsel to Kostin referred to:-

- a. Judgments delivered by the European Court of Human Rights on the 12th September 2000 (Application No. 37043/1997) and 2nd July 2009 (Application no. 41652/2005). Another judgment referred to during the extradition proceedings is **Alver v Estonia** (Application no. 64812/01), which refers to the prison conditions during the 1990s. The court confirmed that *“the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him 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 health and well being are adequately secured.”* The court decided in favour of applicant’s claim and reached the decision on the basis of the space each inmate had in the cell, a lack of freedom of movement outside the dormitory during the daytime, and length of time which the inmate was subjected to these conditions, *“... weighs heavily as an aspect to be taken into account for the purpose of establishing whether the impugned detention conditions were degrading from the point of view of Article 3.”* Matters were made worse due to the poor conditions in the detention facilities, that is lack of sanitary conditions, no proper furniture, no ventilation, lack of natural light, poor food.
- b. A report issued by the American Department of State which relates to Estonia.
- c. A report issued by Amnesty International in 2008 which refers to the poor conditions in the Estonian prisons.

During the sitting of the 9th September 2011 Kostin gave evidence and declared that:-

i. He had been found guilty by an Estonian Criminal Court of theft, and convicted to imprisonment for a period of two years and eight months. He absconded in order not to spend time in jail due to the prison conditions. Kostin declared that since he resides in Tallinn, if returned to Estonia he will be sent to the Tallinn prison.

ii. He suffers from Hepatitis C. Although no medical certificates or other evidence was brought forward to prove this, the prosecution did not contest this assertion.

iii. During 2009 he was in jail in Tallinn, Estonia where a doctor is only available twice a week. The prison cell is shared between twelve inmates and its footprint is approximately 25 square metres. He also claimed that each day he was only allowed to go out of the prison cell for one hour, and could shower only once every week. Furthermore the heating in the prison cells is inadequate. Whatever you need has to be bought. On admission the inmate is given toothpaste, a tooth brush and a bar of soap. The rest has to be bought. Once the toiletries finish, the inmate has to buy his own. Although an inmate can receive money from friends or family, he is only entitled to thirty per cent (30%) of the amount. The rest is used to pay for court expenses. Therefore if the inmate has no funds, he will have to do without the items he requires. Furthermore, friends and family members cannot send any things to the inmate except money and letters. Although breakfast, lunch and dinner are served, the diet is inadequate, especially on taking account of his medical condition. Each inmate is provided with two light jackets, two trousers and two T-shirts. Kostin claims that this clothing is not adequate during the winter period. No shoes are provided unless you buy them.

During 9th May and 18th May 2007 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment visited Estonia. A report was issued after carrying out "full visits" to Murru and Viljandi Prisons, and a "targeted visit" to Tallinn Prison. The report deals with material conditions in the Murru Prison, which were found to be generally

acceptable. With respect to the Tallinn prison it was reported that:-

“..... material conditions in the remand section remained on the whole unchanged since the 2003 visit. Once again, occupancy levels in many cells were too high (e.g. up to six prisoners in a cell measuring some 15 m²)..... efforts should continue to be made to reduce the cell occupancy levels in the existing establishment.”

The report claims that in the Tallinn prison no progress has been registered with regards to purposeful activities for detainees; *“The vast majority of prisoners continued to be confined to their cells for 23 hours a day without being offered any out of cell activities, apart from one hour of daily outdoor exercise.”* The report encourages the Estonian authorities to ensure that prisoners in at the Tallinn prisons have access to work, education, sports and recreational activities. Furthermore the practice of forcible urine tests at Murru and Tallinn prisons is *“.... unacceptable and could well be considered as inhuman and degrading, also in the light of the potential health risks for the prison concerned.”*

On the 11th July 2007 a Memorandum to the Estonian Government was published, entitled *“Assessment of the progress made in implementing the 2004 recommendations of the Commissioner for Human rights of the Council of Europe.”*, for the attention of the Committee of Ministers and the Parliamentary Assembly. Concern was expressed, amongst others, with regards to conditions in detention facilities, health protection and work of detainees. Concern was expressed that prisoners could only shower once a week, and that prisoners had to pay for their own toiletries. In a report issued by the Commissioner for Human Rights in 2003, he called upon the authorities to allow inmates a choice of alternative diets.

In a report published this year by the Estonian Chancellor for Justice and entitled *“2010 Overview of the Chancellor of Justice activities for the presentation of ill-treatment”*, it is stated that *“prisons are still using some of the buildings from the Soviet era which are unsuitable for modern execution of punishment (Harku, Tallinn and Murru Prison).”*

During the sitting held on the 9th September 2011, the prosecution filed a copy of an undated letter issued by an official of the Ministry of Justice, stating that the Alver judgment refers to conditions in the Central Prison which has now been shut for a number of years. Furthermore the report issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, does not state that prison conditions in Estonia are in breach of fundamental human rights. A report issued by Amnesty International is based on the reports issued by the Commissioner for Human Rights and the CPT report, without having granted the Estonian government the opportunity to present its arguments. In another letter sent by the Director of the Sentencing Enforcement Division to the Vice President of Eurojust, dated 7th September 2011, it is claimed that in prison the inmates can acquire general and vocational education, they are allowed to communicate with people outside the prison, and offered a job and help from a social worker. With regards to the Tallinn prison, it is claimed that its architecture dates a few decades, and it is planned to replace this prison with a new building within five years. It would therefore seem that although in the CPT report it is claimed that “... *it was envisaged that the construction of a new prison in Tallinn would commence in the near future, for completion in 2011.*”, to date this project has not been undertaken. Furthermore, it is claimed that Estonian prison conditions are compliant with the European Convention.

According to Article 3 of the Convention, “*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*”.

In a judgment delivered on the 27th October 2011 by the European Court on Human Rights in the case **Ahorugeze v Sweden**, the Court confirmed that:-

i. Extradition by a Contracting State may give rise to an issue under Article 3, “*and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question would, if extradited, face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. The establishment of such*

responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention.”

ii. The responsibility is on the extraditing country in not taking action which will expose the individual to proscribed ill-treatment.

iii. *“If the applicant has not been extradited or deported when the Court examines the case, the relevant time for the assessment of the existence of such a risk will be that of the proceedings before the Court.”*

iv. Ill-treatment must attain a minimum level of severity. The assessment depends *“...on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration and its physical or mental effects.”*

v. Allegations of ill-treatment has to be supported by appropriate evidence.

vi. *“Aliens who are subject to removal cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State. The fact that the applicant’s circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3.....In any event, the threshold for a medical condition to raise an issue under Article 3 is, as shown by the case-law referred to above, a very high one.”*

In **Veermae v Finland**, decision delivered on the 15th March 2005, applicant complained that his expulsion from Finland to be sent back to Estonia to serve the rest of his sentence, would tantamount to a violation of Article 3 of the Convention. The Court held:-

“It is the Court’s well-established position that Contracting States have the right to control the entry, residence and expulsion of aliens. However, extradition by a Contracting State – or any other type of removal of a foreign national – may give rise to an issue under Article 3, and hence engage the responsibility of that State, where substantial grounds have been shown for believing that the person concerned would face a real risk of being subjected to

torture or to inhuman or degrading treatment or punishment in the country to which he is to be removed. A mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3.” (see for example Soering v. The United Kingdom, judgment of 7 July 1989, Series A no. 161, and Vilvarajah and Others v. The United Kingdom, judgment of 30 October 1991, Series A no. 215.)”.

There is no doubt that a person who is incarcerated does not forfeit his protection to the rights guaranteed by the Convention. Prisoners are in a vulnerable position and the authorities have a duty to protect them. Estonia, like any other country that is a signatory to the Convention, has the duty to ensure that the prison conditions are compatible with respect to human dignity. Although the deprivation of liberty brings with it an element of suffering, the prisoner is not to be subjected to unnecessary distress or hardship. An application alleging breach of Article 3 of the Convention does not require the applicant to prove that there was a positive intention to humiliate or debase him. From what Kostin stated there certainly is a possibility of ill-treatment if he is subjected to the prison conditions which he described during his testimony. The main concern relates to the overcrowding, number of hours which an inmate has to spend in his cell, and medical care which he will receive in an Estonian prison. According to the information concerning the human rights situation in Estonian prisons, it is apparent that up to April 2007¹ there were poor prison conditions, including overcrowding and prisoners being confined to their cells without being offered out-of cell-activities. It is not clear whether in 2011 the prison conditions have improved or remained the same, and whether the recommendations made by the European Committee have been addressed. In the judgment GOH vs Romania delivered on the 21st June 2011, the ECHR commented: *“In its previous cases where applicants had at their disposal less than 3 sq.m of personal space, the Court has found that the*

¹ When a delegation by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) visited three Estonian prisons.

*overcrowding was so severe as to justify of itself a finding of a violation of Article 3 of the Convention (see, among many others, Lind v. Russia, no. 25664/05, 59, 6 December 2007; Kantyrev v. Russia no. 37213/02 50-51, 21 June 2007; Andrey Frolov v. Russia, no. 205/02, 47-49, 29 March 2007, and Labzov v. Russia, no. 62208/00, 44, 16 June 2005).". There is no certainty that the cell space afforded to Kostin will be less than 3sqm or that he will be spending the day confined to his prison cell. In their submission the Estonian authorities claim that "There are also two other prisons in Estonia – the Tallinn Prison and and the Harku and Murru Prison. The architecture of these two prisons dates back a few decades, **but they are also adjusted to the modern cell-type regime**. We do however plan to close the two older prisons down in the five year prospect and build a third new prison – The Tallinn Prison.". Furthermore, from the Estonian government's submission it appears that while in prison inmates have the opportunity to work and attend school. The court is not certain that while serving his sentence in an Estonian prison Kostin will be living in the conditions he described during his testimony. A mere possibility does not suffice to give rise to a breach of Article 3. In the Veermae case the court added that the applicant "... would be free to lodge an application against Estonia should he consider his treatment there to be in breach of that Article or any other provision of the Convention.". In these circumstances the court dismisses Aleksei Kostin's opposition that his extradition to Estonia would give rise to a violation of Article 3 of the European Convention. Since Kostin was granted legal aid, he is not to incur the judicial costs relating to this proceeding. The acts of the proceedings are to be returned to the Court of Magistrates (Malta) for the continuation of the extradition proceedings.*

< Final Judgement >

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