L'altro diritto ONLUS-
c/o Dipartimento di Scienze Giuridiche
Via delle Pandette 35 - 50127 Firenze
Fax 055-4374925
Email: adir@altrodiritto.unifi.it
home page: www.altrodiritto.unifi.it

Centro di documentazione su carcere, devianza e marginalità
Centro Consulenza Extragiudiziale
C.F. 94093950486
Iscrizione Registro Regionale del Volontariato
Sezione Provincia di Firenze
Atto dirigenziale n. 363 del 5/2/2003

EUROPEAN COURT OF HUMAN RIGHTS

Council of Europe
Strasbourg, France

Third Party Intervention

L'Altro diritto onlus

Case *MURŠIĆ v. CROATIA*
Application n° 7334/13

1. With letter dated 20 October 2015, the Deputy Grand Chamber Registrar informed L'Altro diritto onlus that the President of the Grand Chamber had granted leave, under Rule 44 § 4 (b) of the Rules of Court, to make written submissions to the Court in the case Muršić v. Croatia (Application no. 7334/13).

2. As an NGO engaged in the protection of prisoners' rights at a domestic and international level, the present intervener would like to highlight the importance of the interpretative clarification requested to the Grand Chamber in the present case. Specifically, this case allow the Court (I) to provide a clear interpretation of the personal space criterion within the assessment of a violation of Article 3 in cases of inhuman and degrading detention, (II) as well as to point out a series of other relevant factors influencing the evaluation of prison conditions, (III) to precise the issue of the burden of proof within these cases, and, lastly, (IV) to clarify when a domestic remedy can be considered effective.

3. L'Altro diritto has a specific interest in ensuring that the law relating to the violations of article 3 of the Convention should be clear, foreseeable and accessible to those affected by it. This applies to any jurisdiction bound to use and interpret the procedural and substantial safeguards contained in Article 3 of the Convention, as set down by the case law of the European Court of Human Rights.

4. This is particularly compelling if one considers the subsidiarity principle as one of the fundamental principles underpinning the whole Convention system. It is the principle of subsidiarity which enables the Court to fully assume its function as a regulatory court as intended by the framers of the Convention or, as the Interlaken Conference put it, "to concentrate on its essential role of guarantor of human rights and to adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights" (point 2 of the Action Plan). The subsidiarity principle, nonetheless, as the Court has taught us, needs to be balanced with a second pillar, namely the principle that rights must be effective: the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective (see, *inter alia*, *Airey c. Ireland*, § 24; *Artico v. Italy*, §33). This principle serves as a "counterweight" to the principle of subsidiarity: where failure by the Court to act would result in a denial of justice on its part, rendering the fundamental rights guaranteed under the Convention inoperative, the Court can and must intervene in the role attributed to it by Article 19 of the Convention. The principle of subsidiarity also

needs to be read in context with the principle of the evolutionary interpretation of the Convention, according to which the latter is a "living instrument which must be interpreted in the light of present-day conditions" (see *Vo v. France* [GC], no. 53924/00, § 82, ECHR 2004-VIII). By virtue of this principle, the Court's position regarding the scope of a particular Convention right may evolve over the years or decades.

5. By virtue of the sum of these principles, we are persuaded that an harmonization and at least a provisionally final word of the Grand Chamber in this matter is necessary in order to provide national authorities, and particularly the domestic judiciary, with the correct interpretation of the scope of the protection offered by Article 3 to individual prisoners. Specifically, and by virtue of the combination of the subsidiarity principle with the principle of the evolutionary interpretation of the Convention, the scope of the protection offered by the Grand Chamber cannot be inferior to the level of safeguard already offered by its previous case law. We ask the Grand Chamber not to renegotiate or step back from the level of protection provided for by the *Kudla*, *Ananyev* and the subsequent case law.

6. As a matter of fact, in fulfilment of the requirements of the pilot judgment (*Torreggiani v. Italy*), articles 35bis and 35ter have been introduced in the Italian penitentiary law (Law n. 354/1975), which foresees both a preventive and a restorative remedy for violations of prisoners' rights. The text of article 35-ter explicitly refers to the ECtHR judicial interpretation as the source of law to be applied by national judges, thus introducing, for the first time in Italy, a direct reference to the European precedents as a binding source of law. This reference is felt as a real epistemological revolution within a civil law system and is potentially able to reinforce the attention for the ECtHR case law. The dysfunctionality of the subsidiarity principle, with the consequential decrease of the protection afforded at a national level will result in an always increasing number of applications to the Court in order to obtain a full protection under Article 3.

7. The present intervention is, thus, asking the Grand Chamber to provide a clear interpretation of the scope of the protection offered by Article 3 of the Convention in order to safeguard prisoners' rights against inhuman and degrading treatments in prison. This appears of vital importance within the European context and, particularly, as we shall see, for the Italian context.

I – The assessment of the personal space criterion in cases of inhuman and degrading conditions of detention

8. In this perspective it is useful to remember that the scope of the protection against inhuman and degrading treatments in prison is set forth as a positive substantial obligation for the State, in *Kudla v. Poland*, where for the first time the evaluation of prison conditions is directly linked with the respect for human dignity.

9. Following the same argumentative path, the Court argued that objectively unacceptable detention conditions are directly damaging the human dignity and constitute a degrading treatment. The cumulative effect of detention conditions (material conditions of detention, detrimental effect on the applicant's health and well-being, combined with the length of the period during which the prisoner was detained) amounts therefore to a decisive element of the evaluation (*Kalashnikov v. Russia*).

10. Within this same perspective, the milestone judgment, *Ananyev v. Russia*, argues that the issue of the personal space available is only one (even if a qualified one) of the conditions to assess a violation of Article 3. If we want to value the principle of human dignity and to place it at the core of the evaluation of the Court, we should not depart from this basic principle.

11. In this perspective we understand the logic behind the relativization of the spatial criterion, operated by the reasoning in Muršić. At the same time we are highly concerned that this approach will be read, at the Italian level and maybe in other Member States, as a way of reducing the level of protection, by eroding the scope of the strong presumption principle.

12. Nonetheless, the criterion of the personal space available had become central in the assessment of the inhuman and degrading prison conditions. We turn to the Grand Chamber in order to clarify whether the personal space available in prison constitutes only one of the possible criteria for the evaluation of the inhuman and degrading treatment. We shall argue that the personal space available embodies a sort of qualified criterion in a strong meaning, *i.e.* it can be considered as a minimum (and this minimum needs to be established in a clear and reasoned manner), below which the violation is always found *per se*.

13. The *Ananyev* judgment has established what has been called in the subsequent cases, the *Ananyev* test, related to the minimum personal space available in prison. The *Ananyev* test is not only grounded on the minimum personal space available in prison, but also on the idea of a liveable space. Specifically, the Court identified three criteria, namely a. an individual sleeping place in the cell, b. at least three sq.m. of floor space per detainee and c. the overall surface area of the cell must be such as to allow detainees to move freely between items of furniture. If only one of these criteria is lacking, the situation creates in itself a strong presumption of violation of Article 3 of the Convention. This evaluation is able to guarantee the absolute nature of the right involved and has become pivotal in the ECtHR subsequent case law.

14. As a matter of fact, a variety of interpretations have originated by the so-called *Ananyev* test, related to the minimum personal space available. As suggested in the Muršić decision (§§ 52-57), and clearly outlined by Judge Sicilianos, in his dissenting opinion, we can identify four interpretative positions, from a "maximalist" approach that considers 3 (or 4) sq. m as a bare minimum to be observed in all circumstances, a lack of which is in itself sufficient for finding of a violation of Article 3 of the Convention, to a "minimalist" position, grounded on the strong presumption principle, that relativise the 3 (or 4) sq.m. criterion on the basis of other factors.

15. It is clear that we are witnessing an interpretative dissonance within the Chamber judgments of the Court. The right at stake in these cases is provided for by Article 3 of the Convention. That is an absolute right of the utmost importance. Where the right is so important, it is appropriate that the ECtHR confirms the evolutionary and dynamic interpretation in order to clarify the content of this right so as to enhance the scope of the protection and to avoid possible steps backward.

16. We are thus appealing to the Grand Chamber to provide a clear criterion concerning the personal space available in prison. We would like to remark that the *Ananyev* test remains a milestone. This seems uncontested. About the 3 criteria of this test, we assume the absolute nature of the criterion of the single bed for each detainee (which presently seems uncontested). Concerning the 3 sq.m. criterion, we argue that this should represent a minimum level beyond which an absolute presumption exists, that can only be challenged in cases of extreme urgency and necessity and for a considerably limited period of time.

Concerning the freedom of movement between pieces of furniture (which, as we shall see, remains largely downplayed in Italy), it should be valued and reaffirmed even at a European level.

17. Taking into account the Italian experience, we invite the Grand Chamber to consider as a criterion, in order to assess the spatial aspect of the prison condition, the personal space available in cell compared with the specific kind of activities that the penitentiary regime imposes on the detainees. One of the few evolutionary ordinances of the Italian Surveillance Judiciary on this issue (Surveillance Judge of Bologna, 8 September 2014), values this aspect affirming that in assessing the personal space available in the cell, deduction needs to be made of the pieces of furniture which do not allow the activities to be carried out in the cell. In the specific case, the Judge deducted from the personal space available to the prisoner the size of the dining table, on the basis that the meals had to be consumed inside the cell (no other space, such as a canteen, being provided within the prison).

18. As a matter of facts, apart from the cited Ordinance and even before Muršić, the history of Italian case law concerning the remedies introduced after the Torreggiani pilot judgment shows an alarming reductive approach. In particular, the Italian judiciary, both at a Surveillance court level and at a Civil court one, reveals a prevailing interpretative trend that we could define "cadastral jurisprudence". This case law appears to be predominantly focused on the personal space criterion, eluding the assessment of the violation of Article 3 in the light of human dignity, considering the global detention conditions of each individual case.

19. Looking at the Italian situation, we have witnessed a backlash immediately after the release of the Muršić decision. In an Ordinance of the Surveillance Judge of Florence, the rebuttal of the strong presumption is used to reject a detailed application denouncing detrimental prison conditions on a global scale. The Italian judge goes even further as to misinterpret point c. of the *Ananyev* test. Specifically, the Surveillance judge affirms that the freedom of movement around pieces of furniture is guaranteed by the fact of moving the table from the cell to the sanitary as need be. This interpretative effort appears entirely directed to conclude that the amount of personal space available is superior to 3 sq.m. and therefore no violation occurred. This shows how the spatial criterion is entrenched in the Italian judiciary approach.

II – Other Relevant Factors

20. An interesting aspect of the Muršić decision which deserves further consideration is the emphasis given to other factors - beyond the amount of personal space- which must be taken into account in order to assess inhuman and degrading conditions of detention. A clear discussion on the relevant factors beyond the amount of personal space available in each cell, able to influence the assessment of the violation of Article 2 seems to us necessary and consistent with the principle of the evolutionary interpretation of the Convention, the more so when the right at stake is of an absolute nature as Article 3.

21. For this reason, we welcome a clear statement from the part of the Grand Chamber, on the relevance of the assessment of the global prison conditions, including a list of other indicators, beyond the personal space available. This seems essential looking at the Italian situation, where judges are consistently dismissing the evaluation of other relevant factors beyond the spatial criterion, thus significantly reducing the level of protection afforded in cases of potential violation of Article 3. In order to value the relevance of the evaluation of the global conditions of detention when assessing a violation of Article 3, we would like to discuss some factors that seem to us substantial.

Hygienic conditions

22. As a matter of facts, the Italian decisions on complaints based on Articles 35-bis and 35-ter show the reluctance of judges to take into account factors as poor hygienic condition (at the level of the cell, the sanitary and the showers), the presence of rats, bugs and pigeons and bird droppings in the cell, the absence of available hot water, the rationing of the access to the showers and the confinement in the cell with a reduction of out of the cell activities, cleanliness of bedding (sheet and blankets), water infiltrations with consequent flooding and creation of mould, inadequate ventilation, lighting and heating, access to minimum medical care, restricted access to social and educational activities.

Work

23. The Court in Muršić, § 67, states that the applicant's complaint about being unable to engage in prison work could not raise an issue under Article 3 of the Convention. We wonder whether among the elements which contribute to finding a violation of article 3 it should be, instead, considered the fact that prisoners are forced to an unpaid, or paid far below the normal standards, prison

labour. This consideration is not put forward on the basis of the recent ECtHR jurisprudence in the field of prison labour, which has stated that the 2006 Rules are expression of a new consolidated trend according to which there is an unconditional obligation under Article 4 of the Convention to remunerate the work of all detainees in all circumstances.

24. What brings us to consider the constriction to do an unpaid or evidently poor paid work a material fact under Article 3 of the Convention, is Article 4 of European Social Charter, which relates the salary level to the dignity of the workers (a similar norm is contained in art. 36 of Italian Constitution). The Charter states that workers have the right to a fair remuneration, sufficient for a decent standard of living for themselves and their families. Therefore, according to the Charter, a decent salary is connected to the protection of the dignity of the person, which is the good protected by Article 3.

25. Our contention is developed, once again, on the basis of the Italian situation and Italian concrete cases. In Italy, there is a structural violation of the prisoners' right to remuneration. The law states that salary must be at least the 2/3 of the minimum stated for free workers, but prison salaries are less than 1/3 of the minimum. For this reason, Labour Courts have continuously condemned the prison administration in the last years. Despite many condemnations, the State is not revising the salary for those who work for the prison system. Instead, it has recently doubled the maintenance costs forcedly taken from working prisoners. In this way, the salary is no more able to guarantee a life in dignity even within the prison.

26. In a case followed by L'Altro Diritto, an aged prisoner refused to work because of the poor salary and in order to leave the job to other poor prisoners, more in need than him. He was already entitled to a social benefit for needy elderly of 400€ per month, working in prison he would have earned 150€ more. The prisoner was disciplinary sanctioned because of the violation of the obligation to work. We met another similar case. A prisoner applied to the Surveillance Judge to obtain the compensatory remedy for violation of Article 3 of the Convention (art. 35ter). His application was rejected, *inter alia*, because he had refused to work, although he was detained in a living space between 3 and 4 square meters and there were other indicators of an ill-treatment. Even in this case, the prisoner had refused to work in order to leave the poor salary to other prisoners more in need than him.

Family

27. In the Muršić decision, it is reported (§§ 15-19) that the applicant is complaining for the insufficient opportunities to have contacts with his family. The Court did not decide whether this is an element that must be considered relevant under Article 3.

28. More radically, we wonder whether forced sexual deprivation configures a degrading and inhuman treatment. In State Reports to the Human Rights Committee, the allowance of and provision for conjugal visits has been often presented as a fulfilment of the obligation to secure humane living conditions and treatment of prisoners.

29. Moreover, very recently, a decision by the High Court of Punjab[1] has provided an interesting review of the global case law on the issue of intimate visit. The Court quoted, *inter alia*, the Grand Chamber judgment, *Dickson v. U.K.*, to conclude that a broad *consensus* has emerged on judicial platform: "It may be seen that from U.S. to Europe, the rights to conjugal visits, procreation or even artificial insemination facilities have been recognized only partially, being integrally embedded in Articles 8 & 12 of 'European Convention on Human Rights' or as the rights that are fundamental to the liberty and human dignity emanating from the Eighth Amendment, and further subject to the justifiable and proportionate restrictions."

30. The Punjab Court, on the contrary, affirms that the right at stake needs to be linked with the right to human dignity, grounding this reasoning within the expansive, dynamic interpretative trends aiming at enlarging the scope of the protection of prisoners' rights: "there is no gainsaying that ordinarily the right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution to which a very expansive, dynamic and vibrant meaning has been given by the Apex Court through several historical pronouncements".

Quality and Quantity of Food

31. The applicant in Muršić complains about the inadequacy of prison food (§ 16). The Court did not deal with this complaint. The bad quality and scarcity of

[1] Jasvir Singh & Anr. vs. State of Punjab & Ors., CWP No.5429 of 2010 (O&M), 29.05.2014.

food is an issue often raised by prisoners. We would like to understand in particular whether the bad quality of drinkable water could raise an issue under Article 3 of the Convention.

32. In our own experience, Italian prisons do not always ensure free drinkable water of good quality. In the specific case of the prison of Ranza, where, as an NGO we play the role of Ombudsman of prisoners, on the basis of prisoners' complaints, we asked the Healthcare authority for a sampling and analysis of the quality of the water provided to detainees. The Healthcare authority assessed the bad quality of the water, saying, however, that the water was not as bad as to create an imminent risk for the health. On this basis, the Health authority allowed the administration to continue to provide the water to prisoners and ordered to quickly install a mechanism of water filtration.

33. The Italian Surveillance Judge, wrongly in our opinion, did not consider the bad quality of the water as a violation of Article 3, on the ground that it does not constitute an immediate risk for the health. Instead, we argue that the lack of adequate water supply -in terms both of quantity and quality- at least for drinking and for preparing meals, raises an issue under Article 3 of the Convention, not because the State must guarantee the health of the prisoner but because the State must guarantee the quality and quantity of food.

III – The reverse burden of proof principle

34. Another fundamental principle that has been elaborated by the Court's case law is the reverse burden of proof in order to assess the violation of the inhuman and degrading treatment. This principle has been constantly reaffirmed and constitutes one of the most important aspects in order to guarantee the effectiveness of the protection under Article 3 of the Convention.

35. As a matter of fact, as the Court had the occasion to clarify, the distribution of the burden of proof is intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake. In cases of potential violations of Article 3 in prison, there are objective difficulties experienced by the applicants in collecting evidence to substantiate their claims about the conditions of their detention. In such instances the respondent Government alone have access to information capable of corroborating or refuting these allegations. In our opinion, this means that once the applicant establishes a *prima facie* case, the burden is on the Government to collect and

produce relevant documents. A failure on their part to submit convincing evidence on material conditions of detention may give rise to the drawing of inferences as to the well-foundedness of the applicant's allegations.

36. Now, this fundamental principle would be completely undermined if we accept that a simple statement produced by the Government after it had been given notice of the complaint will suffice. This is what seems to happen in the Muršić decision (§§12, 59).

37. In Italy we are experiencing a similar situation. As a matter of facts, the extent of factual disclosure by the Italian Penitentiary Administration is rather limited and the supporting evidence they produce habitually consists in a series of reports and declarations issued by the director of the impugned detention facility after they have been given notice of the complaint. The Prison Administration usually advances the explanation that the original prison documentation has not been kept. In this connection the ECtHR has already noted (see, *inter alia*, *Ananyev*) that the destruction of the relevant documents did not absolve the Government from the obligation to support their factual submissions with appropriate evidence.

38. We have witnessed the substantial disapplication of the reverse burden of proof principle within the Italian context, where the "cadastral jurisprudence" has repeatedly accepted simple reports by the Prison Administration as evidence. Even in cases where L'Altro diritto has tried to access any documental evidences, the Administration has often denied to possess relevant documents. In cases of rationing of the use of the showers in the Sollicciano prison, for example, the NGO asked for the Prison Administration's official order and was not able to recover it because it was not preserved, nor was it produced by the Administration during the investigation in the proceedings. The same occurred for the documentation concerning the disinfestation and reconditioning of the cells in cases of rats, bugs and bird droppings.

39. Judge Sicilianos suggests what appears to us as an interesting and embraceable approach, qualifying the reverse burden of proof evidence, by asking a solid factual basis to rebut the strong presumption, *i.e.* the fact that the allegations are not disputed by the applicant or, alternatively, the fact that the evidence provided for by the respondent State have been established beyond

reasonable doubt by an independent and impartial national tribunal or other competent authority.

40. We support the reasons behind this approach. Having in mind the Italian situation, though, we would be satisfied with the reaffirmation of the basic principle that an evidence, in order to be able to rebut the strong presumption, should be a document formed before the application, *e.g.* the prison population register, official documents and directives by the Prison Administration, the cell records, the cadastral map of the prison, *etc*.

41. Failing to provide this, we fall within the situation in which the word of the applicant is set against the word of the State. In these cases, unless the latter is visibly unsubstantiated or contradictory, the Government's statements play the role of a trump. This seems to us to be a sort of reversal of the reverse burden of proof principle.

IV On the effectiveness of the remedies

42. Finally, the Court in Muršić reminds us that to be effective a remedy must be capable of directly resolving the impugned state of affairs. We would like to understand how to assess the effectiveness of a remedy.

43. As a matter of fact, the so-called "Italian model" has been recently ratified in the *Stella v. Italy* decision and has been indicated as a possible way of dealing with the issue of endemic overcrowding and systematic violations in the material condition of detention, in the subsequent Pilot Judgments (*Neshkov v. Bulgaria*, §§ 282 and 286, *Varga v. Hungary*, § 105).

44. This surprises us because, according to the wording of Article 35-bis of the Italian Penitentiary Law[2], even if the decision of the judge is provisionally enforceable, if the Administration does not comply and appeals the decision, the Judge cannot appoint an *ad acta* commissioner until the time the decision becomes final, and this could take more than one year. Is this constituting an effective remedy?

45. On the same line, under Article 35-ter[3] if the Surveillance Judge doesn't decide before the prisoner finishes his/her term, the applicant loses the

[2] *Stella v. Italy*, Application n. 49169/09, §18.

[3] *Ivi*, §19.

possibility of obtaining the compensation in kind. This implies that he must file a new application in front of the Civil Court. Again, we wonder whether this undermines the effectiveness of the remedy.

* * *

46. For the reasons given above, we ask to the Grand Chamber to clarify the points submitted, taking into account the necessity of enhancing the protection of prisoners' rights in cases of violation of Article 3 and in line with the principle of the evolutionary interpretation of the Convention.

Place FLORENCE

Date 9 November 2015

The Director

prof. Emilio Santoro

L'ALTRO DIRITTO
ASSOCIAZIONE DI VOLONTARIATO
CENTRO DI DOCUMENTAZIONE SU
CARCERE DEVIANZA E MARGINALITA'
Via delle Pandette, 35 - 50127 FIRENZE
Fax: 055 - 4374925
Codice Fiscale: 94093950486