IN THE EUROPEAN COURT OF HUMAN RIGHTS

LAKATOŠOVÁ AND LAKATOŠ

Applicants

v

THE SLOVAK REPUBLIC

Respondent State

Application Number 655/16

Applicants' Observations on the Government's Observations

I. General Comments

1. The applicants submit the following observations on the observations submitted by the Slovak Government ("the Government") and sent to the applicants' representatives on 10 April 2017. For ease of reference, the applicants follow the order of the Government's observations. The Court should not take the applicants' failure to comment on any particular fact or argument

raised by the Government as acceptance of that fact or argument; unless expressly provided otherwise, the applicants reject the entirety of the Government's submissions.

2. The applicants reiterate that their rights under Article 14 taken with Articles 2 and Article 13 were violated by the ineffective investigation and trial conducted by the domestic authorities, including the domestic courts. During the investigation and the subsequent trial, the authorities failed to examine the possible racial motivation of the perpetrator (M.J.) adequately and, notably, deprived the applicants of the possibility to challenge a crucial expert witness opinion. The failure of the trial court to deliver a judgment with full reasoning compounded the violation, and deprived the applicants of an effective remedy, in particular by creating a serious obstacle for review of the judgment by the Slovak Constitutional Court.

II. Admissibility and Merits of the Application

A. Statement of the Facts

3. At §§ 3-4 of their observations, the Government correctly point out that the civil proceedings in the case against M.J. ended after the applicants withdrew their claim. The applicants were no longer willing to participate in the case because of their continued fear of M.J. and unwillingness to face him in court and continue to relive the events of 16 June 2012. In any event, those proceedings do not affect the Court's consideration of the applicant's complaints. See, e.g., *Kelly and others v United Kingdom* (2001), § 105 ("*the obligations of the State under Article 2 cannot be satisfied merely by awarding damages (see e.g. Kaya v. Turkey, p. 329, § 105;*

Yaşa v. Turkey, p. 2431, § 74). The investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible").

4. At §§ 5-14 of their observations, the Government set out M.J.'s own statements, those of key witnesses, and the controversial expert opinion on M.J.'s psychological state, in an attempt to demonstrate that a racial motive could not be established. The fact that no one could testify to previous racist conduct, that M.J. himself could not identify the reason for his actions, and that the psychiatric expert could not conclude that there was a racial motive, are put forward by the Government as evidence that the investigation was adequate.

5. The applicants, in turn, highlight the various statements by M.J. that point to a racial motive. In addition to the statement, quoted at § 7 of the Government's observations, that *"I have to deal with the Roma population*", M.J. made various other statements, including the following:

    a. *"I do not know, probably because I have been working as police officer for 20 years and there are always problems with Roma ..."* (M.J.'s testimony on 17 June 2012, answering a question from the investigating officer on the motive behind his actions);
    b. *"The situation might have escalated when I noticed threats from Roma in Hurbanovo… I had a feeling of fear for my life and health and also the security of my family. If I was not acting faster than them, they could have acted and done to my family what I did to them"* (M.J.'s testimony from 12 July 2012);

c. “*A person who did not experience or does not have any experience with them [Roma] can’t even imagine what kind of humans they are...! And especially when they were about to get monetary support, that was a catastrophe... During that time to come to the centre of Hurbanovo, you see only a black cloud... They just stand there and scream... You know, they cannot talk quietly, they scream like they are f***ed up”* (page 30 of the expert witness report).

The expert witness report also contains several statements (mainly on pages 28-29) describing M.J.’s frustration with Roma in Hurbanovo. He uses the term “socially inadaptable citizens” several times (see, e.g., § 13 of the Government’s observations, line 7 – where the term is translated as “socially unassimilated”), which the Government omit to mention is a well-known euphemism for Roma in Slovakia.

6. At § 6 of their observations, the Government quote M.J. denying any personal problems with Roma in Hurbanovo. Yet elsewhere at §§ 6-7, M.J. is quoted as saying that the Romani population of Hurbanovo was troublesome. Moreover, despite denying any problems with the Lakatoš family, he later admitted using physical violence against Roma, including during an incident when he slapped members of the Lakatoš family, including Mário Lakatoš, whom he murdered one week later.

7. In response to the Government’s attempt to use the applicants’ own evidence against them, at §§ 8-9 of the observations, the applicants also reiterate that they met M.J. only few times before the massacre and thus could not have any knowledge about his attitude towards Roma.

8. The applicants note that many of the witnesses cited by the Government, notably at §§ 10-12 of their observations, are hardly impartial, as they are friends and family of M.J. The Government also fail to mention that some of these witnesses who attested to M.J.'s character – and lack of racism – themselves made racist statements during the investigation, including using racist epithets. For example, Klaudia Darážová, who testified on 19 July 2012, and Mário Hebelka, who testified on 20 June 2012, used racially biased language when referring to Roma (see Annex 8 to the Government's observations). Their evidence hardly excludes the possibility that the massacre was racially motivated.

9. The applicants also recall the general climate of antigypsyism which exists in Slovakia, and the culture of institutional antigypsyism which taints the Slovak police, of which M.J. was a member. See Annex 29 to the application.

10. At §§ 13-14 of their observations, the Government cite an expert psychological opinion laden with jargon, making it often incomprehensible. The applicants again reiterate their arguments, aired in vain at domestic level, as to why the report was without value as a piece of evidence capable of unmasking the racial motivation behind the massacre. However, the applicants consider it important to mention that the expert witness opinion states, at page 19, that M.J.'s focus on solving the "Roma issue" was important from the psychological point of view. It further states that M.J.'s threshold of tolerance towards the "problematic behaviour" of Roma had decreased and that he acted with the aim to solve the situation radically. Furthermore, the expert explicitly stated that solving the "Roma issue" was important in terms of the motivational

foreground and that M.J.'s anger and hatred were directed to those members of Roma community with whom he had dealt when he was on duty. The Government's citation of the report is therefore selective. To the extent that the Court can understand sentences such as "*Action at the time of the act enhancedly, furiously, resolutely, hetero-aggressive with unclear motive, however not confused or hallucinatory (pathologic), within abnormal – short circuit reaction with intensified affect with qualitative change of mind – it was a qualitative damage of mind (cloudy, confused), characterised by a change, not loss of mind, with subsequent memory insufficiency*", they hardly amount to a basis for the domestic authorities, including the courts, to abandon their inquiry as to racial motivation.

11. On the basis of all these elements (above, §§ 5-10), the applicants reject the Government's conclusion and assert that there was a clear basis for continuing to investigate whether the massacre was motivated by the victims' ethnicity.

12. The Government neglect to mention that in the indictment (see Annex 2 to the application), the prosecutor did not address the issue of racial motivation in his evaluation of the offence. Under domestic law, the question of racist motivation is related to the length of sentence (see Article 144 § 2(e) of the Criminal Code read with section 140 (e); and Annex 29 to the application), so this omission did not prevent the trial court from unmasking any racist motivation behind the massacre during the sentencing phase of proceedings; but, of course, the failure to mention the issue in the indictment made it much less likely that this would happen. See below, §15.

13. The Government describe at §§ 18-23 of their observations certain events from the main hearing which took place on 25-27 March 2013, when the judgment was delivered. It is not disputed that both the prosecutor and the applicants' representative accepted M.J.'s declaration; it would have been fruitless obstruction for the applicants' lawyer to have done otherwise. For the reasons explained directly above (§ 12) and below (§ 15), the applicants' lawyer intended to address the issue of racial motivation in the sentencing phase of the trial, in accordance with domestic law.

14. The applicants note the Government's observation, at § 21, that the applicants were not present at the trial. The applicants hope the Court appreciates the traumatic nature of what happened and their wish to avoid re-traumatisation by attending, particular as their evidence was not needed.

B. Relevant Domestic Law

15. At § 24 of their observations, the Government cite some provisions of domestic law, but do not refer to the provisions of the Criminal Code which govern racial motivation. These were set out at Annex 29 to the application. The applicants find it important to recall that racial motivation, in accordance with Article 144 § 2(e) of the Criminal Code, is a factor that enhances punishment. While addressing racial motivation in the indictment will ensure that the matter is considered by the trial court, it is not necessary as a matter of domestic law for the prosecutor to mention racial motivation; the trial court can still find racial motivation during the trial and sentence the accused accordingly. This is why the failure to carry out proceedings that were capable of unmasking racial

motivation in this case was a result of failings by various actors – notably the prosecutor and the trial court – the effects of whose conduct must be taken together.

C. The Law

16. The applicants reject the Government's argument, at §§ 26-37 of their observations, that the investigation complied with Convention standards. The authorities confined themselves to questioning potentially biased witnesses and relying on a medical expert opinion which – to the extent that it is comprehensible – links the massacre to M.J.'s views about Roma.

17. The Government's assertion at § 26 that "*[n]one of the witnesses stated anything that would testify [to] any racial motive of the committed act*" is incorrect. In addition to the indications in the psychological/psychiatric expertise that there was a racial motive, the police had evidence that M.J. had been violent towards Roma, and had assaulted one of the victims one week before the massacre.

18. The Government rely, at §§ 27-31 of their observations, on the assertion that the applicants' representative did not challenge the evidence on racial motivation and did not make any allegation with respect to potential racial motivation. This argument reflects a serious misunderstanding of the Court's case law by the Government: the authorities must act on their own motion to investigate deaths; they must not wait for the next-of-kin to act. See, mutatis mutandis, *İlhan v Turkey*, §§ 61 and 63. This principle is even more important in cases where racial motivation might have

played a role, given the importance of reasserting society's condemnation of racism and ethnic hatred and maintaining the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence (e.g. *Nachova v Bulgaria* (Grand Chamber, 2007), § 160). Offences committed against particularly vulnerable groups, such as Roma, must be investigated vigorously (see *Balázs v Hungary* (2015), § 53).

19. The applicants reject the Government's assertion at §§ 28-30 of their observations that they did not mention any allegation in relation to racial motivation during the main hearing. The allegation is repeated at § 34 in fine of the Government's observations (the "*applicants did not reason even with [sic] their allegations about the racist motive of any of their claims [sic] either in criminal or civil proceedings*"). This is untrue: the applicants' lawyer highlighted the need to unmask the racist motivation during the criminal trial. Questions about racial motivation were posed by the applicants' lawyer to the expert witness in the field of psychiatry and psychology on 26 March 2013. As indicated on page 18 of the minutes from the main hearing, the applicants' representative emphasised the importance for the applicants of unmasking any racial motivation. However, the trial court did not allow the applicants' representative to ask most of the questions he tried to put to the experts. Moreover, the applicants' representative mentioned the inadequate examination of a possible racial motivation as one of the main reasons for submitting his request for a second expert opinion (page 23 of the minutes).

20. In response the argument made by the Government, at § 31 and § 34 in fine of their observations, that the applicants did not mention racial motivation before the civil court, the applicants again note it is

not the role of the civil court but of the investigative authorities to unmask racial motivation in cases such as this.

21. At §§ 33 et seq. of their observations, the Government rely heavily on the principle that the procedural limb of Article 2, read with Article 14, is an obligations of means, and not results. The applicants of course agree. What the applicants claim is that the required means were not deployed.

22. The Government's argument at § 34, which seems to be the only answer they give to the Court's question about the duty to deliver a fully reasoned judgment, is difficult to understand. The Government appear to argue that because racial motive was not proved, it is irrelevant that a simplified form of judgment was delivered. This is question-begging: the Government assume that the investigation and trial were adequate, whereas the very purpose of the requirement to deliver a fully reasoned judgment is to make it possible to confirm whether that is the case. In this case, the Specialised Criminal Court failed to deliver any decision whatsoever. The failure of the court to issue fully reasoned judgment leads to serious doubts whether the authorities gave proper consideration to the specific nature of this case and treated this crime differently to cases without potential racial motivation. See, e.g., *Nachova and others v Bulgaria* (Grand Chamber, 2007), § 160. This requirement is extremely important not only for the parties to the criminal proceedings (especially the victims and their next-of-kin) but also for the general public, in order for them to be able to carry out public supervision, to secure accountability in practice as well as in theory, and to preserve their confidence in criminal justice system. See, e.g., *McKerr v United Kingdom* (2001), § 115. Access to the criminal justice on its own is not sufficient;

States must also ensure that the system is effective. See, e.g., *M.C. v. Bulgaria* (2003), §§ 150-151. The failure of the trial court to deliver a reasoned judgment is also a key failing given the fact that racial motivation was not mentioned in the indictment; as explained above, this meant that the only part of the procedure capable of unmasking racial motivation was the sentencing phase. See above, § 15.

23. At § 35 of their observations, the Government resist the Court's suggestion, made in the questions the Court posed to the Parties, that the Court's judgment in *Balázs v Hungary* (2015) is relevant to this case. By focusing on the factual differences between the two cases, the Government overlook the clear applicability of the Court's ruling in that case. Perhaps the most important point from *Balázs*, missed by the Government, is that "*not only acts based solely on a victim's characteristic can be classified as hate crimes. For the Court, perpetrators may have mixed motives, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to*" (§ 70). This nuance approach flies in the face of the Government's assertion, throughout their observations, that there was no evidence of racial motivation. M.J. clearly expressed a desire to "deal" with Roma in Hurbanovo during the investigation stating, inter alia, that "*this family has paid for all of them*" (Expert Opinion, p. 31). See, mutatis mutandis, *Balázs*, §§ 60 and 66. Likewise, according to the opinion of the expert witness in the field of psychology (see page 5 of the minutes of the examinations of the experts, at Annex 11 to the Government's observations), M.J. expressed his anger and hatred towards "*the part of Roma ethnicity, which was regularly the subject of his interventions as a city policeman, i.e. towards those who were violators of the law*". See, mutatis mutandis, *Balázs*, § 66. Yet

the investigating authorities and the trial court failed to provide an explanation as to why the evidence did not point to racial motivation. See mutatis mutandis *Balázs*, § 72.

24. At § 36 of their observations, the Government question the competence of the Court to rule on the present case. The Government appear to misunderstand the applicants' complaint. The applicants are not asking the Court to retry M.J for murder. Instead, they are complaining about the failure of the authorities and courts to conduct the investigation and proceedings in such a way as to make it possible to expose whether the massacre was racially motivated. The Court made the distinction – and the scope of its examination of cases such as this one – clear in *Nikolova and Velichkova v Bulgaria* (2007), § 61.

25. The Government assert at § 37 of their observations that the allegations of racial motivation are based solely on statements of M.J. reproduced in the expert witness report. This is inaccurate. As mentioned above, M.J. also made statements to the police officers (see also § 6 of the Government's observations). It is striking that the Government are still not aware of the evidence pointing to racial motivation. The Government also misunderstand the reason that the applicants included further material showing a climate of antigypsyism in Slovakia generally, and a climate of institutional antigypsyism among police in particular. The point of these materials is to show the context in which the massacre took place. The failure to conduct an investigation and trial which were capable of exposing and punishing racial motivation not only impacts the applicants, but exacerbates a situation in which Roma have reason to believe they are targets of police violence and murder.

26. The applicants reject the Government's suggestion at § 38 of their observations that the applicants' representative did not make appropriate requests at the hearing, because "*[p]art of them did not at all concern the handled criminal case and the rest did not lead to a judicial decision about sentence, protective measure and damage compensation, but concerned the guilt or innocence of the indicted*". In jurisdictions such as Slovakia, where racial motivation leads to an enhanced penalty, and so can be dealt with in the sentencing phase if not alleged in the indictment, the adequacy of the investigation and the subsequent trial must be considered together. This is reflected in the fact that questions about the adequacy of the investigation and the trial are posed together in the Court's first question to the Parties. In this case, where the issue of racial motivation was dependent on an expert analysis of M.J.'s mental state, the investigative authorities secured a highly ambiguous, dense, and largely incomprehensible expert report, selectively quoted at § 13 of the Government's observations. After the failure to address racial motivation in the indictment, and M.J.'s decision not to deny committing the offence, the issue came up for determination in the sentencing phase, where the trial judge has the power (and final opportunity) to take steps to unmask any racial motivation and enhance the penalty accordingly. Yet questions and motions for further evidence submitted by the applicants' representative at that phase were dismissed by the trial court, ostensibly because they were not related to the court's decision on sentence, protective measures, or damages. The applicants of course do not invite the Court to decide, in fourth instance, that the trial judge violated Article 257 § 8 of the Slovak Criminal Code; that is not the Court's role. Instead, the applicants submit that the judge's decision to refuse the applicants' request to put forward evidence concerning M.J.'s mental state and other evidence put

forward in the civil proceedings, and to proceed to impose a lighter sentence on M.J. on the basis of the expert opinion cited at § 13 of the Government's observations, ratified the inadequacies in the investigation and the failure to examine racial motivation in the indictment. The trial court's actions were also incompatible with the principle that parties to proceedings which fall within the scope of Article 6 § 1 of the Convention have the right to comment on expert reports produced with the effect of influencing the decisions of national courts or tribunals (*Mantovanelli v France* (1997), § 33). Article 6 § 1 does not impose specific rules about the admissibility evidence in criminal cases; but it does require the proceedings overall to be fair. *Schenk v Switzerland* (1988), § 34. In the present case, the psychological assessment of M.J. was crucial to unmasking any racist motive, so that this could be reflected in the sentencing – which, again, because of the failure to examine the issue at the investigation stage and in the indictment, and because of M.J.'s decision not to deny committing the offence, was the last moment in the proceedings when racial motivation might have been unmasked. The arbitrary nature of the trial court's action was underscored by its failure even to make a formal decision on the applicants' representatives' request. Under section 162 of the Code of Criminal Procedure, the court must decide on procedural issues by "resolution" (*uznesenie*). As is obvious from the minutes of the main hearing, the court decided on all the procedural motions and motions on supplementary documentary evidence by resolution (see page 25). However, there was no resolution issued on the motion of the legal representative of the victims to order a second expert opinion, despite the fact that the request is explicitly mentioned at page 24 of the minutes. This is not only contrary to domestic law, but also to the requirement under the Convention to

give reasons for decisions to exclude evidence. See, e.g., *Suominen v Finland* (2003), § 36).

27. In response to the Government's claims at §§ 38-40 of their observations that the applicants submitted certain evidence only at the main hearing, the applicants recall that the requirement to conduct an effective investigation falls entirely on the authorities, not on next-of-kin. See above, § 18. Likewise, given the decision not to address racial motivation in the indictment, given M.J.'s decision not to deny committing the offence, and given the fact that the trial court is empowered to consider racial motivation as part of the sentencing, regardless of whether it was mentioned in the indictment, it was natural for the applicants' representative to raise the issue of racial motivation at the sentencing stage of the proceedings.

28. At the end of their observations, the Government conclude that the applicants had sufficient opportunity to participate effectively in the proceedings. The applicants maintain their position that this was not the case. In particular, the fact that the Specialised Criminal Court's judgment is absent of any reasoning casts doubts about whether the proceedings where capable of exposing and punishing racial motivation. In closing, the applicants recall the defining characteristics of this case: several indications of racial motivation; the alleged diminished mental capacity of the perpetrator; the extraordinary reduction of the sentence; and the applicants' inability to challenge the credibility of the expert witness opinion. The applicants believe that in similarly complex cases where several issues arise, the Convention requires the trial court to give details of its reasoning. In a racially charged environment, like that which exists due to antigypsyism (especially among police) in Slovakia,

this absence of reasoning undermines confidence in legal procedures for protecting racial minorities from violence and murder. Imposing the lowest possible sentence on the perpetrator of a pre-meditated murder, on the basis of a dubious expert witness opinion and without providing reasoning for doing so, does not reflect the deterring effect criminal law must have on society. See, e.g., *Okkali v Turkey* (2006), § 66). The lack of reasoning together with the fact that the law does not give victims a right to appeal holdings on guilt and sentence also curtailed the possibility of effective constitutional review by the Constitutional Court, which the Constitutional Court itself admitted.

The European Roma Rights Centre, on behalf of the applicants

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