IN THE EUROPEAN COURT OF HUMAN RIGHTS

EMINOV

Applicant

v

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

Respondent State

Application Number 31268/14

Applicant's Observations on the Government's Observations

1. The applicant submits the following observations on the written observations ("GO"), dated 27 October 2015, submitted by the Government of the Republic of Macedonia ("the Government"). For ease of reference, the applicant follows the structure of the Government's observations. In the light of the death of the applicant, Neat Eminov, and the request by his surviving son Smail Ametov, to replace him, the use of the term "the applicant", below, should be taken to refer to Mr Ametov.

FACTS

2. The applicant has no response to the Government's observations on the facts (GO §§ 1-7).

RELEVANT DOMESTIC LAW

3. The applicant has no response to the Government's list of applicable domestic legislation (GO § 8).

ADMISSIBILITY OF THE APPLICATION

4. The applicant takes note of the Government's lack of objection to the admissibility of the application (GO § 9).

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MERITS OF THE APPLICATION

Did the respondent State discharge its positive obligation under Article 2 of the Convention to protect the right to life of the applicant's son? In this connection did the respondent State undertake all reasonable measures to prevent R.A.'s death? The parties are invited to comment on the absence, as noted in the material from the domestic proceedings, of any medical examination of the applicant's lungs, blood and urine before his admission to prison?

5. The applicant has no response to GO §§ 10-11.

6. The applicant does not believe that the Government have discharged their burden of proof to "provide a satisfactory and convincing explanation" for R.A.'s death (GO §§ 12-27).

7. The applicant does not contest the Government's observation that convicts serving prison sentences in penitentiary facilities in the Republic of Macedonia enjoy access to healthcare services "in principle" (§ 12 GO). However, in the present case, the applicant insists that at the time when R.A. was serving a sentence in Gevgelija Prison, he had limited access to health services and the medical care provided to him was inadequate. The applicant also draws attention to the country report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") following its visit to the Republic of Macedonia in September 2010, just after R.A.'s death, concluding "[t]here remain a number of important structural deficiencies in this area [provision of healthcare to prisoners" (see application, Annex 14).

8. The applicant reiterates that, at the time of R.A.'s imprisonment, Gevgelija Prison did not have an infirmary, a full-time doctor, a qualified nurse, or any other personnel suitably trained in healthcare, contrary to the recommendation made in the Council of Europe's revised European Prison Rules (§ 41). Dr Sretko Jovanov was hired by Gevgelija Prison on a monthly basis through a service contract to conduct medical examinations of convicted persons once every week-end and, if necessary, to be available at any moment. However, this doctor did not examine R.A. upon admission or during his stay in prison, as confirmed by the prison director Pavle Nikov before the Basic Court in Gevgelija (see application, Annex 29). Moreover, the prison doctor was not even called on the morning of 1 August 2010 when R.A.'s health deteriorated and he was taken to Gevgelija General Hospital. Therefore, the applicant rejects the Government's assertion that the absence of a full-time doctor and the lack of an infirmary within the prison did not prevent R.A. from enjoying the healthcare to which he was entitled (§12 GO). The Government are simply incorrect when they assert that R.A. had access to a doctor at any time (§18 GO). While in theory the authorities might be able to discharge their obligations towards prisoners under the Convention in the absence of a full-time doctor at the prison, the arrangements in Gevgelija prison did not work to ensure that R.A. had adequate healthcare.

9. The applicant also disputes the Government's suggestion (§14 GO) that the authorities complied with the paragraphs 16 and 42 of the revised European Prison Rules by obtaining information from R.A. on his health during his first conversation with a social worker on the date of admission, followed by examining him at the Centre for Prevention and Treatment of Drug Abuse ("CPTDA") in Gevgelija. International and national standards on health care in prison stipulate that when entering prison, all prisoners should be seen by a medical doctor without delay. The CPT requires that every newly arrived prisoner be properly interviewed and physically examined by a medical

doctor or fully qualified nurse reporting to a doctor as soon as possible after admission.[1] The CPT also recommends that the record drawn up following a medical examination of a newly admitted prisoner contain: (i) an account of statements made by the person concerned which are relevant to the medical examination (including his description of his state of health and any allegations of ill-treatment); (ii) an account of objective medical findings based on a thorough examination; (iii) the doctor's conclusions in the light of (i) and (ii) (application, Annex 14).

10. The Macedonian Law on the Execution of Sanctions states that upon admission to and discharge from prison, a medical doctor must examine every convicted person and determine her/his state of health (Article 125 paragraph 1); young-adult convicts are subjected to systematic medical screening at least once a year (Article 133). Information about a person's health condition is recorded in the personal file of the convicted person (Article 125).

11. Upon his admission to Gevgelija Prison, information about R.A.'s health condition and medical history was taken by officials (a prison officer and a social worker) who do not appear to be trained in providing healthcare, qualified to perform medical screenings, or competent to identify the symptoms of the severe bronchopneumonia which proved to be fatal for R.A. In addition, contrary to the requirements of domestic law (see above, § 10) and the Instruction for House Order Enforcement in Gevgelija Prison (1997), a medical file was not opened for R.A. at the prison. The Government therefore incorrectly conclude that the prison staff adequately discharged their duties towards R.A. by interviewing him about his health condition (GO § 15).

12. In response to the Government's sanguine assessment of the provision of healthcare to prisoners, the applicant draws the Court's attention to the CPT report of its visit to the Republic of Macedonia in 2008 (available at http://www.cpt.coe.int/documents/mkd/2008-31-inf-eng.htm):

> *23. As to medical screening, the national authorities informed the CPT that it had instituted a system of thorough medical screening for each new inmate within 24 hours of admission to prison. However, the reality is that no thorough screening process has ever been instituted. The recent case of a prisoner who died in the remand section of Tetovo Prison without being seen by a doctor is illustrative of this deficiency (see paragraph 28). Moreover, the delegation observed once again that there is still no screening at all for injuries and that any medical screening of newly-admitted inmates which did take place was superficial and perfunctory, consisting of only an interview without a physical examination.*

13. The Government have provided no evidence that situation had changed by the time R.A. entered Gevgelija Prison.

14. The applicant submits that the medical examination at the CPTDA cannot amount to the standard of medical screening required for new inmates prison, as:

    a. R.A. was not examined by a prison doctor;

    b. the medical findings of that examination were not kept in the prison's official personal medical records for inmates; and

    c. the purpose of the examination was solely to treat R.A.'s drug addiction and withdrawal symptoms, and therefore was not designed to identify other symptoms from which he

[1] See "The CPT Standards", available at http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf, page 30.

might be suffering (notably the bronchopneumonia which led to R.A.'s death only two days later).

15. In response to the Government's statement that a detailed examination of the lungs, blood, and urine of inmates upon admission to prison is not mandatory under Macedonian law (GO §17), the applicant notes these tests might not be a standard when admitting new prisoners in general, but blood and urine tests are common practice when admitted drug-dependent individuals, even prisoners, into treatment. When R.A. was admitted for opioid-substitution treatment at the CPTDA, the admission-dosing decision was made on the mere basis of R.A.'s statements, despite his being in a particularly vulnerable position, rather than on the results of urine and blood tests. The applicant notes that some prison facilities in the country (e.g. Idrizovo Prison) run urine tests as a standard procedure for prisoners who are on methadone treatment, as confirmed by the CPT's report found at Annex 14 to the application. The Government have not explained why this practice was not applied in R.A.'s case.

16. Moreover, the Ministry of Health of the Republic of Macedonia has issued No. 07-9041/1 Instruction on Practicing Evidence-Based Medicine for Treatment of Drug Addiction (Упатство за практикување на медицина заснована на докази при третман на зависности од дрога), dated 29 October 2013. The Instruction requires mandatory medical check-ups when admitting drug users for treatment at the health centre, including blood and urine tests and other laboratory tests and/or x-ray screening if clinical symptoms require them. This instruction refers to a previous one from August 2010, in force at the time of R.A.'s admission to Gevgelija Prison. The failure to test R.A.'s blood and urine when referred to treatment at the CPTDA was therefore contrary to the standards in place in Macedonia for treating prisoners in his condition.

17. In response to the Government's argument that the standards for admitting persons who are drug users into penitentiary institutions in Europe depend on the development of the State concerned (GO §17), in its 11th general report (Council of Europe, 2001), the CPT underlined that at any given time, even in times of economic difficulty, "*the act of depriving a person of his liberty always entails a duty of care which calls for effective methods of prevention, screening, and treatment. Compliance with this duty by public authorities is all the more important when it is a question of care required to treat life-threatening diseases.*"

18. The applicant disputes the Government's repeated assertion that R.A.'s alleged failure to articulate his symptoms means that the "good faith" response of those who cared for him was sufficient (see §§ 16, 23 GO). Pulmonary distress, including bronchopneumonia and pulmonary oedema, was established during R.A.'s autopsy and is commonly associated with methadone use. Clinically speaking, even if R.A. did not complain about this distress (which the Government hardly prove was the case), it should have been detected. The suggestion that the treatment of a person in custody – and therefore already in a vulnerable position – should depend on how that person reports his symptoms to doctors flies in the face of the Court's case law, according to which "*L'obligation de protéger la vie des personnes détenues implique également de leur dispenser avec diligence les soins médicaux à même de prévenir une issue fatale*". *Taïs v France* (2006) § 98. R.A. was in a very vulnerable state, affected by withdrawal symptoms. It is questionable whether in such a condition R.A. would be able to assess his health objectively. It would therefore have been reasonable to take all measures to ensure that that R.A.'s lungs were examined at the CPTDA.

19. In addition to being a detainee suffering from drug addiction, the applicant also notes that R.A. is a member of the Roma minority. Given widespread racial profiling of and other forms of

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discrimination against Roma in Macedonia,[2] R.A.'s Roma ethnicity is much more likely to explain the poor level of treatment he received than his alleged reluctance to articulate his symptoms.

20. As regards distribution of prescribed doses of methadone by prison officers (GO § 25), the applicant notes that non-medical prison staff should not be authorised to dispense any medication.[3]

21. In any event, the applicant reiterates that the burden is on the Government to explain how R.A. died in custody. The Government's treatment of the factual gravamen of this case – how R.A. got access to sufficient methadone to kill him – is so convoluted and ambiguous that it sheds no light on the question at all. The Government concludes that "*any possibility for the deceased R.A. to get an overdose in prison was excluded*" and bases its conclusion on a theoretical description of the protocols in place for distributing and disposing of methadone in the prison (GO § 26). There is no concrete evidence that those protocols were followed in this case. Even supposing that R.A. got methadone some other way – that is, accepting the Government's implication that R.A. was somehow personally responsible for his overdose – the State is still liable under Article 2: "*l'article 2 de la Convention implique l'obligation positive pour les Etats de prendre préventivement toutes les mesures nécessaires pour protéger les personnes relevant de leur juridiction contre le fait d'autrui ou, le cas échéant, contre elles-mêmes*". *Taïs v France* (2006) § 96. The applicant ultimately agrees with the Government that "*it cannot be reliably concluded which were the circumstances that led to the increased presence of methadone and barbiturates in the body of the deceased*" (GO § 24). But in these circumstances, the inability to reach a conclusion, especially in the absence of any blood or urine test, must lead to a finding of a violation of the substantive limb of Article 2.

22. In addition, the Government have provided no explanation as to why R.A. was placed alone in a six-bed room without contact with other inmates. The applicant is of the opinion that this amounts to "solitary confinement" as that term is used by the CPT (see CPT's General Reports, CPT/Inf/C (2002) 1 [Rev. 2015] § 54; hereinafter "the CPT standards"). The Revised European Prison Rules indicate that the medical practitioner or qualified nurse looking after inmates must pay particular attention to the health of prisoners held under conditions of solitary confinement and must visit such prisoners daily (§ 42.3). Similarly, the CPT has established that healthcare staff should visit the prisoner immediately after placement in solitary confinement and thereafter, on a regular basis, at least once per day, and provide her/him with prompt medical assistance and treatment as required (CPT standards, § 54). As previously mentioned, the prison doctor never visited R.A. while he was in Gevgelija Prison.

23. The authorities failed to act in accordance with their domestic legal obligations and common medical practice. The applicant underlines the Court's previous position that "*where a detainee dies as a result of a health problem, the State must offer a reasonable explanation as to the cause of death and the treatment administered to the person concerned prior to his or her death*".

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[2] See, inter alia, European Commission Against Racism and Intolerance ("ECRI"), *First Report on the Former Yugoslav Republic of Macedonia*, page 17, § 30; ECRI, *Third Report on the Former Yugoslav Republic of Macedonia*, page 6, § 2, and page 23, § 96; ECRI, *Fourth Report on the Former Yugoslav Republic of Macedonia*, page 32, § 97; ECRI, *Second Report on the Former Yugoslav Republic of Macedonia*, page 17, § 46; Council of Europe Commissioner for Human Rights Thomas Hammarberg, *Report of Visit to "the Former Yugoslav Republic of Macedonia" on 25-29 February 2008*, §§ 89, 91.

[3] A. Lehmet, J. Pont, *Prison health care and medical ethics – A manual for health-care workers and other prison staff with responsibility for prisoners' well-being*, Council of Europe (November 2014), p.26; see, also, CPT/Inf(2015)40, p.24: "*Further, in the CPT's view, it is not within the competence of prison officers to provide primary health care or to dispense prescription medication – primary health-care should be only provided by a medically qualified healthcare professional and dispensing medication should only be carried out by a nurse or a trained pharmaceutical dispenser*".

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Makharadze and Sikharulidze v Georgia (2011), § 72. The Government have provided no reasonable explanation as to how R.A. ended up with a massive lung inflammation that went undetected and high doses of methadone and barbiturates in his body. The Government's own reliance on R.A.'s failure to announce his symptoms, in the light of his highly vulnerable position, is no more than an attempt to undermine the Court's consistent case law as to the treatment of detainees.

24. The applicant therefore invites the Court to find a violation of the substantive limb of Article 2.

Having regard to the procedural protection of the right to life (see paragraph 104 of Salman v. Turkey [GC], no. 21986/93, ECHR 2000-VII), was the investigation in the present case by the domestic authorities in breach of Article 2 of the Convention?

25. The applicant disputes the course of events the Government set out at §28 GO. The initial autopsy report, dated 2 August 2010, was a mere forensic examination and did not contain any expert opinion as to whether the presence of methadone and barbiturates in the urine was directly related to the medical treatment that had been administered. That report also did not address whether the methadone therapy had been appropriate in light of R.A.'s state of health, nor whether the methadone therapy had had an immediate impact on his health. These questions were addressed in the supplementary request to the Institute for Forensic Medicine at the Faculty of Medicine at the University St. Kiril and Methodius, ordered by the Veles Basic Court a year and a half later (see application, Annex 13). Moreover the autopsy report was delivered to the Veles Basic Public Prosecutor's Office ("BPPO") on 14 December 2010, after four and a half months, with no explanation given for the delay. See application, Annex 7, and, mutatis mutandis, *Luluyev v Russia* (2006), § 96.

26. The Macedonian authorities' lack of diligence in this case is part of a larger pattern. The CPT visited Macedonia from 21 September to 1 October 2010 and in its report (application, Annex 14) noted:

> *The Committee remains concerned that deaths in custody are not systematically the subject of an investigation, in order to establish the cause of death, identify possible criminal and/or disciplinary responsibility and ascertain whether there are lessons to be learned for the future as regards operating procedures.*

27. The report goes on to describe the authorities' negligence in this very case:

> *The circumstances surrounding the death of the inmate at Gevgelija Prison, which occurred in August 2010, were more obscure. The nineteen-year-old man concerned was arrested and held overnight in Kavadarci Police Station and transferred to Gevgelija Prison on 30 July 2010. Two days later, on 1 August 2010, he was found unconscious in his cell at 7 a.m. and was immediately transferred to Gevgelija Hospital. At 8.50 a.m. he was transferred by ambulance to Skopje but was declared dead upon arrival at Skopje University Hospital. A number of outstanding issues remain to be answered concerning this death, such as: was the person provided with Naloxone (an antidote to opiate intoxication) at Gevgelija Hospital before being transferred to Skopje given that he was known to be a drug addict and on methadone maintenance; why was it necessary to transfer the patient to Skopje (a journey of three to four hours); why was the person not medically screened during the two days he was held in Gevgelija Prison; how did the person obtain the wound on his forehead. The CPT's delegation stressed the importance*

of carrying out an investigation into this case when it met with the national authorities at the end of the visit.

The CPT recommends that the authorities institute a practice of carrying out thorough inquiries into every death in custody, which in each case should include an autopsy.

As regards more particularly the death in Gevgelija Prison, the Committee would like to receive, in due course, the outcome of any inquiry (including the autopsy report).

28. This report indicates that the death of R.A. was not the subject of an investigation prior to the CPT visit to Macedonia. The applicant submits that the Court has no reason to deviate from the CPT's findings: there is nothing in the Government's observations about what has happened since the CPT's visit to suggest that the failings in this case were rectified.

29. The applicant contests the Government's unsupported assertion that a "natural death" justifies a finding of no criminal act (GO § 29). In any event, it is unclear on what basis the Government conclude that R.A.'s death was "natural".

30. In response to GO § 30, the applicant notes that the expert report dated 31 January 2012 and produced by the Forensic Institute (see application, Annex 13) did not answer all of the questions asked by the Veles Basic Court, notably whether:

    a. the medical treatment R.A. received was in accordance with the health regulations and especially if adequate medical measures and methods were applied;

    b. the medical personnel acted negligently; and

    c. R.A. would have died had he not received methadone treatment.

31. More importantly, the applicant notes that this expert report did not examine whether the medical care provided to R.A. upon admission to Gevgelija Prison and upon referral to the CPTDA were adequate, but focused instead on the medical care provided to R.A. just before his death occurred on 1 August 2010. The care provided just before R.A.'s death has never been in question.

32. The applicant reiterates the other shortcomings of the investigation of the BPPO, such as the failure to question in person any of the prison officers working on the days in quesiton, instead relying on their written statements addressed to the prison director. See application, annexes 4, 5, 6, 11, and 12. The Government have not addressed these shortcomings in their observations.

33. In addressing the complaint about a violation of the procedural limb of Article 2, the Government revisit the question of the circumstances of R.A.'s death, asserting the inability of the authorities to have "*anticipated and prevented R.A.'s death given the short time period and sudden inflammatory reaction, which presumably could be due to previous methadone overdose occurred before admission to prison*" (§ 32 GO). There was no evidence that the lung inflammation was sudden and no indication that R.A. had ingested a significant quantity of methadone before being admitted to prison. In any event, given the authorities' responsibility to make sure that the applicant was not a harm to himself, and the absence of any lung, blood, or urine examination at the point of admission, the applicant reiterates that the Government have failed to discharge the

burden on them to provide a reasonable explanation for R.A.'s death. The Government's assertion is all the more questionable since R.A. was already showing withdrawal symptoms upon admission, having spent the previous night in custody in the police station in Kavadarci. According to the prison records, R.A. stated last time he took methadone was two days before his admission to Gevgelija Prison. The Government have done nothing to substantiate their claim that R.A. entered prison having recently ingested a high quantity of methadone.

34. At GO § 32, the Government assert that the investigation was "*fast, prompt, in detail, and led to clarification of the most important aspects related to the death of R.A.*". This description fails on its face. The Government have failed to explain the delays described in the application, and the Government admit that the investigation did not clarify the core issue: how R.A. had access to a sufficiently high dose of methadone to kill him. In any event, the standard the Government holds itself up to does not meet the standard set out in the Court's case law: "*Il s'agit essentiellement, au travers d'une telle enquête, d'assurer l'application effective des lois internes qui protègent le droit à la vie et, dans les affaires où des agents ou organes de l'Etat sont impliqués, de garantir que ceux-ci aient à rendre des comptes au sujet des décès survenus sous leur responsabilité*". *Anguelova v Bulgaria* (2002), § 137. The investigation described by the Government, designed, they claim, to "establish the facts" (GO § 30), operated from the assumption that such "a natural death" could not have resulted from a crime (GO § 29) and that the authorities could not have been expected to anticipate that a drug addict already receiving methadone treatment might have related health problems (GO § 32). The authorities' investigation was by no means designed to ensure that State officials be held to account for the death of R.A. which occurred on their watch.

35. In the light of the procedural delays, the failures to investigate key factual aspects of the case, and inasmuch as the authorities seem to have excluded the possibility of holding any officials to account from the start, the applicant reiterates the claim that there was a violation of the procedural limb of Article 2.

Did the applicant have at his disposal an effective domestic remedy for his complaints under Article 2, as required by Article 13 of the Convention?

36. The Government maintain that the applicant had an effective remedy in the form of a possibility to bring a subsidiarity (i.e. private) prosecution (GO §§ 35-37). However, the Court has already established in its case law that private prosecutions do not amount to a remedy that applicants are required to exhaust before applying to the Court: "*victims of alleged violations are not required to pursue the prosecution of State agents on their own. This is a duty of the public prosecutor, who is better placed in that respect*" (*Kitanovski v the former Yugoslav Republic of Macedonia* (2015) § 90. In the light of the principle that there is a "close affinity" between effective remedies under Article 13 and the requirement to exhaust domestic remedies (*Selmouni v France* (1999), § 74), the applicant maintains that a private prosecution cannot be considered an effective remedy. In any event, even if such a remedy might prove effective in certain cases, as the Government describe at GO § 37, it was theoretical and illusory (in the Government's words, "not very successful") in this case: Article 367 paragraph 1 item 6 of the Criminal Procedure Code made it impossible to establish the criminal liability of the prison, and in the absence of an effective investigation, the applicant could not identify any natural person responsible. The applicant also notes that the notice he received on 22 December 2010 (mentioned at GO § 35) did not mention the possibility of bringing a private prosecution.

37. In relation to the civil proceedings taken in the domestic courts (GO §§ 39-41), the Government note the plaintiff's failure "*to prove the existence of damage that was caused by intent or gross*

negligence", the legal standard applicable under domestic law which, as the Government note, places the burden of proof on the plaintiff. In circumstances where domestic law requires the plaintiff to prove such a high level of culpability in civil proceedings concerning a death in custody, and where the authorities fail to carry out an investigation capable of providing a reasonable explanation of such a death, the applicant submits that those civil proceedings do not amount to an effective remedy under Article 13. See *Šilih v Slovenia* (Grand Chamber, 2009), §§ 194-195. The Government's mere assertion that the investigation was "full and effective" (GO § 41) does not make it so: the authorities failed in their duty under the Convention to provide a reasonable explanation for why someone in custody had a high enough level of controlled substances in his body to kill him. The Government's continued insistence on calling R.A.'s death "natural" (GO § 41) demonstrates their persistent misunderstanding, even at this stage, of the State's duties under Article 2 of the Convention towards people in custody set out, for example, in *Taïs v France* (2006), §§ 96-98.

The European Roma Rights Centre
28 January 2016