

# **Ruling n°1400 of 8 July 2020 (20-81.739) – Cour de cassation (*Court of Cassation*) - Criminal Chamber**

## **ECLI:FR:CCAS:2020:CR01400**

**Unfair conditions of detention, pre-trial detention, right to an effective remedy and possible release of the detainee. Follow-up to the ECHR judgement JMB v. France.**

*Only the french version is authentic*

Prison overcrowding - Pre-trial detention

Dismissal

### **Summary**

**The national court responsible for applying the Convention, must, without awaiting possible future amendments to the current legislative or regulatory texts, take into consideration the decision of the European Court of Human Rights condemning France for the lack of a preventive remedy making it possible to put an end to demeaning conditions of detention.**

**The judicial judge must ensure that a person placed in demeaning conditions of detention has recourse to a preventive and effective remedy to put an end to violations of Article 3 of the European Convention on Human Rights.**

**As guardian of individual freedoms, it is the responsibility of this judge to ensure that the conditions of pre-trial detention always respect the dignity of the person and that the deprivation of liberty is free of inhuman and degrading treatment.**

**The applicant's description of his or her personal conditions of detention must be sufficiently credible, precise and present to constitute a prima facie evidence of their degrading nature.**

**In the event the public prosecutor has not previously verified these allegations, the Investigating Chamber must carry out additional checks for the purposes of assessing the reality of the allegations, independently of its power to order the release of the person concerned.**

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Appellant: Mr A... X...

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### **Facts and procedure**

1. According to the ruling appealed and the submissions in the proceedings:
2. In the context of a judicial investigation that began on 13 May 2019, Mr A.. X... was charged on 29 November 2019 with murder committed as part of an organised crime gang, attempted murder committed as part of an organised crime gang and participation in an association of criminals with a view to preparing a crime.

3. On the same day, he was placed in pre-trial detention in Ploemeur prison by order of the Liberty and Detention judge of the tribunal judiciaire of Rennes (*Rennes Tribunal of First Instance*).
4. By order of 28 January 2020, the Liberty and Detention judge rejected a request for release submitted by Mr A.. X...
5. Mr A... X... appealed this decision.

## **Reviewing plea**

### **On the second plea**

#### Statement of plea

6. The plea submits that the ruling under appeal upheld the order rejecting Mr X.'s request for release, whereas:

- *“The provisions of Articles 137-3, 144 and 144-1 of the Criminal Procedure Code, to the extent that - and contrary to the recommendations to France of the European Court of Human Rights - they do not allow the Investigating Judge or the Liberty and Detention Judge to effectively improve the situation of detainees subjected to conditions of detention that constitute inhuman and degrading treatment and accordingly to put an end to alleged violations; these provisions infringe the principle of safeguarding human dignity as well the new constitutional principle arising therefrom of the prohibition of inhuman and degrading treatment, individual freedom, the right to respect for private life and the right to an effective remedy;*

- *given the declaration of unconstitutionality that will ensue, the ruling under appeal shall be deprived of any legal basis”.*

#### **Court’s response**

7. The Cour de cassation (*Court of Cassation*) ruled today to refer the priority question of constitutionality relating to Articles 137-3, 144 and 144-1 of the Criminal Procedure Code to the Constitutional Council.

8. Article 23-5, paragraph 4, of Ordinance No. 58-1067 of 7 November 1958 relative to the Constitutional Council provides that when a case has been referred to the Constitutional Council, the Council of State or the Cour de cassation (*Court of Cassation*) shall stay proceedings until the former has handed down its ruling. This is not the case when the person concerned is deprived of liberty as a result of the proceedings and when the law provides that the Cour de cassation (*Court of Cassation*) shall rule within a specified period.

9. It should be noted that in its decision No. 2009-595 DC of 3 December 2009, the Constitutional Council ruled that whereas paragraph 4 of the above-mentioned Article may result in a final decision being handed down in proceedings when a priority constitutional question has been referred to the

Constitutional Council without awaiting its ruling, neither the afore-mentioned provision nor the authority of res judicata prevents the litigant from introducing further proceedings to allow the decision of the Constitutional Council to be taken into account.

## **On the first and third pleas**

### Statement of pleas

10. The first plea submits that the judgment under appeal has upheld the order rejecting Mr X.'s request for release, whereas:

*1°/ when the description given of the allegedly degrading conditions of detention is credible and reasonably detailed to constitute a prima facie evidence of ill-treatment within the meaning of Article 3 of the European Convention on Human Rights, the burden of proof is shifted to the respondent Government, who alone has access to information capable of corroborating or refuting the applicant's allegations (ECHR, 30 January 2020, J.M.B and Others v. France, no. 9671/15, § 258);*

*Mr A.. X... ., detained at the Lorient-Ploemeur remand centre since 29 November 2019, denounced his conditions of detention as constituting inhuman or degrading treatment within the meaning of Article 3 of the Convention, due to overcrowding and the lack of privacy and the insecurity that resulted from this overcrowding, citing comments made in the press by the Prison Governor as well as a report of the General Inspector of Prisons that appeared to corroborate his allegations;*

*By confirming the order by stating that such violations "have not been effectively demonstrated" by the applicant, and, in so doing, by failing to provide any evidence to demonstrate compliance with these requirements, the Investigating Chamber wrongly inversed the burden of proof and violated Article 3 of the European Convention on Human Rights;*

*2°/ when overcrowding in a prison deprives detainees of adequate personal space, it may constitute in and of itself sufficient proof of inhuman or degrading treatment within the meaning of Article 3 of the European Convention; in any event, Article 3 of the Convention is violated when, in addition the lack of personal space, there are other inadequate material conditions of detention such as no access to the prison yard or to fresh air and light, poor ventilation, insufficient or excessive temperatures in the cells, lack of privacy in using toilets, or poor sanitary and hygienic conditions; In his written submission duly filed with the court, Mr. A... X... ., detained at the Lorient-Ploemeur prison since 29 November 2019, denounced the flagrant overcrowding of the premises resulting in a lack of personal living space, i.e. a personal space of less than 4 m<sup>2</sup>, a serious violation of his privacy, as well as shocking material conditions of detention in view of Article 3 of the Convention, citing, notably, comments made in the press by the Prison Governor as well as a report of the General Inspector of Prisons; in confirming the order on the grounds that the detainee's "peremptory assertion" did not make it possible to prove the inhuman or degrading nature of his detention conditions while failing to rule on the substance of the evidence produced by the detainee, the Examining Chamber failed to give any legal grounds to its decision in view of Article 3 of the European Convention on Human Rights."*

11. The third plea submits that the ruling under appeal has upheld the order rejecting Mr X.'s request for release, whereas:

*"in order for a system of protection of the rights of detainees guaranteed by Article 3 of the Convention to be effective, preventive and compensatory remedies must co-exist in a complementary manner. The preventive remedy must effectively put an end to the alleged violation or result in an improvement in the material conditions of detention. Once the situation complained of has ceased, the person must have recourse to a compensatory remedy" (ECHR, 30 January 2020, J.M.B. and others v. France, no. 9671/15,*

*p. 1). France, no. 9671/15, § 167); in confirming the order handed down, observing that, on the one hand, "no decision of the European Court of Human Rights has established the principle that all violations of Article 3 of the Convention will result in the release of the person concerned" and, on the other hand, that "the detainee has recourse to [...] a compensatory remedy" for liability as well as "a preventive remedy [...] before the administrative court" by way of an urgent application procedure, the contested order, which has failed to ensure the existence of an effective preventive remedy to put an immediate end to the undignified conditions of detention has violated Articles 3 and 13 of the European Convention on Human Rights."*

## **Court's response**

12. The pleas are joined.

13. It results from Articles 137(3), 144 and 144(1) of the Criminal Procedure Code that in assessing the need to place a person in detention or to maintain that person in detention, the court must take account of the requirements of the judicial process, the need to preserve public order and the reasonableness of the detention period.

14. Until now, notwithstanding Article III, paragraph 4 of the Criminal Procedure Code, the Cour de cassation (*Court of Cassation*) has held as a principle that a possible infringement of the dignity of a person arising from the conditions of detention, while it may engage the liability of the public authorities due to inadequate functioning of the public service, does not constitute a legal obstacle to the placement and maintenance of a person in pre-trial detention (Crim., 18 September 2019, Appeal no. 19-83.950, in the process of being published).

15. It is only when there are allegations of elements specific to the person concerned that are sufficiently serious to endanger his or her physical or mental health that the Cour de cassation (*Court of Cassation*) has held that the trial judges may reach their decision on grounds that do not fall solely within the requirements of Articles 137-3, 143-1 et seq. of the Criminal Procedure Code (Crim., 29 February 2012, Appeal No. 11-88.441, Bull. crim., No. 58). Article 147-1 of the Criminal Procedure Code, resulting from Law No. 2014-896 of 15 August 2014, enshrined this principle in law by providing that in all matters and at all stages of the proceedings and unless there is a serious risk of the re-offence, the release of a person placed in pre-trial detention may be ordered, of its own motion or at the request of the person concerned, when a medical assessment establishes that this person is suffering from a life-threatening pathology or that his or her physical or mental health is incompatible with continued detention.

16. However, on 30 January 2020, the European Court of Human Rights condemned France in its judgment in the case of *JMB & ors* for conditions of detention contrary to Article 3 of the European Convention on Human Rights in numerous French prisons (req. n° 9671/15 and 31 others).

17. The Court also issued a condemnation under Article 13 of the Convention.

18. Observing the absence of a preventive judicial remedy, the European Court of Human Rights held, inter alia, that although the referral to the administrative court, in this case the judge of interim release, made it possible to take action to remedy the most serious violations to which detainees in certain prisons were subjected to, the powers of injunctive relief available to that judge does not enable him or her to effectively put an end to conditions of detention that are contrary to the Convention.

19. It made numerous recommendations on the basis of Article 46 of the Convention including the necessity for the French State to adopt general measures to ensure conditions of detention for prisoners in conformity with Article 3 of the Convention, to put in place a preventive and effective remedy, combined with a compensatory remedy, to redress the situation to which the prisoners are subjected and to put an end to alleged violations.

20. The general recommendations contained in this decision are, by their very nature, addressed to the Government and to Parliament. However it is for the national courts responsible for applying the Convention to take this decision into consideration without awaiting amendment to the laws or regulations.

21. In this regard, the judicial court is obliged to ensure that a person placed in demeaning conditions of detention has recourse to a preventive and effective remedy to put an end to violations of Article 3 of the Convention.

22. As guardian of individual freedom, it is his responsibility to ensure that pre-trial detention is always carried out in conditions that respect the dignity of the person and that the deprivation of liberty is free from inhuman and degrading treatment.

23. It follows that when the applicant's description of his personal conditions of detention is sufficiently credible, precise and present to constitute a prima facie evidence of their undignified nature and in the event that the public prosecutor has not previously verified these allegations, the Investigating Chamber must carry out additional checks for the purposes of assessing the reality of the allegations, independently of its power to order the release of the person concerned.

24. If the Investigating Chamber, upon completion of these verifications, finds that the principle of human dignity has been violated and has not been remedied in the meantime, it must order the release of the person, subjecting him or her, where appropriate, to house arrest with electronic surveillance or to judicial supervision.

25. In upholding the order made by the Liberty and Detention Judge, the ruling under appeal observes that whereas it is held that Mr X's pre-trial detention placed him in demeaning conditions falling within the scope of Article 3 of the European Convention on Human Rights, this is a peremptory assertion based on a press article and a report by the Governor of Prisons dating from 2018 and does not evidence *in concreto* the specific situation of the person concerned, who has been in detention since 29 November 2019.

26. The judges add that the court is neither in a position to assess whether Mr X. is in a double or triple cell, nor if he is deprived of natural light and ventilation. Assuming that his conditions of detention do in fact fall within the scope of Article 3 of the Convention, which has not in fact been proven, the sanction for such treatment cannot be the release of the person concerned due to the inalienable constitutional rights guaranteed by the pre-trial detention that has the purpose to seek out the perpetrators of an offence by avoiding any interference in the judicial investigation by the person detained.

27. The Court observes that no decision of the European Court of Human Rights has established a principle stating that all violations of Article 3 of the Convention be sanctioned by the release of the

person concerned. More in a leading decision (Crim. 18 September 2019, no. 19-83. 950), the Cour de cassation (*Court of Cassation*) ruled that although any violation of the person's dignity resulting from conditions of detention may give rise to liability on the part of the public authorities due to inadequate functioning of the public service, it cannot constitute a legal obstacle to the placement and maintenance in pre-trial detention.

28. The Court concludes that the detainee therefore has a compensatory remedy and that he or she also has a preventive remedy by way of an interim release procedure in the administrative court pursuant to Article L. 521-2 of the Code of Administrative Justice which requires the urgent application judge to rule within forty-eight hours of the application.

29. For the reasons set forth in paragraphs 16 to 24 above, the Investigating Chamber was wrong to hold that a possible infringement of the person's dignity resulting from conditions of detention could not constitute a legal obstacle to placing or keeping him in pre-trial detention.

30. The ruling is not however sanctioned since allegations made by Mr X... referred only to the general conditions of detention in the remand centre in which he was being held, without giving any details concerning his specific personal situation notably the size of his cell, the number of occupants of the cell, its interior layout and the number of hours per day during which he was detained in the cell.

31. The pleas must therefore be rejected.

32. In addition, the ruling is in order both in terms of form and in terms of the provisions of Articles 137-3 and 143-1 et seq. of the Criminal Procedure Code.

**ON THESE GROUNDS**, the Court:

**DISMISSES the appeal**

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President: Mr Soulard

Reporting Judge: Mr Guéry

Advocate-General: Ms Zientara-Logeay

Lawyer(s): SCP Spinosi et Sureau