



HUNGARIAN HELSINKI COMMITTEE

H-1054 Budapest, Bajcsy-Zsilinszky út 36-38. I/12

H-1242 Budapest, Hungary P.O. Box 317

+ 36 1 321 4323, 321 4141, 321 4327

helsinki@helsinki.hu

www.helsinki.hu

Communication from the Hungarian Helsinki Committee concerning the cases of ISTVAN GABOR KOVACS and VARGA AND OTHERS v. Hungary

(Application nos. 15707/10, 14097/12, 45135/12, 73712/12, 34001/13,
44055/13, and 64586/13)

5 June 2017

The **Hungarian Helsinki Committee (HHC)** is a leading human rights organisation in Hungary and in Central Europe. The HHC monitors the enforcement of human rights enshrined in international human rights instruments, provides legal defence to victims of human rights abuses by state authorities and informs the public about rights violations. The HHC's main areas of activities are centred on protecting the rights of asylum seekers and foreigners in need of international protection, as well as monitoring the human rights performance of law enforcement agencies and the judicial system. It particularly focuses on the conditions of detention and the effective enforcement of the right to defence and equality before the law.

For over 20 years the HHC has been running a detention monitoring program. Since 1995 the organization has carried out 1237 monitoring visits at police jails, 48 visits at penitentiary institutions and also made 51 inspections at places of immigration detention. The HHC submitted numerous applications to various international forums (CPT, UNWGAD, CPT, SPT, UPR, etc.) in related subject matters. The HHC lawyers have litigated cases related to the conditions of and treatment in detention in Hungarian prisons both before domestic forums and the European Court of Human Rights (see e.g. the cases *Engel v. Hungary*, Application no.: 46857/06, and *Csüllög v. Hungary*, Application no.: 30042/08), and three out of the six applicants in the *Varga and Others v. Hungary* were represented by HHC's lawyers.

With reference to the judgments of the European Court of Human Rights (ECtHR) **in the cases of ISTVAN GABOR KOVACS and VARGA AND OTHERS v. Hungary**, and the action plan on the implementation of these judgements submitted by the Government of Hungary, **the HHC respectfully submits the following observations.**

While significant progress has been made in relation to the problems raised by the judgment, there are still outstanding issues of concern, as a result of which we are of the view that **the case should not be closed at this point in time**. Below we are presenting the problems in a structure following that of the Revised Action Plan submitted by the Government of Hungary on 2 March 2017 (hereafter: Action Plan).



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helsinki@helsinki.hu

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1. Reduction of prison population

According to the 2015 Yearbook of the National Prison Administration, in 2015, the average number of detainees was 17,796 and the average occupancy rate was 135%.¹ While in **2016**, due to the newly constructed additional places, **the average occupancy rate decreased to 131%, the average number of detainees went up to 18,023.**² This is because the number of convicted persons increased to an extent (from 13,027 on 31 December 2015³ to 13,543 on 31 December 2016⁴) that it could not be offset by the continued decrease in the number of pre-trial detainees (from 3978 at the end of 2015⁵ to 3,622 a year later⁶).

This substantiates HHC's view that **without steps to control and reduce the "input", i.e. the influx of detainees into the prison system, even a substantial prison-construction project may not yield lasting results.**

It must also be pointed out that even though the number of pre-trial detainees seems to be on the decrease, the number of alternative coercive measures motioned by the prosecution and/or applied by the courts is still very low. 2016 data will only be available in July 2017, but in 2015, prosecutors motioned pre-trial detention in the investigation phase in altogether 5075 cases (out of which it was ordered by the court in 4453 cases),⁷ while house arrest was motioned by the prosecution in 186 cases and a geographical ban (ban to leave a certain administrative area) in 216 cases.⁸ So there is still room for improvement in this regard. (It has to be added that the new code of criminal procedure, the draft of which is debated in Parliament would bring positive changes to the system of coercive measures, so if the passing of the bill may trigger improvement in this regard.)

We believe that the recommendations that we formulated and submitted to the Ministry of Justice with a view to the reduction of the influx of inmates should be considered by the Government.⁹ The steps proposed include

- the abolition of custodial sentences for minor offences (e.g. less severe cases of violent public behaviour);
- the abolition of short-term criminal confinement (with a maximum duration of 90 days) and its replacement with non-custodial measures;
- increased use of alternatives to pre-trial detention;
- no pre-trial detention for offences carrying a sanction of less than 3 years of imprisonment;
- increasing the daily rate of petty offence fines when transforming them into confinement for non-payment;

¹ <http://bv.gov.hu/download/b/a7/61000/%C3%89vk%C3%B6nyv%202015%20v%C3%A9gleges.pdf>, p. 11.

² The National Prison Administration's (NPA) response of 5 May 2017 to the HHC's freedom of information request (hereafter: NPA Response 2017)

³ *Számok, tények 2015*: brief information note available from the NPA's website (<http://bv.gov.hu/sajtoszoba>).

⁴ NPA Response 2017

⁵ *Számok, tények 2015*

⁶ NPA Response 2017

⁷ <http://ugyveszseg.hu/repository/mkudok8724.pdf>, p. 48.

⁸ 24 May 2017 reaction of the Chief Public Prosecutor's Office to the HHC's freedom of information request.

⁹ See: http://www.helsinki.hu/wp-content/uploads/MHB_javaslatok_tulzsufoltsag_201605-1.pdf



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helsinki@helsinki.hu

www.helsinki.hu

- abolition of unlimited pre-trial detention;
- abolition of the so-called medium-sentencing requirement (stipulating that as a rule a judge should impose the mean length of imprisonment, and that a specific reasoning obligation prevails if he/she wants to diverge from the mean of the scale of imprisonment set forth by the Penal Code).

2. The newly introduced preventive remedy

2.1. Outline of the system

The October 2016 amendment of the Penitentiary Code (Act CCXL of 2013 on the Execution of Punishments, Measures, Certain Coercive Measures and Petty Offence Confinement) introduced a special type of complaint into conditions of detention. Under the new **Article 144/B of the Code**, the detainee may file a complaint with the prison governor about the conditions of detention.

Based on the complaint, the governor shall – within 15 days – take measures to improve the conditions by placing the inmate in a non-overcrowded cell. If this is not possible due to the general occupancy rates in the given prison, the governor shall contact the National Headquarters to initiate the transfer of the inmate into a non-overcrowded prison. If this is possible, a transfer will be ordered by the headquarters within 8 days from receiving the governor's notification. (According to the law, when the decision is made, account must be taken of whether the transfer might have a detrimental impact on the inmate's family ties. If the concerned inmate believes that the transfer would adversely impact his/her family ties, he/she may appeal against the transfer order to the penitentiary judge).

If it is not possible to identify a less crowded prison to which the complainant could be transferred without negatively impacting his/her family ties, the national headquarters refers the case back to the prison governor, who – in such cases – shall consider the granting of certain entitlements mitigating the effects of overcrowding (additional open-air time, additional visits, etc.).

While in itself the above mechanism would be unproblematic and its introduction a measure to be welcomed, there is one element of the system that generates conflicts and problems: **the filing of an Article 144/B complaint is a precondition for claiming compensation.**

In terms of the newly introduced Article 10/A Paragraph (6) of the Penitentiary Code, **a compensation claim may only be submitted if a complaint under Article 144/B has been filed beforehand.** This precondition does not prevail if the placement under overcrowded circumstances is in place for less than 30 days. Furthermore, if the conditions violating fundamental rights prevail for a longer period of time (and the Article 144/B complaint yields no improvement), the complainant is not required to submit a new complaint within three months. This means in practice that **if they want to be compensated for substandard detention conditions, inmates must submit new Article 144/B complaints every three months.**



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www.helsinki.hu

2.2. The remedy is ineffective due to the lack of sufficient prison-capacity

The main problem with this scheme is that while in principle the prison system must obviously be provided with a possibility to remedy the violations stemming from substandard conditions before a financial compensation is claimed, in the present situation it is unreasonable to make the claiming of financial compensation conditional on the submission of a complaint.

As it is clear from the Action Plan, the capacity of penal institutions amounts to 13,774 places and there were 18,023 detainees on 6 January 2017. This means **that at present, there is no possibility to provide satisfactory placement for a significant proportion (close to 1/4th) of the inmates, so the situation inevitably leads to thousands of inmates submitting – mostly futile – complaints about their placement on a three-monthly basis, thus creating a substantial administrative burden for the already overworked penitentiary personnel.**

This assessment is supported by the National Prison Administration's 5 May 2017 response to the HHC's freedom of information request on complaints and compensation claims related to the overcrowding of prisons (NPA response): **between 1 January and 21 April 2017, altogether 984 complaints were submitted due to substandard detention conditions. Only in 136 cases (13.8%) could governors take measures to remedy the situation within the concerned prison, in the rest of the cases the complaint was forwarded to the national headquarters. Out of the 734 cases in which the national headquarters had taken a decision until 21 April 2017, only in 72 (9.8%) could the complaining detainee be transferred into another prison, in the remaining over 90% of the cases, there was no less crowded prison into which the complainant could have been transferred, so the case had to be referred back to the prison governor.**

2.3. Repercussions against complaining inmates

One potential unwanted effect of the administrative burden placed on the penitentiary personnel by the requirement of putting forth foreseeably unsuccessful complaints every three months seems to be that some staff members try to dissuade inmates from exercising this right through extra-legal means. **Some lawyers report that those clients of theirs who submit Article 144/B complaints are then subjected to threats and/or detrimental treatment, as a result of which many of them decide to withdraw their complaints.**

For example, in Budapest, there was severely disabled woman (only able to walk with a stick) who had a medical opinion prescribing that she must be placed in a small cell with few inmates. Accordingly, she was for five years placed in such a cell. After she had filed a complaint about the conditions of placement, she was moved into a large cell, and allegedly references were made that she was transferred as a result of complaining. When the lawyer raised this with the governor, he was given a summary reply claiming that the woman is placed in accordance with her security regime and smoking habits. The question why after five years she was transferred into a different type of cell was not addressed at all.



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Another inmate who was placed in a so-called therapeutic group and met all the conditions of being placed in the reintegration unit (offering a less strict regime in preparation for release), was moved into a normal maximum-security unit after he submitted a complaint concerning the conditions of detention.

Besides the two examples outlined above, the HHC has also received additional reports from lawyers on pressure exercised on complaining inmates (either threats or promises of certain benefits) with a view to making them withdraw their complaints.

We are therefore of the view that until the planned prison constructions (scheduled to be accomplished in 2019) are completed, and thus it can be guaranteed that complaints into detention conditions carry a realistic chance of success, the application of the requirement to submit Article 144/B complaints as a precondition for claiming compensation, ought to be suspended.

Furthermore, to minimise the possibility of putting pressure on inmates with the aim of dissuading them from exercising their fundamental rights of complaint, the reasons for any withdrawal of an Article 144/B complaint must be carefully looked into if the substandard detention conditions have not changed in the given case.

3. The compensation procedure

As described in the Action Plan, under the new legislation, an inmate may file a claim for compensation for overcrowding and other detrimental physical conditions of detention. Submitting an Article 144/B complaint is a precondition of claiming compensation in most cases (for exceptions, see below). The claim must be filed with the detaining penitentiary institution, which forwards it to the penitentiary judge along with a document detailing the conditions of the claimant's detention. The penitentiary judge may hold a hearing if he/she deems it necessary, but can deliver a decision on the basis of the file only.

Below we are outlining the most problematic point of the procedure, focusing on deficiencies stemming from both the legislation and the (slowly) evolving practice.

3.1. Amount of the compensation

The average damages granted by the ECtHR in the overcrowding cases adjudicated until the suspension of the examination of similar applications in November 2016 was around HUF 3,000 per day (cca. EUR 9.7). As opposed to this, according to the new legislation,¹⁰ the compensation to be paid to detainees shall be between HUF 1,200 and HUF 1,600 (EUR 3.9 and EUR 5.2) depending on the overall conditions of detention. While we are aware of the margin of appreciation the State Parties enjoy in formulating their remedial systems, **we believe that a solution in which the highest**

¹⁰ Article 10/A Paragraph (3)



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possible compensation is hardly over 50% of the average damages granted by the ECtHR, cannot be considered to be a satisfactory execution of the pertaining judgment.

In addition, the Hungarian system does not allow for the granting of procedural costs, so if the complainant is represented by a lawyer, his/her fee will have to be deducted from the compensation granted to the detainee, which further reduces the available amount in comparison to the Strasbourg procedure.

We are therefore of the view that the daily amount of compensation should be adjusted to better reflect the scale used by the ECtHR.

3.2. Deduction of the amount of child support and damages caused by the criminal offence for which claimant has been convicted

Under Article 10/A Paragraphs (7) and (8) and Article 10/B of the Penitentiary Code, **the amount of child support and damages caused by the criminal offence for which claimant has been convicted must be deducted from the amount of the compensation and paid to those persons who have a claim to these amounts** (the damages caused by the offence are deductible only if there is a final and binding court decision establishing them).

The inmate may only be paid what is left after the deduction. If child support and/or the damages exhaust the full amount of the compensation, the inmate is not paid anything at all as compensation.

While the aim of this legislative solution can be regarded as legitimate, **there is a strong element of discrimination, as no such deduction is prescribed for any other compensation granted by the courts in relation to the violation of inherent personal rights**, such as human dignity and the ban on inhuman or degrading treatment or punishment.

We are therefore of the view that either a similar deduction policy should be introduced with regard to other types of compensation granted for violations of inherent personal rights, or it should be abolished in such cases as well, since the status of the claimants (detainees convicted for offences) cannot serve as a justification for the differentiation, as their punishment is the deprivation of liberty, no additional limitations as to the compensation for violations can be introduced with a view to the offence they committed.

3.3. Complaint to be submitted about the conditions of detention as a precondition for claiming compensation

As it was mentioned above, the submission of an Article 144/B complaint is a precondition of claiming compensation for substandard detention conditions [for exceptions, see point c) below].

We reiterate our above outlined criticism that until the prison system has sufficient capacity to make Article 144/B complaints a meaningful remedy offering a realistic chance of success, making compensation claims conditional on the submission of a foreseeably futile complaint will only cause tensions in the system and a superfluous administrative burden on the prison personnel. However,



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there are additional problems concerning the relationship between Article 144/B complaints and compensation claims, these are described below.

a) **There is an uncertainty in the law on whether if an Article 144/B complaint yields results** (e.g. the inmate is placed in a non-overcrowded cell or moved into such a prison), **it excludes the possibility of claiming compensation for the preceding period when the person was held in substandard circumstances.** Whereas in our view, the measures taken in relation to such a complaint can only prevent compensation claims for the subsequent detention period, according to reports from lawyers, in some prisons the personnel have informed the inmates that if they accept these measures (e.g. one additional hour of open air exercise per week, or the possibility of leasing an extra book from the library in every month), they waive their right for compensation for the preceding period as well.

There are ongoing cases that will most probably clarify how penitentiary judges view this matter, however, at this moment, we are not aware of any final and binding decisions concerning this issue.

b) **It is also uncertain on the basis of the legislation, whether a person who after 1 January 2017 is placed under acceptable conditions without having submitted an Article 144/B complaint, must file a complaint to be able to claim compensation for the substandard conditions he/she had to suffer before his/her transfer to a better cell/prison.** (E.g. an inmate is held under substandard conditions between 1 June 2016 and 31 March 2017, he is placed in an acceptable cell on 1 April 2017. The question is whether he is required to submit an Article 144/B complaint after that date if he wants to claim compensation for the period between 1 June 2016 and 31 March 2017.)

Based on the strict grammatical interpretation of the law, it is not possible to submit a claim for compensation without filing an Article 144/B complaint beforehand even if in the meantime the detainee has been placed among conditions that are up to standard. Lawyers have informed the HHC that they advise their clients to do so, because otherwise they risk the rejection of their compensation claim on the basis of Article 10/A Paragraph (6) of the Penitentiary Code. This however increases the administrative burden of the penitentiary system by generating complaints that are obviously unjustified (since the complainants are forced by the ambiguous legislation to file complaints after their placement has been improved).

c) In terms of Article 436 Paragraph (10) of the Penitentiary Code, those can also claim compensation (i) whose placement under conditions violating fundamental rights came to an end between 1 January and 31 December 2016; (ii) whose applications submitted to the ECtHR concerning such placement have been registered.

Under Paragraph (11) of the same Article, such claimants are not required to file an Article 144/B complaint to be able to claim compensation ("When deciding on claims submitted under Paragraph (10), Paragraph (6) of Article 10/A shall not be applied [...]).

The jurisprudence evolving in this regard clearly contradicts the law: although the law unambiguously states that Paragraph (6) of Article 10/A (the provision making compensation



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conditional on filing an Article 144/B complaint) **shall not be applied to these two categories of claimants, penitentiary judges take the stance that this is only true for the period preceding 1 January 2017.** So if someone submitted an application to the ECtHR on 1 June 2016 concerning his placement under substandard conditions between, let us say, 30 December 2010 and the date of the application, and that person is still detained today in an overcrowded cell, then – according to the judicial practice – he will be able to claim compensation unconditionally for the period between 30 December 2010 and 31 December 2016, while for the period between 1 January 2017 and today, he can only claim compensation if he submits an Article 144/B complaint beforehand.

While such a solution could be justified in principle, the legislator chose a different approach, so **this *contra legem* judicial interpretation restricting the right to claim compensation is obviously not acceptable.**

d) Another problem concerning the legislation is that under Article 436 Paragraph (10) of the Penitentiary Code, the claim for compensation of ECtHR applicants is only admissible if the *application has been registered by the ECtHR*. But even a compensation claim based on a registered application can be inadmissible if (i) it was submitted after 10 June 2015 and (ii) the ECtHR *received* the application with more than 6 months after the injurious placement had come to an end.

There are a number of problems with this list of conditions. First, not all the applicants have proof that their applications have actually been registered by the ECtHR (even a letter from the court with the case number is no proof of that, since it does not certify what the subject matter of the application was). Second, the Penitentiary Code makes the admissibility of the compensation claim dependant on when an application was received by the ECtHR, whereas the court's procedural rules designate as the date of the application's submission the date of the application's dispatch and not the date on which it reaches the court. Thus, **it may happen that the Hungarian legislation will render a compensation claim inadmissible, although the underlying Strasbourg application is admissible.**

We are of the view that the law should be amended in order (i) not to exclude persons who have submitted valid and admissible applications to the ECtHR from the possibility of obtaining a compensation within Hungary, and (ii) to dissolve any uncertainties concerning the relationship of Article 144/B complaints and the admissibility of compensation claims.

3.4. Lack of an adversarial procedure

Under Article 10/A Paragraph (5) of the Penitentiary Code, the compensation claim must be submitted to the penitentiary institution where the person is held, or from which he/she was released, and – in terms of Article 70/A Paragraph (2) – the penitentiary institution forwards – within 15 or 30 days – the claim to the penitentiary judge along with its observations and the documentation that it regards relevant in the case.



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According to the Penitentiary Code,¹¹ the penitentiary judge may decide not to hold a hearing in relation to compensation claims and decide on the basis of the available documentation only. According to lawyers providing representation in such cases, the practice is that **penitentiary judges do not hold hearings, even in cases where the detainee or the lawyer expressly requests a hearing.**

Furthermore, the penitentiary institutions do not provide their observations and the attached documentation to the detainee or his/her lawyer, nor do the penitentiary judges notify them about the arrival of the documentation at the court. Hence, **unless the lawyer keeps record of approximately when the case file may arrive at the court and unless he/she keeps inquiring about whether it has arrived, he/she will not have a possibility to inspect the file, get acquainted with the penitentiary institution's observations and reflect on them.** (Detainees who do not have a lawyer are in an even more disadvantaged situation in this regard for obvious reasons.)

This means that there will be no equality of arms in compensation cases, as the penitentiary institution will have a chance to get acquainted with and react to the claims of the detainee, but it will not be so the other way around, so the penitentiary judge will deliver his/her decision in an uneven procedural situation.

We recommend that either a hearing be the main rule, from which diversion would be possible only in exceptional cases, or – if that does not seem plausible due to the volume of the problem – the penitentiary institution would be obliged to send to the claimant and his/her lawyer the documentation it forwards to the penitentiary judge along with the claim, and sufficient time would be provided for the claimant to examine the file and put forth observations regarding it.

3.5. Overburdening of the penitentiary and the judicial system

As it could be foreseen, **a very high number of compensation claims have been submitted** through the penitentiary institutions to the penitentiary judges, **but neither the penitentiary system nor the judiciary have been provided with additional capacities to handle this inevitable increase in the workload.**

According to the NPA response, **2,198 claims** for compensation had been submitted by **21 April 2017**. However, only **23 judicial decisions** on compensations had been sent to the Ministry of Justice for implementation by **3 May 2017**, out of which **9 compensations had been paid** by this date.¹²

The severe problems caused by the massive influx of claims is substantiated by the lawyers' experience. **One lawyer for example reported to the HHC at the end of May that out of the cca. 150 claims he had submitted on behalf of inmates who had previously turned to the ECtHR, only 9 had been adjudicated.** These 9 decisions came from two courts, other courts had not delivered decisions on any of the claims he had submitted. He also mentioned that out of the 22 claims he had submitted through the Budapest Maximum and Medium Security Prison between 30 January and 16 February, none had been forwarded to the competent penitentiary judge, although the period within

¹¹ Article 70/A Paragraph (1)

¹² 4 May 2017 response given by the Ministry of Justice to the HHC's freedom of information request.



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which penitentiary institutions are required to do so is 15 days (if the claim concerns one institution) or 30 days (if the claim concerns more institutions).

Since 30 June 2017 will be the deadline for submitting claims for those whose substandard detention conditions came to an end before 1 January 2017, it is expected that the influx of claims will become even higher in the coming weeks, adding to the pressure on the penitentiary system and the judiciary.

This extreme increase in workload without additional capacities also impacts the proceedings negatively: penitentiary judges will obviously opt for not holding hearings if they cannot handle the cases within the prescribed deadline even if they work from the files only. They will also not have the sufficient time to thoroughly examine the facts submitted to them by either the claimant or the penitentiary institutions.

For instance, in some of the already adjudicated cases, certain penitentiary institutions presented the gross floor size of the cells as moving space, and penitentiary judges accepted it as the basis for assessing whether a violation had taken place, although the Hungarian legislation clearly states that the actual moving space per inmate shall be calculated by deducting the space covered by furniture and equipment from the gross floor space of the cell. **In the absence of an adversarial proceeding** (during which the complainants could have drawn the judge's attention to the fact that the figures provided by the institution are flawed in this way) **and without the necessary time and human resources, it is inevitable that deficient decisions will be made**, necessitating appeals on the side of the claimants and their lawyers.

We recommend that additional resources be provided to the penitentiary system and the judiciary to handle compensation claims, until the influx of claims is stabilised at a manageable level.

4. Recommendations

- Steps should be taken to reduce the influx of detainees into the prison system, because in the absence of such measures even a substantial prison-construction project may not yield lasting results. The recommendations formulated and submitted to the Ministry of Justice in May 2016 by the HHC with a view to such a reduction should be taken into consideration in this regard.
- Until the planned prison constructions (scheduled to be accomplished in 2019) are completed, and thus it can be guaranteed that complaints into detention conditions carry a realistic chance of success, the application of the requirement to submit such complaints as a precondition for claiming compensation, ought to be suspended.
- To minimise the possibility of putting pressure on inmates with the aim of dissuading them from exercising their fundamental rights of complaint, the reasons for any withdrawal of an



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Article 144/B complaint should be carefully looked into by the prison administration if the substandard detention conditions have not changed in the given case.

- The daily rate of compensation should be adjusted to better reflect the scale used by the ECtHR in Hungarian prison overcrowding cases.
- With regard to the deduction of child support and damages caused by the criminal offence underlying the detention from the compensation paid to inmates, a similar deduction policy should be introduced with regard to other types of compensations granted for violations of inherent personal rights, or it should be abolished in overcrowding cases as well, since the status of the claimants (detainees convicted for offences) cannot serve as a justification for such a differentiation.
- The law should be amended in order (i) not to exclude persons who have submitted valid and admissible applications to the ECtHR from the possibility of obtaining a compensation within the Hungarian legal system, and (ii) to dissolve any uncertainties concerning the relationship of Article 144/B complaints and the admissibility of compensation claims.
- In compensation claim proceedings either a hearing by the penitentiary judge should be the main rule, from which diversion would be possible only in exceptional cases, or – if that does not seem plausible due to the workload this would result in – the penitentiary institution should be obliged to send to the claimant and his/her lawyer the documentation it forwards to the penitentiary judge along with the claim so that the equality of arms would be respected.
- Additional financial and human resources should be provided to the penitentiary system and the judiciary to handle compensation claims, until the influx of claims is stabilised at a manageable level.