



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF MASTROMATTEO v. ITALY

(Application no. 37703/97)

JUDGMENT

STRASBOURG

24 October 2002

This judgment is final but may be subject to editorial revision.

In the case of Mastromatteo v. Italy,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mr C.L. ROZAKIS,
Mr J.-P. COSTA,
Mr G. RESS,
Sir Nicolas BRATZA,
Mr B. CONFORTI,
Mr GAUKUR JÖRUNDSSON,
Mr G. BONELLO,
Mrs V. STRÁŽNICKÁ,
Mr C. BÎRSAN,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr B. ZUPANČIČ,
Mr M. PELLONPÄÄ,
Mrs M. TSATSA-NIKOLOVSKA,
Mr E. LEVITS,
Mr S. PAVLOVSKI,

and also Mr P.J. MAHONEY, *Registrar*,

Having deliberated in private on 13 March, 5 June and 25 September 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37703/97) against the Italian Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian national, Mr Raffaele Mastromatteo (“the applicant”), on 11 December 1996.

2. The applicant, who had been granted legal aid, was represented before the Court by Mr B. Nascimbene, a lawyer practising in Milan. The Italian Government (“the Government”) were represented by their Agent, Mr U. Leanza, Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs, assisted by Mr V. Esposito, co-Agent, and Mr F. Crisafulli, deputy co-Agent.

3. The applicant alleged that the Italian authorities were responsible for his son's death because he had been murdered by prisoners who had been granted prison leave and had taken advantage of it to abscond.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 14 September 2000 it was declared admissible by a Chamber of that Section, constituted as provided in Rule 26 § 1.

6. On 22 November 2001 the Chamber relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

7. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

8. The applicant and the Government each filed written observations on the merits of the case.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 March 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr F. CRISAFULLI,

deputy co-Agent;

(b) *for the applicant*

Mr B. NASCIMBENE,

Mrs M.S. MORI,

Counsel.

The Court heard the addresses of these representatives and their replies to questions put by the judges. After the hearing the parties submitted supplementary information relating to those questions.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1933 and lives in Cinisello Balsamo (Milan).

A. The murder of the applicant's son

11. On 8 November 1989 the applicant's son was murdered by a criminal (M.R.) who had just robbed a bank with two accomplices (G.M. and G.B.). After leaving the bank the three robbers had failed to find the fourth accomplice (A.C.), who was supposed to be waiting for them with the getaway car. They had therefore made off on foot with the police in pursuit. Their path had then crossed a car being driven by A.Mastromatteo, the applicant's son. They had attempted to take control of the car, but it would appear that A.Mastromatteo had tried to get away from his attackers by accelerating, whereupon M.R. had shot him at point-blank range. He died a few hours later.

B. Identification of the criminals

12. The four criminals were subsequently identified and charged. Three of them (M.R., A.C. and G.M.) were serving prison sentences at the material time, whereas the fourth accomplice, G.B., was free.

13. From the documents in the case file it is possible to reconstruct the case history of the criminals, particularly that of M.R. and G.M., both of whom were responsible for the applicant's son's death.

1. M.R.

14. M.R., who fired the fatal shot, was serving a prison sentence of fifteen years and seven months for attempted murder, armed robbery and other offences. He was due to be released on 2 July 1999 and was serving his prison sentence in Alessandria. When it convicted M.R. on 25 March 1987, the Milan Assize Court of Appeal had considered him to be a danger to society.

15. In a decision of 26 October 1989 the Alessandrian judge responsible for the execution of sentences granted M.R. prison leave from 10.45 a.m. on 1 November 1989 to 10.45 a.m. on 3 November 1989 with the condition that he remain at his home in Monza (near Milan).

It was the first time that M.R. had been granted prison leave. The case file shows that the judge responsible for the execution of sentences relied on

the reports by the prison authorities concerned stating that they were satisfied with M.R.'s behaviour, rehabilitation and willingness to reintegrate.

16. The decision granting prison leave was communicated to the appropriate police authorities.

The information provided by Monza Police Station shows that M.R. had reported to the police station at 3.15 p.m. on 1 November 1989. In a note drawn up on 6 March 2000 the police station stated that at the time no anomaly had been recorded during M.R.'s prison leave.

17. On the expiry of M.R.'s prison leave on 3 November, he failed to return to Alessandria Prison and could not be found.

On the same day Alessandria Prison informed Monza Police Station that M.R. had not returned and that he should therefore be considered to have absconded.

A "wanted" notice was drawn up and circulated throughout the country by means of the police national computer system. The notice has not been kept in the police files.

2. G.M.

18. G.M. was serving a six-year prison sentence imposed on 16 December 1986 for aiding and abetting armed robbery and other offences.

19. Since 21 October 1988 he had been subject to a semi-custodial regime, which is an alternative measure to imprisonment, pursuant to a decision of the Venice court responsible for the execution of sentences. G.M. worked in Milan and returned to the city prison in the evenings.

20. In granting him that alternative regime to imprisonment, the court had relied on the reports by the prison authorities stating that G.M. had been of good behaviour and showed a willingness to reintegrate and that nothing untoward had occurred during his previous periods of prison leave. Furthermore, on 28 June 1988 the Milan Police had given a favourable opinion of the work which G.M. would be undertaking.

21. The following obligations were attached to the semi-custodial regime:

- (a) leave the prison after 5 a.m. (subsequently 4 a.m.) and return by 11 p.m. at the latest;
- (b) not quit the authorised job without giving notice;
- (c) not spend money without permission;
- (d) use public transport;
- (e) avoid excessive consumption of alcohol; and
- (f) spend bank holidays with his family and remain in the Milan area.

22. That decision was sent, *inter alia*, to the Social Services Department of Milan, which was the authority responsible for implementing supervisory measures. That authority carried out one inspection, at the prisoner's home and his place of work, during the period of approximately twelve months

which elapsed between the date on which the semi-custodial measure was granted and the date on which G.M. absconded.

23. No supervisory measure was envisaged by the police authorities.

24. G.M.'s criminal record shows that on 26 October 1989, which was a few days before the applicant's son was murdered, he had committed a handling offence. He was convicted of that offence in 1991 in a judgment which became final on 18 March 1992.

3. *A.C.*

25. A.C. was serving a prison sentence for armed robbery committed jointly with M.R. His criminal record shows that he had a previous conviction for murder. He was in prison in Alessandria.

26. In a decision of 23 August 1989 the Alessandrian judge responsible for the execution of sentences granted him prison leave from 19 to 26 September 1989. The judge responsible for the execution of sentences, relying on the reports by the prison authorities concerned, had been satisfied with A.C.'s behaviour in prison. The report prepared by the prison workers responsible for monitoring A.C. had stressed his good behaviour during his previous periods of prison leave.

27. While on prison leave A.C. was subject to a number of constraints: he had to report to the police station daily; stay at home from 10 p.m. to 8 a.m.; and not leave the district of Sesto San Giovanni (Milan).

The decision granting him prison leave was communicated to the appropriate police authorities. The file shows that A.C. reported to the police station daily to sign the register.

28. On 26 September 1989, when his prison leave expired, A.C. did not return to the prison and was deemed to have absconded. On the same day Alessandria Prison informed Monza Police Station that A.C. had not returned and that he should therefore be considered to have absconded.

A "wanted" notice was drawn up and circulated to the various police forces throughout the country.

4. *G.B.*

29. G.B., the fourth accomplice, was not in prison at the material time. His criminal record shows a number of convictions for armed robbery and other offences.

C. The criminal proceedings against the offenders and the applicant's application to join the proceedings as a civil party seeking damages

30. The four offenders were subsequently identified and charged.

31. Of the three prisoners, only M.R. and G.M. were convicted of the murder of the applicant's son, aided and abetted by G.B., and given long sentences.

32. The third prisoner, A.C., who was to have been the driver, was convicted only of armed bank robbery.

33. The applicant lodged an application to join the criminal proceedings against the offenders as a civil party. The defendants were ordered to pay the civil parties damages in an amount to be determined by the civil courts; the criminal courts awarded the applicant 50,000,000 Italian lira (ITL), however, as a down payment to be made immediately.

34. The applicant did not state whether the down payment of ITL 50,000,000 had been paid to him or whether, failing payment, he had taken steps to attempt to obtain the money.

35. In any event the applicant has not sued the criminals for damages in the civil courts. He submitted that they would not in any case have been solvent.

D. The claim for compensation under Act no. 302 of 1990

36. On 6 November 1992 the applicant lodged a claim with the Ministry of Justice and the Ministry of the Interior for compensation under Act no. 302 of 1990, which provides for compensation for victims of terrorism and mafia-type criminal organisations.

In support of his claim, the applicant alleged that his son had been murdered by criminals who were serving prison sentences and that they were members of a "gang" whose criminal activities fell into the category of organised crime.

37. The applicant stated that the Minister for Justice had advised him, at a meeting, not to bring legal proceedings against the State.

38. On 6 October 1994 the committee responsible for examining the applicant's claim ordered a further inquiry with a view to establishing whether or not the criminals responsible for the death of the applicant's son could be deemed to be members of a "criminal organisation", which would have rendered applicable the statutory provisions on which the applicant relied.

The committee attached some weight to a report drawn up by the Prefect (*Prefetto*) of Milan stating that the bank robbery which had culminated in the murder of the applicant's son was not an isolated episode, but the workings of a criminal organisation operating in the area.

39. However, on 21 April 1995, on the basis of the results of the further inquiry, the above-mentioned committee ruled out the possibility that A. Mastromatteo's murder could be deemed to be the workings of a criminal organisation.

40. Relying on that negative opinion, the Ministry of the Interior rejected the applicant's claim for compensation.

41. On 25 July 1995 the applicant lodged a special appeal with the President of the Republic against the decision of the Ministry of the Interior.

42. On 20 November 1996 the *Consiglio di Stato* expressed the opinion that the appeal should be dismissed because the instant case did not involve terrorist acts or acts of a mafia-type criminal organisation within the meaning of Article 416*bis* of the Criminal Code.

43. On 24 February 1997 the President of the Republic dismissed the appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Measures facilitating reintegration (*benefici penitenziari*)

44. Act no. 663 of 10 October 1986 (known as the “Gozzini Act” after its sponsor) modified the Prison Act (Act no. 354 of 26 July 1975) in order to facilitate the return to the community of convicted prisoners.

45. Section 30*ter* (8) of the Prison Act provides that a prisoner may be granted prison leave on condition that he has behaved well in prison and is not a danger to society. According to the seriousness of the offences, the prisoner must have served an unsuspended period of his sentence before he or she can be deemed eligible for prison leave.

It is left to the judge responsible for the execution of sentences, who must consult the prison authorities, to determine whether or not the prisoner is a danger to society.

46. According to a circular of the Ministry of Justice dated 9 July 1990 on the application of the Gozzini Act, which reproduced two notes of 29 December 1986 and 30 May 1988, a measure facilitating reintegration could not be granted merely because no disciplinary penalties had been imposed; it also had to be established that the prisoner was genuinely willing to participate in the reintegration and rehabilitation programme. Furthermore, the assessment of whether the prisoner was a danger to society had to be based not only on the information provided by the prison workers, but also on the information available from the police where the judge, in his discretion, deemed such clarification necessary.

47. Legislative Decree no. 306 of 8 June 1992, which became Act no. 356 of 7 August 1992, introduced more stringent conditions in respect of offences committed by a criminal organisation.

The statute in question has ruled out, *inter alia*, the possibility of granting prison leave or other alternative measures to imprisonment where particularly serious offences (for example, mafia-type association) are concerned, unless the prisoner co-operates with the judicial authorities.

Where a prisoner convicted of aggravated armed robbery is concerned (Article 628 § 3 of the Criminal Code), the Act (section 4*bis* of the Prison Act) provides that no measure facilitating reintegration can be ordered if there is evidence of a link between the prisoner and organised crime.

The judge responsible for the execution of sentences must request information from the police; he shall in any event make a decision within thirty days of requesting the information.

48. A semi-custodial regime is an alternative measure to imprisonment (section 48 of the Prison Act) which allows the prisoner to spend part of the day outside the prison working or undertaking other activities which will facilitate his or her return to the community. The prisoner does not wear the prison uniform.

Under section 50 of the Prison Act a semi-custodial regime can be granted after an unsuspended period of imprisonment has been served, the length of which will vary according to the seriousness of the offence, and if the prisoner's behaviour has improved and the conditions for his or her progressive return to the community are met.

That measure may be granted by the court responsible for the execution of sentences. A programme is then drawn up by the governor of the prison concerned.

49. The statistics provided by the Government for the period 1991 to 2001 show that

(a) the percentage of prisoners on prison leave who have taken advantage of that measure to abscond has never exceeded 1.12%;

(b) the percentage of prisoners subject to the semi-custodial regime who have taken advantage of it to abscond has been below 2%; and

(c) the percentage of prisoners having committed an offence while subject to the semi-custodial regime and, accordingly, having been deprived of the alternative measure was 0.26% in 1999, 0.71% in 2000 and 0.12% in 2001.

B. Civil proceedings against judges

50. Act no. 117 of 1988 governs civil proceedings against judges. Section 2(3)(d) of that statute provides that proceedings can be brought against a judge if he or she has – intentionally or by an act of gross negligence – taken an inappropriate measure in the exercise of his or her duties.

C. Action for damages

51. Article 2043 of the Civil Code sets forth the principle of *neminem laedere*, which is a general duty not to harm others. Anyone who alleges

that he has sustained damage in breach of that principle may bring an action for damages.

D. Compensation under Act no. 302 of 1990

52. Act no. 302 of 1990 makes provision for state compensation for victims of terrorism and mafia-type criminal associations.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

53. The first paragraph of Article 2 of the Convention provides:

“Everyone's right to life shall be protected by law. ...”

54. The applicant accused the authorities of having contributed to creating the conditions for his son's murder by granting measures facilitating the reintegration of the criminals in question. He also complained that he had received no compensation from the State. In support of his claims the applicant relied on Article 2 of the Convention.

55. The Court is therefore required to rule on two separate issues, which it will examine in turn.

A. Alleged breach by the authorities of their duty to protect the right to life of the applicant's son

1. The parties' submissions

(a) The applicant

56. The applicant submitted that there had been a breach of the positive obligations to protect his son's life in that the Italian authorities had granted prison leave to very dangerous habitual offenders.

He alleged that the judges dealing with the applications for measures facilitating reintegration had not carried out an appropriate and proper examination of the prisoners' files, particularly with regard to the assessment of their dangerousness to society.

The applicant complained in particular that on 26 October 1989 the relevant judge had granted M.R. two days' prison leave, whereas A.C., his co-accused and former accomplice, who had been in the same prison, had

just taken advantage of that measure to abscond. In the applicant's submission, this amounted to serious negligence by the authorities.

57. According to the applicant, it was clear, furthermore, that neither G.M., while on his semi-custodial regime, nor M.R. and A.C., during their prison leave, had been supervised by the police authorities. Proof of that omission lay in the fact that the Government had not produced any record or other document evidencing the supervisory measures actually implemented.

58. Moreover, no effective measure had been taken to find A.C. and M.R. after they had absconded.

59. In the applicant's opinion, the facts of the present case clearly illustrated the lack of co-ordination and information between the prison services, the rashness and negligence of the police authorities, the inadequacy of the supervision carried out by the judges responsible for the execution of sentences and their errors of assessment.

60. The applicant pointed out, lastly, that although the prison policy of reintegrating prisoners could not in theory be criticised, the present case was a striking illustration of the problem of an inappropriate and wrongful use of the measures facilitating reintegration.

(b) The Government

61. The respondent Government submitted that the positive obligations under Article 2 of the Convention enjoined the State to adopt measures necessary to protect life and to set up a judicial system whereby responsibility could be established in the event of an attempt on someone's life, but that the State could not be required to prevent any possible violence.

In the instant case the authorities had done everything in their power to protect A. Mastromatteo's life and, after his death, had taken all measures necessary to identify and punish the murderers.

62. In the Government's submission, any possible violation could concern only the actions of M.R. and G.M., who were the only ones who had actively participated in the murder just after having been granted prison leave and semi-custodial treatment respectively.

63. The Government, which pointed out that a punishment also pursued a rehabilitative aim, submitted that the system of granting measures facilitating reintegration was compatible with the requirements of Article 2 of the Convention.

In that connection the Government argued that the relevant legislation was already compatible at the material time with the requirements of Article 2 in that it conferred on the judges responsible for the execution of sentences the power to make enquiries, if they saw fit, as to whether a prisoner had connections with the criminal milieu.

64. In the Government's submission, the impugned decisions of the judges responsible for the execution of sentences were in conformity with the statutory requirements.

65. With regard to the supervisory measures attached to the prison leave, although the respondent Government acknowledged that these alone could not prevent offences from being committed, they were nonetheless ordered after a favourable assessment by the judge and were therefore intended to place only a minimal restriction on the freedom of the prisoner who had temporarily been released.

66. The Government observed that, even acknowledging that there may have been some shortcomings on the part of the authorities, the link between those shortcomings and the death of A. Mastromatteo was objectively tenuous and subjectively unforeseeable.

The causal link was tenuous, they alleged, given the circumstances in which the victim died, namely, following a long series of coincidences and therefore fortuitous, unforeseen and unforeseeable incidents. Nothing indicated that the authorities could have known that A. Mastromatteo's life was really in danger.

2. *The Court's assessment*

(a) **General principles**

67. The Court reiterates at the outset that Article 2 enshrines one of the basic values of the democratic societies making up the Council of Europe (*McCann and Others*, judgment of 22 September 1995, Series A no. 324, p. 45, § 147).

The first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (*Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3159, § 115; see also *Tanribilir v. Turkey*, no. 21422/93, § 70, 16 November 2000; and *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, p. 1403, § 36).

The State's obligation extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

68. That does not mean, however, that a positive obligation to prevent every possibility of violence can be derived from this provision (see, *inter alia*, *Tanribilir*, cited above, § 71, and application no. 16734/90,

Commission decision of 2 September 1991, Decisions and Reports 72, at p. 243). Such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources (*Osman*, cited above, p. 3159, § 116).

Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. A positive obligation will arise, the Court has held, where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (*Osman*, cited above, p. 3159, § 116; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, ECHR 2002-III; and *Bromiley v. the United Kingdom* (dec.), no. 33747/96, 23 November 1999, unreported).

(b) Application to the present case

69. The situation examined in the *Osman* and *Paul and Audrey Edwards* cases concerned the requirement of personal protection of one or more individuals identifiable in advance as the potential target of a lethal act.

The instant case differs from those cases in that it is not a question here of determining whether the responsibility of the authorities is engaged for failing to provide personal protection to A. Mastromatteo; what is at issue is the obligation to afford general protection to society against the potential acts of one or of several persons serving a prison sentence for a violent crime and the determination of the scope of that protection.

70. The Court must first determine whether the system of alternative measures to imprisonment engages in itself the responsibility of the State under Article 2 of the Convention for the death of a passer-by inflicted by prisoners serving sentences for violent crimes who had been granted prison leave in accordance with that system.

71. The Court notes that the murder of A. Mastromatteo was committed by M.R., aided and abetted by G.M. and G.B. Only M.R. and G.M. were prisoners, the former being on prison leave and the latter benefiting from a semi-custodial regime. Accordingly, only the conduct of those two criminals may potentially engage the responsibility of the State for breach of the duty to protect life.

72. One of the essential functions of a prison sentence is to protect society, for example by preventing a criminal from re-offending and thus causing further harm. At the same time the Court recognises the legitimate aim of a policy of progressive social reintegration of persons sentenced to

imprisonment. From that perspective it acknowledges the merit of measures – such as temporary release – permitting the social reintegration of prisoners even where they have been convicted of violent crimes.

The Court observes in this regard that, in the Italian system, before a prisoner is eligible for prison leave, he must have served a minimum period of imprisonment, the period being dependent on the gravity of the offence of which he was convicted. Furthermore, under section 30^{ter} (8) of the Prison Act, prison leave may be granted to a prisoner only if he has been of good behaviour while in prison and if his release would not present a danger to society. In this connection the mere absence of disciplinary punishments is not sufficient to justify the grant of measures facilitating reintegration, the prisoner being required to show a genuine willingness to participate in the reintegration and rehabilitation programme. The assessment of a prisoner's dangerousness to society is left to the judge responsible for the execution of sentence, who is obliged to consult the prison authorities. Such an assessment must be based not only on information furnished by the prison authorities but also on information available from the police when the judge considers this to be necessary.

In addition, Act no. 356, which makes special provision for the case of crimes committed by members of a criminal association, excludes the possibility of prison leave or other measure alternative to imprisonment in the case of particularly serious offences, at least in cases where the offender has not co-operated with the judicial authorities. Moreover, if a prisoner has been convicted of aggravated armed robbery, prison leave may not be granted if there is evidence of a link between the prisoner and organised crime. The judge responsible for the execution of sentences is required to request information from the police and in any case to take his or her decision within thirty days of such request (see paragraphs 44-48 above).

The Court considers that this system in Italy provides sufficient protective measures for society. It is confirmed in this view by the statistics supplied by the respondent State, which show that the percentage of crimes committed by prisoners subject to a semi-custodial regime is very low, as is that of prisoners absconding while on prison leave (see paragraph 49 above).

73. Accordingly, there is nothing to suggest that the system of reintegration measures applicable in Italy at the material time must be called into question under Article 2.

74. It remains to be seen whether the adoption and implementation of the decisions to grant M.R. prison leave and G.M. semi-custodial treatment disclose a breach of the duty of care required in this area by Article 2 of the Convention.

In that regard it is clear that if M.R. and G.M. had been in prison on 8 November 1989, A. Mastromatteo would not have been murdered by them. However, a mere condition *sine qua non* does not suffice to engage

the responsibility of the State under the Convention; it must be shown that the death of A. Mastromatteo resulted from a failure on the part of the national authorities to “do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge” (*Osman*, cited above, para. 116), the relevant risk in the present case being a risk to life for members of the public at large rather than for one or more identified individuals.

75. In that connection the Court notes that the Alessandrian judge responsible for the execution of sentences took his decision with regard to M.R. on the basis of the reports by the prison authorities, which were satisfied with M.R.'s behaviour, his rehabilitation and his willingness to reintegrate (see paragraph 15 above).

In the case of G.M., the Venice court responsible for the execution of sentences relied on the reports by the prison authorities, which had been satisfied with the prisoner's behaviour and rehabilitation, on the success of the previous periods of prison leave and on the police's approval of the professional activity G.M. would be undertaking (see paragraph 20 above).

76. The Court considers that there was nothing in the material before the national authorities to alert them to the fact that the release of M.R. or G.M. would pose a real and immediate threat to life, still less that it would lead to the tragic death of A. Mastromatteo as a result of the chance sequence of events which occurred in the present case. Nor was there anything to alert them to the need to take additional measures to ensure that, once released, the two did not represent a danger to society.

Admittedly, M.R. was granted prison leave after his former accomplice, A.C., had taken advantage of the prison leave granted by the same judge to abscond. However, this fact alone cannot in the view of the Court suffice to establish a special need for caution when deciding to release M.R., in the absence of material showing that the authorities should reasonably have foreseen that the two would conspire together to carry out a crime which would result in the loss of life.

77. In these circumstances the Court does not find it established that the prison leave granted to M.R and G.M. gave rise to any failure on the part of the judicial authorities to protect A. Mastromatteo's right to life.

78. With regard to the allegedly negligent conduct of the police, the evidence shows that M.R. was subject to the type of supervision normally envisaged when prison leave is granted (see paragraph 16 above).

After M.R., and moreover A.C., had absconded, “wanted” notices were circulated according to the method generally used in such cases (see paragraph 17 above).

Even supposing that the authorities could have taken more effective measures to find the fugitives, the Court does not see any reason to hold them liable for any breach of the duty of care required by Article 2 of the Convention.

79. In the light of these considerations, the Court considers that there has not been a violation of Article 2 of the Convention under this head.

B. Alleged breach of procedural obligations under Article 2

1. The parties' submissions

(a) The applicant

80. The applicant criticised the authorities for not awarding him compensation for the death of his son.

He acknowledged that domestic law afforded him the possibility of suing the criminals for damages in the civil courts, but submitted that he had not availed himself of that possibility because, having regard to their very poor financial situation, such a claim was doomed to failure.

81. The applicant observed that he had not availed himself of the remedy provided by the Judges' Liability Act either because a judge's liability was engaged only where malice or gross negligence could be made out, which meant that the admissibility of claims was subject to a very stringent filtering process.

82. Lastly, with regard to a claim for damages against the State, the applicant stated that he had been discouraged from pursuing such a claim by a representative of the Ministry of Justice.

(b) The Government

83. The Government observed that three remedies had been available to the applicant to seek compensation for the death of his son and that he had not used any of them.

84. Firstly, the applicant could have sued the criminals in the civil courts.

85. Secondly, the applicant could have sued the judges responsible for the execution of sentences under Act no. 177 of 1988.

86. The Government submitted lastly that, even supposing that the applicant had been discouraged from suing the State for damages by a representative of the Ministry of Justice, nothing had prevented him from doing so.

87. In conclusion, the Government alleged that the remedies available under domestic law were sufficient for the purposes of Article 2 of the Convention.

2. The Court's assessment

88. The Court considers that the applicant complained essentially about not having received compensation from the State for the death of his son, who had been the victim of a violent crime.

Since the applicant has not based his complaint on Article 13 of the Convention, the Court will examine it from the standpoint of the procedural obligations under Article 2.

(a) General principles

89. The Court reiterates that the positive obligations laid down in the first sentence of Article 2 of the Convention also require by implication that an efficient and independent judicial system should be set in place by which the cause of a murder can be established and the guilty parties punished (see, *mutatis mutandis*, *Calvelli and Ciglio v. Italy*, [GC], no. 32967/96, ECHR 2002, § 51). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Paul and Audrey Edwards*, cited above, §§ 69 and 71).

90. The form of investigation may vary according to the circumstances. In the sphere of negligence, a civil or disciplinary remedy may suffice (see *Calvelli and Ciglio*, cited above, § 51).

91. In an investigation into a death for which State agents or authorities are allegedly responsible, it is necessary for the persons responsible for the investigation to be independent from those implicated in the events. This means hierarchical or institutional independence and also practical independence (*Paul and Audrey Edwards*, cited above, § 70).

(b) Application to the present case

92. In the instant case the Court finds that a procedural obligation arose to determine the circumstances of A. Mastromatteo's death. Indeed, two of the murderers were prisoners and were in the custody of the State at the material time.

93. The Court notes that the Italian authorities began and completed an investigation satisfying the above criteria, and that M.R. and G.M. were convicted of A. Mastromatteo's murder and given long sentences. Furthermore, M.R. and G.M. were ordered to compensate the applicant, who had lodged a claim for damages in the proceedings, that is, to make him a down payment immediately on the amount that the civil courts would subsequently determine at the applicant's request.

In these circumstances, the Court considers that the Italian State satisfied the obligation under Article 2 of the Convention to guarantee a criminal investigation.

94. The question which arises in the instant case is whether, in addition to punishing the murderers, the procedural obligations under Article 2 of the

Convention extend to requiring a remedy by which a claim can be lodged against the State.

95. The Court notes that the applicant sought compensation in connection with the nature of the crime committed by the criminals and that his claim was dismissed on the ground that the statute providing for assistance to victims of mafia-type or terrorist crimes was not applicable to the case (see paragraphs 36-43 above).

However, the applicant could have sued the authorities for negligence. In that connection the Court notes that, under Italian law, two remedies were available for lodging a claim for damages against the authorities: an action against the State under Article 2043 of the Civil Code and an action against the judges responsible for the execution of sentences under the Judges' Liability Act no. 117 of 1988 (see paragraphs 50-51 above).

It is true that these remedies are available only on proof of fault on the part of the relevant authorities. However, the Court observes that Article 2 of the Convention does not impose on States an obligation to provide compensation on the basis of strict liability and the fact that the remedy under Act no. 117 of 1988 is made dependent on proof of malice or gross negligence on the part of the judge in question is not such as to render the procedural protection afforded under domestic law ineffective. This is the more so since in the present case the actual effectiveness of the two remedies cannot be assessed because the applicant did not use either of them.

96. In the light of these considerations, the Court considers that the procedural requirements under Article 2 of the Convention have been satisfied.

97. In conclusion, there has not been a violation of Article 2 of the Convention under this head either.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that there has not been a violation of Article 2 of the Convention with regard to the preventive measures;
2. *Holds*, by sixteen votes to one, that there has not been a violation of Article 2 of the Convention with regard to the procedural guarantees.

Done in French and in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 October 2002.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the partly dissenting opinion of Mr G. Bonello is annexed to this judgment.

L.W.
P.J.M.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

1. The novelty and complexity of the issues raised by this case make it difficult for me to assert definitive views. Exiting the labyrinth was arduous, and I pay tribute to the majority who suffered less in finding the way.

2. The facts of the case are virtually undisputed. On 8 November 1989 the applicant's son was murdered by a gang of four criminals following the hold up of a bank. The marksman who actually shot the victim dead, and two of the members of the armed band, carried out the bank robbery during special prison leave, or while benefiting from a regime of semi-liberty which enabled them to leave prison where they were serving long terms of incarceration for violent crime.

3. In particular, the prisoner M.R., who actually killed A. Mastromatteo, was at the material time undergoing a sentence of over fifteen years for attempted murder, armed robbery and other offences. The court, in condemning him, had considered him as “socially dangerous”. A.C., previously convicted of murder, was, at the material time, serving an eleven-year prison sentence for armed robbery committed in league with M.R. G.M. was (better: should have been) in prison for six years for aiding and abetting armed robbery and other offences. G.B., the last comrade in the pack, had assembled a portfolio of excellent convictions for armed robbery and other delights, but was not in detention at the relevant time.

4. I followed the majority in finding no “substantive” violation of the right to life for which the State is responsible, solely because of the impossibility of locating, in accordance with the Court's case-law as it stands today, the compelling causal link between the failures by the State and the death of the victim, which would justify a finding of a “substantive” breach of Article 2.

5. I parted with the comity of the majority, however, in that I voted for a “non-substantive” violation of that Article. I believe the Court could, and should, have held that the “procedural obligations” inherent in Article 2 include a duty by the State to offset harm suffered by the victims of murder in cases where a State's “strict” (or objective) liability is engaged.

6. To avoid misunderstandings, let me emphasise at the outset my unswerving support for any system that aims at the reintegration of convicts into the fold of society. I applaud Italy's brave measures directed at the re-socialisation of prisoners, including regimes of semi-liberty and controlled temporary releases from prison. It would be at least foolish to suggest that, because of a minimal incidence of failures, measures as rewarding as these should be scrapped.

7. These “rehabilitation” programmes are seen to serve a dual range of interests: those of the State, which benefits from a compression of criminality, and those of the delinquents themselves, who are introduced to alternatives to a life of crime. The fundamental question, to me, is, however another: must the State promote only *two* interests, as the majority suggests, or *three*? Must it only aim at protecting its own concerns and at the same time fostering those of criminals – or, must it aspire to complementing these two admittedly hallowed values with those of the (sporadic) victims of the system?

8. It is my view that the Italian legal framework has been particularly generous in advancing its own, and the criminals', interests and particularly uncaring of those of the victims when the system fails. My colleagues have, rightly, given a loud voice to the concerns of society and to those of criminals. At the risk of dissonating the choir, I ask for the victims of this class of crimes to have voices too.

9. A State, I submit, does not adequately ensure to everyone the enjoyment of the right to life when it puts in place machinery which benefits society and criminals if it works properly and, when it does not, overlooks the fate of its victims. For the balancing of appropriate values to have any equitable meaning at all, I would want the re-socialisation of the criminal to go hand in hand with the socialisation of the risk. Even when no liability attaches to the State in tort, one surely arises from the inherent hazards of social measures such as those at issue.

10. Italy has acknowledged in various areas and in a concrete manner an enlightened deference to the exigencies of “strict liability”, independently of tortious liability. Italy recognises a legal obligation to compensate, among others, the victims of organised crime, of compulsory inoculations, of terrorism and of contaminated blood transfusions. In these spheres the State's liability in tort is far, but far, more tenuous than it is in the case of felonies committed by prisoners recklessly released from detention through official errors of judgement. I find it at least arbitrary, if not discriminatory, that compensation is available when the State's culpability can be perceived as minute, and denied when it is the consequence of fatal aberrations of the system. A humanising spirit of solidarity, translated into legal norms, drives the Italian State – a spirit which then sadly grinds to a halt on the doorstep of innocent victims of shoot-outs by convicts on parole.

11. In my view, the obligation to protect life extends to interfacing the State's own advantages in safeguarding society and rehabilitating offenders with a corresponding duty to make damage good, when the promotion of the first values – exceptionally – results in the harm of those sacrificed in the pursuit of those interests.

12. The issue of state liability not based on fault, but solely on “social risk” in case of crimes committed by convicts who are temporarily out of prison in pursuance of re-socialisation measures, has rarely come up for

determination by the courts. I am aware of two decisions – both by tribunals in France – where coverage for objective liability of the State seems to have been built into the system by case-law. In the first, three convicts on temporary release from prison carried out a successful hold up of a bank¹; in the other, a prisoner committed a murder six months after absconding, having abused of temporary prison leave².

13. In the first case the court found the State liable for the damage suffered by the bank, precisely because measures to re-socialise convicts necessarily entail risks to third parties and the State steps in as the insurer of social hazards. In the second case no damages were awarded, but only because the interval of six months between the prisoner's premature release and the murder had considerably weakened the link of causation.

14. I find it rather distressing that a bank's right to its money found more sympathy in a court of ordinary law than a man's right to his life found in a court of human-rights law.

15. I underscore that I joined the majority in finding no “substantive” violation of Article 2 without any enthusiasm. I am well aware that, at this early stage of the Court's case-law, a finding of a substantive breach would appear unwarranted and, possibly, audacious. I consider the reasoning of the Court, if taken in the wake of its own previous rulings, sufficiently compelling. My grudging agreement with the majority on this issue is, however, qualified by various considerations which I feel I have to place on record.

16. There is hardly any doubt in my mind that the granting of temporary licences to leave prison, and the benefit of semi-liberty, to three of the convicted delinquents who coalesced to pirate the life of young Mastromatteo was nothing but a fatal blunder on the part of the judges charged with the execution of sentences. The constraints of civilised society had temporarily deprived these three wrongdoers of their freedom of malefaction; the guardians of justice had, after due process, held their grievous and repeated propensity to violent crime against them. In fact, the court that jailed M.R. awarded him a gilt-edged diploma of “socially dangerous” as a testimonial of his past achievements. This was known to the judges who authorised their untimely release. The gates of prison were then opened for them.

17. An authority which reaches the conclusion that a sentence of confinement meted out by the court of the land to a convicted criminal ought to be temporarily put aside does so assuming the responsibilities

1. *Garde des Sceaux*, Minister for Justice v. Banque populaire de la région économique de Strasbourg – *Conseil d'Etat* 29 April 1987.

2. *Garde des Sceaux* v. Henry – *Conseil d'Etat*, 27 March 1985. See also Minister for Justice v. Thouzellier (damage caused by minors who had escaped from a secure reform school, *Conseil d'Etat*, 3 February 1956, and *Garde des Sceaux* v. Theys (damage caused by convicts on prison leave) - *Conseil d'Etat*, 2 December 1981.

inherent in that decision. If the ruling turns out to be misinformed and causes mischief to innocent third parties, the onus of establishing justification should, in my view, shift to the State. It is not for the victim to prove the State's liability. It is for those organs of the State responsible for the premature liberation of criminals to disprove it.

18. In the present case I perceive it particularly difficult for the State to whitewash the error of judgement committed by the judges who authorised the release of reoffenders already convicted of murder, attempted murder, complicity in attempted murder, and armed robbery, one a card-carrying member of the elite league of “socially dangerous”. This is the more so since the judge who authorised the release of M.R. (“socially dangerous”) did so at a time when A.C., his historic accomplice in crime previously convicted for murder, had already absconded, having abused his prison leave, and was at large, compliments of the State. That this combination of red alerts flashed no warning lights points to an insouciance as injudicious as it was short-sighted.

19. The stark killing of young Mastromatteo goes some way to confirming that the judges who authorised the release of the criminals made shabby use of the discretion which Italian law entrusted them to exercise. They judged that the State owed faith and credit to those who deserved diffidence and scepticism. The law subjects the temporary release of convicts from prison to the judge's informed persuasion that the person to benefit from that measure displayed no “social danger”. In the present case the judge so believed. A judgmental fiasco carrying the price tag of one human life.

20. The murder was committed some time *after* the authorised period of leave had elapsed, without the convicts returning to jail. No substantial effort appears to have been invested by the police to recapture the “socially dangerous” prisoners on the run, before gunshot and the spent cadaver of a young man attracted some attention.

21. I believed it to be an indisputable axiom of law that in case of fault or negligence from which harm results, it is the lapser who pays. It seems however that the Court's case-law can be made to justify other, more nonconformist, solutions. In the present murder, the one who paid for the failings of the State was not their author, but their victim. Perhaps because it was not a case of fault or negligence, but one of fault *and* negligence. It is with overwhelming rational bewilderment and considerable legal perplexity that I have found myself identifying with this.