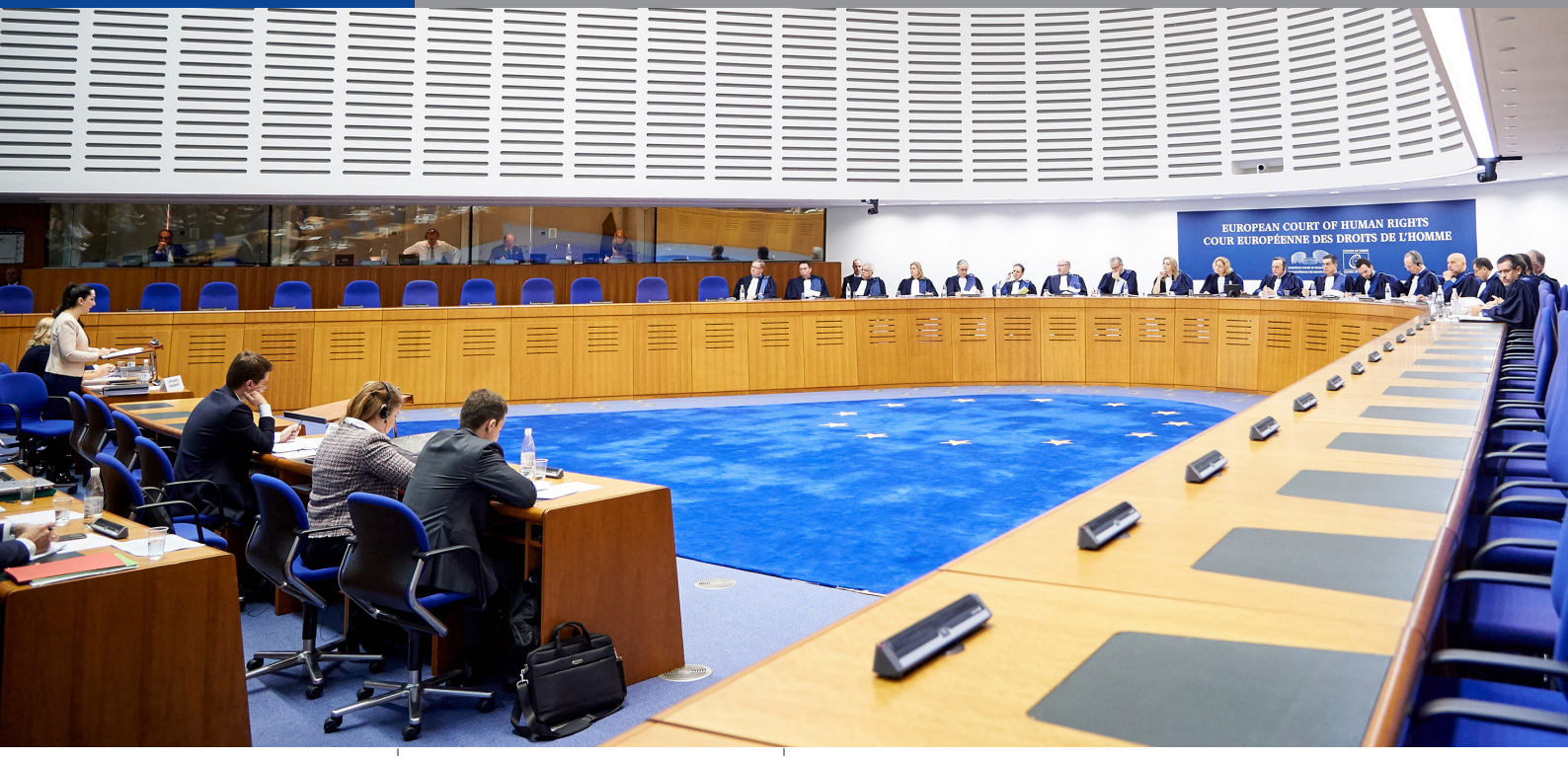
228

April
2019
Avril

INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour



The Court's monthly round-up of case-law, news and publications

Le panorama mensuel de la jurisprudence, de l'actualité et des publications de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

1949.2019

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

The Information Note contains legal summaries of the cases examined during the month in question which the Registry considers to be of particular interest. The summaries are drafted by Registry's lawyers and are not binding on the Court. They are normally drafted in the language of the case concerned. The translation of the legal summaries into the other official language can be accessed directly through hyperlinks in the Note. These hyperlinks lead to the HUDOC database, which is regularly updated with new translations. The electronic versions of the Note (in PDF, EPUB and MOBI formats) may be downloaded at www.echr.coe.int/NoteInformation/en.

Legal summaries published in the Case-Law Information Notes are also available in HUDOC, under "Legal Summaries" in the Document Collections box. The HUDOC database is available free-of-charge through the Court's Internet site (http://hudoc.echr.coe.int). It provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), the European Commission of Human Rights (decisions and reports) and the Committee of Ministers (resolutions).

An annual index provides an overview of the cases that have been summarised in the monthly Information Notes. The index for 2019 is cumulative and is regularly updated.

-ooOoo-

La Note d'information contient les résumés d'affaires dont le greffe de la Cour a indiqué qu'elles présentaient un intérêt particulier. Les résumés sont rédigés par des juristes du greffe et ne lient pas la Cour. Ils sont en principe rédigés dans la langue de l'affaire concernée. Les traductions des résumés vers l'autre langue officielle de la Cour sont accessibles directement à partir de la Note d'information, au moyen d'hyperliens pointant vers la base de données HUDOC qui est alimentée au fur et à mesure de la réception des traductions. Les versions électroniques de la Note (en format PDF, EPUB et MOBI) peuvent être téléchargées à l'adresse suivante : www.echr.coe.int/NoteInformation/fr.

Les résumés juridiques publiés dans la Note d'information sur la jurisprudence de la Cour sont également disponibles dans la base de données HUDOC, sous la catégorie de documents « Résumés juridiques ». La base de données HUDOC, disponible en libre accès à partir du site internet de la Cour (http://hudoc.echr.coe.int), permet d'accéder à la jurisprudence de la Cour européenne des droits de l'homme (arrêts et décisions de Grande Chambre, de chambre et de comité, affaires communiquées, avis consultatifs et résumés juridiques extraits de la Note d'information sur la jurisprudence), de la Commission européenne des droits de l'homme (décisions et rapports) et du Comité des Ministres (résolutions).

Un index annuel récapitule les affaires résumées dans les Notes d'information. L'index pour 2019 est cumulatif ; il est régulièrement édité.

European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex – France
Tel: + 33 (0)3 88 41 20 18
Fax: + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
twitter.com/echrpublication
RSS feeds

For publication updates, please follow the Court's Twitter account at twitter.com/echrpublication

Photos: Council of Europe

Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)

Cour européenne des droits de l'homme
(Conseil de l'Europe)
67075 Strasbourg Cedex – France
Tél. : + 33 (0)3 88 41 20 18
Fax : + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
twitter.com/echrpublication
Fils RSS

Pour toute nouvelle information relative aux publications, veuillez consulter le compte Twitter de la Cour : twitter.com/echrpublication

Photos : Conseil de l'Europe

Couverture : vue intérieure du Palais des droits de l'homme (architectes : Richard Rogers Partnership et Atelier Claude Bucher)

TABLE OF CONTENTS / TABLE DES MATIÈRES

Article 5 § 4

Speediness of review/Contrôle à bref délai

- Automatic review of immigration detention not held within seven working days as required by domestic law: *no violation*
- Absence de contrôle automatique d'une rétention administrative dans le délai de sept jours ouvrables prévu par le droit interne : *non-violation*

ARTICLE 6

Article 6 § 1 (civil)

Oral hearing/Tenue d'une audience

- Proceedings brought by prison authorities, requesting presence of official during prisoner's consultations with lawyer, held without oral hearing or seeking submissions: *violation*
- Procédure entamée par les autorités carcérales pour pouvoir imposer la présence d'un fonctionnaire lors d'entretiens détenu-avocat, tenue sans audience ni demande d'observations : *violation*

ARTICLE 8

Respect for private life/Respect de la vie privée

- Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother
- Avis consultatif relatif à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention

- Official present during consultations between prisoner and his lawyer: *violation*
- Présence d'un fonctionnaire lors des entretiens entre un détenu et son avocat : *violation*

- Use of surgical symphysiotomy in Irish maternity hospitals: *communicated*
- Recours à la symphysiotomie chirurgicale dans les maternités irlandaises : *affaire communiquée*

- Alleged lack of legal basis for the withdrawal of the right to drive motor vehicles: *communicated*
- Défaut alléguée de base légale du retrait du droit de conduire des véhicules à moteur : *affaire communiquée*

Respect for family life/Respect de la vie familiale

- Transfer of child back to biological parents after nine years in care of foster mother: *no violation*
- Foster mother and children denied access to child following his transfer to biological parents after nine years in foster care: *violation*
- Retour d'un enfant auprès de ses parents biologiques après neuf ans passés auprès d'une mère nourricière : *non-violation*

- Mère nourricière et enfants privés de contacts avec un enfant à la suite de son retour auprès de ses parents biologiques, après neuf ans dans une famille d'accueil : *violation*

- Refusal to allow a prisoner convicted of terrorist offences to leave prison under escort to pay her respects to her late father: *no violation*
- Refus d'autoriser la sortie de prison sous escorte d'une détenue pour actes terroristes pour se recueillir sur la dépouille de son père : *non-violation*

Expulsion

- Review of proportionality overly superficial in the expulsion of a convicted person who had become an invalid dependent on his children: *expulsion would constitute a violation*
- Contrôle de proportionnalité trop superficiel dans l'expulsion d'un condamné pour crime, devenu invalide et dépendant de ses enfants : *l'expulsion emporterait violation*

ARTICLE 10

Freedom of expression/Liberté d'expression

- Ban on access to means of communication during house arrest without connection to requirements of criminal investigation: *violation*
- Interdiction visant l'accès aux moyens de communication pendant l'assignation à résidence dénuée de lien avec les exigences de l'enquête pénale : *violation*

ARTICLE 13

Effective remedy/Recours effectif

- Absence of effective remedy for allegations of inhuman conditions of transport of prisoners: *violation*
- Absence de recours effectif relativement à des allégations de conditions inhumaines de transport de détenus : *violation*

ARTICLE 15

Derogation in time of emergency/Dérogation en cas d'état d'urgence

- Detention based on mere suspicion of membership of an illegal organisation, without any specific incriminating evidence: *not "strictly required"*
- Détention fondée sur le simple soupçon d'appartenance à une organisation illégale, sans éléments à charge concrets : *« stricte mesure » dépassée*

ARTICLE 18

Restriction for unauthorised purposes/Restrictions dans un but non prévu

- Political activist's house arrest with restrictions on communication, correspondence and use of Internet, aimed at suppressing pluralism: *violation*
- Assignation à résidence d'un militant politique, avec des restrictions concernant la communication, la correspondance et l'usage d'internet, dans le but d'éliminer le pluralisme : *violation*

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/Épuisement des voies de recours internes
Effective domestic remedy – France/Recours interne effectif – France

- Effectiveness of a suspensive remedy, in respect of an asylum request submitted after the application had been lodged with the Court: *admissible*
- Effectivité d'un recours suspensif, concernant une demande d'asile réalisée après la saisine de la Cour : *recevable*

Exhaustion of domestic remedies/Épuisement des voies de recours internes
Effective domestic remedy – Hungary/Recours interne effectif – Hongrie

- Effectiveness of constitutional complaint to challenge either application of legislation in court proceedings or court rulings, both allegedly contrary to the Fundamental Law: *inadmissible*

ARTICLE 2

Life/Vie
Effective investigation/Enquête effective

Alleged responsibility of Russia in the downing of a plane over eastern Ukraine and alleged lack of effective investigation: *communicated*

Responsabilité alléguée de la Russie dans l'explosion d'un avion en vol au-dessus de l'est de l'Ukraine et absence alléguée d'enquête effective : *affaire communiquée*

Ayley and Others/et autres – Russia/Russie, 25714/16 and 56328/18, Communication [Section III]

Traduction française du résumé | Printable version

In July 2014 there was intense fighting between the forces of the government of Ukraine and separatist forces in eastern Ukraine. On 17 July 2014 Malaysia Airlines commercial flight MH17 disintegrated in the air over the territory of eastern Ukraine. All persons on board died.

The 380 applicants are relatives of persons who were on that plane. According to them, the separatist entities in eastern Ukraine were either under the control of the authorities of the Russian Federation or operated in very close cooperation with them.

Although Russia has repeatedly denied any involvement in the destruction of the aircraft, the applicants allege, in particular, that the Russian Federation was responsible for the destruction of the plane and for their relatives' deaths, either directly or indirectly, and failed to investigate the disaster properly or to cooperate with other international investigations.

Communicated under Article 2 (substantive and procedural aspects) and under Articles 3, 8 and 13 of the Convention.

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Conditions of transport of prisoners: *violation*

Conditions de transport de détenus : *violation*

Tomov and Others/et autres – Russia/Russie, 18255/10 et al., Judgment | Arrêt 9.4.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The applicant prisoners complained about the inhuman and degrading conditions in which they had been transported by road and rail and about the lack of effective means of redress for their complaints.

Law – Article 3

(1) *The Government's request that three applications be struck out of the list of cases on the basis of unilateral declarations* – Although the Court had already adjudicated similar issues in many previous cases and had clarified the nature of the Russian authorities' obligations under the Convention, it continued to receive significant numbers of meritorious applications of that kind. Acceptance of the Government's request would leave the current situation unchanged, without any guarantee that a genuine solution would be found in the near future. Nor would it advance the fulfilment of the Court's task under Article 19, namely to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto". The request to strike the applications out of the list had therefore to be rejected.

(2) *Merits*

(a) *Summary of the approach to be taken* – Whether there had been a violation of Article 3 could not be reduced to a purely numerical calculation of the space available to a detainee during the transfer. Only a comprehensive approach to the particular circumstances of the case could provide an accurate picture of the reality for the person being transported. Nevertheless a strong presumption of a violation arose when detainees were transported in conveyances offering less than 0.5 square metres of space per person. The low height of the ceiling, especially of single-prisoner cubicles, which forced prisoners to stoop, could exacerbate physical suffering and fatigue. Inadequate protection from outside temperatures, when prisoner cells were not sufficiently heated or ventilated, would constitute an aggravating factor. The strong presumption of a violation of Article 3 was capable of being rebutted only in the case of a short or occasional transfer. By contrast, the adverse effects of overcrowding had to be taken to increase with longer duration and greater frequency of transfers, making the applicant's case of a violation stronger.

As regards longer journeys, such as those involving overnight travel by rail, the Court's approach would be similar to that applicable to detention in stationary facilities for a period of a comparable duration. Even though a restricted floor space could be tolerated because of multi-tier bunk beds, it would be incompatible with Article 3 if prisoners forfeited a night's sleep on account of an insufficient number of sleeping places or otherwise inadequate sleeping arrangements. Factors such as a failure to arrange an individual sleeping place for each detainee or to secure an adequate supply of drinking water and food or access to the toilet seriously aggravated the situation of prisoners during transfers and were indicative of a violation of Article 3.

(b) *Application in the present cases*

(i) *The four male applicants* – Each journey had involved at least one overnight train ride during which only six sleeping places had been available in the large compartments and three in the small ones. Prisoners outnumbered the available sleeping places sometimes by a factor of two, and the sixty-centimetre bunks were too narrow to accommodate more than one person under normal conditions. The "bridge" half-bunk was too short for the average person and, being positioned at chest level, it impeded movement in an already overcrowded compartment and prevented passengers from standing upright. The applicants had been deprived of a night's rest on one or more consecutive nights because of insufficient sleeping places. That in itself was indicative of inhuman and degrading treatment that violated Article 3, but there had been several additional factors which had to have aggravated their plight.

Firstly, three of the applicants had spent at least fifteen hours locked inside an unheated compartment at sub-zero outside temperatures. Secondly, two toilet visits and three pots of water per day for the entire duration of a sixty-two-hour journey could not be considered an adequate arrangement. Thirdly, all four applicants had been transported to and from the train station in multi-prisoner cells of a standard prison van. On each occasion the travel time had been between one and two and a half hours and each prisoner had had less than 0.5 square metres of floor space at his disposal. Such conditions immediately preceded or followed a train journey in conditions which the Court had found to constitute inhuman and degrading treatment.

(ii) *The two female applicants* – The applicable regulations required that certain categories of vulnerable detainees, including women, be transferred separately from other prisoners. Multi-prisoner cells were routinely allocated to male prisoners, while female prisoners were relegated to cramped metal cubicles for the duration of transfers. As a consequence, the female applicants had been placed in single-prisoner cubicles measuring 0.325 square metres.

One of the female applicants had had to travel in one such cubicle no fewer than seven times over a three-week period. The fact that she had routinely spent up to two hours in such a confined space was sufficient on its own to justify the finding of a violation of Article 3. In addition, the applicant, who suffered from diabetes and was overweight, and as such required a generous allocation of seating space and good access to ventilation, had had to share the cubicle with another woman.

The second female applicant had undergone at least ten transfers over a two-month period, spending a total of one hour and ten minutes in a single-prisoner cell on each journey on the way to and from court hearings. The cell had been assembled from metal sheets that formed a fully enclosed cubicle with air holes in the door. There was no heating inside the cell and the cold was transferred from the outside.

(iii) *Conclusion* – All the applicants had been transported in conditions that had appeared to be compatible with the requirements of the domestic regulations. It had not been claimed that any officials had sought to cause them hardship or suffering. However, even in the absence of an intention to humiliate or debase the applicants, the actual conditions of transfer had had the effect of subjecting them to distress of an intensity exceeding the unavoidable level of suffering inherent in detention. Those conditions undermined their human dignity, and that treatment had to be characterised as "inhuman and degrading".

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 3: The complaints of inhuman or degrading conditions of detention and those concerning conditions of transport were relevantly similar as regards the types of remedies that were in theory available for such grievances in the Russian legal system. The Court's findings regarding the effectiveness of the domestic remedies in conditions-of-detention cases were accordingly applicable in the applicants' case with certain qualifications relating to the short duration of transfers.

As regards complaints which detainees could address to commanders of the escorting unit, hierarchical superiors did not have a sufficiently independent standpoint to consider complaints that called into question the way in which they discharged their duty to maintain the appropriate conditions of detention or transport. A complaint could also be sent to the federal or regional ombudsperson's office or a public monitoring commission. However, those bodies were not vested with the authority to issue legally binding decisions.

Railways fell under the jurisdiction of transport prosecutors who were tasked with supervising the application of laws and ensuring respect for human rights and freedoms. However, infringement reports or orders issued by a prosecutor were primarily matters between the supervising authority and the supervised body and were not geared towards providing preventive or compensatory redress to the aggrieved individual. There was no legal requirement compelling the prosecutor to hear the complainant or to ensure his or her effective participation in the ensuing proceedings.

However diligently the proceedings before courts were conducted, they would normally conclude too late to be able to put an end to a situation involving an ongoing violation. Unlike the conditions in a remand prison or penal facility which the prisoner endured for months or years, transfers took a much shorter time, in the range of days or weeks. Nevertheless, the fact that the courts could take cognisance of the merits of the complaint even after the end of a transfer, establish the facts and make redress tailored to the nature of the violation made the judicial remedy prima facie accessible and capable, at least in theory, of affording appropriate compensatory redress. However, aspects of proceedings before the Russian courts were particularly problematic.

The provisions of the Civil Code on tort liability imposed special rules on compensation for damage caused by State authorities and officials. They required the claimant to show that the damage had been caused through an unlawful action or omission on the part of the specific State authority or official. That requirement established an unattainable burden of proof. The Russian courts' approach was unduly formalistic based as it was on the requirement of formal unlawfulness of the authorities' actions. The accessibility of the regulatory framework establishing normative conditions of transport had been classified "for service use only" and as such was not accessible to prisoners claiming a breach of their rights.

The framework of judicial proceedings in its present state did not allow claimants an adequate opportunity to prove their allegations of inhuman or degrading conditions of transport, to prevent repetition of similar violations or to recover damages in that connection. Judicial proceedings in connection with inhuman or degrading conditions of transport did not satisfy the criteria of an effective remedy that offered a reasonable prospect of success.

Conclusion: violation (unanimously).

Article 46

(1) *Whether there existed a structural problem calling for the adoption of general measures* – The Court had found a violation of Article 3 on account of prisoners' transport conditions in over fifty cases. In many of those cases it had also found a violation of Article 13 due to the absence of an effective remedy. More than 680 prima facie meritorious applications were now pending before the Court in which the main or secondary complaint related to alleged inadequate conditions of transportation. The above numbers, taken on their own, were indicative of the existence of a recurrent structural problem.

The violations of Article 3 found in the previous judgments had originated in geographically diverse regions of the Russian Federation. However, the set of facts underlying those violations had been substantially similar: an acute lack of personal space during transportation, inadequate sleeping arrangements, dysfunctional heating and restricted access to sanitary facilities. The violations found stemmed chiefly from an unwavering application of the domestic normative framework.

Notwithstanding a trend towards an improvement in the conditions of transport and an overall reduction of the prisoner population in Russia, the urgency of the problem had not abated. It was of grave concern that no domestic remedies had been made available more than six years after the judgment in *Ananyev and Others v. Russia* in which the Court had required that such remedies be introduced in respect of a relevantly similar issue of inhuman and degrading conditions of detention. Taking into account the recurrent and persistent nature of the problem, the large number of people affected, and the urgent need to grant them speedy and appropriate redress at the domestic level, the Court considered that repeating its findings in similar individual cases would not be the best way to achieve the Convention's purpose. It was compelled to address the underlying structural

problems in greater depth, to examine the source of those problems and to provide further assistance to the respondent State in finding appropriate solutions and to the Committee of Ministers in supervising the execution of the judgments.

(2) *Origin of the problem and general measures required to address it* – The recurrent violations of Article 3 resulting from inadequate conditions of transport were an issue of considerable magnitude and complexity. It was a multifaceted problem owing its existence to a large number of negative factors, such as the geographical remoteness of many penal facilities which had been built far from major cities under the former regime, the long distances involved, the ageing rolling stock, exceedingly restrictive regulations and standards, and a lack of transparency during prisoner transportation. That situation required comprehensive general measures at national level, which had to take into consideration a large number of individuals who were currently affected by it.

(a) Avenues for improving conditions of transport

(i) *Reducing allocation to remote facilities* – The emphasis needed to be on placing prisoners as close to their home as possible so as to save them from the hardships of a long railway journey, to reduce the number of prisoners travelling by rail to faraway destinations, and also to avoid the burden of long and expensive journeys for visiting family members.

(ii) *Review of the normative framework and adaptation of vehicles* – Efforts had been made by the Russian authorities with a view to improving the conditions of prisoner transportation. Nevertheless, the seating arrangements for prison vans and railway carriages used for short-distance train journeys had to be reviewed with a view to guaranteeing sufficient space per person and a more even distribution of prisoners in compartments. Unless mandated by compelling security considerations, the use of single-prisoner cubicles had to be avoided. Elements that impeded prisoners from standing up, such as bridge bunks in large compartments of prisoner railway carriages, would need to be uninstalled. On longer rail journeys, special care had to be taken to ensure decent sleeping arrangements for prisoners. Each of them should have his or her own sleeping place, and adequate access to sanitary facilities, drinking water and food.

Protection of vulnerable individuals had to be based on their individual characteristics rather than on a formal group classification. The conditions of transport had to be individualised and tailored to the needs of prisoners who could not be transported in ordinary conditions on account of a mental condition or physical characteristics, such as obesity.

(b) *Making available effective remedies* – The Russian Federation's obligations under the Convention compelled it to set up the effective domestic remedies required by Article 13 without further delay.

To be efficient, the system for detainees' complaints to the domestic authorities had to ensure prompt and diligent handling of complaints, secure prisoners' effective participation in the examination of grievances, and provide a wide range of legal tools for the purpose of eradicating the identified breach of Convention requirements. Lastly, prisoners had to be able to avail themselves of remedies without having to fear that they would incur punishment or negative consequences for doing so. Lodging a complaint with a supervising authority was usually a more reactive and speedy way of dealing with grievances than litigation. The authority in question had to have the mandate to monitor the violations of prisoners' rights, be independent, and have the power to investigate the complaints with the participation of the complainant and the right to render binding and enforceable decisions. The Court's findings in *Ananyev and Others*, emphasising the important role of supervising prosecutors and the manner in which the procedure before them needed to be modified, were also applicable to complaints about conditions of transport. Public monitoring commissions might also be given a more prominent role in upholding the rights of prisoners in transit. To be truly effective, however, they would need an extended mandate and the power to render binding decisions.

A prisoner might also complain to a court of general jurisdiction about an infringement of his or her rights or liberties under the Code of Administrative Procedure. However, it was not certain that these new type of proceedings had equipped the Russian courts with appropriate legal tools allowing them to consider the problem transcending an individual complaint and effectively deal with situations of concurrent violations of prisoners' rights resulting from the application of an exceedingly restrictive regulatory framework.

In all cases where a violation of Article 3 had already occurred, the wrong caused to the individual was susceptible of being redressed by means of a compensatory remedy. Monetary compensation had to be accessible to any current or former inmate who had suffered inhuman or degrading treatment and had made an application to that effect. A finding

that the conditions had fallen short of the requirements of Article 3 would give rise to a strong presumption that they had caused non-pecuniary damage to the aggrieved person, and the level of compensation awarded for non-pecuniary damage could not be unreasonable in comparison with the awards made by the Court in similar cases. In the particular context of the applicants' case, the domestic courts should be able to appreciate that, even in a situation where every individual aspect of the conditions of transport had complied with the domestic regulations, their cumulative effect could have been such as to constitute inhuman or degrading treatment.

(c) *Time-limit for making effective domestic remedies available* – The Court had called on the Russian authorities to make available domestic remedies in respect of a relevantly similar complaint more than six years ago. Having regard to the amount of time that had since elapsed and the apparent lack of progress in that matter, the Court considered that the required remedies had to be made available not later than eighteen months after the judgment became final.

(3) *Processing of similar pending cases* – It was appropriate for the Court to adjourn adjudication of applications in which a complaint of inadequate conditions of transport was the main complaint, pending the implementation of the present judgment by the Russian Federation, for a period of eighteen months from the date on which the judgment becomes final.

Article 41: Finding of a violation constituted sufficient just satisfaction in the case of one of the applicants; sums ranging betweeen EUR 1,500 and EUR 5,000 to each of the other applicants in respect of non-pecuniary damage.

The Court also found, unanimously, a violation of Article 38 on account of the respondent State's failure to comply with its obligations and submit requested material and a violation of Article 6 § 1 due to one applicant being denied an effective opportunity to present his position, in breach of the principle of a fair trial.

(See *Ananyev and Others v. Russia*, 42525/07 and 60800/08, 10 January 2012, Information Note 148; see also *Guliyev v. Russia*, 24650/02, 19 June 2008; *Fedotov v. Russia*, 5140/02, 25 October 2005, Information Note 79; *Orchowski v. Poland*, 17885/04, 22 October 2009, Information Note 123; *Torreggiani and Others v. Italy*, 43517/09 et al., 8 January 2013, Information Note 159; *Gerasimov and Others v. Russia*, 29920/05 et al., 1 July 2014, Information Note 176; *Stella and Others v. Italy* (dec.), 49169/09, 16 September 2014, Information Note 177; *Neshkov and Others v. Bulgaria*, 36925/10 et al., 27 January 2015, Information Note 181; *Varga and Others v. Hungary*, 14097/12 et al., 10 March 2015, Information Note 183; *Muršić v. Croatia* [GC], 7334/13, 20 October 2016, Information Note 200; *Polyakova and Others v. Russia*, 35090/09 et al., 7 March 2017, Information Note 205; *Domján v. Hungary* (dec.), 5433/17, 14 November 2017, Information Note 212; and Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, and the Declarations adopted by the High Contracting Parties at the Interlaken and İzmir conferences)

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Use of surgical symphysiotomy in Irish maternity hospitals: *communicated*

Recours à la symphysiotomie chirurgicale dans les maternités irlandaises : *affaire communiquée*

L.F. – Ireland/Irlande, 62007/17, Communication [Section V]

Traduction française du résumé | Printable version

A symphysiotomy is a surgical procedure that involves partially cutting through the fibres of the pubis symphysis (the joint uniting the pubic bones) so as to enlarge the capacity of the pelvis. The procedure allows the pubis symphysis to separate as to facilitate natural childbirth where there is a mechanical problem. Symphysiotomy was first used in the eighteenth century for selected cases of obstructed labour. Although its use continued to be indicated in certain specific situations, by the mid-twentieth century it had largely been abandoned in Western Europe, due, in large part, to the fact that caesarean sections had become much safer. In the 1940s, however, the practice was reintroduced in certain Irish maternity hospitals and it continued to be used there, to varying degrees, until the mid-1980s.

Concerns regarding the prevalence of symphysiotomies in these maternity hospitals and the long-term effects of the procedure emerged in 2001. Many women who had undergone the procedure reported chronic health problems. There was believed to be a strong correlation between the use of the procedure and the acceptance of Catholic doctrine regarding sterilisation and contraception. Following a number of reports on the

practice, the Minister for Health announced the establishment of an *ex gratia* payment scheme offering compensation to women who had undergone a surgical symphysiotomy or pubiotomy in any hospital in Ireland between 1940 and 1990.

The applicant complains that she was precluded from making any complaint before the domestic courts about the performance of a symphysiotomy without her free, full and informed consent. She further complains under Article 3 that there has never been an independent and thorough investigation into the practice of symphysiotomy in Ireland.

Communicated under Articles 3 and 8 of the Convention.

ARTICLE 5

Article 5 § 1

Deprivation of liberty/Privation de liberté

Eight-year-old child alone left for over twenty-four hours in a police station without being reported to the child welfare authorities: *Article 5 § 1 applicable; violation*

Enfant de huit ans resté plus d'une journée seul dans un commissariat de police sans signalement aux autorités de protection des mineurs : *article 5 § 1 applicable ; violation*

Tarak and/et Depe – Turkey/Turquie, 70472/12, Judgment | Arrêt 9.4.2019 [Section II]

English translation of the summary | Version imprimable

En fait – Les requérants sont une mère et son fils, âgé de huit ans à l'époque des faits.

Tard dans la soirée du 26 octobre 2001, des policiers enquêtant sur un cambriolage vinrent perquisitionner le domicile d'un voisin des requérants ; ils se présentèrent également au domicile de la requérante, à la recherche d'un suspect. Absente, la requérante avait confié l'enfant au voisin. Or, à l'issue de la perquisition, le voisin fut arrêté et emmené au commissariat de police. Après le recueil de sa déposition, il fut libéré sans avoir passé la nuit au commissariat.

Selon la requérante, les policiers ayant arrêté le voisin avaient aussi emmené avec eux l'enfant. Dans les premières heures du 28 octobre, la mère fut à son tour arrêtée. Selon elle, l'enfant dormait sur un bureau quand elle arriva au commissariat. Après interrogatoire, elle serait repartie avec lui.

Sur plainte de la mère pour, entre autres, détention abusive de l'enfant, le procureur enquêta et inculpa plusieurs policiers, mais le tribunal clôtura l'affaire en 2009 pour cause de prescription.

En droit – Article 5 § 1

a) *Établissement des faits* – La Cour ne relève aucun élément contredisant, d'une part, le témoignage du voisin selon lequel l'enfant avait été emmené au commissariat la première nuit, ni, d'autre part, le témoignage de l'avocate de la requérante déclarant y avoir vu l'enfant le 28 octobre 2001.

Rien n'indique non plus que l'enfant soit sorti du commissariat entre-temps, comme cela aurait pu par exemple être le cas s'il avait été pris en charge par le voisin relâché, par un autre voisin responsable, ou par un parent ou un proche.

Le Gouvernement n'a présenté aucun élément pouvant donner à croire, par exemple, que l'enfant ait été transféré dans un délai raisonnable après son arrivée au commissariat dans une institution pour enfants, ou auprès d'une autorité semblable ; ou que le procureur de permanence ait été avisé de la présence d'un mineur au commissariat.

Le dossier ne permet pas non plus de dire si le tribunal a recueilli ou non le témoignage du procureur avec lequel l'avocate a déclaré avoir eu une conversation le lendemain sur la présence de l'enfant au commissariat.

Partant, les éléments concordants et précis susmentionnés permettent de conclure que l'enfant, alors âgé de huit ans, a été emmené au commissariat par des agents de police et y a été retenu, seul, au moins du 27 au 28 octobre 2001, jusqu'à l'arrivée de sa mère.

b) *Appréciation* – Eu égard au fait qu'il n'était pas accompagné après son arrivée au commissariat, cet enfant de très jeune âge était livré à lui-même dans les locaux de la police. Il se trouvait donc dans une situation de vulnérabilité. Dans ces conditions, il importe peu de savoir si l'enfant était dans un bâtiment fermé et gardé et dont toute sortie non autorisée était interdite. En effet, on ne pouvait attendre de ce très jeune enfant qu'il quitte le commissariat tout seul.

Aux yeux de la Cour, la situation caractérisée par un tel faisceau d'éléments peut être qualifiée de

« privation de liberté » au sens de l'article 5 § 1 de la Convention.

Or, le Gouvernement ne s'est pas prononcé sur le point de savoir si cette privation de liberté poursuivait l'un des buts autorisés par cette disposition ; et le dossier ne contient aucun élément permettant de dire que tel était le cas. En conséquence, il y a lieu de considérer que la privation de liberté du requérant était arbitraire.

Conclusion : violation à l'égard du second requérant (unanimité).

La Cour déclare par ailleurs irrecevables, pour défaut manifeste de fondement, les griefs présentés sur le terrain de l'article 3 de la Convention, estimant que la gifle prétendument reçue par l'enfant au commissariat n'était pas établie, et que l'angoisse de la mère n'avait pas atteint le seuil de gravité requis.

Article 41 : 7 500 EUR au second requérant pour préjudice moral.

Lawful arrest or detention/Arrestation ou détention régulières

No criminal-process reasons for house arrest: *violation*

Absence de raisons liées à la procédure pénale pour justifier l'assignation à résidence : *violation*

Navalnyy – Russia/Russie (no. 2/n° 2), 43734/14, Judgment | Arrêt 9.4.2019 [Section III]

(See Article 18 below/Voir l'article 18 ci-dessous, page 26)

Lawful arrest or detention/Arrestation ou détention régulières
Procedure prescribed by law/Voies légales

Pre-trial detention of a judge without prior lifting of immunity, on the basis of an unreasonable extension of the concept of *in flagrante delicto*: *violation*

Détention provisoire d'un juge sans levée préalable de son immunité, par une extension déraisonnable de la notion de flagrant délit : *violation*

Alparslan Altan – Turkey/Turquie, 12778/17, Judgment | Arrêt 16.4.2019 [Section II]

(See Article 5 § 1 (c) below/Voir l'article 5 § 1 c) ci-après)

Article 5 § 1 (c)

Reasonable suspicion/Raisons plausibles de soupçonner

Detention based on mere suspicion of membership of an illegal organisation, without any specific incriminating evidence: *violation*

Détention fondée sur le simple soupçon d'appartenance à une organisation illégale, sans aucun élément à charge concret : *violation*

Alparslan Altan – Turkey/Turquie, 12778/17, Judgment | Arrêt 16.4.2019 [Section II]

English translation of the summary | Version imprimable

En fait – À la suite de la tentative de coup d'État militaire du 15 juillet 2016, dont les autorités attribuèrent la responsabilité à une organisation clandestine (dite FETÖ/PDY), l'état d'urgence fut décrété le 20 juillet 2016. Le lendemain, la Turquie notifia au Conseil de l'Europe la mise en œuvre du pouvoir de dérogation prévu par l'article 15 de la Convention.

Le requérant était alors juge à la Cour constitutionnelle de Turquie (« la CCT »). Le 16 juillet 2016, comme trois mille autres magistrats, il fut arrêté et placé en garde à vue. Le 20 juillet 2016, un juge de paix ordonna sa mise en détention provisoire, au motif qu'il était soupçonné d'être « membre d'une organisation terroriste armée » (article 314 du code pénal). En août 2016, la CCT révoqua le requérant.

En octobre 2017, la Cour de cassation rendit dans une autre affaire un arrêt de principe, selon lequel l'arrestation des magistrats suspectés d'appartenance à une organisation armée devait être considérée comme s'inscrivant dans le cadre d'une situation de « flagrant délit » : la détention provisoire peut alors être ordonnée selon la procédure de droit commun, sans levée préalable de l'immunité.

Le requérant conteste la légalité de sa mise en détention, en deux points : i) selon la loi spéciale attachée à son statut, son immunité en tant que juge devait au préalable être levée par la CCT, ce qui n'avait pas été le cas ; ii) sa détention a été ordonnée sur la base d'un dossier alors vide de tout élément à charge. En janvier 2018, la CCT rejeta son recours, en se référant : pour le premier point, à

l'arrêt susmentionné de la Cour de cassation ; pour le second, à divers éléments à charges obtenus depuis sa mise en détention.

En juillet 2018, l'état d'urgence fut levé. En mars 2019, le requérant fut condamné.

En droit

Article 15 (*considérations liminaires*) : La présente requête n'a pas pour objet les mesures dérogatoires prises pendant l'état d'urgence : la mise en détention du requérant a été décidée sur le fondement d'une législation qui existait déjà avant l'état d'urgence et est restée en vigueur par la suite.

Cela étant, et bien que la mise en détention du requérant ait en outre eu lieu un jour avant l'entrée en vigueur de la mise en œuvre par la Turquie de l'article 15 de la Convention, les difficultés auxquelles la Turquie devait faire face à la suite de la tentative de coup d'État militaire ayant eu lieu quelques jours plus tôt constituent certainement un élément contextuel dont la Cour doit pleinement tenir compte pour interpréter et appliquer ci-après l'article 5.

Article 5 § 1

a) *Sur le respect des « voies légales » pour la décision initiale de mise en détention*

i. *Sur l'article 5 § 1 en soi* – Le principe de sécurité juridique peut se trouver compromis si les juridictions internes introduisent dans leur jurisprudence des exceptions allant à l'encontre du libellé des dispositions légales applicables.

Le code de procédure pénale turc donne une définition classique de la notion de « flagrant délit », liée à l'actualité de l'infraction ou à son antériorité immédiate. Or, selon la nouvelle lecture jurisprudentielle de cette notion, un soupçon d'appartenance à une organisation criminelle peut suffire à caractériser la flagrance sans qu'il soit besoin de relever un élément de fait actuel ou un autre indice apparent révélant l'existence d'un acte délictueux actuel.

Il y a là une interprétation extensive de la notion de flagrant délit, qui réduit à néant les garanties procédurales accordées au corps de la magistrature pour le mettre à l'abri des atteintes du pouvoir exécutif. Cette forme de protection est accordée aux juges pour leur permettre d'exercer leurs fonctions en toute indépendance sans restrictions illégitimes de la part d'organes extérieurs à la magistrature, ou même de la part de magistrats exerçant des fonctions de contrôle ou de recours. Au demeurant, cette immunité ne signifie pas impunité : la mise en détention d'un membre de la CCT restait légalement possible, pourvu que fussent respectées les garanties découlant de la Constitution et de la loi relative à la CCT.

Par ailleurs, on ne voit pas comment la jurisprudence constante de la Cour de cassation sur la notion d'infraction continue pouvait justifier d'étendre la portée de la notion de flagrant délit.

Ainsi, la façon dont le droit interne a été appliqué en l'espèce apparaît manifestement déraisonnable. La mise en détention du requérant n'a dès lors pas eu lieu selon les « voies légales ».

ii. *Sur l'incidence de l'article 15* – Une interprétation extensive de la notion de flagrant délit ne saurait être considérée comme une réponse adaptée à la situation d'état d'urgence, ses conséquences juridiques outrepassant largement le cadre légal de l'état d'urgence. De ce fait, elle ne se justifie aucunement au regard des circonstances spéciales de l'état d'urgence. Bref, une mesure de détention provisoire qui n'a pas été décidée « selon les voies légales » ne peut pas être considérée comme ayant respecté la « stricte mesure requise par la situation ».

Conclusion : violation (six voix contre une).

b) *Sur l'existence de raisons plausibles de soupçonner le requérant d'une infraction*

i. *Sur l'article 5 § 1 en soi* – La nécessité de combattre la criminalité organisée ne saurait justifier que l'on étende la notion de « plausibilité » jusqu'à porter atteinte à la substance de la garantie assurée par l'article 5 § 1 c) de la Convention.

L'infraction visée au stade de la mise en détention provisoire était celle d'appartenance à une organisation illégale. Or, la circonstance que le requérant ait été interrogé à ce sujet avant sa mise en détention provisoire montre tout au plus que la police le soupçonnait, mais ne persuade pas que ladite infraction pouvait avoir été commise par lui.

La décision de mise en détention du requérant ne fait apparaître aucun témoignage ou autre élément ou information accréditant, à son encontre, l'existence de forts soupçons d'appartenance à une organisation illégale. Les références vagues et générales aux dispositions du code de procédure pénale sur la détention provisoire et aux pièces du dossier ne sont pas suffisantes pour justifier la « plausibilité » des soupçons censés avoir fondé la

mise en détention provisoire du requérant, en l'absence, d'une part, d'une appréciation individualisée et concrète des éléments du dossier – qui, en l'espèce, était commun à quatorze suspects – et, d'autre part, d'informations pouvant justifier les soupçons pesant sur le requérant ou d'autres types d'éléments ou de faits vérifiables.

Quant aux éléments de preuve retenus par la CCT pour établir la « plausibilité » des soupçons d'appartenance du requérant à une organisation illégale, ils ont été obtenus bien après la décision de mise en détention, seul objet du présent grief. De même, le fait que le requérant ait ultérieurement été condamné par le tribunal compétent pour statuer au fond sur les accusations n'a aucune incidence non plus sur l'examen du présent grief. Et le Gouvernement n'a pas fourni d'autres indices de l'existence de « motifs plausibles » de soupçonner le requérant à la date de son placement en détention.

ii. *Sur l'incidence de l'article 15* – Il résulte de ce qui précède que la mise en détention litigieuse ne peut pas être considérée comme ayant respecté la « stricte mesure requise par la situation ». Conclure autrement réduirait à néant les conditions minimales de l'article 5 § 1 c) quant à la plausibilité requise des soupçons motivant une privation de liberté et irait à l'encontre du but poursuivi par l'article 5 de la Convention, et cela d'autant plus que la mise en détention litigieuse concernait ici un membre du corps judiciaire, siégeant de surcroît au sein d'une juridiction suprême.

Conclusion : violation (six voix contre une).

Article 41 : 10 000 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

Article 5 § 4

Speediness of review/Contrôle à bref délai

Automatic review of immigration detention not held within seven working days as required by domestic law: *no violation*

Absence de contrôle automatique d'une rétention administrative dans le délai de sept jours ouvrables prévu par le droit interne : *non-violation*

Aboya Boa Jean – Malta/Malte, 62676/16, Judgment | Arrêt 2.4.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The applicant had been held in immigration detention awaiting examination of his asylum application. Under Maltese law an automatic review of the lawfulness of immigration detention had to take place within seven working days of the individual's placement in detention, following which the detention could be extended. In the applicant's case, and contrary to the domestic law, such review was only carried out after a period of twenty-five days had expired.

Law – Article 5 § 4: The forms of judicial review satisfying the requirements of Article 5 § 4 might vary from one domain to another, and would depend on the type of deprivation of liberty in issue.

It was not excluded that a system of automatic periodic review of the lawfulness of detention by a court might ensure compliance with the requirements of Article 5 § 4. However, long intervals in the context of automatic periodic review might give rise to a violation of Article 5 § 4. The requirements of Article 5 § 4 as to what may be considered a "reasonable" interval in the context of periodic judicial review varied from one domain to another, depending on the type of deprivation of liberty in issue.

In the context of detention pending deportation or extradition, the factors affecting the lawfulness of detention might change over the course of time. Therefore shorter intervals between reviews were necessary for detention pending deportation or extradition as compared to detention after conviction by a competent court or detention of persons of unsound mind. Indeed, the factors affecting the lawfulness of detention were likely to evolve faster in situations where the proceedings were continuing than in situations where the proceedings had been closed after the establishment of all relevant circumstances.

At the same time, given the limited scope of the review of the lawfulness of detention required under Article 5 § 4 in extradition cases – which did not extend, for example, to the questions whether the detention was "necessary" for the prevention of crime or fleeing –, the review did not need be as frequent as in cases of deprivation of liberty under Article 5 § 1 (c). Thus, the Court had, for example, found that intervals between periodic reviews of detention ranging from two to four months had been compatible with the requirements of Article 5 § 4. However, it was not the Court's task to attempt to rule as to the maximum period of time between reviews which should automatically apply to a certain category of detainees. The question of whether periods complied with the requirement

had to be determined in the light of the circumstances of each case.

The applicant had been detained on 10 September 2016 and he had appeared before the Board on 30 September 2016. His first review was meant to have taken place automatically within seven working days, that was, at the latest on 20 September. However, on 20 September no review had taken place as a Board member had been abroad. As allowed by law (Regulation 6(3) of the Reception Regulations), the Board could have extended the period by another seven working days. Given that the 21 September was a public holiday, i.e. a non-working day, the next review was to be held by the latest 30 September – the date on which the Board had actually convened. When the Board had reconvened on 30 September they were still within the maximum domestic time-limit. On that day, given that one of the applicant's lawyers of choice had been abroad, the case had been put off to 5 October 2016. On the latter date the Board had explained to the applicant why it had not been able to comply with the deadline provided by law for his first review; it had considered his situation and given reasons for its decision to continue the applicant's detention.

Thus, the procedural irregularity in the case was that the applicant had not had an automatic review within the first seven working days and that the period for review had not been properly extended. Nevertheless, the hearing had taken place within the maximum time-limit provided by law and it had only been adjourned because one of the applicant's lawyers of choice had been abroad.

While under Article 5 § 1 detention which was not compliant with domestic law induced a violation of that provision, a breach of time-limits for automatic reviews established in law did not necessarily amount to a violation of Article 5 § 4, if the proceedings by which the lawfulness of an applicant's detention were examined had nonetheless been decided speedily. In the applicant's case, despite certain irregularities the time which had elapsed until his first review could not be considered unreasonable.

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there had been no violation of Article 5 § 1, finding that the applicant's detention had been closely connected to the ground of detention relied on by the Government and the length of detention could not have been considered unreasonable.

(See also *Abdulkhakov v. Russia*, 14743/11, 2 October 2012, Information Note 156)

ARTICLE 6

Article 6 § 1 (civil)

Oral hearing/Tenue d'une audience

Proceedings brought by prison authorities, requesting presence of official during prisoner's consultations with lawyer, held without oral hearing or seeking submissions: *violation*

Procédure entamée par les autorités carcérales pour pouvoir imposer la présence d'un fonctionnaire lors d'entretiens détenu-avocat, tenue sans audience ni demande d'observations : *violation*

Altay – Turkey/Turquie (no. 2/n° 2), 11236/09, Judgment | Arrêt 9.4.2019 [Section II]

(See Article 8 below/Voir l'article 8 ci-dessous, page 18)

ARTICLE 8

Respect for private life/Respect de la vie privée

Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother

Avis consultatif relatif à la reconnaissance en droit interne d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention

Advisory opinion requested by the French Court of Cassation/Avis consultatif demandé par la Cour de cassation française, P16-2018-001, Opinion | Avis 10.4.2019 [GC]

English translation of the summary | Version imprimable

Contexte et questions – Les questions posées par la Cour de cassation française dans sa demande d'avis consultatif sont ainsi formulées :

« 1. En refusant de transcrire sur les registres de l'état civil l'acte de naissance d'un enfant né à

l'étranger à l'issue d'une gestation pour autrui, en ce qu'il désigne comme étant sa « mère légale » la « mère d'intention », alors que la transcription de l'acte a été admise en tant qu'il désigne le « père d'intention », père biologique de l'enfant, un État-partie excède-t-il la marge d'appréciation dont il dispose au regard de l'article 8 [de la Convention] ? À cet égard, y a-t-il lieu de distinguer selon que l'enfant est conçu ou non avec les gamètes de la « mère d'intention » ?

2. Dans l'hypothèse d'une réponse positive à l'une des deux questions précédentes, la possibilité pour la mère d'intention d'adopter l'enfant de son conjoint, père biologique, ce qui constitue un mode d'établissement de la filiation à son égard, permet-elle de respecter les exigences de l'article 8 de la Convention ? »

La jurisprudence de la Cour de cassation a évolué postérieurement à l'arrêt *Mennesson c. France* (65192/11, 26 juin 2014, Note d'information 175). La transcription de l'acte de naissance d'un enfant né d'une gestation pour autrui pratiquée à l'étranger est désormais possible pour autant qu'il désigne le père d'intention comme étant le père de l'enfant lorsqu'il en est le père biologique. Elle demeure impossible s'agissant de la maternité d'intention. L'épouse du père, mère d'intention, a toutefois maintenant la possibilité d'adopter l'enfant si les conditions légales sont réunies et si l'adoption est conforme à l'intérêt de l'enfant, ce qui crée un lien de filiation à son égard, l'adoption de l'enfant du conjoint étant par ailleurs facilitée par le droit français.

Par une décision du 16 février 2018, la cour de réexamen des décisions civiles a fait droit à la demande de réexamen du pourvoi en cassation déposée le 15 mai 2017 par les époux Mennesson, agissant en qualité de représentants légaux des deux enfants mineurs, contre l'arrêt de la cour d'appel de Paris du 18 mars 2010 qui avait annulé la transcription sur les registres de l'état civil français des actes de naissance américains de ces derniers.

La Cour de cassation a saisi la Cour de la présente demande d'avis consultatif dans le cadre du réexamen de ce pourvoi en cassation.

Avis

a) *Sur la question de savoir si le droit au respect de la vie privée, au sens de l'article 8, d'un enfant né à l'étranger à l'issue d'une gestation pour autrui, qui requiert la reconnaissance en droit interne du lien de filiation entre celui-ci et le père d'intention lorsqu'il est le père biologique, requiert également la possibilité d'une reconnaissance en droit interne d'un lien de filiation entre cet enfant et la mère d'intention, désignée dans l'acte de naissance légalement établi à l'étranger comme étant la « mère légale », dans la situation où l'enfant a été conçu avec les gamètes d'une tierce donneuse, et où le lien de filiation entre l'enfant et le père d'intention a été reconnu en droit interne*

i. *S'agissant de l'intérêt supérieur de l'enfant* – L'absence de reconnaissance d'un lien de filiation entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention a des conséquences négatives sur plusieurs aspects du droit de l'enfant au respect de la vie privée. D'un point de vue général, il défavorise l'enfant dès lors qu'il le place dans une forme d'incertitude juridique quant à son identité dans la société.

En outre, du fait que l'intérêt supérieur de l'enfant comprend aussi l'identification en droit des personnes qui ont la responsabilité de l'élever, de satisfaire à ses besoins et d'assurer son bien-être, ainsi que la possibilité de vivre et d'évoluer dans un milieu stable, l'impossibilité générale et absolue d'obtenir la reconnaissance du lien entre un enfant né d'une gestation pour autrui pratiquée à l'étranger et la mère d'intention n'est pas conciliable avec l'intérêt supérieur de l'enfant, qui exige pour le moins un examen de chaque situation au regard des circonstances particulières qui la caractérise.

ii. *S'agissant de l'étendue de la marge d'appréciation dont disposent les États parties* – Malgré une certaine évolution vers la possibilité d'une reconnaissance juridique du lien de filiation entre les enfants nés d'une gestation pour autrui pratiquée à l'étranger et les parents d'intention, il n'y a pas consensus en Europe sur cette question.

Aussi, lorsqu'un aspect particulièrement important de l'identité d'un individu se trouve en jeu, comme lorsque l'on touche à la filiation, la marge laissée à l'État est d'ordinaire restreinte. En outre, d'autres aspects essentiels de la vie privée des enfants sont concernés dès lors que sont en question l'environnement dans lequel ils vivent et se développent et les personnes qui ont la responsabilité de satisfaire à leurs besoins et d'assurer leur bien-être. Ceci conforte le constat de la Cour quant à la réduction de la marge d'appréciation.

iii. *Conclusion* (unanimité) : Vu les exigences de l'intérêt supérieur de l'enfant et la réduction de la marge d'appréciation, le droit au respect de la vie privée, au sens de l'article 8, d'un enfant né à l'étranger à l'issue d'une gestation pour autrui, requiert que le droit interne offre une possibilité

de reconnaissance d'un lien de filiation entre cet enfant et la mère d'intention, désignée dans l'acte de naissance légalement établi à l'étranger comme étant la « mère légale ».

b) *Sur la question de savoir si le droit au respect de la vie privée de l'enfant né d'une gestation pour autrui pratiquée à l'étranger, dans la situation où l'enfant a été conçu avec les gamètes d'une tierce donneuse, requiert que la reconnaissance d'un lien de filiation entre cet enfant et la mère d'intention se fasse par la transcription sur les registres de l'état civil de l'acte de naissance légalement établi à l'étranger, ou s'il admet qu'elle puisse se faire par d'autres moyens, tels que l'adoption de l'enfant par la mère d'intention*

L'identité de l'individu est moins directement en jeu lorsqu'il s'agit non du principe même de l'établissement ou de la reconnaissance de sa filiation mais des moyens à mettre en œuvre à cette fin. Ainsi, le choix de ces moyens pour permettre la reconnaissance du lien enfant-parents d'intention tombe dans la marge d'appréciation des États, sachant qu'il n'y a pas de consensus européen sur cette question.

De plus, l'intérêt supérieur de l'enfant, s'appréciant avant tout *in concreto*, requiert que ce lien, légalement établi à l'étranger, puisse être reconnu au plus tard lorsqu'il s'est concrétisé. Il appartient en principe en premier lieu aux autorités nationales d'évaluer, à la lumière des circonstances particulières de l'espèce, si et quand ce lien s'est concrétisé. Cependant, on ne saurait déduire de l'intérêt supérieur de l'enfant ainsi compris que la reconnaissance du lien de filiation entre l'enfant et la mère d'intention impose aux États de procéder à la transcription de l'acte de naissance étranger en ce qu'il désigne la mère d'intention comme étant la mère légale. Selon les circonstances de chaque cause, d'autres modalités peuvent également servir convenablement cet intérêt supérieur, dont l'adoption, qui, s'agissant de la reconnaissance de ce lien, produit des effets de même nature que la transcription de l'acte de naissance étranger.

En somme, vu la marge d'appréciation dont disposent les États s'agissant du choix des moyens, d'autres voies que la transcription, notamment l'adoption par la mère d'intention, peuvent être acceptables dans la mesure où les modalités prévues par le droit interne garantissent l'effectivité et la célérité de leur mise en œuvre, conformément à l'intérêt supérieur de l'enfant, apprécié par le juge à la lumière des circonstances de la cause.

Il revient au juge interne de se prononcer sur l'adéquation du droit français de l'adoption avec les critères énoncés ci-dessus par la Cour, en tenant compte de la situation fragilisée dans laquelle se trouvent les enfants tant que la procédure d'adoption est pendante.

Conclusion (unanimité) : Le droit au respect de la vie privée de l'enfant, au sens de l'article 8, ne requiert pas que cette reconnaissance se fasse par la transcription sur les registres de l'état civil de l'acte de naissance légalement établi à l'étranger ; elle peut se faire par une autre voie, telle que l'adoption de l'enfant par la mère d'intention, à la condition que les modalités prévues par le droit interne garantissent l'effectivité et la célérité de sa mise en œuvre, conformément à l'intérêt supérieur de l'enfant.

(Voir *Labassee c. France*, 65941/11, 26 juin 2014, Note d'information 175 ; *Foulon et Bouvet c. France*, 9063/14 et 10410/14, 21 juillet 2016 ; et *Paradiso et Campanelli c. Italie* [GC], 25358/12, 24 janvier 2017, Note d'information 203. Voir aussi la fiche thématique Gestation pour autrui)

Respect for private life/Respect de la vie privée

Official present during consultations between prisoner and his lawyer: *violation*

Présence d'un fonctionnaire lors des entretiens entre un détenu et son avocat : *violation*

Altay – Turkey/Turquie (no. 2/n° 2), 11236/09, Judgment | Arrêt 9.4.2019 [Section II]

Traduction française du résumé | Printable version

Facts – The applicant, a prisoner serving a life sentence, had received a package from his lawyer containing items, such as a book and a newspaper, which the domestic courts held did not relate to the rights of the defence and should not be handed over to him. A subsequent request to the public prosecutor was lodged by the prison administration requesting that section 5 of Law no. 5351, which provided for an official to be present during consultations between a prisoner and his or her lawyer, be applied to the applicant. The domestic court, in an examination carried out on the basis of the case file, without holding a hearing and without seeking submissions from the applicant or his lawyer, granted the application.

Law

Article 8: Article 8 encompassed the right of each individual to approach others in order to establish

and develop relationships with them and with the outside world, that is, the right to a "private social life", and might include professional activities or activities taking place in a public context. There was, therefore, a zone of interaction of a person with others, even in a public context, which might fall within the scope of "private life". A person's communication with a lawyer in the context of legal assistance fell within the scope of private life, since the purpose of such interaction was to allow an individual to make informed decisions about his or her life. More often than not the information communicated to the lawyer involved intimate and personal matters or sensitive issues. It therefore followed that whether it be in the context of assistance for civil or criminal litigation or in the context of seeking general legal advice, individuals who consulted a lawyer could reasonably expect that their communication would be private and confidential.

As regards the content of the communication, and the privilege accorded to the lawyer-client relationship, in the context of persons deprived of their liberty, there was no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concerned matters of a private and confidential character. The borderline between correspondence concerning contemplated litigation and that of a general nature was especially difficult to draw and correspondence with a lawyer might concern matters which had little or nothing to do with litigation. That principle applied *a fortiori* to oral, face-to-face communication with a lawyer. It therefore followed that, in principle, oral communication and correspondence between a lawyer and his or her client was privileged under Article 8.

In spite of its importance, the right to confidential communication with a lawyer was not absolute but might be subject to restrictions. The margin of appreciation of the respondent State in the assessment of the permissible limits of interference with the privacy of consultation and communication with a lawyer was narrow in that only exceptional circumstances, such as to prevent the commission of serious crime or major breaches of prison safety and security, might justify the necessity of limitation of these rights. The Convention did not prohibit the imposition on lawyers of certain obligations likely to concern their relationships with their clients. That was the case in particular where credible evidence had been found of the participation of a lawyer in an offence, or in connection with efforts to combat certain practices. On that account, however, it was vital to provide a strict framework for such measures, since lawyers occupied a vital position in the administration of justice and could, by virtue of their role as intermediary between litigants and the courts, be described as officers of the law.

In the applicant's case the domestic courts had referred to section 59 of Law no. 5275 as the legal basis for their interference with the confidentiality of the applicant's meetings with his lawyer. They had ruled in that connection that the lawyer's behaviour had been incompatible with the profession of a lawyer in so far as she had sent books and periodicals to the applicant which had not been defence-related.

However section 59 of Law no. 5275 was an exceptional measure which contained an exhaustive list of circumstances in which the confidentiality of lawyer-client communication might be restricted. According to that provision, only when it was apparent from documents or other material that the privilege enjoyed by a prisoner and his or her lawyer was being used as a means for communication with a terrorist organisation, or for the commission of a crime, or otherwise jeopardised the security of the institution, might the presence of a prison official during lawyer-client meetings be ordered.

The interception of correspondence solely because it did not relate to the rights of defence was not provided in that section as grounds for restricting the confidentiality of consultation with a lawyer. To conclude otherwise would run counter to the plain meaning of the text of the provision and would mean that any correspondence from a lawyer which was not defence-related could result in such a serious measure being imposed, without any limitation in duration.

In the applicant's case, although the letter and spirit of the domestic provision in force at the time of the events were sufficiently precise – save for the lack of temporal limits to the restriction –, its interpretation and application by the domestic courts to the circumstances of the applicant's case was manifestly unreasonable and thus not foreseeable within the meaning of Article 8 § 2. It followed that such an extensive interpretation of the domestic provision in the present case did not comply with the Convention requirements of lawfulness.

Conclusion: *violation* (unanimously).

Article 6

(a) *Applicability* – It was evident that Article 6 did not apply under its criminal head to those pro-

ceedings, as the applicant did not have any criminal charge to answer. The question was whether the civil limb of Article 6 § 1 was applicable.

The relevant domestic legislation conferred on prisoners the right to have confidential communication with their lawyers in line with the European Prison Rules. It followed that a "dispute over a right", for the purposes of Article 6 § 1, could be said to have existed. With regard to whether the right in question was civil, the Court had developed an extensive approach, according to which the "civil" limb had covered cases which might not initially appear to concern a civil right but which might have direct and significant repercussions on a private pecuniary or non-pecuniary right belonging to an individual. Through that approach, the civil limb of Article 6 had been applied to a variety of disputes which might have been classified in domestic law as public-law disputes.

With regard to procedures instituted in the prison context, some restrictions on prisoners' rights fell within the sphere of "civil rights". The substance of the right in question, which concerned the applicant's ability to converse in private with his lawyer, was of a predominately personal and individual character, a factor that brought the present dispute closer to the civil sphere. Since a restriction on either party's ability to confer in full confidentiality with each other would frustrate much of the usefulness of the exercise of this right, the Court concluded that private-law aspects of the dispute predominated over the public-law ones. Article 6 § 1 was therefore applicable under its civil limb.

(b) *Merits* – In proceedings concerning the prison context, there might be practical and policy reasons for establishing simplified procedures to deal with various issues that could come before the relevant authorities. The Court did not rule out that a simplified procedure might be conducted via written proceedings, provided that they complied with the principles of a fair trial as guaranteed under Article 6 § 1. However, even under such a procedure, parties had to at least have the opportunity of requesting a public hearing, even though the court might refuse the application and hold the hearing in private.

In the applicant's case no oral hearing had been held at any stage of the domestic proceedings. Under domestic legislation the proceedings had been carried out on the basis of the case file and neither the applicant nor his chosen representative had been able to attend their sittings. It was therefore of little importance that the applicant had not explicitly requested a hearing, as the relevant procedural rules did not require one except in the case of disciplinary sanctions. The relevant rules concerning the procedure before assize courts in those types of disputes indicated that the question of holding a hearing was a matter to be decided by the assize courts of their own motion. In other words, it was not up to the applicant to request a hearing and he could not reasonably be considered to have waived his right to one.

The decision to restrict the applicant's right to confidential meetings with his lawyer had been taken by the domestic court in a non-adversarial manner without obtaining the applicant's defence submissions. The applicant's objections to that decision before the assize court had also been determined on the basis of the case file alone without holding a hearing, even though the applicant's objections had concerned factual and legal issues. The assize court had had full jurisdiction to assess the facts and the law of the case and render a final decision by annulling the decision of the first-instance court had it allowed the applicant's objection. The holding of a hearing would therefore have allowed the assize court to form its own impression of the sufficient factual basis for the consideration of the case and the legal issues raised by the applicant.

In the circumstances of the case – namely the combined effect of the non-adversarial nature of the proceedings before the enforcement court, the seriousness of the measure imposed and the lack of a hearing either before the enforcement court or at the objection stage before the assize court – it meant that the applicant's case had not been heard in accordance with the requirements of Article 6 § 1.

Conclusion: *violation* (unanimously).

Article 41: EUR 2,000 in respect of non-pecuniary damage.

(See also *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 55391/13 et al., 6 November 2018, Information Note 223)

Respect for private life/Respect de la vie privée

Use of surgical symphysiotomy in Irish maternity hospitals: *communicated*

Recours à la symphysiotomie chirurgicale dans les maternités irlandaises : *affaire communiquée*

L.F. – Ireland/Irlande, 62007/17, Communication [Section V]

(See Article 3 above/Voir l'article 3 ci-dessus, page 11)

Respect for private life/Respect de la vie privée

Alleged lack of legal basis for the withdrawal of the right to drive motor vehicles: *communicated*

Défaut alléguée de base légale du retrait du droit de conduire des véhicules à moteur : *affaire communiquée*

S.R. – Norway/Norvège, 43927/17, Communication [Section II]

Traduction française du résumé | Printable version

The applicant's right to drive motor vehicles was withdrawn. He complains that the relevant section of the Road Traffic Act did not form an adequate legal basis for the withdrawal.

Communicated under Article 8 of the Convention.

Respect for family life/Respect de la vie familiale

Transfer of child back to biological parents after nine years in care of foster mother: *no violation*

Foster mother and children denied access to child following his transfer to biological parents after nine years in foster care: *violation*

Retour d'un enfant auprès de ses parents biologiques après neuf ans passés auprès d'une mère nourricière : *non-violation*

Mère nourricière et enfants privés de contacts avec un enfant à la suite de son retour auprès de ses parents biologiques, après neuf ans dans une famille d'accueil : *violation*

V.D. and Others/et autres – Russia/Russie, 72931/10, Judgment | Arrêt 9.4.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The first applicant had been the appointed guardian of a child, who had several serious health conditions and whose parents had considered themselves unable to attend to his special needs. The remaining applicants had been or were the first applicant's foster children. The child in question had been transferred to the first applicant's care at the age of eight months and had lived with her for the first nine years of his life. The child was subsequently transferred back to his parents at their request.

Law – Preliminary issue: The first applicant was not biologically related to the child. Furthermore, she was no longer his guardian, with the result that she no longer had legal status to act on his behalf in judicial or other proceedings at domestic level. The child had been transferred to, and was now living with, his biological parents, who had full parental authority over him, which included, among other things, the representation of his interests. They had not authorised the first applicant to represent him before the Court. The first applicant did not therefore have standing to act before the Court on behalf of the child.

Article 8

(a) *Applicability* – The relationship between a foster family and a fostered child who had lived together for many months could amount to family life within the meaning of Article 8 § 1, despite the lack of a biological relationship between them. The existence of family ties between the applicants and the child prior to his transfer to his natural parents was not in dispute between the parties. Indeed, although there was no biological link between them, the child had remained in the first applicant's constant care from the age of eight months for the first nine years of his life. The other applicants, when still minors, had, at various times, been taken into the care of the first applicant, and had lived as a family with the child for periods ranging from one to seven years before he was eventually transferred to his biological parents. Close personal ties between the applicants and the fact that the first applicant had assumed the role of the child's parent were acknowledged by domestic courts in various sets of proceedings. In such circumstances, the relationship between the applicants and the child constituted "family life" within the meaning of Article 8 § 1.

(b) *Merits*

(i) *Termination of the first applicant's guardianship over the child and his transfer to his natural parent's care* – There was currently a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests had to be paramount. A child's best interests might, depending on their nature and serious-

ness, override those of the parents. In particular, a parent could not be entitled under Article 8 to have such measures taken as would harm the child's health and development. The parents' interests nevertheless remained a factor when balancing the various interests at stake. Child interests dictated that the child's ties with his or her family be maintained, except in cases where the family had proved particularly unfit. It followed that family ties might only be severed in very exceptional circumstances and that everything had to be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. Article 8 imposed on every State the obligation to aim at reuniting natural parents with his or her child.

In the applicants' case, the domestic authorities had been faced with a difficult choice between allowing the applicants, who at that time were the child's *de facto* family, to continue their relationship with him or to take measures to bring about the boy's reunion with his biological family. To that end, they had been called upon to assess and fairly balance the competing interests of the child's parents and those of the applicants. They had also had to bear in mind that, in view of his special physical and psychological conditions, the child was particularly vulnerable. The domestic authorities had therefore been required to show particular vigilance in assessing his interests and to afford him increased protection with due regard to his state of health.

The child had spent the first nine years of his life in the first applicant's care, a period during which she had remained the boy's primary carer, having fully assumed the role of his parent. Albeit undoubtedly a considerable period of time, that factor could not alone rule out the possibility of the child's reunification with his biological family. Indeed, effective respect for family life required that future relations between parent and child be determined in the light of all the relevant considerations and not by the mere passage of time.

It was true that the child's parents had acquiesced to the appointment of the first applicant as his guardian. At the same time, they had never formally renounced their parental authority over their son; neither had they been restricted in, nor had they been deprived of, that authority. The domestic courts had established that although during the first eight years of the child's life his parents had not maintained contact with him, they had nevertheless supported him financially and had accommodated the first applicant's requests regarding, *inter alia*, his medicine and diet. They had remained present in their son's life, with the result that the first applicant could not have realistically assumed that the boy would remain in her care permanently. Care orders were by their very nature meant to be temporary measures, to be discontinued as soon as circumstances permitted, and any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child.

The domestic courts had carefully assessed the child's best interests, with due regard to his state of health and his needs. In various sets of court proceedings, they had noted, in particular, the first applicant's attachment and genuinely caring attitude towards the child, and her proactive approach in taking care of him and addressing his health issues, which had ensured progress in his physical and psychological development and overall improvement of his conditions. As regards the biological parents, initially the authorities had had doubts as to whether they were fit and capable of securing their son's needs. In particular, the authorities had pointed to the lack of personal contact between them and had urged them to take a more responsible attitude regarding their parental obligations. In that connection, the courts had rejected their first claim for the boy's transfer to their care, noting that such an immediate transfer could traumatise him and compromise his health, and that an adaptation period was necessary for him to get used to his natural parents. In the subsequent proceedings, however, the courts had found that the parents were fit to raise him. It was noteworthy that by that time the contact arrangements between the child and his parents had been in place for a year. When taking that decision, the domestic courts had satisfied themselves, with due regard to written evidence, including psychological reports, and witness statements, that his parents had re-established their relations with him; that they could adequately understand his psychological particularities, emotional state, needs and capabilities; that they had appropriate living conditions for the child; and that the latter felt calm and comfortable with them.

When ordering the child's transfer to his biological parents and the termination of the first applicant's guardianship over him, the domestic authorities had acted within their margin of appreciation and in compliance with their obligation under Article 8 to aim for the reunification of the child with his parents. They had provided "relevant and sufficient" reasons for the measure complained of. Whilst the Court acknowledged the emotional hardship that that decision must have caused the applicants, their rights could not override the best interests of the child. The first applicant's arguments had been addressed and had received reasoned replies. The

Court was satisfied that the decision-making process had been fair and had provided the applicants with sufficient safeguards of their rights under Article 8. The interference with the applicants' family life had been "necessary in a democratic society".

Conclusion: no violation (unanimously).

(ii) *The applicants' access to the child* – The domestic courts had rejected the first applicant's claims in respect of access to the child with reference to the absence of any legal link between them after her guardianship had been terminated; they also pointed out the lack of biological kinship between them, which pursuant to the Russian Family Code had ruled out any possibility for the first applicant to seek access to the child.

The Court had previously expressed its concern regarding the inflexibility of the Russian legal provisions governing contact rights. Those provisions set out an exhaustive list of individuals who were entitled to maintain contact with a child, without providing for any exceptions to take account of the variety of family situations and of the best interests of the child. As a result, a person who was not related to the child but who had taken care of him or her for a long period of time and had formed a close personal bond with him or her was entirely and automatically excluded from the child's life and could not obtain contact rights in any circumstances, irrespective of the child's best interests.

The texts of the court decisions revealed that the courts had made no attempt to assess the particular circumstances of the case, and, in particular, had not (i) taken into consideration the relationship that had existed between the applicants and the child prior to the termination of the first applicant's guardianship over him; (ii) considered the question of whether, and why, contact between the applicants and the child might or might not be in his best interests; or (iii) given any consideration to the question of whether and why the interests of the child's natural parents might or might not override those of the applicants. In fact, in its final and binding decision, the appellate court had limited itself to holding that the right to seek access to a child could in no circumstances be guaranteed to any individuals other than those listed in the Russian Family Code. The Court could not accept such reasoning as "relevant and sufficient" to deny the applicants access to the child. The relevant court decisions had not been based on the assessment of the individual circumstances of the case and had automatically ruled out any possibility for the family ties between the applicants and the child to be maintained.

The domestic authorities had failed in their obligation to fairly balance the rights of all individuals involved with due regard to particular circumstances of the case, which had amounted to a failure to respect the applicants' family life.

Conclusion: violation (unanimously).

Article 41: EUR 16,000 jointly to the applicants in respect of non-pecuniary damage.

(See also *Nazarenko v. Russia*, 39438/13, 16 July 2015, Information Note 187; and *Antkowiak v. Poland* (dec.), 27025/17, 22 May 2018, Information Note 219)

Respect for family life/Respect de la vie familiale

Refusal to allow a prisoner convicted of terrorist offences to leave prison under escort to pay her respects to her late father: *no violation*

Refus d'autoriser la sortie de prison sous escorte d'une détenue pour actes terroristes pour se recueillir sur la dépouille de son père : *non-violation*

Guimon – France, 48798/14, Judgment | Arrêt 11.4.2019 [Section V]

English translation of the summary | Version imprimable

En fait – La requérante, membre de l'organisation terroriste ETA, était détenue depuis onze années pour infractions graves liées au terrorisme lorsqu'elle a demandé une autorisation de sortie sous escorte pour se rendre au funérarium où reposait son père décédé. Sa demande a été rejetée pour des questions logistiques ainsi que tous ses recours.

En droit – Article 8 : Le refus opposé à la requérante de l'autoriser à sortir de prison sous escorte pour se rendre au funérarium et se recueillir sur la dépouille de son père constitue une ingérence dans son droit au respect de sa vie familiale, prévue par la loi, et qui avait pour but de prévenir les risques d'évasion et de troubles à l'ordre public, visant à garantir la sûreté publique, la défense de l'ordre et la prévention des infractions pénales.

Les autorités judiciaires ont examiné avec diligence la demande de la requérante et ont jugé que le décès de son père constituait un motif exceptionnel pouvant justifier une autorisation de sortie sous escorte. Elles ont toutefois rejeté cette demande.

En effet, le profil pénal de la requérante, puisqu'elle purgeait plusieurs peines de prison pour des actes de terrorisme et continuait de revendiquer son appartenance à l'organisation ETA, le contexte de la sortie à organiser, et des éléments factuels comme la distance géographique de près de 650 km avaient permis de considérer que l'escorte devait être particulièrement renforcée.

La requérante a présenté promptement sa demande d'autorisation de sortie, laissant un délai de six jours aux autorités pour organiser une escorte. Toutefois, le délai imparti, une fois l'autorisation de sortie sous escorte définitivement accordée, était insuffisant pour organiser une escorte composée d'agents spécialisés pour le transfert et la surveillance d'une condamnée pour des faits de terrorisme, avec un repérage des lieux préalable.

Aucune alternative à une sortie sous escorte ne pouvait être envisagée dans les circonstances de l'espèce pour satisfaire la demande de la requérante.

Et si la requérante n'avait pas revu son père depuis 2009, elle avait bénéficié régulièrement de visites de la part des membres de sa famille et d'amis.

Partant, les autorités judiciaires ont procédé à une mise en balance des intérêts en jeu, à savoir, d'une part, le droit de la requérante au respect de sa vie familiale et, d'autre part, la sûreté publique, la défense de l'ordre et la prévention des infractions pénales. L'État défendeur n'a pas dépassé la marge d'appréciation dont il jouit dans ce domaine.

Ainsi, le refus opposé à la requérante de sortir de prison sous escorte, pour se rendre au funérarium et se recueillir sur la dépouille de son père, n'était pas disproportionné aux buts légitimes poursuivis.

Conclusion : non-violation (unanimité).

(Voir aussi *Płoski c. Pologne*, 26761/95, 12 novembre 2002, Note d'information 47 ; *Kubiak c. Pologne*, 2900/11, 21 avril 2015 ; et *Kanalas c. Roumanie*, 20323/14, 6 décembre 2016)

Expulsion

Review of proportionality overly superficial in the expulsion of a convicted person who had become an invalid dependent on his children: *expulsion would constitute a violation*

Contrôle de proportionnalité trop superficiel dans l'expulsion d'un condamné pour crime, devenu invalide et dépendant de ses enfants : *l'expulsion emporterait violation*

I.M. – Switzerland/Suisse, 23887/16,
Judgment | Arrêt 9.4.2019 [Section III]

English translation of the summary | Version imprimable

En fait – Le requérant est un ressortissant kosovar né en 1964, installé en Suisse depuis 1993. En 2003, il commit un viol ; sa peine fut fixée à deux ans et trois mois de réclusion. Une fois cette condamnation devenue définitive, les autorités décidèrent de l'expulser (du canton en 2006, puis de l'ensemble de la Suisse en 2010).

Au fil des ans, son état de santé se détériora : depuis 2012, il est invalide à 80 %. En 2015, son dernier recours contre la décision d'expulsion fut rejeté : le Tribunal administratif fédéral estima que le principe de subsidiarité commandait de laisser une importante marge de discrétion aux autorités. Par suite, le requérant a perdu sa rente d'invalidité ; il est dépendant de ses enfants.

En droit – Article 8

a) *Ingérence* – Outre la vie privée (le requérant vivant en Suisse depuis longtemps), l'article 8 entre également ici en jeu au titre de la vie familiale : invalide, le requérant est quotidiennement assisté (tâches ménagères, soins, toilette, habillage) par ses enfants adultes et financièrement dépendant envers eux ; il est également le père de deux enfants mineurs nés en Suisse. Peu importe ici l'éventuelle possibilité pour ses enfants adultes de continuer à lui apporter un soutien financer à distance en cas de renvoi au Kosovo, ou le fait que le requérant n'ait invoqué auprès des autorités sa paternité quant aux deux enfants mineurs (nés en 2006) que postérieurement à l'arrêt rendu en 2015.

b) *Nécessité dans une société démocratique* – Si les autorités internes avaient procédé à une mise en balance circonstanciée des intérêts en cause, prenant en compte les différents critères établis par la jurisprudence de la Cour, et si elles avaient indiqué des motifs pertinents et suffisants pour justifier leur décision, alors la Cour aurait, en ligne avec le principe de subsidiarité, pu le cas échéant être amenée à considérer que la décision des autorités internes s'inscrivait dans le cadre de la marge d'appréciation reconnue à l'État défendeur dans le domaine de l'immigration.

Tel n'est pas le cas en l'espèce. La proportionnalité de la mesure de renvoi n'a été examinée que

de manière superficielle. Le Tribunal administratif fédéral s'est attaché à la gravité de l'infraction commise, a brièvement traité la question du risque de récidive et a fait mention des difficultés auxquelles serait confronté le requérant à son retour au Kosovo. Son analyse s'est limitée à ces éléments.

D'autres aspects n'ont pas, ou trop superficiellement, été abordés, alors qu'il s'agissait de critères pertinents au regard de la jurisprudence de la Cour, et notamment la solidité des liens sociaux, culturels et familiaux du requérant avec le pays d'hôte et avec le pays de destination, les éléments d'ordre médical, la dépendance du requérant par rapport à ses enfants majeurs, l'évolution du comportement du requérant douze ans après la commission de l'infraction, l'impact de détérioration considérable de son état de santé sur son risque de récidive.

Ces carences empêchent la Cour de tirer une conclusion claire quant à savoir si les intérêts invoqués par le requérant l'emportent sur l'intérêt de son expulsion pour le maintien de l'ordre public. Bref, les autorités internes ne sont pas parvenues à démontrer de manière convaincante que la mesure d'éloignement prise était proportionnée aux buts légitimes poursuivis.

Conclusion : l'expulsion emporterait violation (unanimité).

Article 41 : constat de violation suffisant en lui-même pour le préjudice moral.

ARTICLE 10

Freedom of expression/Liberté d'expression

Ban on access to means of communication during house arrest without connection to requirements of criminal investigation: *violation*

Interdiction visant l'accès aux moyens de communication pendant l'assignation à résidence dénuée de lien avec les exigences de l'enquête pénale : *violation*

Navalnyy – Russia/Russie (no. 2/n° 2), 43734/14, Judgment | Arrêt 9.4.2019 [Section III]

(See Article 18 below/Voir l'article 18 ci-dessous, page 26)

ARTICLE 13

Effective remedy/Recours effectif

Absence of effective remedy for allegations of inhuman conditions of transport of prisoners: *violation*

Absence de recours effectif relativement à des allégations de conditions inhumaines de transport de détenus : *violation*

Tomov and Others/et autres – Russia/Russie, 18255/10 et al., Judgment | Arrêt 9.4.2019 [Section III]

(See Article 3 above/Voir l'article 3 ci-dessus, page 7)

ARTICLE 15

Derogation in time of emergency/ Dérogation en cas d'état d'urgence

Detention based on mere suspicion of membership of an illegal organisation, without any specific incriminating evidence: *not "strictly required"*

Détention fondée sur le simple soupçon d'appartenance à une organisation illégale, sans éléments à charge concrets : *« stricte mesure » dépassée*

Alparslan Altan – Turkey/Turquie, 12778/17, Judgment | Arrêt 16.4.2019 [Section II]

(See Article 5 § 1 (c) above/Voir l'article 5 § 1 c) ci-dessus, page 13)

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Political activist's house arrest with restrictions on communication, correspondence and use of Internet, aimed at suppressing pluralism: *violation*

Assignation à résidence d'un militant politique, avec des restrictions concernant la communication, la correspondance et l'usage d'internet, dans le but d'éliminer le pluralisme : *violation*

Navalnyy – Russia/Russie (no. 2/n° 2), 43734/14, Judgment | Arrêt 9.4.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The applicant, a political opposition figure, complained that the decision to place him under house arrest and the restrictions imposed on him during that time had been arbitrary and unnecessary and had been applied in order to prevent him from pursuing his public and political activities.

Law

Article 5: The applicant's house arrest had been ordered primarily on the grounds that he had breached a previous preventive measure, namely an undertaking not to leave Moscow during the investigation. Throughout the fourteen months of the undertaking, the applicant had regularly appeared before the investigator and participated in procedural acts whenever required. He had taken the initiative to notify the investigator of his trips to the Moscow Region and nothing in the case file indicated an intention to flee or to otherwise hamper the progress of the investigation by making those trips. The Court could not overlook the intensity of the surveillance to which the applicant had been subjected in the period before he had been placed under house arrest. It appeared from the Government's own submissions that the authorities had been aware of his activities in considerable detail and had kept thorough records. From the sample of the surveillance reports submitted to the Court, the impugned trips appeared to be family outings, unrelated to the criminal case in question.

There was no reasonable explanation as to why the district court, in full knowledge of those circumstances, had endorsed the view that the applicant had breached his undertaking or that his conduct had warranted a deprivation of liberty. The domestic courts had no criminal-process reasons which called for the undertaking to be converted into house arrest. The house arrest had therefore been ordered against the applicant unlawfully.

Conclusion: violation (unanimously).

Article 10: The district court had set conditions for the applicant's house arrest. Those included banning him from communicating with anyone apart from his immediate family and lawyer, receiving or sending any correspondence, or using the Internet. He had been further banned from making statements, declarations or addresses to the public or from commenting on the criminal case to the media. The district court had subsequently amended two of the conditions, finding them to be unlawful. After removing the two unlawful restrictions, the court had imposed a new one – on the use of radio and television, which it had specified among the banned means of communication. The way the new condition had been formulated left it unclear whether the applicant had been prevented from watching television and listening to the radio, or whether he had only been restricted from appearing on air. In any event, the scope of the new restriction was even wider than the previous ban on making public comments on the criminal case because it had limited the applicant's access to broadcast media for making statements on any subject matter.

There was no link between the restrictions on the applicant's freedom of expression and the risks indicated by the Government. As to the risk of absconding, supposedly demonstrated by the trips to the Moscow Region, it was difficult to see how even a genuine belief that the applicant had been about to flee could be relevant to a ban on his use of radio and television as a means of communication. The applicant had been confined to his flat; he had been under strict surveillance and worn an electronic tracking device; he had not been allowed to leave his flat, even to take walks. In those circumstances it was unlikely that an opportunity to issue a public statement via radio or television would have facilitated absconding. As to the possibility of the applicant using a public statement to influence witnesses or otherwise obstruct the investigation, it had been referred to in the abstract and its relation with the use of radio and television remained equally tenuous.

The restrictions had been applied without any apparent connection to the requirements of the criminal investigation. The ban on the applicant's access to means of communication in the house-arrest order had not served the purpose of securing his appearance before the investigator or at his trial, and, as with the decision to place him under house arrest, had had no connection to the objectives of criminal justice.

Conclusion: violation (unanimously).

Article 18 taken in conjunction with Article 5: The applicant's complaint under Article 18 represented a fundamental aspect of the case which had not been addressed and which merited a separate examination.

The Court had found that the applicant's detention under house arrest had been ordered unlawfully in

breach of Article 5, and that the ban on his access to means of communication had not pursued a legitimate aim in breach of Article 10. In view of those conclusions, the Court could dispense with an assessment of the issue of plurality of purposes in respect of those measures and focus on the question whether, in the absence of a legitimate purpose, there had been an identifiable ulterior one.

The request to have the undertaking not to leave Moscow replaced with house arrest had been lodged immediately following the applicant's two arrests for taking part in unauthorised public gatherings. Both those arrests had been found by the Court to be in breach of Articles 5 and 11, and one of them also in breach of Article 18 (see *Navalnyy v. Russia* [GC], 29580/12 et al., 15 November 2018, Information Note 223). In that case the Court had noted the pattern of the applicant's arrests and had found that the grounds given for his deprivation of liberty had become progressively more implausible. It had accepted the allegation that he had been specifically and personally targeted as a known activist. His deprivation of liberty in the current case had to be seen in the context of that sequence of events.

The applicant's house arrest, together with the restrictions on his freedom of expression, had lasted for over ten months. That duration appeared inappropriate to the nature of the criminal charges at stake. The restrictions imposed on the applicant, especially the communication ban, which even the domestic courts had considered unlawful, had become increasingly incongruous over the course of that period, as their lack of connection with the objectives of criminal justice had become increasingly apparent.

In its discussion of Article 18 in connection with Articles 5 and 11 in *Navalnyy* [GC], the Court had relied on the converging contextual evidence that at the material time the authorities had been becoming increasingly severe in their response to the conduct of the applicant and other political activists and, more generally, to their approach to public assemblies of a political nature. It had also referred to the broader context of the Russian authorities' attempts to bring the opposition's political activity under control and noted that the applicant's role as an opposition politician had played an important public function through democratic discourse.

The evidence relied on in *Navalnyy* [GC] was equally pertinent to the case in issue and was capable of corroborating the applicant's allegations that his placement under house arrest with restrictions on communication, correspondence and use of the Internet had pursued the aim of curtailing his public activity, including organising and attending public events. The restrictions on his right to liberty in the case had pursued the same aim as in *Navalnyy* [GC], namely to suppress political pluralism. That constituted an ulterior purpose within the meaning of Article 18, of significant gravity.

Conclusion: violation (unanimously).

Article 41: EUR 20,000 in respect of non-pecuniary damage.

(See also *Merabishvili v. Georgia* [GC], 72508/13, 28 November 2017, Information Note 212)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/ Épuisement des voies de recours internes Effective domestic remedy – France/ Recours interne effectif – France

Effectiveness of a suspensive remedy, in respect of an asylum request submitted after the application had been lodged with the Court: *admissible*

Effectivité d'un recours suspensif, concernant une demande d'asile réalisée après la saisine de la Cour : *recevable*

A.M. – France, 12148/18, Judgment | Arrêt 29.4.2019 [Section V]

English translation of the summary | Version imprimable

En fait – Après avoir purgé une peine privative de liberté pour des actes de terrorisme, le requérant, ressortissant algérien, fit l'objet d'un arrêté préfectoral ordonnant de le faire reconduire en Algérie, en exécution de l'interdiction du territoire dont sa condamnation avait été assortie. Après avoir introduit un recours contre cet arrêté devant les juridictions administratives, il a demandé à la Cour, le 12 mars 2018, une mesure provisoire visant à faire suspendre son renvoi vers l'Algérie. Puis, le 19 mars 2018, il a fait une demande d'asile auprès de l'Office français de protection des réfugiés et des apatrides (OFPRA), qui a rejeté sa demande quelques jours plus tard. Après quoi, le 6 avril 2018, il a fait parvenir à la Cour un formulaire de requête dûment complété.

En droit – Article 35 § 1 : La « date d'introduction de la requête » pertinente pour apprécier la condition d'épuisement des voies de recours internes est, en l'espèce, celle de l'introduction de la demande de mesure provisoire.

a) *Sur l'effectivité et l'accessibilité de la demande d'asile* – La demande d'asile est le seul recours suspensif de plein droit ouvert aux personnes dans une situation similaire à celle du requérant. Dans sa décision *M.X. c. France* ((déc.), 21580/10, 1er juillet 2014), la Cour a tenu pour établi, d'une part, que les instances de l'asile se prononçaient systématiquement sur les risques encourus en cas de renvoi par le demandeur avant de rechercher si les actes qui lui étaient reprochés relevaient des clauses d'exclusion de la Convention de Genève ou de la protection subsidiaire et, d'autre part, que l'administration tirait toutes les conséquences d'une reconnaissance de risques au regard de l'article 3 de la Convention par les instances de l'asile en s'abstenant d'exécuter la mesure de renvoi vers le pays concerné, quand bien même l'intéressé aurait été exclu des protections conventionnelle et subsidiaire.

Par ailleurs, aucune question d'accessibilité en pratique de ce recours ne se pose en l'espèce.

En conséquence, la saisine de l'OFPRA constituait bien en l'espèce un recours à épuiser.

b) *Sur le moment de l'introduction de la demande d'asile* – En principe, les requérants qui cherchent à éviter d'être renvoyés par un État contractant doivent avoir épuisé les voies de recours internes ayant un effet suspensif avant de solliciter des mesures provisoires.

Toutefois, selon une jurisprudence constante de la Cour, le dernier échelon d'un recours peut être atteint après le dépôt de la requête, tant que la Cour ne s'est pas prononcée sur sa recevabilité. En l'espèce, si la saisine de l'OFPRA ne constituait pas le dernier échelon de la voie de recours ouverte par la demande d'asile, elle en constituait cependant le seul ayant un effet suspensif. Or, même si cet échelon a été atteint après le dépôt de la requête, il reste qu'il l'a été avant que la Cour ne se prononce sur la recevabilité de celle-ci. En effet, le requérant a saisi l'OFPRA une semaine après avoir soumis sa requête à la Cour, et l'OFPRA a rejeté sa demande d'asile quatre jours après avoir été saisi. Par ailleurs, le requérant avait engagé en parallèle une autre voie de recours, en saisissant les juridictions administratives contre l'arrêté préfectoral, avant de solliciter de la Cour l'application de l'article 39 de son règlement.

Dans ces circonstances très particulières, la Cour estime qu'il serait excessivement formaliste de déclarer à ce stade la requête irrecevable pour non-épuisement des voies de recours internes, l'essentiel étant que les autorités internes aient été en mesure de se prononcer sur la violation de la Convention alléguée par le requérant. Il y a donc lieu de rejeter l'exception du Gouvernement tirée du non-épuisement des voies de recours internes.

Conclusion : recevable (unanimité).

Quant au fond, la Cour a ensuite conclu, à l'unanimité, à l'absence de violation de l'article 3 dans l'éventualité de la mise à exécution de la décision de renvoyer le requérant vers l'Algérie.

(Voir aussi le Guide pratique sur la recevabilité)

Exhaustion of domestic remedies/ Épuisement des voies de recours internes
Effective domestic remedy – Hungary/ Recours interne effectif – Hongrie

Effectiveness of constitutional complaint to challenge either application of legislation in court proceedings or court rulings, both allegedly contrary to the Fundamental Law: *inadmissible*

Effectivité d'un recours constitutionnel pour contester l'application de la législation dans une procédure, ou pour contester une décision judiciaire, en cas de contrariété supposée avec la Loi fondamentale : *irrecevable*

Szalontay – Hungary/Hongrie, 71327/13, Decision | Décision 12.3.2019 [Section IV]

Traduction française du résumé | Printable version

Facts – The applicant, the managing director of a company, complained that his right to a fair trial had been violated in criminal proceedings against him. In particular, he argued that the principle of equality of arms had not been observed and that the courts had not been impartial.

Law – Article 35 § 1: The Court was called upon to ascertain whether, having regard to the particular circumstances of the applicant and the nature of his complaint, the remedy indicated by the Government, namely the procedures outlined in section 26(1) and section 27 of the Constitutional Court Act, had been accessible, effective and capable of offering sufficient redress.

Under section 26(1) and section 27 of the Constitutional Court Act, the Constitutional Court could

examine constitutional complaints if the grievance – in the case of section 26(1) – had occurred as a result of the application of a piece of legislation allegedly contrary to the Fundamental Law in court proceedings or – in the case of section 27 – if the grievance had occurred as a result of court rulings allegedly contrary to the Fundamental Law.

The applicant's case could fall into both categories. His grievances concerned both the application of a provision of the Code of Criminal Procedure barring him from submitting a challenge for bias in an effective manner; and his conviction and sentence resulting from judgments that demonstrated a lack of impartiality on the part of the courts and a failure to observe the principle of equality of arms. The first of those issues could relate to the constitutionality of the relevant provision, whereas the second one could relate to the constitutionality of the application of the law by the courts.

The applicant's complaints fell entirely within the ambit of the right to a fair trial, which was enshrined in the Fundamental Law (see, conversely, *Király and Dömötör v. Hungary*). Sections 41 and 43 of the Constitutional Court Act contemplated, respectively, the striking down of a legal provision or the quashing of a court decision if they were in breach of the Fundamental Law; nevertheless, those rules did not provide for the possibility of compensation. However, that did not preclude the effectiveness of the remedies in issue in the instant case. That was because the eventual striking down of the impugned legal provision pursuant to section 26(1) of the Constitutional Court Act, coupled with the quashing of the court judgments pursuant to section 27, would have resulted in new proceedings before the competent criminal courts in accordance with section 41 of the same Act. Moreover, a constitutional complaint lodged solely under section 27 could also have resulted in the quashing of the judgments and in new proceedings in the applicant's case. Therefore, a successful constitutional complaint, relying either on a combination of sections 26(1) and 27 of the Constitutional Court Act or on section 27 alone, would have been capable of putting an end to the grievance by prohibiting the application of the impugned rule and ordering new proceedings. Had the applicant availed himself of a constitutional complaint after the final and binding second-instance judgment, a positive outcome might have secured him redress in the form of the resumption of the criminal case, this time devoid of the procedural irregularities complained of. The statutory sixty-day time-limit starting from the day when the applicant had become aware of the final judgment had provided an adequate opportunity for him to lodge a constitutional complaint.

The remedy suggested by the Government was therefore one which could afford the highest national court the opportunity to examine the violations alleged in the present case.

As regards the question whether a constitutional complaint in this instance would, in practice, have offered a reasonable prospect of success, the Government had not provided examples of cases where the Constitutional Court had dealt with issues similar to the ones arising in the present application. However, being aware of its supervisory role subject to the principle of subsidiarity, the Court could not substitute its own view of the issues at hand for that of the Constitutional Court, which, for its part, had not been afforded the opportunity to examine the issues arising in the applicant's case.

A threshold requirement under section 29 of the Constitutional Court Act for the admissibility of a constitutional complaint was that a conflict with the Fundamental Law had to have significantly affected the judicial decision in question. In the Court's view, that could have been an arguable claim on the applicant's part, given the nature of the allegations he had made. Those revolved in essence around the assertion that the non-observance of the principle of equality of arms and the lack of impartiality on the part of the courts had resulted in his wrongful conviction in an unfair trial.

In the applicant's case either a constitutional complaint under section 26(1) coupled with a complaint under section 27 against the impugned legislation, or a constitutional complaint solely under section 27 against the judgments given in allegedly unfair proceedings, were accessible remedies offering reasonable prospects of success. There were no circumstances exempting the applicant from having to lodge such complaints.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See *Mendrei v. Hungary* (dec.), 54927/15, 19 June 2018, Information Note 220; and compare *Király and Dömötör v. Hungary*, 10851/13, 17 January 2017, Information Note 203)

Exhaustion of domestic remedies/ Épuisement des voies de recours internes Effective domestic remedy/Recours interne effectif – Romania/Roumanie

Failure to use a new remedy, applicable to pending cases, to obtain reimbursement of national taxes in breach of EU law: *inadmissible*

Non-épuisement d'une nouvelle voie de recours, applicable aux affaires pendantes, pour rembourser des taxes internes contraires au droit de l'UE : *irrecevable*

Pop and Others/et autres – Romania/Roumanie, 54494/11 et al., Decision | Décision 2.4.2019 [Section IV]

English translation of the summary | Version imprimable

En fait – En 2009, afin de faire immatriculer en Roumanie des véhicules d'occasion achetés dans d'autres pays de l'Union européenne (UE), les trois requérants durent payer une « taxe de pollution », instituée en 2008. Après paiement, ils intentèrent des procédures en restitution, estimant que cette taxe était contraire au droit de l'UE. En 2011, les juridictions roumaines rejetèrent leurs demandes, pour des raisons de forme. Les requérants saisirent alors la Cour, en invoquant l'article 1 du Protocole n° 1 et l'article 13 de la Convention.

En août 2017 est entrée en vigueur une ordonnance gouvernementale d'urgence (OUG 52/2017) instituant une procédure de remboursement de diverses taxes, dont la taxe de pollution (y compris les intérêts pour l'intervalle de temps pertinent).

Entre-temps, les requérants ont entamé d'autres démarches pour le remboursement de la taxe litigieuse : le premier a formulé une nouvelle demande, qui sera traitée sur le fondement de cette nouvelle ordonnance ; le second a obtenu un remboursement partiel ; le troisième a obtenu un remboursement intégral de la taxe ainsi qu'un remboursement partiel des intérêts, à la suite d'un jugement rendu en octobre 2012.

En droit – Article 35 § 1 (*épuisement des voies de recours internes*)

a) *Concernant les deux premiers requérants* – Bien que son instauration relève peut-être davantage d'une volonté des autorités nationales de mettre en conformité le droit national avec le droit de l'UE que de régler au niveau interne les différends portant sur la Convention, la nouvelle voie de remboursement créée par l'OUG 52/2017 est également ouverte aux justiciables ayant introduit une requête devant la présente Cour à propos des taxes en question.

Eu égard aux garanties mises en place (une procédure sans frais, des modalités claires et prévisibles, des délais contraignants et un contrôle juridictionnel effectif), rien ne permet à ce stade de douter de l'effectivité de cette nouvelle voie de recours.

S'il est vrai que c'est en principe à la date de l'introduction de la requête que s'apprécie l'épuisement des voies de recours internes, l'importance du principe de subsidiarité justifie ici de faire une exception. Il convient donc d'exiger l'exercice préalable du nouveau recours même pour les requêtes déjà introduites devant la Cour avant son instauration.

b) *Concernant le troisième requérant* – La nouvelle voie de recours susmentionnée ne peut s'appliquer au troisième requérant, puisqu'il a bénéficié, avant son entrée en vigueur, d'un jugement définitif ordonnant le remboursement de la taxe de pollution, ainsi que des intérêts à compter de la date de saisine du tribunal.

En effet, comme le capital et une partie des intérêts lui ont été versés conformément au jugement, le seul grief persistant du requérant concerne l'absence de remboursement des intérêts afférents à la taxe pour la période allant de la date du paiement de cette taxe jusqu'à la date d'introduction de son action en restitution devant le tribunal.

Cependant, le requérant disposait de deux recours internes pour faire valoir cette lacune du remboursement (soit contester cet aspect du jugement devant la juridiction supérieure, soit en demander la révision pour cause de contrariété avec le droit de l'UE). Or il n'en a utilisé aucun.

Conclusion : irrecevable pour les trois requérants (non-épuisement des voies de recours internes).

ARTICLE 37

Striking out applications/Radiation du rôle

Unilateral declarations containing no undertaking to reopen investigation in cases where such reopening was *de jure* or *de facto* impossible: *struck out*

Déclarations unilatérales ne contenant pas l'engagement de rouvrir l'enquête dans des affaires où pareille mesure est impossible *de jure* ou *de facto* : *radiation du rôle*

Taşdemir – Turkey/Turquie, 52538/09,
Kutlu and Others/et autres – Turkey/Turquie, 18357/11,
Karaca – Turkey/Turquie, 5809/13,
Decisions | Décisions 12.3.2019 [Section II]

Traduction française du résumé | Printable version

Facts – The applicants alleged that their relatives had been unlawfully killed by State agents. In two of the applications (*Kutlu and Others* and *Karaca*), the accused had been acquitted on evidential and self-defence grounds respectively. In *Taşdemir* the criminal proceedings had been discontinued at the appeal stage as they had become time-barred.

In all three cases the Government submitted unilateral declarations acknowledging that there had been a breach of Article 2 and proposing compensation, but containing no undertaking to reopen or to continue the investigations.

Law – Article 37 § 1 (c): In *Kutlu and Others* the trial court had ordered in its judgment that the prosecutor should be informed of the police officers' acquittal on evidential grounds so that he or she could take action to find the real perpetrators responsible for the killing of the applicants' relative. It was therefore possible for the applicants, if they so wished, to request the prosecutor to open a new investigation, in accordance with a recent legislative amendment which allowed the re-opening of an investigation, including in cases where an application had been struck out by the Court on the basis of a unilateral declaration submitted by the Government.

In *Taşdemir* and *Karaca* the Court noted that it had previously refused to entertain unilateral declarations without an undertaking by respondent States to conduct an investigation that would comply with Article 2 where the domestic investigation into a disappearance or killing had been prima facie deficient.

There might, however, be situations where it was *de jure* or *de facto* impossible to reopen criminal investigations. Such situations might arise, for example, when the alleged perpetrators had been acquitted and could not be put on trial for the same offence, or when the criminal proceedings had become time-barred on account of the statute of limitations in the national legislation. Indeed, a reopening of criminal proceedings which had been terminated on account of the expiry of the statute of limitations could raise issues concerning legal certainty and thus have a bearing on a defendant's rights under Article 7. In a similar vein, putting the same defendant on trial for an offence for which he or she had already been finally acquitted or convicted could raise issues concerning that defendant's right not to be tried or punished twice within the meaning of Article 4 of Protocol No. 7.

In addition to the examples of *de jure* impossibilities, there was a possibility that if a long time had passed since the incident, any evidence might have disappeared, been destroyed or become untraceable and it might therefore in practice no longer be possible to reopen an investigation and conduct it in an effective fashion.

Thus, whether a member State was under an obligation to reopen criminal proceedings, and consequently whether a unilateral declaration should contain such an undertaking, would depend on the specific circumstances of the case, including the nature and the seriousness of the alleged violation, the identity of the alleged perpetrator, whether other persons not involved in the proceedings might have been implicated, the reason why the criminal proceedings had been terminated, the shortcomings and any defects in the criminal proceedings before the decision to bring the criminal proceedings to an end, and whether the alleged perpetrator had contributed to the shortcomings and defects that led to the criminal proceedings being brought to an end.

In *Taşdemir*, the criminal proceedings against the police officers for failure to stop the applicants' relative from committing suicide had become time-barred. In *Karaca*, the village guards had been acquitted of the killing of the applicants' son on the grounds of self-defence. Moreover, there was no allegation that other individuals had also been involved in the impugned deaths. Consequently, it was *de jure* impossible, under Turkish law, to reopen a criminal investigation into the deaths of the applicants' relatives.

In this respect the Court noted that in its Resolution concerning the Grand Chamber's judgment in *Jeronovičs v. Latvia*, the Committee of Ministers considered that all the measures required by Article 46 § 1 of the Convention had been adopted and decided to close its investigation, even though the applicant's request to reopen the investigation had been rejected by the prosecutor on account of the expiry of the limitation period.

The unilateral declaration procedure was an exceptional one. As such, when it came to breaches of the most fundamental rights contained in the Convention, it was not intended either to circumvent an applicant's opposition to a friendly settlement or to allow a Government to escape their responsibility for such breaches. However, the prevailing issues in Turkey in these kinds of cases had already been examined in the Court's clear and extensive case-law and had also been sufficiently brought to the attention of the Committee of Ministers and were being followed up under the terms of Article 46 § 2 of the Convention.

Having regard to the admissions contained in the Government's declarations, the disciplinary punishment imposed on the police officers in *Taşdemir* and the amount of compensation proposed – which was consistent with the amounts awarded in similar cases –, it was no longer justified to continue the examination of all three applications. That decision was without prejudice to the possibility for the applicants to exercise any other available remedies in order to obtain redress. Should the Government fail to comply with the terms of their unilateral declarations, the applications could be restored to the list in accordance with Article 37 § 2.

Conclusion: struck out.

(See *Tahsin Acar v. Turkey* (preliminary issue) [GC], 26307/95, 6 May 2003, Information Note 53; and *Jeronovičs v. Latvia* [GC], 44898/10, 5 July 2016, Information Note 198)

ARTICLE 46

Execution of judgment – General measures/Exécution de l'arrêt – Mesures générales

Respondent State required to take general measures to resolve structural problem of inhuman conditions of transport of prisoners and the absence of effective remedies

État défendeur tenu de prendre des mesures générales afin de remédier à un problème structurel de conditions inhumaines de transport de détenus et à l'absence de recours effectif

Tomov and Others/et autres – Russia/Russie, 18255/10 et al., Judgment | Arrêt 9.4.2019 [Section III]

(See Article 3 above/Voir l'article 3 ci-dessus, page 7)

OTHER JURISDICTIONS

Inter-American Court of Human Rights (IACtHR)/Cour interaméricaine des droits de l'homme

State obligations regarding forced disappearances and participation of armed forces in public security tasks

Obligations incombant à l'État en ce qui concerne les disparitions forcées et la participation des forces armées à des missions de sécurité publique

Case of Alvarado Espinoza et al. v. Mexico/Affaire Alvarado Espinoza et autres c. Mexique, Series C No. 370/Série C n° 370, Judgment | Arrêt 28.11.2018

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]
[Le présent résumé a été fourni gracieusement (en anglais uniquement) par le Secrétariat de la Cour interaméricaine des droits de l'homme. Il porte uniquement sur les questions de fond et de réparation traitées dans l'arrêt. Un résumé officiel plus détaillé (en espagnol uniquement) est disponible sur le site web de cette cour : www.corteidh.or.cr.]

The case refers to the forced disappearances of Nitza Paola Alvarado Espinoza, José Ángel Alvarado Herrera and Rocío Irene Alvarado Reyes on 29 December 2009. The disappearances occurred during "Joint Operation Chihuahua" and the fight against organised crime in Mexico, with the participation of the armed forces in security tasks. To date, the fate or whereabouts of the three victims is unknown. The case also relates to the lack of due diligence in the investigations of these incidents within a reasonable period of time and the State's obligation to guarantee the rights of the victims' relatives, who were forced to move and who suffered threats and harassment.

Merits

(a) Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the American Convention on Human Rights (ACHR); and Article I(a) of the Inter-American Convention on Forced Disappearance of Persons (not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees): The Inter-American Court of Human Rights (hereafter "the Court") stressed the particular importance of using circumstantial evidence, indicators and presumptions in demonstrating the concurrence of the elements of an enforced disappearance. Thus, in establishing the State's responsibility, the Court verified the context in which the events occurred; the alleged serious violations of human rights and impunity; the standards regarding the participation of armed forces in security tasks; and testimonials and references from authorities.

Regarding the participation of the armed forces in security tasks, the Court interpreted the obligations

established in Articles 1(1) and 2 of the ACHR, as well as Article 32(2) thereof, regarding the obligation to guarantee security for all and maintain public order, while acknowledging the serious threat posed to the community by organised crime. The Court acknowledged that when tackling serious threats to the community, it was important that the State act within limits and according to procedures that ensure the preservation of public security and respect for human rights at all times.

The Court reaffirmed that, as a general rule, the preservation of internal public order and security must primarily be the responsibility of the civilian police forces. However, when, as an exception to the rule, armed forces participate in security tasks, that participation must be:

(i) *extraordinary*, in that every intervention has to be justified and exceptional, temporary and restricted as strictly necessary in accordance with the circumstances of the case;

(ii) *subordinated and complementary* to the work of the civil forces. The tasks assigned to the armed forces cannot extend to those that belong to the institutions in charge of the procurement of justice or the judicial or ministerial police;

(iii) *regulated* through legal mechanisms and protocols on the use of force, according to the principles of exceptionality, proportionality and absolute necessity, and in accordance with the respective training thereon;

(iv) *monitored* by competent, independent and technically capable civil bodies.

Moreover, the Court reiterated its jurisprudence that the State is obliged to provide simple and expeditious recourse for denouncing human rights violations, and to address such complaints before the ordinary rather than the military jurisdiction.

Conclusion: violation (unanimously).

(b) Articles 8(1) (right to a fair trial), 25 (right to judicial protection) and 2 (domestic legal effects) of the ACHR; and Articles I(b) (obligation to punish persons who commit or attempt to commit forced disappearance) and IX (obligation to try cases in ordinary jurisdictions only) of the Inter-American Convention on Forced Disappearance of Persons: The Court found the State responsible for a lack of due diligence within the first hours and days after it had received notice of the disappearances. The Court also found a violation of the duty to conduct a serious, impartial, effective and complete investigation within a reasonable period of time. Furthermore, it reiterated the State's responsibility owing to the fact that the investigation took place before the military jurisdiction, which because of the lack of due diligence had serious implications.

(c) Articles 5(1) (right to humane treatment), 22(1) (freedom of movement and residence), 17(1) (rights of the family), 11 (right to privacy), 19 (rights of the child) and 63(2) (provisional measures) of the ACHR: Regarding the right to personal integrity of the relatives, the Court acknowledged the suffering of the direct victims' relatives due to these violations. Moreover, the Court concluded that not only did the State fail to guarantee the right of movement and residence to the relatives of the victims, who as various family groups had been forced to flee from their place of residence owing to the threats and harassment they had been subjected to, but it also failed to provide guarantees for their safe return. This occurred in spite of the fact that the Court had been ordering provisional measures since 2010. Therefore, the State had failed to comply with the provisional measures ordered.

Conclusion: violation (unanimously).

For the first time, the Court ruled in a judgment on a contentious case on the provisional measures related to the said case in the light of Articles 63(1) and 63(2) of the ACHR. The Court decided that it would lift the provisional measures, as the State's obligations deriving therefrom had become obligations in accordance with the Court's order that it provide integral reparation in accordance with Articles 63(1) and 63(2) of the ACHR.

Reparations – The State must: investigate the whereabouts of the victims and the facts of the case; provide rehabilitative measures for the relatives; publish the judgment; publicly acknowledge responsibility; make reparations for the damage caused to the "life plans" of the relatives; take steps to create a register of missing persons; provide training on the safeguards of public safety; and ensure protection to relatives and guarantees for their safe return, as well as grant compensation.

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Elections/Élections

The Court has elected Linos-Alexandre Sicilianos (judge elected in respect of Greece – see photograph) as its new President. Linos-Alexandre Sicilianos has been one of the two Vice-Presidents

of the Court since 2017. He succeeds Guido Raimondi, whose term of office expires on 4 May 2019, as President. The Court has also elected Roberto Spano as Vice-President and Ksenija Turković as Section President. Following these elections, the composition of the Sections will change on 5 May (for further details, see the Court's website).

During its spring session held from 8 to 12 April 2019, the Parliamentary Assembly of the Council of Europe elected Lorraine Schembri Orland judge of the Court in respect of Malta and Saadet Yüksel as judge of the Court in respect of Turkey. Their nine-year terms in office will commence no later than three months after their election.

Le 1er avril 2019, la Cour plénière a élu Linos-Alexandre Sicilianos (juge élu au titre de la Grèce – voir photo) président de la Cour. Vice-président de la Cour depuis 2017, Linos-Alexandre Sicilianos succédera à Guido Raimondi, dont le mandat prendra fin le 4 mai 2019. La Cour a également élu le juge Roberto Spano vice-président et Ksenija Turković présidente de section. À la suite des élections, la composition des sections changera le 5 mai (voir le site web de la Cour).

Lors de sa session de printemps qui s'est tenue du 8 au 12 avril 2019, l'Assemblée parlementaire du Conseil de l'Europe a élu Lorraine Schembri Orland juge à la Cour au titre de Malte et Saadet Yüksel juge à la Cour au titre de Turquie. Leurs mandats de neuf ans commenceront au plus tard trois mois à compter de leur élection.

The Court's first advisory opinion/ Premier avis consultatif de la Cour

In response to the first request for an advisory opinion under Protocol No. 16 to the Convention, from the French Court of Cassation, the Court delivered its opinion in April 2019 (see the legal summary under Article 8 above, page 16).

The advisory opinion is available in Spanish, as well as in the Court's two official languages.

-ooOoo-

En réponse à la première demande d'avis consultatif soumise par la Cour de cassation française en vertu du Protocole nº 16 de la Convention, la Cour a rendu son avis en avril 2019 (voir le résumé juridique sous l'article 8 ci-dessus, page 16).

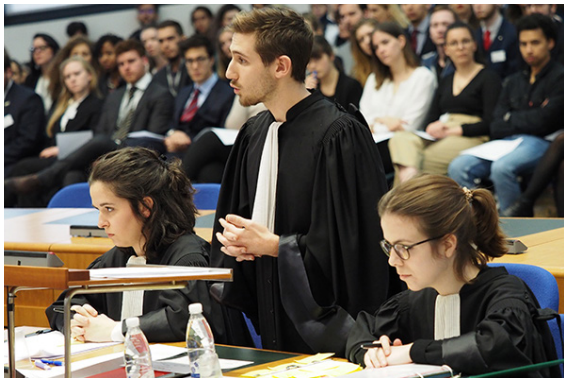
L'avis consultatif est disponible en espagnol, ainsi que dans les deux langues officielles de la Cour.

2019 René Cassin Competition/ Concours européen de plaidoirie René Cassin 2019

The final round of the 34th edition of the René Cassin Competition, which takes the form of a mock trial, in French, concerning rights protected by the European Convention on Human Rights, took place at the Court in Strasbourg on 5 April 2019.

Thirty-two university teams from nine countries (Belarus, Belgium, France, Germany, Italy, the Netherlands, Romania, Russia and Switzerland) competed on a fictitious case concerning multinational companies and human rights. Students from the University of Paris 2 were declared the winners after beating a rival team from the Catholic University of Lille (France) in the final round.

Further information about this year's competition and previous contests can be found on the René Cassin Competition website (http://concours-cassin.eu).



La finale de la 34e édition de cette compétition de procès fictifs en langue française, fondés sur la Convention européenne des droits de l'homme, s'est tenue à la Cour, à Strasbourg, le 5 avril 2019.

Trente-deux équipes universitaires en provenance de neuf pays (Allemagne, Belarus, Belgique, France, Italie, Pays-Bas, Roumanie, Russie et Suisse) étaient en compétition sur un cas fictif portant sur le thème de l'entreprise multinationale et des droits de l'homme. Les étudiants de l'université de Paris 2 ont été déclarés vainqueurs à l'issue de la finale qui

les opposait à des étudiants de l'université catholique de Lille (France).

Des informations complémentaires sur le concours et les précédentes éditions peuvent être consultées sur le site internet du concours Cassin (http://concourscassin.eu).

European Moot Court Competition 2019/ Concours européen de plaidoiries 2019

On 18 April 2019 the Court welcomed the Grand Finale of the 7th European Human Rights Moot Court Competition, held in English and organised by the European Law Students' Association (ELSA) in co-operation with the Council of Europe. The Moot Court Competition aims to provide law students, who aspire to become lawyers or judges in the future, with practical experience of the European Convention on Human Rights and its implementation.

Twenty university teams from thirteen countries competed in a fictitious case concerning hate speech and discrimination against women. A team from the University of Oxford was declared the winner.

Le 18 avril 2019, la Cour a accueilli la finale de la 7e édition du Concours européen de plaidoiries en langue anglaise, organisé par l'Association européenne des étudiants en droit (ELSA) avec le soutien du Conseil de l'Europe. L'objectif de ce concours de plaidoiries est de proposer une formation pratique sur la Convention européenne des droits de l'homme et sa mise en œuvre à des étudiants en droit, futurs juges, avocats ou juristes.

Vingt équipes universitaires de treize pays ont plaidé une affaire fictive concernant les discours haineux et la discrimination à l'égard des femmes. Les étudiants de l'université d'Oxford ont remporté ce concours.

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

Key cases/Affaires phares

The Bureau has approved the list of key cases for the first quarter of 2019, as put forward by the Jurisconsult.

Le Bureau a approuvé la liste des affaires phares du premier trimestre 2019 proposée par le jurisconsulte.

Case-Law Guides: new translation/ Guides sur la jurisprudence : nouvelle traduction

The Court has recently published a translation into Russian of the Guide on Article 2 (right to life) on its website.

Руководство по статье 2 конвенции о защите прав человека и основных свобод – Право на жизнь

La Cour a récemment publié une traduction en russe du guide sur l'article 2 (droit à la vie) sur son site web.

Annual Report 2018 on the supervision of the execution of judgments of the Court/ Rapport annuel 2018 sur la surveillance de l'exécution des arrêts de la Cour

The Committee of Ministers has published the Annual Report 2018 on its supervision of the execution of judgments and decisions of the European Court of Human Rights, including the introduction by the Chairs of the Committee of Ministers' HR meetings and the remarks by the Director General of the Directorate General Human Rights and Rule of Law.

-ooOoo-

Le Comité des Ministres a rendu public le Rapport annuel 2018 sur sa surveillance de l'exécution des arrêts et décisions de la Cour européenne des droits de l'homme, incluant l'introduction des présidences des réunions DH du Comité des Ministres ainsi que

les observations du Directeur général de la Direction Générale Droits de l'Homme et Etat de Droit.

Commissioner for Human Rights/ Commissaire aux droits de l'homme

The annual activity report 2018 of the Council of Europe's Commissioner for Human Rights is available on the Commissioner's website.

-ooOoo-

Le rapport annuel d'activité 2018 de la Commissaire aux droits de l'homme du Conseil de l'Europe est disponible sur le site web de cette dernière.