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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

Le panorama mensuel de la jurisprudence 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

COUNCIL OF EUROPE
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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 lawyers under the authority of the Jurisconsult 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 version of the Note may be downloaded at www.echr.coe.int/NoteInformation/en.

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

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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 sous l'autorité du jurisconsulte 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. La version électronique de la Note peut être téléchargée à l'adresse suivante : www.echr.coe.int/NoteInformation/fr.

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

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ARTICLE 1

Jurisdiction of States/Juridiction des États

Death of Spanish soldier, killed during UN peacekeeping mission by Israeli artillery in Lebanon: *outside jurisdiction; inadmissible*

Décès d'un soldat espagnol, tué par des tirs israéliens lors d'une mission de maintien de la paix menée sous l'égide de l'ONU au Liban : *absence de juridiction ; irrecevable*

Toledo Polo – Spain/Espagne, 39691/18, Decision/Décision 22.3.2022 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant's son was a member of the Spanish armed forces and deployed to Lebanon at the relevant time, in the context of a peacekeeping mission established by the United Nations Security Council. He was killed while on duty and positioned in an observation tower during exchange of fire between Israel and Hezbollah, after Israeli artillery rounds hit the tower.

The applicant considered that the acts might constitute a crime under Spanish criminal law and unsuccessfully sought to bring proceedings, with the domestic courts concluding that the acts were outside the scope of Spanish criminal jurisdiction. The applicant complained before the Court that the investigation into her son's death had been neither effective nor capable of leading to the prosecution of any individual.

Law – Article 1: The present case differed from *Hanan v. Germany* [GC] in that the death at issue had not allegedly been inflicted by members of the armed forces of the respondent State, but by the armed forces of a third State which was not a Contracting State to the Convention. Moreover, the factual and legal situation in the present case differed in several crucial respects from the *Hanan* case, as far as the Court's approach to the existence of a "jurisdictional link" for the purposes of Article 1 was concerned.

Additionally, the Memorandum of Understanding between the UN and Spain in relation to the United Nations Interim Force in Lebanon (UNIFIL) did not refer to situations where personnel contributed by Spain were the *victims* of any crimes or offences committed while on duty.

The principle – that institution of a domestic criminal investigation or proceedings concerning deaths outside the jurisdiction *ratione loci* of the respondent State might trigger jurisdiction – was also not applicable to the present case. Although both the military judge and the central investigating judge had opened a criminal preliminary investigation into the death, under domestic law, jurisdiction could have been asserted only if the domestic courts had been able to establish the existence of intention in the commission of the act which had caused the death. The national courts had concluded that that was not the case, and that the facts therefore did not give rise to Spain's extra-territorial criminal jurisdiction.

In the context of their preliminary investigation, there was nothing to suggest that the Spanish authorities had failed in establishing whether there had been Spanish jurisdiction. Scientific tests had been carried out, evidence had been collected from the scene and multiple witnesses had been questioned. In addition, a detailed investigation report by UNIFIL had been requested and Spanish military personnel had been sent to Israel to learn first-hand about the investigations carried out by the Israeli authorities themselves. Further, both the military judge and the central investigating judge had acted of their own motion, starting proceedings on the same day of the events, even before the applicant had lodged a complaint. Those proceedings had not been confined to determining whether an award of compensation had been justified, but had included the determination of the specific origin of the artillery shell, the context in which it had been launched and the forces responsible for it, responsibility having been assumed by the State of Israel itself. Separate investigations had been carried out by the UN, the Israeli Army and the Spanish courts, acting on their own behalf. Their outcome had been subject to parliamentary scrutiny when the Minister of Defence had addressed the Congress of Deputies and given full details of the results of such investigations.

The Court was also mindful of the restrictions on Spain's legal powers to undertake further investigative measures on the ground in Lebanon, and that the death had occurred in the context of an exchange of fire between Israel and Hezbollah in southern Lebanon.

The Court also did not identify any special features capable of bringing the facts of the present case under the jurisdiction of Spain for the purposes of Article 1:

– the mere nationality of the deceased did not amount to a special feature;

– the observation tower where the incident had occurred had been located in a sector led by Spain and commanded at the time by a Spanish General. However, that area was situated in Lebanon and was neither under the effective control of Spain nor under its flag;

– the Israeli authorities had not been prevented, due to any legal or practical reasons, from themselves instituting a proper investigation, which had excluded in principle the risk of a situation of impunity; and

– there was no indication that Spain had failed to cooperate with any Israeli investigation, in the sphere of cooperation in criminal matters and in conformity with the requirements of the procedural limb of Article 2.

In view of the above, the domestic decisions determining the absence of extraterritorial jurisdiction to carry on with the criminal process in application of domestic law could not be considered arbitrary or manifestly unreasonable.

Conclusion: inadmissible (incompatible *ratione personae* and *ratione loci*).

(See *Hanan v. Germany* [GC], 4871/16, 16 February 2021, Legal Summary; see also *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 36925/07, 29 January 2019, Legal Summary)

ARTICLE 2

Positive obligations (substantive aspect)/ Obligations positives (volet matériel)

Alleged failings in the prevention of global warming: *relinquishment in favour of the Grand Chamber*

Carences alléguées dans la lutte contre le réchauffement climatique : *dessaisissement au profit de la Grande Chambre*

Verein KlimaSeniorinnen Schweiz and Others/et autres– Switzerland/Suisse, 53600/20

(See Article 13 below/Voir l'article 13 ci-dessous, page 26)

Positive obligations (substantive aspect)/ Obligations positives (volet matériel)

No measures to protect life of conscript who committed suicide, against backdrop of harassment, monetary disputes and discouragement of reporting misconduct in his military unit: *violation*

Absence de mesures visant à protéger la vie d'un appelé qui s'était suicidé, bien qu'il eût été harcelé, mêlé à un différend financier et dissuadé de signaler des méfaits au sein de son unité militaire : *violation*

Nana Muradyan – Armenia/Arménie, 69517/11, Judgment/Arrêt 5.4.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant is the mother of V. who died at the age of 18, allegedly by suicide, during his compulsory military service in a military unit in the "Republic of Nagorno-Karabakh". She complains about the death of her son and that the domestic authorities had failed to carry out an effective investigation into the matter.

Law – Article 2

(a) *Admissibility (exhaustion of domestic remedies)* – A civil claim for compensation under Article 162.1 of the Civil Code for non-pecuniary damage could not have provided sufficient redress to the applicant. In particular, having regard to the ceiling prescribed by Article 1087.2 § 7 (1) of the Civil Code of AMD 3,000,000 (approximately EUR 6,000) on the amount of compensation for non-pecuniary damage that could be potentially awarded for a breach of the right to life, in the circumstances of the present case the compensation that could have been awarded by the civil courts was not in reasonable proportion to any award the Court might have made under Article 41 of the Convention in respect of comparable violations of Article 2.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits*

(i) *Substantive limb* – The applicant's son had been a conscript carrying out his mandatory military service under the care and responsibility of the authorities when he had died allegedly by suicide. There was no evidence in the material before the Court to support the hypothesis that his life had been taken intentionally as claimed by the applicant. Any allegation that he had been murdered would thus be purely speculative.

According to the findings of the investigation and the charges brought against two of the former servicemen, V. had committed suicide as a consequence of harassment by his fellow servicemen. It was established during the investigation that he had been subjected to abuse (physical and psychological violence) at the hands of more senior conscripts and junior command staff within the first few months of starting service. In addition, aside from hazing and harassment by more powerful recruits or junior command staff, relations between servicemen constantly involved monetary issues and frequent disagreements in that regard. V., on the day of his death, had been involved in such a disagreement concerning the repayment of a debt

owed by him to one of the servicemen. While the Court could not speculate whether the command staff's ignorance of the incidents of harassment (and even physical violence) and the existence of non-statutory relations among servicemen had been due to their own omission or even indifference, it was clear that the environment in the military unit had been such that junior officers had been discouraged from reporting misconduct. It was also unclear whether the command staff had been reprimanded for the events that took place specifically on the day of the incident or for their failure to maintain discipline and morale in the military unit in general.

It appeared from the material before the Court that the command of the military unit had failed to adopt practical measures to ensure that signals of bullying and mistreatment in the military unit under their responsibility were effectively reviewed. Further, due to the unhealthy environment in the military unit, reporting misconduct appeared to have been in fact discouraged.

The domestic authorities had been required to adopt practical measures aimed at effectively protecting conscripts against the dangers inherent in military life and appropriate procedures for identifying the shortcomings and errors likely to be committed in that regard by those in charge at different levels. They had also been required to secure high professional standards among regular soldiers to protect conscripts. They had, however, failed to fulfil those obligations in the present case.

Conclusion: violation (unanimously).

(ii) *Procedural limb* – There had been a number of elements which had seriously impaired the effectiveness of the investigation. These included failures in collecting important forensic evidence during the first months of the investigation; an absence of adequate explanations for certain injuries noted in the autopsy report, a lack of thoroughness in investigating the disagreements between the servicemen involved and their conduct as well the actions and omissions of the command staff of the military unit on the day of V.'s death; a failure to assess newly emerged evidence concerning the abuse he had been subjected to since he had been drafted in conjunction with the events on the day of his death and his severely depressed psychological state. Moreover, it was unclear why charges had only been brought against two of the three servicemen implicated in the events preceding his death. Lastly, the investigation, as also acknowledged by the Court of General Jurisdiction of Yerevan, had been unreasonably lengthy and in breach of the requirements of Article 2. According to the information provided by the Government on 1 July 2020, the investigation had still been pending on that date and had thus until then lasted for more than ten years and three months after V.'s death. No highly convincing and plausible reasons had been provided by the Government to justify this delay.

Conclusion: violation (unanimously).

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

(See also *Kılınç and Others v. Turkey*, 40145/98, 7 June 2005; *Abdullah Yılmaz v. Turkey*, 21899/02, 17 June 2008, Legal Summary; *Mosendz v. Ukraine*, 52013/08, 17 January 2013, Legal Summary)

Positive obligations (substantive aspect)/ Obligations positives (volet matériel)

Authorities' failure to take preventive action against recurrent domestic violence leading to the applicant's attempted murder by her partner and their son's actual murder: *violation*

Absence de mesures préventives des autorités face à des violences domestiques récurrentes ayant abouti à la tentative de meurtre de la requérante par son compagnon et au meurtre de leur fils : *violation*

Landi – Italy/Italie, 10929/19, Judgment/Arrêt 7.4.2022 [Section I]

English translation of the summary – Version imprimable

En fait – Entre 2015 et 2018, la requérante et ses enfants ont subi des violences domestiques de la part de son compagnon, N.P., pour lesquelles les autorités nationales ont été averties. En 2018, N.P. a tué leur fils âgé d'un an et a tenté de tuer la requérante. La requérante a obtenu des dommages-intérêts en tant que partie civile dans la procédure pénale contre N.P.

Elle se plaint devant la Cour, en particulier, du manque de protection et d'assistance de la part de l'État défendeur.

En droit – Article 2 : Cette provision s'applique au cas de la requérante, victime de violence domestique répétée et d'une tentative de meurtre, et en raison du décès de son fils.

Le cadre juridique italien était propre à assurer une protection contre des actes de violence pouvant être commis par des particuliers dans une affaire donnée. La panoplie des mesures juridiques et opérationnelles disponibles offrait aux autorités concernées un éventail suffisant de possibilités adéquates et proportionnées au regard du niveau de risque (mortel) en l'espèce.

i. *Sur le point de savoir si les autorités ont réagi immédiatement aux allégations de violence domestique* – Entre 2015 et 2018, les carabiniers ont procédé à une évaluation du risque autonome, proactive et exhaustive lors des agressions par N.P. de la requérante et de leurs enfants, indépendamment des plaintes de la requérante. Ils ont tenu dûment compte du contexte particulier des affaires de violence domestique, en sollicitant, à la lumière de l'existence présumée d'un risque réel et immédiat pour la vie de la requérante et de ses enfants, des mesures conservatoires ainsi que des mesures privatives de liberté. Cependant, les procureurs qui avaient pour mission d'apprécier ces propositions n'ont pas fait preuve de la diligence particulière requise dans leur réaction immédiate aux allégations de violence domestique formulées par la requérante. En 2015, le procureur aurait pu maintenir les poursuites malgré le retrait de la plainte de la requérante, ou au moins effectuer une enquête approfondie durant les quatre mois précédents son classement sans suite. En 2017, aucune enquête n'a été menée par le procureur et aucune mesure n'a été prise. Et en 2018, si une enquête a été ouverte par le procureur pour le délit de mauvais traitements et si une expertise a été demandée sur l'état psychologique de N.P., la requérante n'a jamais été entendue et aucune mesure de protection n'a été prise.

ii. *La qualité de l'appréciation des risques* – Alors qu'ils avaient été informés par les carabiniers des antécédents de violence de N.P., les procureurs n'ont pas montré, lors du traitement des plaintes de la requérante, qu'ils avaient pris conscience du caractère et de la dynamique spécifiques de la violence domestique, même si tous les indices étaient présents, à savoir en particulier le schéma d'escalade des violences subies par la requérante et ses enfants, les menaces proférées, les agressions répétées ainsi que la maladie mentale de N.P. Même le psychiatre qui suivait N.P. a sous-estimé la situation, considérant l'agression subie par la requérante en 2018 comme un « différend » entre époux. Les autorités n'ont pas mis en place des mesures de protection, alors qu'elles avaient été sollicitées par les carabiniers. Les risques de violence récurrente n'ont pas été correctement évalués ou pris en compte.

À l'exception des propositions faites par les carabiniers aux procureurs, les autorités ont manqué à leur devoir d'effectuer une évaluation immédiate et proactive du risque de récidive de la violence commise à l'encontre de la requérante et des enfants et de prendre des mesures opérationnelles et préventives visant à atténuer ce risque, à protéger la requérante et les enfants ainsi qu'à censurer la conduite de N.P. Les procureurs, en particulier, sont restés passifs face au risque sérieux de mauvais traitements infligés à la requérante et, par leur inaction, ont permis à N.P. de continuer à la menacer, la harceler et à l'agresser sans entraves et en toute impunité.

iii. *Les autorités savaient-elles ou auraient-elles dû savoir qu'il existait un risque réel et immédiat pour la vie du fils de la requérante ?* – À la lumière des éléments exposés ci-dessus, les autorités nationales savaient ou auraient dû savoir qu'il existait un risque réel et immédiat pour la vie de la requérante et de ses enfants du fait des violences commises par N.P. et elles avaient l'obligation d'évaluer le risque de réitération de celles-ci et de prendre des mesures adéquates et suffisantes pour la protection de la requérante et de ses enfants. Cependant, elles n'ont pas respecté cette obligation, n'ayant réagi ni « immédiatement », comme cela est requis dans les cas de violence domestique, ni à tout autre moment.

iv. *Les autorités ont-elles pris des mesures préventives adéquates dans les circonstances de l'espèce ?* – Sur la base des informations qui étaient connues des autorités à l'époque des faits et qui indiquaient qu'il existait un risque réel et immédiat que de nouvelles violences fussent commises contre la requérante et ses enfants, face aux allégations d'escalade des violences domestiques que formulait la requérante, et compte tenu des problèmes de santé mentale de N.P., les autorités n'ont pas fait preuve de la diligence requise. Elles n'ont pas procédé à une évaluation du risque de létalité qui aurait spécifiquement ciblé le contexte des violences domestiques, et en particulier la situation de la requérante et de ses enfants, et qui aurait justifié des mesures préventives concrètes afin de les protéger d'un tel risque. Au mépris flagrant de la panoplie des diverses mesures de protection qui étaient directement à leur disposition, les autorités, qui auraient pu appliquer des mesures de protection, en prévenant les services sociaux et les psychologues, et en plaçant la requérante et ses enfants dans un centre antiviolence, n'ont pas fait preuve d'une diligence particulière pour prévenir les violences commises à l'encontre de l'intéressée et de ses enfants, ce qui a abouti à la tentative de meurtre de la requérante et au meurtre de son fils. Les mesures susmentionnées – comme l'a également reconnu le GREVIO en vérifiant la conformité du cadre juridique national avec l'article 55.1 de la Convention d'Istanbul – pouvaient et devaient être adoptées par les autorités, conformément à la législation italienne, indépendamment du dépôt de plaintes et indépendamment du fait qu'elles soient retirées ou du changement de la perception du risque de la part de la victime.

Dans ces circonstances, les autorités ne sauraient passer pour avoir fait preuve de la diligence requise. Dès lors, elles ont manqué à leur obligation positive découlant de l'article 2 de protéger la vie de la requérante ainsi que celle de son fils.

Conclusion : violation (unanimité).

Article 14 combiné avec l'article 2 : Les principes pertinents, énoncés pour la première fois dans l'arrêt *Opuz c. Turquie*, ont été étoffés dans l'arrêt *Volodina c. Russie*.

La requérante a été victime de violences de la part de N.P. à plusieurs reprises et les autorités ont eu connaissance de ces faits. Toutefois les procureurs n'ont mené aucune enquête ni pendant les quatre mois ayant suivi le dépôt de la première plainte de la requérante ni après la commission de l'agression de 2018 et aucune mesure de protection n'a été prise nonobstant la sollicitation des carabiniers. Il s'agit d'une passivité imputable aux procureurs chargés de mener l'enquête.

Depuis 2017 et l'adoption de l'arrêt *Talpis c. Italie*, l'État a pris des mesures pour mettre en œuvre la Convention d'Istanbul, témoignant ainsi de sa volonté politique réelle de prévenir et de combattre la violence à l'égard des femmes.

La requérante n'a pas réussi à établir un commencement de preuve d'une passivité généralisée de la justice à fournir une protection efficace aux femmes victimes de violence domestique ou le caractère discriminatoire des mesures ou pratiques adoptées par les autorités à son égard. Elle n'a fourni aucunes données statistiques ou observations d'organisations non gouvernementales.

La requérante n'a pas allégué non plus que les policiers avaient cherché à la dissuader de faire poursuivre N.P. ou de témoigner contre lui, ou qu'ils avaient essayé de quelque manière que ce soit d'entraver ses plaintes qui visaient à demander une protection contre les violences alléguées. Au contraire, ils ont signalé à plusieurs reprises aux procureurs la situation de l'intéressée même lorsqu'elle avait retiré sa dernière plainte et ont sollicité l'adoption de mesures de protection.

Les procureurs ont certes manqué à leur obligation de prendre des mesures préventives qui auraient pu avoir une chance réelle de modifier l'issue tragique ou du moins d'atténuer le préjudice. Toutefois, au vu notamment de l'attitude proactive des carabiniers, l'inaction des autorités d'enquête en l'espèce ne peut être considérée comme une défaillance systémique.

Ainsi, il n'y a pas d'éléments tendant à prouver que les procureurs en l'espèce aient agi de manière ou dans une intention discriminatoire à l'égard de la requérante. Il ne peut y avoir violation de l'article 14 qu'en cas de défaillances généralisées découlant d'un manquement clair et systémique des autorités nationales à apprécier la gravité, l'ampleur et l'effet discriminatoire sur les femmes du problème de la violence domestique.

Les défaillances dénoncées dans la présente affaire ayant pour origine une grave passivité de la part des autorités et bien que répréhensibles et contraires à l'article 2 ne sauraient être considérées en soi comme révélatrices d'une attitude discriminatoire de la part des autorités.

Conclusion : irrecevable (défaut manifeste de fondement).

Article 41 : 32 000 EUR pour préjudice moral.

(Voir *Opuz c. Turquie*, 33401/02, 9 juin 2009, Résumé juridique ; *Talpis c. Italie*, 41237/14, 2 mars 2017, Résumé juridique ; et *Volodina c. Russie*, 41261/17, 9 juillet 2019, Résumé juridique ; voir aussi *A. c. Croatie*, 55164/08, 14 octobre 2010, Résumé juridique, et *Bălşan c. Roumanie*, 49645/09, 23 mai 2017, Résumé juridique)

ARTICLE 3

Extradition

No real individual risk of ill-treatment in case of extradition of ethnic Uzbeks to Kyrgyzstan: *extradition would not constitute a violation*

Absence de risque individuel réel en cas d'extradition d'Ouzbeks de souche vers le Kirghizistan : *l'extradition n'emporterait pas violation*

Khasanov and/et Rakhmanov – Russia/Russie, 28492/15 and/et 49975/15, Judgment/Arrêt 29.4.2022 [GC]

Traduction française du résumé – Printable version

Facts – The applicants, both nationals of Kyrgyzstan, faced extradition to that country where they were wanted on charges of aggravated misappropriation (first applicant) and several counts of aggravated robbery, destruction of property and murder (second applicant). In the proceedings concerning their extradition and their requests for refugee status, their allegations that they were at risk of persecution and ill-treatment in Kyrgyzstan because they belonged to a vulnerable ethnic group were dismissed. The applicants' extradition was stayed on 16 June and 12 October 2015, respectively, on the basis of an interim measure granted by the Court under Rule 39 of the Rules of Court, which indicated to the Russian Government that

they should not be removed for the duration of the proceedings before it. The applicants were released from detention in 2014 and 2015 respectively.

The applicants complain that in the event of their extradition to Kyrgyzstan they would face a real risk of ill-treatment contrary to Article 3 because they belonged to the Uzbek ethnic minority. In a judgment of 19 November 2019, a Chamber of the Court found, by five votes to two, that there would be no violation of Article 3 if the applicants were extradited. On 15 April 2020 the case was referred to the Grand Chamber at the applicants' request.

Law – Article 3

(a) *General principles established in the Court's case-law*

(i) *Prohibition on exposing aliens facing removal to a risk of ill-treatment* – In extradition cases, a Contracting State's obligation to cooperate in international criminal matters was subject to the same State's obligation to respect the absolute nature of the prohibition under Article 3. Therefore, any claim of a real risk of treatment contrary to that provision in the event of extradition to a certain country must be subjected to the same level of scrutiny regardless of the legal basis for the removal.

(ii) *Scope of the assessment: general situation and individual circumstances* – The risk assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances. If substantial grounds have been shown for believing that the person concerned, if returned, would face a real risk of being subjected to treatment contrary to Article 3, the applicant's removal would necessarily breach that article, regardless of whether the risk emanated from a general situation of violence, a personal characteristic of the applicant, or a combination of the two.

In cases such as the present one a three-tier assessment had to be carried out.

First, the general situation in the destination country had to be examined and, where relevant, whether there was a general situation of violence existing in that country. The existence of the latter would not normally in itself entail a violation of Article 3 in the event of an expulsion to the country in question, unless the level of intensity of the violence, was sufficient to conclude that any removal to that country would necessarily breach that provision.

Second, the assessment of a claim concerning systematic ill-treatment of a member of a group was different from the assessment relating to the general situation of violence in a particular country, on the one hand, and to individual circumstances, on the other. The Court in such cases had to examine whether the existence of a group systematically exposed to ill-treatment, falling under the "general situation" part of the risk assessment, had been established. Applicants belonging to an allegedly targeted vulnerable group should not describe the general situation but the existence of a practice or of a heightened risk of ill-treatment for the group of which they claimed to be members. They then had to establish their individual membership of the group concerned, without having to demonstrate any further individual circumstances or distinguishing features.

Third, when it could not be established that a group was systematically exposed to ill-treatment, despite a possible well-founded fear of persecution in relation to certain risk-enhancing circumstances, the applicants had to demonstrate the existence of further special distinguishing features which would place them at a real risk of ill-treatment. Failure to demonstrate such individual circumstances would lead the Court to find no violation of Article 3.

(iii) *Nature of the Court's assessment* – The material point in time for the assessment must be that of the Court's consideration of the case. A full and *ex nunc* evaluation was required where it was necessary to take into account information that had come to light after the final decision by the domestic authorities was taken. The existence of the risk had to be assessed primarily with reference to those facts which were known or ought to have been known by the Contracting State at the time of the expulsion. This proviso demonstrated that the primary purpose of the *ex nunc* principle was to serve as a safeguard in cases where a significant amount of time had passed between the adoption of the domestic decision and the consideration of an applicant's Article 3 complaint by the Court, and therefore where the situation in the receiving State might have developed, that is to say, deteriorated or improved. Any finding in such cases regarding the general situation in a given country and its dynamic as well as the finding as to the existence of a particular vulnerable group, was in its very essence a factual *ex nunc* assessment made by the Court on the basis of the material at hand. Accordingly, any examination of whether there had been an improvement or a deterioration in the general situation in a particular country amounted to a factual assessment and was amenable to revision by the Court in the light of changing circumstances. There was therefore nothing to preclude such a re-examination of the general situation from being carried out by a Chamber in a judgment dealing with an individual case.

(b) *Application of the general principles established to the instant case* – Between 2012 and 2016 the Court had examined nine cases concerning extraditions of ethnic Uzbeks from Russia to Kyrgyzstan in which it had found that they continued to run a real risk of illtreatment. While it had not considered the general human rights situation, though highly problematic, to be such as to prevent any extradition, it had established that specific reports described a targeted and systematic practice of ill-treatment against ethnic Uzbeks at the relevant time. The Court had to now ascertain whether the currently available information and material still supported a similar finding in respect of the applicants in the present case, such that their membership of that group sufficed to demonstrate the real risk alleged.

(i) *The circumstances of the applicants' cases* – As almost six years had passed since the adoption of the final domestic judgments in the applicants' cases, in accordance with the *ex nunc* principle, the Grand Chamber had to assess the existence of a real risk at the time of its consideration of the case.

(ii) *General situation in Kyrgyzstan* – The available reports of the United Nations human rights bodies and of international, regional and national NGOs describing the present-day situation in Kyrgyzstan continued to indicate that incidents of torture and ill-treatment, a lack of effective investigations, and recurrent impunity were still major concerns for Kyrgyzstan and that, despite legal and institutional changes in that country, insufficient action had been taken by the Kyrgyz authorities to prevent torture and other ill-treatment in practice. However, this material did not support a finding that the general situation in the country had either deteriorated as compared to the previous assessments, which had not led the Court to reach findings precluding all removals to Kyrgyzstan, or that it had reached a level calling for a total ban on extraditions to that country.

(iii) *The situation of ethnic Uzbeks in Kyrgyzstan* – The applicants' claims combined elements relating to the general situation in Kyrgyzstan and to individual circumstances. As it had not been disputed that they were Kyrgyz nationals of ethnic Uzbek origin, the issue was whether there was reliable and objective proof that ethnic Uzbeks were a group which was systematically exposed to ill-treatment in Kyrgyzstan. The Court had concluded in a number of judgments concerning the extradition to Kyrgyzstan of ethnic Uzbeks that they faced a real risk of ill-treatment as a consequence of their ethnic origin. In the instant case the Court had to focus its scrutiny as to whether they continued to run a heightened risk of ill-treatment as compared to other persons in that country, this being the main point of disagreement between the parties.

In making its assessment, the Court took into account any indications of an improvement or worsening in the human rights situation in general or in respect of a particular group or area that might be relevant to the applicants' circumstances. The Court's previous findings that ethnic Uzbeks in Kyrgyzstan constituted a vulnerable group for the purposes of Article 3 had been based on specific reports describing a targeted and systematic practice of ill-treatment against that group at the relevant time. As regards the current situation, the Court noted the absence of specific reporting on ethnicity-based torture of ethnic Uzbeks, as opposed to other ethnicity-based risks, such as insecurity, discrimination with respect to economic and security matters, ethnic profiling and political. While in the aftermath of the ethnic clashes of June 2010 there had been specific evidence indicating that ethnic Uzbeks had been at a heightened risk of ill-treatment, the above-mentioned UN, international, regional and national reports no longer contained such indications. Consequently, there was no basis for reaching a conclusion that ethnic Uzbeks constituted a group which was still systematically exposed to ill-treatment.

(iv) *The applicants' individual circumstances* – The Russian courts had engaged with their Convention obligations by carefully and appropriately examining the existence of the individual risks capable of preventing the applicants' extradition. Both applicants had failed to demonstrate to the domestic courts, the Chamber or the Grand Chamber the existence of ulterior political or ethnic motives behind their prosecution in Kyrgyzstan or further special distinguishing features which would expose them to a real risk of ill-treatment. In the absence of any demonstration of the existence of substantial grounds for believing that they would face a real risk of being subjected to treatment contrary to Article 3, this threshold had not been met by the applicants in the present case.

In view of the above findings, the Court did not deem it warranted to rule on the assurances provided by the Kyrgyz authorities in the applicants' cases.

Conclusion: extradition would not constitute a violation (unanimously).

Accordingly, the interim measures previously indicated to the respondent Government under Rule 39 of the Rules of Court came to an end.

(See also *Makhmudzhan Ergashev v. Russia*, 49747/11, 16 October 2012; *Gayratbek Saliyev v. Russia*, 39093/13, 17 April 2014; *Tadzhibayev v. Russia*, 17724/14, 1 December 2015; and *R. v. Russia*, 11916/15, 26 January 2016)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

State immunity legislation preventing applicants from bringing employment claims after dismissal from foreign embassies within the United Kingdom: *violations*

Législation sur l'immunité de juridiction ayant empêché les requérantes d'introduire des actions en justice après avoir été licenciées par des ambassades étrangères au Royaume-Uni : *violations*

Benkharbouche and/et Janah – United Kingdom/Royaume-Uni, 19059/18 and/et 19725/18, Judgment/Arrêt 5.4.2022 [Section IV]

(See Article 37 below/Voir l'article 37 ci-dessous, page 30)

Independent and impartial tribunal/ Tribunal indépendant et impartial

Notification of applications concerning judicial independence in Poland

Communication d'affaires concernant l'indépendance de la justice en Pologne

20 applications/20 requêtes – Poland/Pologne, 41097/20 et al., Communications [Section I]

ECHR press release – Communiqué de presse CEDH

Article 6 § 1 (civil) (criminal/pénal)

Independent and impartial tribunal/ Tribunal indépendant et impartial Tribunal established by law/Tribunal établi par la loi

Alleged lack of independence and impartiality of newly established Supreme Court's Disciplinary Chamber deciding the lifting of a judge's immunity from criminal prosecution: *communicated*

Défaut allégué d'indépendance et d'impartialité de la chambre disciplinaire, instance nouvellement établie au sein de la Cour suprême, appelée à statuer sur la levée de l'immunité pénale d'un juge : *affaire communiquée*

Wróbel – Poland/Pologne, 6904/22, Communication [Section I]

(See Article 18 below/Voir l'article 18 ci-dessous, page 29)

Article 6 § 1 (administrative/ administratif)

Civil rights and obligations/Droits et obligations de caractère civil Access to court/Accès à un tribunal

Inadmissibility of legal actions concerning global warming on grounds of insufficient individual and direct interest: *relinquishment in favour of the Grand Chamber*

Irrecevabilité d'actions en justice en matière de réchauffement climatique pour défaut d'intérêt suffisamment personnel et direct : *dessaisissement au profit de la Grande Chambre*

Verein KlimaSeniorinnen Schweiz and Others/et autres– Switzerland/Suisse, 53600/20

(See Article 13 below/Voir l'article 13 ci-dessous, page 26)

ARTICLE 7

Nullum crimen sine lege Nulla poena sine lege

Advisory opinion on the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture

Avis consultatif sur l'applicabilité de la prescription aux poursuites, condamnations et sanctions pour des infractions constitutives, en substance, d'actes de torture

Advisory opinion requested by the Armenian Court of cassation/Avis consultatif demandé par la Cour de cassation arménienne, P16-2021-001, Opinion/Avis 26.4.2022 [GC]

Traduction française du résumé – Printable version

Background and question – The request of the Armenian Court of Cassation was made in the context of criminal proceedings against two police officers implicated in the ill-treatment in April 2004 of the applicant in the case of *Virabyan v. Armenia*. In its judgment of 2 October 2012 in that case, the Court unanimously found procedural and substantive violations of Article 3. More specifically, it found that the applicant had been subjected to torture and that the authorities had failed to carry out an effective investigation into his allegations of ill-treatment. In the context of the Committee of Ministers' supervision of the execution of the Court's judgment under Article 46 § 2 (not as yet closed), new

criminal proceedings were instituted and charges were brought against the police officers implicated in Mr Virabyan's ill-treatment under Article 309 § 2 of the Criminal Code (CC). Whilst the trial court found that the defendants had committed an offence under that provision, it held that they were exempted from criminal responsibility by virtue of the ten-year limitation period in Article 75 § 1(3) of the CC which had expired in April 2014. This decision was upheld by the Court of Appeal. The prosecutor lodged an appeal on points of law to the Court of Cassation which then had to determine whether the proceedings were to be considered under the aforementioned ten-year limitation period or whether they were to be seen as covered by the exception in Article 75 § 6 of the CC, whereby no limitation period could apply to certain types of offences (offences against peace and humanity or envisaged in international treaties to which Armenia was a Party and which prohibit the application of limitation periods). The Court of Cassation thus requested the Court to give an advisory opinion on the following question:

"Would non-application of statutes of limitation for criminal responsibility for torture or any other crimes equated thereto by invoking the international law sources be compliant with Article 7 of the European Convention, if the domestic law provides for no requirement for non-application of statutes of limitation for criminal responsibility?"

Opinion

(a) *General observations regarding the context of the present advisory opinion request* – The question so framed implicitly recognised the hierarchy of laws in the Armenian domestic system as enunciated in Article 75 § 6 of the CC and Article 5 § 3 of the Armenian Constitution. In particular, the latter provision provides that, in the event of a conflict between international treaties ratified by Armenia and Armenian laws, the provisions of the international treaties are to apply. Bearing in mind the Court of Cassation's reliance on Article 3 when framing the present request, the Court deemed it useful, before turning to the question asked specifically with reference to Article 7, to reiterate its case-law relating to limitation periods under Article 3 in so far as relevant for the present opinion.

In particular, the prohibition of torture had achieved the status of *jus cogens* or a peremptory norm in international law. In cases concerning torture or ill-treatment inflicted by State agents, criminal proceedings ought not to be discontinued on account of a limitation period; amnesties and pardons should not be tolerated; and the manner in which the limitation period was applied had to be compatible with the requirements of the Convention. It was thus difficult to accept inflexible limitation periods admitting of no exceptions. Moreover, the Court had found a violation of the procedural aspect of Article 3 in cases where the application of limitation periods had been brought about by the failure of the authorities to act promptly and with due diligence; where prosecutions had become time-barred owing to the inadequate characterisation by the domestic authorities of acts of torture or other forms of ill-treatment as less serious offences, leading to shorter limitation periods and allowing the perpetrator to escape criminal responsibility; on account, chiefly, of the absence of appropriate provisions in the national law capable of adequately punishing acts amounting to torture. In that connection, the Court noted that the offences in question had been subject to a statute of limitation, "a circumstance which in itself [sat] uneasily with its case-law concerning torture or other ill-treatment".

Notwithstanding, it would be unacceptable for national authorities to compensate for the failure to discharge their positive obligations under Article 3 at the expense of the guarantees of Article 7, one of which was that the criminal law must not be construed extensively to an accused's detriment. In particular, and for the purposes of the present Advisory Opinion, the Court noted that it did not follow from the current state of the Court's case-law that a Contracting Party was required under the Convention not to apply an applicable limitation period and thereby effectively to revive an expired limitation period. The Court had recognised, in the context of the reopening of proceedings, that there might be situations where it was *de jure* or *de facto* impossible to reopen criminal investigations into the incidents giving rise to the applications being examined by the Court. Such situations might arise, for example, in cases in which the alleged perpetrators were acquitted and could not be put on trial for the same offence, or in cases in which the criminal proceedings became time-barred on account of the statute of limitation set out in the national legislation. Indeed, the reopening of criminal proceedings that were terminated on account of the expiry of the statute of limitation might raise issues concerning legal certainty and might thus have a bearing on a defendant's rights under Article 7.

(b) *Question concerning Article 7* – The Court first reiterated the general principles developed in its case-law as regards the requirements of legal certainty and foreseeability under Article 7. In this context it recalled, *inter alia*, that, as it had held on several occasions, limitation might be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence had been committed. Limitation periods, which were a common feature of the domestic legal systems of the Contracting States, served several purposes, which included ensuring

legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time.

In its relevant Article 7 rulings, the Court had not found legislative changes extending a limitation period which had not yet expired to constitute a failure to comply with that provision. At the same time, it could also be deduced from its case-law, that where criminal responsibility had been revived after the expiry of a limitation period, it would be deemed incompatible with the overarching principles of legality (*nullum crimen, nulla poena sine lege*) and foreseeability enshrined in Article 7. It followed that where a criminal offence under domestic law was subject to a statute of limitation and became time-barred so as to exclude criminal responsibility, Article 7 would preclude the revival of a prosecution in respect of such an offence on account of the absence of a valid legal basis. To hold otherwise would be tantamount to accepting "the retrospective application of the criminal law to an accused's disadvantage".

In the present context, the Court had not been presented with a legislative extension of a limitation period before its expiry in a case pending for adjudication, but with a situation where the requesting court was to determine whether to apply a ten-year limitation period, pursuant to Article 75 § 1(3) of the CC and Article 35 § 1(6) of the Code of Criminal Procedure, or an already existing provision in Article 75 § 6 of the CC specifying an exception whereby no limitation period was to apply in the circumstances described therein.

Conclusion (unanimously): Where a criminal offence was subject to a statute of limitation pursuant to the domestic law and the applicable limitation period had already expired, Article 7 of the Convention precluded the revival of a prosecution in respect of such an offence.

It was first and foremost for the national court to determine, within the context of its domestic constitutional and criminal law rules, whether rules of international law having legal force in the national legal system, in the present instance pursuant to Article 5 § 3 of the Constitution, could provide for a sufficiently clear and foreseeable legal basis within the meaning of Article 7 to conclude that the criminal offence in question was not subject to a statute of limitation.

(See *Virabyan v. Armenia*, 40094/05, 2 October 2012, Legal Summary; see also *Coëme and Others v. Belgium*, 32492/96 et al., 22 June 2000, Legal Summary; *Del Río Prada v. Spain* [GC], 42750/09, 21 October 2013, Legal Summary; and *Mocanu and Others v. Romania* [GC], 10865/09 et al., 17 September 2014, Legal Summary. See also *Advisory Opinion concerning the use of the "blanket reference" or "legislation by reference" technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law, requested by the Armenian Constitutional Court* [GC], P16-2019-001, 29 May 2020, Legal Summary)

ARTICLE 8

Respect for private life/Respect de la vie privée

Investigation into judge's alleged negligence in the exercise of his judicial functions and proceedings concerning the lifting of his immunity from criminal prosecution: *communicated*

Enquête sur la faute alléguée d'un juge dans l'exercice de ses fonctions judiciaires et procédure relative à la levée de son immunité pénale : *affaire communiquée*

Wróbel – Poland/Pologne, 6904/22, Communication [Section I]

(See Article 18 below/Voir l'article 18 ci-dessous, page 29)

Positive obligations/Obligations positives

Alleged failings in the prevention of global warming: *relinquishment in favour of the Grand Chamber*

Carences alléguées dans la lutte contre le réchauffement climatique : *dessaisissement au profit de la Grande Chambre*

Verein KlimaSeniorinnen Schweiz and Others/et autres– Switzerland/Suisse, 53600/20

(See Article 13 below/Voir l'article 13 ci-dessous, page 26)

ARTICLE 10

Freedom of expression/Liberté d'expression

Justified revocation of broadcasting licence of a TV channel after repeated and serious breach of the statutory requirement to ensure political balance and pluralism in news bulletins: *no violation*

Caractère justifié de la révocation de la licence de radiodiffusion d'une chaîne de télévision à la suite de manquements graves et répétés à l'obligation légale de veiller à l'équilibre et au pluralisme politiques dans les bulletins d'information : *non-violation*

NIT S.R.L. – Republic of Moldova/République de Moldova, 28470/12, Judgment/Arrêt 5.4.2022 [GC]

Traduction française du résumé – Printable version

Facts – The applicant company had a television channel (NIT) which it broadcast nationally from 2004. Their broadcasting licence was revoked by the Audiovisual Coordinating Council ("the ACC") in 2012, for repeated failure to comply with the requirement that broadcasters ensure political and social balance and pluralism, as laid down in Article 7 of the domestic Audiovisual Code of 2006 ("the Code"). In particular, the channel was accused of politically biased programmes, favouring the Party of the Communists of the Republic of Moldova (PCRM - an opposition party at the material time) and broadcasting distorted news items. The applicant company challenged the ACC's decision unsuccessfully before the national courts.

Law – Article 10: The licence revocation had amounted to an interference with the applicant company's right to freedom of expression and had been prescribed by law. The relevant domestic law was formulated sufficiently clearly in order to fulfil the requirements of precision and foreseeability. Moldova's licensing system was consistent with the third sentence of Article 10 § 1, as it was capable of contributing to the quality and balance of programmes; that constituted a sufficient legitimate aim under the third sentence of Article 10 § 1. The interference had also corresponded to the legitimate aim of protecting the "rights of others" under Article 10 § 2. The Court therefore had to determine whether the interference had been "necessary in a democratic society".

(a) *General principles: The need to develop the Court's case-law on media pluralism* – The existing standards on media pluralism had been developed chiefly or exclusively in the context of complaints of unjustified State interference with an applicant's Article 10 rights and where the Court had relied, *inter alia*, on the principle of media pluralism in finding a violation. In the present case, however, it was the other dimension of media pluralism which was at stake, in that the applicant company had complained of restrictions on its freedom of expression which had been based on the grounds of ensuring political pluralism in the media, with the aim of enabling diversity in the expression of political opinion and enhancing the protection of the free-speech interests of others in audiovisual media. A question arose in the present case of striking a proper balance between the competing interests of the community in safeguarding political pluralism in the media, and of respecting the principle of editorial freedom.

A further specific feature was the emphasis laid in the relevant national legal framework on internal pluralism, namely the obligation on broadcasters to present different political views in a balanced manner, without favouring a particular party or political movement. In contrast, earlier cases had been more concerned with issues of external pluralism, which meant the existence of various media outlets, each expressing a different point of view, and was basically achieved by ensuring that the media were not concentrated in the hands of too few (monopoly, duopoly, other positions of dominance).

The Court clarified in this respect that neither aspect, internal or external pluralism, should be considered in isolation from each other; on the contrary, both aspects had to be considered in combination with each other. Thus, in a national licensing system involving a certain number of broadcasters with national coverage, what might be regarded as a lack of internal pluralism in the programmes offered by one broadcaster might be compensated for by the existence of effective external pluralism. However, it was not sufficient to provide for the existence of several channels. What was required was to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes were aimed.

There might be different approaches to achieving overall programme diversity in the European space. A number of national licensing systems tended to rely on the diversity of perspectives provided by the different licensed operators, coupled with structural safeguards and general obligations of fair coverage, while other national systems required stricter content-based duties of internal pluralism. Article 10 did not impose a particular model in that respect.

The Court further examined the issue of the privileged position of the freedom of the press to report on political issues and other matters of public interest in this context. In other words, it considered whether the strict scrutiny, traditionally applicable to any restrictions imposed by the Contracting States, ought to correspondingly limit States' discretion in determining the means of ensuring political pluralism in the area of licensing audiovisual media. In principle, States should enjoy a wide discretion in their choice of the means to be deployed

in order to ensure pluralism in the media; notably, the margin to be accorded in that regard should be wider than that normally afforded to restrictions on expression on matters of public interest or political opinion. However, their discretion in that respect would be narrower, depending on the nature and seriousness of any restriction on editorial freedom that the chosen means might entail.

At the same time, the Court had to be satisfied that the contents of the relevant national legal norms and their application in the concrete circumstances of a given case, seen as a whole, had produced effects compatible with the Article 10 guarantees and had been attended by effective safeguards against arbitrariness and abuse. The fairness of proceedings and procedural guarantees afforded were factors which in some circumstances might have to be taken into account when assessing the proportionality of an interference with freedom of expression.

The existence of procedural safeguards were of particular relevance to the examination of the proportionality of the impugned revocation of the applicant company's broadcasting licence: it had constituted the most severe sanction under the relevant national legal provisions. In cases such as the one at hand, the severity of the sanction was a factor calling for closer scrutiny by the Court and for a narrower margin of appreciation.

(b) *Application to the regulatory framework in place* – The duty on a broadcaster, when giving airtime to one political party or movement, to do likewise in respect of other political parties or movements, could be considered from the angle of the preconditions for affording enhanced protection of journalistic freedom. The impugned provisions of the Code had not specified that a broadcaster had been under a duty to give an equal amount of airtime to all political parties. They had been under a duty to ensure political balance and pluralism. It appeared that that requirement could have been satisfied by offering an opportunity to comment or reply: the latter was an important element of freedom of expression and fell within the scope of Article 10.

The internal pluralism policy as embodied in the Code had received a positive assessment by Council of Europe experts. While that policy might be seen as rather strict, the present case related to a period before Moldova had transitioned to terrestrial digital television. At that time, the number of national frequencies had been very limited. Moreover, following the post-2001 election of the PCRM as the only governing party and the ensuing media situation, the authorities had been under a strong positive obligation to put in place broadcasting legislation ensuring the transmission of accurate and balanced news and information reflecting the full range of political opinions. In that context, the legislative choices underlying the adoption of the provisions in question had been carefully considered and genuine efforts had been made at parliamentary level to strike a fair balance between the competing interests at stake.

The degree of external pluralism, related to the existence of four other television broadcasters with nationwide coverage at the time, was not a reason for calling into question the requirement to observe the internal pluralism rules. All broadcasters, whether public or private, had been subjected to the same rules, which had been applied not to the entire audiovisual content of licensed broadcasters but only to their respective news bulletins.

Implementation of the impugned requirements had been monitored by the ACC, a specialist body established by law. The Code included safeguards to secure its independence and to protect its decision-making from undue government influence and political pressures. Its meetings, monitoring reports and decisions were accessible to the public and the broadcasters' representatives were given an opportunity to attend and to submit comments. The ACC was required to provide reasons for any decision to impose a sanction, which could be challenged before the courts.

Finally, the internal pluralism governance practice put in place by the Moldovan authorities did not seem to be markedly different from that of many other Council of Europe member States. Overall, the respondent State had acted well within its margin of appreciation in the manner in which it had designed the national legal and administrative framework with a view to achieving pluralism in audiovisual media.

(c) *Application of the regulatory framework in NIT's case* – The Court determined that the impugned decision had been supported by relevant and sufficient reasons:

– The sanction had followed a five-day monitoring process. The Court saw no reason to call into question either the relevance or accuracy of the monitoring methodology used by the ACC, or its findings, which had been upheld by the national courts.

– The ACC had found that: the time devoted to one political party (PCRM) had been positive or neutral, whilst the time devoted to its opponent had been mostly negative; persons, institutions or political parties referred to or mentioned in a negative light had not been given a platform to present their own points of view in response; the news bulletins had contained information promoting a unilateral point of view, sometimes not supported by

evidence, and had made use of features capable of distorting reality; and they had promoted aggressive journalistic language.

– In this connection, the national authorities had viewed as an aggravating factor the fact that the news bulletins had used very strong language to describe the government, the parties forming it and their leaders (comparing one leader to "Hitler", and referring to all as "criminals, "bandits", "crooks", "swindlers", "group of criminals" etc.).

– It was true that there was little scope under Article 10 § 2 for restrictions on political speech or on debates of matters of public interest; that governments had to be subjected to close scrutiny also by public opinion; and that there were serious doubts, given the context, that the relevant news bulletin statements could be considered to have amounted to incitement to violence, hatred or xenophobia, or that they could have affected the country's territorial integrity and national security, as the Government had argued. Nevertheless, taking into account the foregoing, and the fact that the exercise of freedom of expression carried with it duties and responsibilities, the news reporting at issue could hardly be said to have been of a kind calling for enhanced protection afforded to press freedom under Article 10. The Court was therefore not persuaded that, by conducting news reporting in the way it had done, the NIT had contributed to political pluralism in any meaningful way.

The Court was mindful of the fact that the severity of the impugned measure might have adversely affected the applicant company's operations in a manner having a potentially "chilling effect" on the freedom of expression of other licensed broadcasters in Moldova. However, in the specific circumstances of the present case, the domestic authorities had acted within their margin of appreciation in achieving a reasonable relationship of proportionality between the competing interests at stake:

– On the one hand, the licence revocation, the most severe of the sanctions, had entailed a shutdown of NIT's broadcasting activities. On the other hand, the news bulletins, broadcast nationwide, had been capable of having a considerable impact.

– In accordance with the Code, the revocation of NIT's licence had occurred after a gradual and uninterrupted series of sanctions for the same or similar types of breaches (twelve sanctions over a period of three years: the issuing of a public warning, the withdrawal of the right to broadcast advertisements for a defined period, the imposition of a fine and then the suspension of the right to broadcast for a certain period). The seriousness of the actions imputed to NIT appeared to have resided not only in its persistence in refusing to comply with the requirements on internal pluralism but also in the nature and accumulation of the transgressions and their gravity when seen as a whole. That had entitled the authorities to consider that applying the most serious of sanctions had been warranted by the applicant company's defiance.

– The applicant company had contended that the revocation, as well as the majority of the sanctions, had been politically motivated: they had been imposed after a change in power, the PCRM becoming the only opposition party and NIT being a platform for its promotion and criticism of the governing forces. The Court therefore had to scrutinise closely the safeguards against arbitrariness and abuse: the Code contained detailed rules pertaining to the ACC's structure and the selection, appointment and functioning of its members, designed to secure its independence and to safeguard against undue governmental influence. At the material time, six out of the nine ACC members had been appointed before the change of government. Even though some high-profile politicians had made public statements calling for the channel to be shut down, that could not alone be regarded as a sufficiently concrete and strong indication that the ACC had failed to act independently. NIT's allegations had been duly examined by the courts. In sum, no concrete evidence had been adduced in the domestic proceedings and in turn before the Court to support the allegation that the ACC had sought to hinder NIT from expressing critical views of the government, or had pursued any other ulterior purpose.

– It was of particular importance that the measure had not prevented NIT from using other means to broadcast its programmes, including news bulletins, and could not prevent the applicant company from pursuing other income-generating activities. Indeed, the applicant company had continued to share content through its Internet homepage and YouTube channel. Moreover, the impugned measure had not had a permanent effect: the applicant company could have reapplied for a broadcasting licence one year after the revocation.

– The Court also examined the fairness of the proceedings and the procedural safeguards afforded in the present case, including: the public nature of the meeting in which ACC took its decision to monitor NIT's news bulletins, and the representation of the NIT at that and previous meetings, as well as the possibility to adjourn such a meeting; the ability to challenge the ACC's decision before the competent courts and ask for a stay of execution; and the provision of reasons by the competent courts when dismissing the applicant company's request for a stay of execution. Such procedural safeguards played a particularly important role in situations

where a measure as intrusive as the revocation of a broadcasting licence had immediate effect upon its publication.

Conclusion: no violation (fourteen votes to three).

The Court also held, by fifteen votes to two, that there had been no violation of Article 1 of Protocol No. 1 (control of the use of property). Noting that the applicant company's pecuniary and other proprietary interests had been sufficiently taken into account in the relevant domestic proceedings, the Court found that the State, acting within its wide margin of appreciation in the area, had struck a fair balance between the general interest of the community and the property rights of the applicant company.

Freedom of expression/Liberté d'expression

Prosecution for administrative offences for calling on voters not to vote for a party or to abstain from voting in elections: *violation*

Poursuites pour des infractions administratives pour avoir appelé les électeurs à ne pas voter pour un parti ou à s'abstenir de voter à des élections : *violation*

Teslenko and Others/et autres – Russia/Russie, 49588/12 et al, Judgment/Arrêt 5.4.2022 [Section III]

Traduction française du résumé – Printable version

Facts – The four applicants were prosecuted for administrative offences for calling on eligible voters not to vote for a specific political party, or to abstain from voting in various parliamentary and presidential elections. The first and fourth applicants were also escorted to a police station in the context of those offences and remained there for several hours.

Law – Article 10: The applicants' prosecution amounted to an "interference" with their right to freedom of expression which pursued the legitimate aim of protecting the rights of others. It was not necessary to determine whether the interferences had been "prescribed by law". The Court examined whether the applicants' prosecution had been convincingly shown to have been "necessary in a democratic society" to achieve the legitimate aims:

(a) *The first and second applicants' calls not to vote for a specific political party* – The first applicant had produced and attempted to distribute leaflets with content related to a forthcoming parliamentary election and a specific political party. He had been expressing his own political views, had not been a candidate himself and had not been acting on behalf of any registered candidate or electoral group.

The Court had previously dealt with the Russian regulatory framework relating to the "flow of information" during an electoral campaign, with a distinction between "informing voters" and "pre-election campaigning" (see *Orlovskaya Iskra* and *OOO Informatsionnoye Agentstvo Tambov-Inform*). It had been lawful under Russian law for the applicant to engage in "informing" other voters during an electoral campaign. In addition, he could engage in "pre-election campaigning" without incurring any expenses whatsoever. It was presumed that "campaign material" had been commissioned by or for the benefit of a candidate or an electoral group and had to have been paid from their election fund. Failure to submit information about such a payment and other related information resulted in prosecution.

The domestic courts had not carried out a meaningful assessment of the content of the first applicant's leaflets and had not explained why it had fallen within the scope of "pre-election campaigning". They had found it sufficient to state that the content had been related to the election and had been produced and disseminated during the electoral campaign. The facts of the case disclosed that even a nominal personal expense for printing out leaflets exposed a private citizen to a risk of prosecution for unlawful pre-election campaigning.

Unaffiliated citizens who wished to exercise their right to freedom of expression by expressing critical views during and in relation to a forthcoming election had been faced with a dilemma: either they abstained from doing so or risked prosecution and, at times, measures such as administrative escorting or arrest. That state of affairs was present during the entire electoral period, that is, for some three months, from the launch of an electoral campaign until after election day.

The Constitutional Court had held against the exclusion of Russian citizens from election campaigning and had considered free elections to be impossible in the absence of free political discussion and opportunities for a free exchange of opinions, including both candidates and citizens. Citizens were allowed to engage in pre-election campaigning without incurring expenses by organising public gatherings or in other ways. The Constitutional Court had left it to the federal legislature's discretion to choose the appropriate method and means to reconcile the exercise of the rights involved, taking into account the historical conditions prevailing at a particular stage of the country's development.

As to the applicable legislation, however, the Government had provided no information about the

regulation of electoral volunteering and had made no specific submissions relating to financial contributions to election funds and electoral campaigns of candidates or electoral groups under Russian law. As a matter of principle, the Court found it difficult to conceive that participation in and organisation of public campaign events would not necessitate any monetary or in-kind expenditure, not even a nominal personal expense, by the person concerned. Nor had the Court been provided with any detailed information relating to the rationale for adopting the relevant provisions of national legislation and whether any other, less restrictive, options had been considered by the authorities to ensure transparency of electoral spending. Furthermore, a complete ban on electoral speech by individuals that involved any amount of personal spending was difficult to reconcile with a legal regime that allowed the same individuals to provide significant amounts in personal donations to the electoral funds of political parties or presidential candidates.

The respondent State had overstepped its margin of appreciation, insofar as Russian law had operated, for all practical purposes, as a total barrier to the applicant disseminating content with a view to encouraging voters to vote in the forthcoming election in a particular manner, and had disproportionately restricted the very essence of his ability to influence an election.

Those findings applied *a fortiori* to the second applicant, who had been prosecuted for unlawful pre-election campaigning in relation to a forthcoming presidential election for putting writing on the rear window of his car saying "United Russia is a party of crooks and thieves". His conviction had subsequently been quashed on rather technical grounds, and for some five years there had been a chilling effect on his exercising of his right to freedom of expression.

(b) *The third and fourth applicants' calls to abstain from voting* – The third applicant had been prosecuted for creating obstacles to the participation of voters in the voting process by calling on the electorate to abstain from voting in a forthcoming presidential election.

Establishing and maintaining the foundations of an effective and meaningful democracy were better served by the active participation of voters in electoral processes, specifically the voting process, conducted in compliance with the principles relating to free and fair elections. That said, in so far as an "interference" under Article 10 was concerned, the respondent State's choice to prosecute calls to abstain from voting in an election had to be subjected to strict scrutiny.

Those calls had not amounted to calling on voters to engage in unlawful activities: there had been no legal obligation under Russian law to vote in an election. Nor had the third applicant incited hatred, intolerance or discrimination or called for violence or other criminal acts to be committed. It had also not been established that the impugned material had contained false information. The Russian courts had found that the material had constituted a point of view. At the same time, they had concluded that the material had been misleading and untruthful: however, the truth of value judgments was not susceptible of proof. The requirement to prove the truth of a value judgment was impossible to fulfil and infringed freedom of opinion itself.

The national courts had not delved into whether the third applicant's exercise of his freedom of expression had contributed to an ongoing nationwide debate on a matter of general interest. The leaflets had encouraged citizens to engage in the electoral process in another manner, specifically through acting as election observers. The third applicant's expression had not been intended to single out and promote or prejudice electoral prospects of any particular candidate running in the national election: indeed, his actions had not been classified as "pre-election campaigning" under Russian law.

The national courts had considered that the impugned material could have influenced voters into adopting the author's point of view and that that had indeed been the third applicant's intention. Yet convincing others of a point of view was often at the heart of the right to freedom of expression in a democracy. The mere fact of that intention had been insufficient to justify the applicant's prosecution. Finally, regarding the Government's reference to the need to reduce abstention in elections, they had failed to convincingly demonstrate how the mere expression of a point of view concerning the non-participation of the electorate in a forthcoming election could have exerted undue influence over eligible voters in the absence of any proven elements of coercion or impediment.

Accordingly, the respondent State had overstepped its margin of appreciation in so far as the applicant had been prevented from disseminating during an election period content with a view to encouraging the electorate to abstain from voting in a forthcoming national election.

The above findings also applied to the fourth applicant's situation. The national courts had considered that the distribution by the applicant of leaflets containing, *inter alia*, calls to abstain from voting in the same presidential election had amounted to "pre-election campaigning" within the meaning of

Russian law. However, it had not been convincingly established that that expression had been intended to single out and promote or prejudice the electoral prospects of any particular candidate running in that election. Moreover, the courts had taken no heed of the rationale for the applicant's calls to abstain from voting as specified in the leaflets, or of the fact that the leaflets had provided information relating to voters' rights, and had encouraged citizens to engage in the electoral process as election observers instead. It had not been convincingly established that the fourth applicant's exercise of his right to freedom of expression had been such as to undermine the foundations of an effective and meaningful democracy.

Conclusion: violation in respect of each applicant (unanimously).

The Court also held, unanimously, that there had been a violation of Article 5 § 1 in respect of the first and fourth applicants, who had been unlawfully deprived of their liberty through escort to a police station in non-compliance with the requirements of Russian law.

Article 41: sums ranging between EUR 3,000 and 3,300 to each applicant in respect of non-pecuniary damage; EUR 14 for pecuniary damage to the fourth applicant; claims dismissed in respect of pecuniary damage to the other applicants.

(See *Orlovskaya Iskra v. Russia*, 42911/08, 21 February 2017, Legal Summary, and *OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia*, 43351/12, 18 May 2021)

Freedom of expression/Liberté d'expression

Justified and proportionate conviction and suspended prison sentence imposed on pro-euthanasia physician for assistance and advice to specific persons on how to commit suicide: *no violation*

La reconnaissance de culpabilité d'un médecin pro-euthanasie et sa condamnation à une peine de prison avec sursis pour avoir aidé plusieurs personnes à se suicider et les avoir conseillés sur la manière de procéder étaient justifiées et proportionnées : *non-violation*

Lings – Denmark/Danemark, 15136/20, Judgment/Arrêt 12.4.2022 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant, a retired physician, and member of an association in favour of euthanasia, was convicted of one count of attempted assisted suicide (count 1) and two counts of assisted suicide (counts 2 and 3) concerning three persons, A, B and C respectively, under Article 240 of the Danish Penal Code. He was sentenced to 60 days' imprisonment, suspended. Maintaining that he had merely provided general advice about suicide, the applicant complained that his conviction was in breach of Article 10.

Law – Article 10: It was not in dispute that the applicant's conviction had constituted an interference, prescribed by law (section 240 of the Penal Code), which had pursued the legitimate aims of the protection of health and morals and the rights of others. The Court noted that regarding counts 1 and 2 the applicant had been convicted not only for having provided guidance, but also for having, by specific acts, procured medications for A and B. Hence, there was reason to doubt whether in respect of these counts there had indeed been an interference with his right to freedom of expression within the meaning of Article 10. Nevertheless, the Court, proceeded on the assumption that there had been such an interference and examined the main question that arose, namely, whether or not the application of section 240 of the Penal Code in the applicant's case had been "necessary in a democratic society".

There was no support in the Court's relevant case-law under Articles 2 and 8 for concluding that a right to assisted suicide existed under the Convention, including in the form of providing information about or assistance that went beyond providing general information about suicide. Accordingly, as the applicant had not been prosecuted for providing general information about suicide, including the guide on suicide that he had prepared and that had been made publicly available on the internet, but had been prosecuted for having assisted suicide through specific acts, the case was not about the applicant's right to provide information that others under the Convention had a right to receive.

In the circumstances of the case, the Court saw no reason to call into question the Supreme Court's conclusions. As regards counts 1 and 2 the Supreme Court had found unanimously that the applicant had provided guidance as well as procured medications, by specific acts, for A and B, in the knowledge that they had been intended for their suicide. Such acts were clearly covered by section 240 of the Penal Code, and implicitly, did not give rise to an issue under Article 10. As regards count 3 the majority had found the applicant guilty under the above provision in that he had assisted C in a specific and significant way in committing suicide, that his advice had not been exempted from punishment because it had been based on his lawful general guide, that his specific advice had been

suited to a greater extent than the general guide to intensifying C's desire to commit suicide, and that his conviction would not be in breach of Article 10. It had been taken into account as an aggravating circumstance that to a certain extent the acts had been committed in a systematic manner and that the applicant had been charged on three counts, the last act being committed after he had been provisionally charged by the police for violation of section 240 of the Penal Code. The applicant's old age had been considered a mitigating circumstance. Further, taking into account the email exchanges between the applicant and C, the Court considered that the reasons relied on by the Supreme Court when finding that the act fell within the scope of section 240 of the Penal Code had been relevant and sufficient.

The Supreme Court had also made a thorough judicial review of the applicable law in the light of the Convention, including the Court's judgment in *Open Door and Dublin Well Woman v. Ireland*. That case differed significantly from the present one. In particular, it was undisputed that the applicant could legally publish his guide on suicide on the internet and could encourage to suicide if not directed at specific persons. The charges had concerned the applicant's concrete assistance or advice to three specific persons on how to commit suicide. The restriction in section 240 of the Penal Code had been imposed in order to protect such persons' health and well-being, by preventing other persons from assisting in their suicide.

Accordingly, the quality of the judicial review of the disputed general measure and its application in the present case militated in favour of a wide margin of appreciation as did the fact that the subject of assisted suicide concerned matters of morals and the comparative law research enabling the Court to conclude that the Member States of the Council of Europe were far from having reached a consensus on this issue.

Lastly, in the circumstances and bearing in mind that the sentence had been suspended, the conviction and the sentence had not been excessive.

In the light of all the above-mentioned considerations, the reasons relied upon by the domestic courts, and most recently the Supreme Court, had been both relevant and sufficient to establish that the interference complained of could be regarded as "necessary in a democratic society", proportionate to the aims pursued, and that the authorities of the respondent State had acted within their margin of appreciation, having taken into account the criteria set out in the Court's case-law.

Conclusion: no violation (unanimously).

(See *Open Door and Dublin Well Woman v. Ireland*, 14235/88 and 14234/88, 29 October 1992, Legal Summary; see also *Haas v. Switzerland*, 31322/07, 20 January 2011, Legal Summary; *Koch v. Germany*, 497/09, 19 July 2012, Legal Summary; and *Perinçek v. Switzerland* [GC], 27510/08, 15 October 2015, Legal Summary)

Freedom of expression/Liberté d'expression

Newspaper prohibited from publishing image with "convicted neo-Nazi" caption, 20 years after plaintiff's conviction, since expunged, given his loss of notoriety and no further criminal conduct: *no violation*

Interdiction faite à un journal de publier une photographie avec la légende « néo-nazi condamné », 20 ans après la condamnation de l'intéressé (entretemps effacée du casier judiciaire), qui s'était fait oublier et avait renoncé à toute conduite répréhensible : *non-violation*

Mediengruppe Österreich GmbH – Austria/Autriche, 37713/18, Judgment/Arrêt 26.4.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant company (applicant) is the owner of the daily newspaper *Österreich*. During the 2016 run-off federal presidential elections, it published an article on the political circles of a presidential candidate, N.H., accompanied by a photograph of H.S. who had been convicted of neo-Nazi activities in 1995 under the National Socialist Prohibition Act. H.S. had led a crime-free discrete life since his release from prison in 1999 and his conviction had meanwhile been deleted from his criminal record. H.S. successfully brought civil proceedings against the applicant which was prohibited from publishing H.S.'s photograph if he was called a "convicted neo-Nazi" in the accompanying text. H.S.'s claim for compensation for non-pecuniary damage was dismissed.

Law – Article 10: The domestic courts' judgments had constituted an interference with the applicant company's right to freedom of expression which had been "prescribed by law" and served the legitimate aim of the protecting the rights and reputation of others, in particular the right to respect for H.S.'s private life. The main question was thus whether the domestic courts had struck a fair balance between the competing rights at stake having regard to the following applicable criteria.

(a) *Contribution to a debate of general interest* – The overall subject of the article – namely the fact that N.H. had an office manager around him, H.S.'s broth-

er, who – at least in the past – had contacts with persons who had aimed at destroying the Austrian constitutional order, must be considered as having been of particular public interest at the time of its publication. The article had appeared at a delicate point during the presidential election in 2016 after the Constitutional Court had ruled unconstitutional a run-off ballot between the two candidates. There had also been particular public interest in the election process and the candidates at the time. There was thus little scope under Article 10 § 2 to restrict the applicant company's right to report on N.H.'s election campaign. Notwithstanding, the impugned article had not alleged that there had been any direct link between N.H. and H.S., or that H.S. had played any role in the election campaign. As found by the domestic courts, H.S. had not been the subject of the article. They had thus concluded that publishing his photograph in a report on N.H.'s political milieu with an incomplete accompanying text had not contributed to the debate on the election, despite the particular public interest in the report as such. The Court accepted their conclusion, considering that the applicant company had not – either in the domestic proceedings or in its submissions to the Court – alleged the existence of a direct link between N.H. and H.S.

(b) *Degree of notoriety of the person affected and subject of the news report* – The Court had already held in similar cases that a person expressing extremist views laid himself open to public scrutiny. This applied all the more to persons who did not only express extremist views but who committed severe crimes such as those under the Prohibition Act that ran counter to the letter and the spirit of the Convention. The Court attached particular importance to the essential function the press fulfilled in a democratic society when reporting on crimes of that kind. As found in its *Österreichischer Rundfunk v. Austria* judgment, in which H.S had also been the plaintiff in the proceedings giving rise to that case, H.S. had been a "well-known member of the neo-Nazi scene in Austria" and a leading member before his 1995 conviction of the ExtraParliamentary organisation Opposition True to the People (VAPO), which aimed at nothing less than destroying the Austrian constitutional order. The proceedings against him had been among the most important ones conducted under the Prohibition Act. Further, at the time of his trial his picture had been widely published. The article in the instant case, however, had been published more than twenty years since H.S.'s conviction and some seventeen years since his release. There was no indication in the parties' submissions or in the documents submitted that H.S. had sought the limelight after his release. Most importantly, the applicant company had not substantiated that H.S. had still been a person of public interest and notoriety when the photograph was published. There had thus been no reason for the civil courts to carry out a detailed examination of whether he had still been such a person. While the Court supported in general the applicant company's view that proceedings against neo-Nazis formed an important part of judicial history in Austria, it could not be automatically concluded that H.S.'s notoriety as an individual had remained the same over the years. As regards the subject matter of the report, this did not relate to the criminal proceedings against H.S. or H.S.'s role in the election campaign.

(c) *Prior conduct of the person concerned* – H.S. had been reintegrated in society after his release and had not had any further criminal convictions. The applicant company had not made any submissions in the civil proceedings regarding H.S.'s conduct after his conviction and had not substantiated its allegation that he had been still active in the right-wing scene. Therefore, the domestic courts had not been obliged, for the purpose of the civil claim, to assess in more detail H.S.'s conduct between his release in 1999 and the publication in 2016.

(d) *Method of obtaining the information and its veracity* – It was undisputed that the statement made by the applicant company in the text accompanying the photograph that H.S. was a (former) convicted neo-Nazi was true. Incidentally, this had been one of the reasons why the domestic courts had dismissed his claims for damages. The information itself could be considered common knowledge and was easily obtainable through an internet search typing in H.S.'s full name. The text had not been, however, complete in respect of an essential point: it had not informed the reader of the fact that the conviction referred to dated back to 1995, that H.S. had served his sentence and that he had not been convicted of a crime since. The information that the conviction had in the meantime been expunged from his criminal record could have been ascertained by the applicant company by consulting the Criminal Record Deletion Act.

(e) *Content, form and consequences of the publication of the article* – The content of the article did not concern H.S. Further, H.S. had not alleged in the domestic proceedings that there had been any tangible consequences arising from the publication in question and had thus not been granted the damages claimed.

(f) *Severity of the sanction imposed* – The restriction imposed on the applicant company had been of a very limited scope. It had not been sanctioned for the report or for the publication of the photograph either in civil or in criminal proceedings. It had not been prevented in general from reporting on H.S. and on the serious crimes once committed by him

but had been prohibited from publishing his image if the accompanying text referred to him as a "convicted neo-Nazi". Further, no compensation had been awarded and no fine imposed. The applicant company only had to reimburse H.S. for the costs of the domestic proceedings.

(g) *The lapse of time between the conviction, the release and the publication of the article in question* – Unlike in the case of *Österreichischer Rundfunk*, and as explicitly noted by the Supreme Court in the present case when referring to the Court's case-law, there had been no temporal connection between H.S.'s 1995 conviction and the article's publication in 2016. His conviction had already been deleted from his criminal record by then. While the Court did not lose sight of the severe political nature of the crime committed by H.S. before 1995 and of the danger with regard to attacks on democracy if journalists were hindered from reporting on the crimes of neo-Nazis, these considerations had to be weighed against the importance of the reintegration into society of persons who had been released from prison after serving their sentence, and their legitimate and very significant interest after a certain period of time in no longer being confronted with their conviction.

In conclusion, in the specific circumstances of the case the reasons adduced by the domestic courts had been undertaken in conformity Court's case-law criteria and were "relevant and sufficient" to justify the interference. The Supreme Court had balanced the competing interests at stake and, by doing so, had examined the case on the basis of the criteria that were established by the Court's own judgment in the case of *Österreichischer Rundfunk*. Accordingly, the Court saw no strong reasons to substitute the domestic courts' views with its own and held that the interference had been "necessary in a democratic society".

Conclusion: no violation (four votes to three).

(See also *Österreichischer Rundfunk v. Austria*, 35841/02, 7 December 2006, Legal Summary; *Axel Springer AG v. Germany* [GC], 39954/08, 7 February 2012, Legal Summary; and *Couderc and Hachette Filipacchi Associés v. France* [GC], 40454/07, 10 November 2015,Legal Summary)

Freedom of expression/Liberté d'expression

Proceedings to lift judge's immunity from criminal prosecution in relation to his exercise of judicial functions and public criticism of the recent judicial reform: *communicated*

Procédure de levée de l'immunité pénale d'un juge en relation avec l'exercice de ses fonctions judiciaires et avec les critiques qu'il avait exprimées publiquement sur la récente réforme du système judiciaire : *affaire communiquée*

Wróbel – Poland/Pologne, 6904/22, Communication [Section I]

(See Article 18 below/Voir l'article 18 ci-dessous, page 29)

ARTICLE 13

Effective remedy/Recours effectif

Lack of remedy in the prevention of global warming: *relinquishment in favour of the Grand Chamber*

Défaut de recours dans la lutte contre le réchauffement climatique : *dessaisissement au profit de la Grande Chambre*

Verein KlimaSeniorinnen Schweiz and Others/et autres– Switzerland/Suisse, 53600/20

Traduction française du résumé – Printable version

The applicants are, on the one hand, an association under Swiss law for the prevention of climate change and of which hundreds of elderly women are members, and on the other, four elderly women (between 78 and 89) who complain of health problems which worsen during heatwaves and which impact their living and health conditions. Since 2016 they have made unsuccessful requests to a number of authorities alleging various omissions in relation to climate protection. They also requested that the authorities take the necessary measures to meet the 2030 goal set by the 2015 Paris Agreement on climate change (COP21), in particular to limit global warming to well below 2 degrees Celsius compared to pre-industrial levels.

The applicants appealed unsuccessfully up to the Federal Court. It found that the applicants were not sufficiently affected in the enjoyment of their Convention rights to assert an interest falling under the protection of the relevant domestic law. Moreover, as neither domestic law nor the Convention guarantees an *actio popularis*, it would be incumbent on the applicants to plead their case before political institutions.

The applicants complain that the respondent State has failed to comply with its positive obligations to effectively protect life (Article 2) and respect for private and family life and the home (Article 8), read in the light of the precautionary principle and the principle of intergenerational equity, which are contained in international environmental law. In that context, they complain that the government

have failed to adopt appropriate regulations and to implement them with adequate and sufficient measures in order to achieve the objectives for combatting climate change.

They also complain under Article 6 of a violation of the right to access to a court, alleging that the domestic courts failed to respond seriously to their requests and provided arbitrary decisions concerning their civil rights. Finally, they complain of a violation of Article 13, in that they did not have at their disposal an effective remedy in respect of the alleged violations under Articles 2 and 8.

On 26 April 2022 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

(See also the case of *Duarte Agostinho and Others v. Portugal and 32 other States*, 39371/20)

ARTICLE 14

Discrimination (Article 2)

No systemic defect pointing to general passivity *vis-à-vis* victims of domestic violence, and no discriminatory attitude towards the applicant: *inadmissible*

Absence de défaillance systémique révélatrice d'une passivité généralisée envers les victimes de violence domestique ; pas d'attitude discriminatoire envers la requérante : *irrecevable*

Landi – Italy/Italie, 10929/19, Judgment/Arrêt 7.4.2022 [Section I]

(See Article 2 above/Voir l'article 2 ci-dessus, page 10)

Discrimination (Article 9 and/et Article 1 of Protocol No. 1/du Protocole n° 1)

No tax exemption for buildings used for the public practice of a non-recognised religion, the rules on such recognition being devoid of the minimum guarantees of fairness and objectivity: *violation*

Pas d'exonération fiscale des immeubles affectés à l'exercice public du culte non reconnu, le régime de reconnaissance manquant de garanties minimales d'équité et d'objectivité : *violation*

Anderlecht Christian Assembly of Jehovah's Witnesses and Others/Assemblée chrétienne des Témoins de Jéhovah d'Anderlecht et autres – Belgium/Belgique, 20165/20, Judgment/Arrêt 5.4.2022 [Section III]

English translation of the summary – Version imprimable

En fait – Les associations requérantes, neuf congrégations de Témoins de Jéhovah, ont été privées à partir de l'exercice d'imposition 2018, du bénéfice de l'exonération du précompte immobilier portant sur les immeubles affectés à l'exercice public de leur culte, à défaut pour elles de rencontrer un nouveau critère légalement prévu par une ordonnance du 23 novembre 2017 de la région de BruxellesCapitale, à savoir l'appartenance à une « religion reconnue ».

En droit – Article 14 combiné avec l'article 9 de la Convention et avec l'article 1 du Protocole n° 1

a) *Applicabilité* – Les immeubles des requérantes concernés par l'imposition litigieuse sont affectés à l'exercice public d'un culte.

L'imposition litigieuse représente 23 % des dons qui leur sont versés et qui constituent leur source exclusive de financement. En outre, le montant dû au titre de cette imposition constitue une part conséquente des frais annuels de fonctionnement liés à ces immeubles soit entre 21,4 % et 32 % suivant les années concernées. Ainsi, cette imposition n'est pas insignifiante et affecte considérablement le fonctionnement des requérantes en tant que communautés religieuses.

De surcroît, les autorités nationales ont ellesmêmes lié l'exonération de l'imposition litigieuse à l'exercice public d'un culte, considérant implicitement mais nécessairement qu'une telle exonération contribue à un exercice effectif de la liberté de religion au sens de l'article 9. Les requérantes, qui bénéficiaient antérieurement de cette exonération, critiquent le fait que celle-ci se voit désormais subordonnée, pour le seul territoire de la région de BruxellesCapitale, à l'exercice public d'un culte d'une religion reconnue.

Lorsque les autorités nationales octroient des privilèges fiscaux à certaines communautés sans y être nécessairement tenues par l'article 9, elles doivent également respecter l'article 14.

L'ensemble de ces éléments suffit à considérer que les faits de l'espèce tombent sous l'empire de l'article 9.

Et dans la mesure où la différence de traitement concernée porte sur l'octroi d'une exonération fiscale qui, le cas échéant, pourrait permettre aux requérantes de se soustraire légalement au paiement d'un impôt, elle tombe aussi sous l'empire de l'article 1 du Protocole n° 1.

b) *Fond*

i. *Différence de traitement* – Il existe une différence de traitement entre les communautés religieuses qui, à l'instar des requérantes, se trouvent privées, à défaut de reconnaissance, du bénéfice de l'exonération du précompte immobilier en région de Bruxelles-Capitale à raison des immeubles affectés à l'exercice public d'un culte, et les autres commu-

nautés qui peuvent, quant à elles, continuer à en bénéficier dès lors qu'elles sont reconnues.

Les requérantes se trouvent dans une situation comparable à celle des communautés dont la religion est reconnue et dont les bâtiments sont affectés à l'exercice public d'un culte.

ii. *Poursuite d'un but légitime* – Par l'adoption de l'ordonnance du 23 novembre 2017, le législateur entendait lutter contre les abus tenant au bénéfice de l'exonération du précompte immobilier relativement à des immeubles qui étaient, en réalité, affectés à des cultes dits « fictifs ».

Aucun cas concret de fraude n'a été cité dans les travaux préparatoires précédant l'adoption de l'ordonnance et par le Gouvernement, et les requérantes n'auraient pas commis ou n'auraient pas été suspectées d'avoir commis une fraude en bénéficiant antérieurement de l'exonération fiscale. Cependant, la lutte contre la fraude fiscale constitue un but dont la légitimité ne saurait, en soi, être remise en cause par la Cour.

iii. *Rapport raisonnable de proportionnalité entre le moyen utilisé et le but visé au regard des garanties offertes dans le cadre de la procédure fédérale de reconnaissance des cultes* – En retenant la reconnaissance du culte comme critère de distinction présidant à l'exonération du précompte immobilier, les autorités ont opté pour un critère qui revêt un caractère objectif et qui peut s'avérer pertinent au regard du but poursuivi. Le choix d'un tel critère relève de la marge d'appréciation des autorités nationales dans le domaine considéré.

Si le critère de la reconnaissance est actuellement retenu par la seule région de Bruxelles-Capitale, à la différence des régions flamande et wallonne, il ne peut en être déduit une discrimination contraire à l'article 14. La Cour a toujours respecté les particularités du fédéralisme dans la mesure où celles-ci sont compatibles avec la Convention.

Le Gouvernement soutient que les requérantes sont libres de solliciter une reconnaissance de leur culte au niveau fédéral pour continuer de bénéficier de l'exonération litigieuse sur le territoire de la région en question. Les requérantes objectent qu'il serait totalement vain de la solliciter en raison des graves déficiences entourant la procédure de reconnaissance. La Cour constitutionnelle ne s'est pas prononcée en l'espèce sur la procédure de reconnaissance des cultes.

Pour la Cour, ni les critères de reconnaissance ni la procédure au terme de laquelle un culte peut être reconnu par l'autorité fédérale ne sont prévus par un texte satisfaisant aux exigences d'accessibilité et de prévisibilité.

Ainsi, d'une part, la reconnaissance d'un culte procède de critères qui n'ont été identifiés par le ministre de la Justice qu'à la faveur de questions parlementaires qui lui ont été adressées. En outre, libellés en des termes particulièrement vagues, ils ne peuvent être considérés comme offrant un degré suffisant de sécurité juridique.

D'autre part, la procédure relative à la reconnaissance des cultes n'est pas davantage encadrée par un texte, qu'il soit législatif ou même réglementaire. Ainsi, l'examen d'une demande de reconnaissance ne s'accompagne d'aucune garantie concernant l'adoption même de la décision statuant sur pareille demande, le processus précédant cette décision et le recours qui pourrait être exercé ultérieurement contre celleci. Particulièrement, aucun délai ne régit cette procédure de reconnaissance. À cet égard, aucune décision n'a été prise à ce jour concernant des demandes de reconnaissance introduites en 2006 et 2013.

Enfin, l'octroi de la reconnaissance est subordonné à la seule initiative du ministre de la Justice et dépend ensuite de la volonté purement discrétionnaire du législateur. Or, pareil régime comprend intrinsèquement un risque d'arbitraire et on ne pourrait raisonnablement attendre de communautés religieuses qu'en vue bénéficier de l'exonération fiscale litigieuse, elles se soumettent à un processus qui ne repose pas sur des garanties minimales d'équité, ni ne garantit une appréciation objective de leur demande.

Ainsi, dès lors que l'exonération fiscale litigieuse est subordonnée à une reconnaissance préalable dont le régime n'offre pas de garanties suffisantes contre des traitements discriminatoires, la différence de traitement dont les requérantes font l'objet manque de justification objective et raisonnable.

Conclusion : violation (unanimité).

Article 41 : constat de violation suffisant pour le préjudice moral.

(Voir aussi *Association Les Témoins de Jéhovah c. France*, 8916/05, 30 juin 2011, Résumé juridique ; *Église de Jésus-Christ des saints des derniers jours c. Royaume-Uni*, 7552/09, 4 mars 2014, Résumé juridique; et *Christian Religious Organization of Jehovah's Witnesses c. Arménie* (déc.), 73601/14, 29 septembre 2020, Résumé juridique)

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Proceedings to lift judge's immunity from criminal prosecution allegedly made for ulterior purposes: *communicated*

Procédure de levée de l'immunité pénale d'un juge censément ouverte à des fins inavouées : *affaire communiquée*

Wróbel – Poland/Pologne, 6904/22, Communication [Section I]

Traduction française du résumé – Printable version

The applicant is a judge at the Criminal Chamber of the Supreme Court of Poland since 2011. He is also a well-known academic involved in promoting the rule of law in Poland and in civic education. In 2020 he was co-rapporteur in a resolution delivered by the joined Civil, Criminal, Labour and Social Security Chambers of the Polish Supreme Court, which held, among other things, that the National Council of the Judiciary lacked independence and that the Disciplinary Chamber of the Supreme Court was not an "independent tribunal established by law".

On 16 March 2021 the State Prosecutor's Office sought to lift his immunity with a view to charging him with unintentional criminal negligence in relation to a judgment of the Criminal Chamber of the Supreme Court given by a bench of three judges, including the applicant. The panel had quashed the contested judgment and remitted the case. According to the State Prosecutor, the applicant had failed to fulfil an obligation to verify whether the accused had already been serving his prison sentence – which had resulted in his being unlawfully detained.

On 31 May 2021 the Disciplinary Chamber of the Supreme Court, sitting as a court of first instance, refused to lift the applicant's immunity. It held that the applicant had shown negligence, which could have been investigated in regular disciplinary proceedings. The delivery of the resolution and oral presentation of its reasons were broadcast by Polish media outlets. The applicant was described as a "perpetrator" and found to have "unintentionally failed to fulfil his duties". The State Prosecutor's Office appealed against that resolution and the applicant against its reasoning.

On 8 February 2022 the Court granted the applicant's request for an interim measure under Rule 39 of the Rules of Court indicating to the respondent State to ensure that the proceedings concerning the lifting of his judicial immunity complied with the requirements of "fair trial" as guaranteed by Article 6 § 1, in particular the requirements of an "independent and impartial tribunal established by law" (*Reczkowicz v. Poland*), and that no decision in respect of his immunity be taken by the Disciplinary Chamber until the final determination of his complaints by the Court. On the same day that Chamber cancelled the appellate hearing in the applicant's case planned for 9 February 2022.

Relying on Article 6 § 1 and, in this connection, *inter alia*, on the Court's judgment in *Reczkowicz,* the applicant complains that the Disciplinary Chamber which examined the application to lift his judicial immunity did not satisfy the requirements of "an independent and impartial tribunal established by law". He also complains under Article 8 that the initiation of proceedings to lift his immunity, based on the alleged failure to fulfil his judicial duties, adversely affected his professional reputation and was aimed at creating a "chilling effect" on him and other judges who defend the rule of law in Poland. Further, he alleges that these proceedings are in breach of Article 10 as they were closely related to his public statements, made in his capacity both as a judge and as a university professor, in which he criticised the so-called reform of the judiciary pursued by the authorities. This interference with his rights did not pursue a legitimate aim and was not necessary in a democratic society. Lastly, relying on Article 18 in conjunction with Articles 8 and 10, the applicant maintained that the initiation of the proceedings for lifting his immunity constituted a covert form of harassment and was aimed at limiting judicial independence in Poland.

Communicated under Articles 6 § 1 (civil and criminal limbs), 8, 10 and 18 of the Convention.

(See *Reczkowicz v. Poland*, 43447/19, 22 July 2021, Legal Summary; see also *Advance Pharma sp. z o.o v. Poland*, 1469/20, 3 February 2022, Legal Summary, and *Grzęda v. Poland* [GC], 43572/18, 15 March 2022, Legal Summary)

ARTICLE 34

Victim/Victime

Victim status of an association and individuals in the area of global warming: *relinquishment in favour of the Grand Chamber*

Qualité de victime d'une association et de personnes physiques en matière de réchauffement climatique : *dessaisissement au profit de la Grande Chambre*

Verein KlimaSeniorinnen Schweiz and Others/et autres– Switzerland/Suisse, 53600/20

(See Article 13 above/Voir l'article 13 ci-dessus, page 26)

ARTICLE 37

Striking out applications/Radiation du rôle

Government concession as to Convention breaches but inadequate offer of redress: *request to strike out dismissed*

Reconnaissance par le Gouvernement de violations de la Convention mais offre de réparation inadéquate : *demande de radiation rejetée*

Benkharbouche and/et Janah – United Kingdom/ Royaume-Uni, 19059/18 and/et 19725/18, Judgment/Arrêt 5.4.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants, two Moroccan nationals, worked as domestic workers within foreign embassies in the United Kingdom. They unsuccessfully brought employment claims after their contracts of employment were terminated: in each case the employer – the Republic of Sudan and the State of Libya, respectively – successfully asserted immunity from the jurisdiction of the English courts by virtue of domestic law (the State Immunity Act 1978, "the 1978 Act"). In a Declaration of Incompatibility, the Court of Appeal declared that the relevant parts of the 1978 Act as applied to the first applicant infringed Article 6 of the Convention, and infringed Articles 6 and 14 in their application to the second applicant.

The Government submitted a Unilateral Declaration acknowledging the breaches, insofar as those provisions had prevented each of the applicants from bringing an employment claim against a foreign State in circumstances where the United Kingdom was not required under customary international law to provide immunity to the foreign State in question. It undertook to pay each applicant GBP 20,000 in respect of pecuniary and non-pecuniary damages and GBP 2,500 in respect of costs and expenses. It further requested the Court to strike the application out of the list of cases in accordance with Article 37. The applicants disagreed with the terms of the Unilateral Declaration.

Law

Article 37: The decision whether to strike the applications out of the Court's list depended on whether the Government's Unilateral Declaration afforded the applicants adequate redress.

The Court was not in a position to calculate the value of the lost opportunity by carrying out a detailed analysis of the strength of the applicants' cases and/or any likely awards. Any redress could therefore only be based on the fact that the applicants, who had been deprived of the opportunity to pursue their claims before the domestic courts, had not had the benefit of the guarantees of Article 6. Nonetheless, the Court had consistently treated the loss of an opportunity as pecuniary damage. It was therefore axiomatic that, provided a causative link could be established between the breach and the loss of opportunity, in assessing the appropriate level of compensation the Court could not be blind to the potential value of the opportunity that had been lost.

In the present case, the applicants had initiated their claims before the Employment Tribunal, only for the Tribunal to find that they had been barred by virtue of domestic legislation. There had therefore been a direct causal link between the acknowledged breaches of Articles 6 and 14 and the applicants' loss of opportunity to pursue their claims. Furthermore, both applicants' claims under domestic law had exceeded GBP 200,000, and a significant proportion of the amount claimed had concerned their employers' alleged failure to pay the National Minimum Wage. Despite the fact that the veracity of those claims could readily be established from the applicants' contracts of employment, the Government had not suggested either that the applicants' claims had lacked merit, or that the sums claimed had been unreasonable.

The Government had undertaken to introduce a remedial order to address the acknowledged incompatibility of the domestic law with Articles 6 and 14. However, they had provided no guarantee that the applicants would have any possibility of having their cases reheard by the Employment Tribunal. Despite the fact that some seven years had passed since the Court of Appeal had first made a Declaration of Incompatibility, and more than four years had passed since the Supreme Court had dismissed the Government's appeal, no draft of the remedial order had been published. It was therefore not clear whether it would have retrospective effect. Even if it did, the possibility for the applicants to have their claims reconsidered would fall squarely within the discretion of the Employment Tribunal.

In the light of the foregoing, the awards proposed by the Government in respect of pecuniary and non-pecuniary damage fell significantly short of the amounts that the Court would award in respect of just satisfaction.

The Court also came to the same conclusion as far as the amounts offered by the Government in respect of the applicants' legal costs were concerned. During the eighteen months that had followed the communication of the applicants' complaint, the parties had been engaged in friendly settlement negotiations. They had also had to respond to the Government's Unilateral Declaration and make their claims for just satisfaction. It was reasonable to assume that that had entailed significant legal costs.

The Court therefore rejected the Government's request to strike the applications out of the Court's list of cases.

Conclusion: request to strike out dismissed.

Article 6 § 1, read alone and taken together with Article 14: The applicants complained that the operation of domestic law had denied them access to court in breach of Article 6 § 1. The second applicant further complained under Article 14 read together with Article 6 § 1 that the relevant provision of domestic law had treated her differently to United Kingdom nationals who were seeking to pursue a similar claim.

Having regard to the particular circumstances of the present case, the Court accepted the Government's concession that there had been a breach of the first applicants' rights under Article 6 § 1 and the second applicant's rights under Article 6 § 1, read alone and together with Article 14. Consequently, it was empowered to make an award of just satisfaction to the applicants. In so doing, it did not consider it necessary to itself examine the substantive issues raised by the applicants' complaints, or to resolve any potential differences between the Supreme Court's views as to what had been required by customary international law and the view expressed by the Court in its case-law (see, among others, *Cudak v. Lithuania* [GC], 15869/02, 23 March 2010, Legal Summary; *Sabeh El Leil v. France* [GC], 34869/05, 29 June 2011, Legal Summary; and *Ndayegamiye-Mporamazina v. Switzerland*, 16874/12, 5 February 2019, Legal Summary).

Article 41: EUR 5,000 to the first applicant and EUR 6,500 to the second applicant for non-pecuniary damage; EUR 50,000 each in respect of pecuniary damage.

ARTICLE 3 OF PROTOCOL No. 1/ DU PROTOCOLE N° 1

Stand for election/Se porter candidat aux élections

Advisory opinion on the assessment of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings

Avis consultatif concernant l'appréciation de la proportionnalité d'une interdiction générale pour une personne de se porter candidate à une élection après une destitution dans le cadre d'une procédure d'*impeachment*

Advisory opinion requested by the Lithuanian Supreme Administrative Court/Avis consultatif demandé par la Cour administrative suprême lituanienne, P16-2020-002, Opinion/Avis 8.4.2022 [GC]

Traduction française du résumé – Printable version

Background and questions – The request of the Lithuanian Supreme Administrative Court for an Advisory Opinion arose in the context of proceedings brought by Ms N.V. challenging the Central Electoral Commission's refusal to register her as a candidate in the Seimas elections of October 2020 because in 2014 she had been removed from her position as a member of the Seimas in impeachment proceedings on account of her non-participation without excuse in the Seimas' meetings owing to her fleeing Lithuania in view of pending criminal proceedings. Under domestic law this meant that she could never again hold a parliamentary mandate. The legal ban preventing her registration was the direct consequence of the Lithuanian constitutional and statutory regulations on impeachment, which the Court in its Grand Chamber judgment of 6 January 2011 in *Paksas v. Lithuania* had found to be in breach of Article 3 of Protocol No. 1 on the ground that a general and unlimited ban, as laid down in those regulations, amounted to a disproportionate sanction. In that case, the law on impeachment had been applied to Mr Paksas, a former President of the Republic. The execution of this judgment was still pending before the Committee of Ministers on the date of adoption of the present advisory opinion.

The questions asked by the Supreme Administrative Court in the request for an advisory opinion were worded as follows:

"(1) Does a Contracting State overstep the margin of appreciation conferred to it by Article 3 of Protocol No. 1 to the Convention, if it does not guarantee the compatibility of the national law with the international obligations arising from the provisions of Article 3 of Protocol No. 1 to the Convention, which results in preventing a person, who has been removed from office of a Member of the Seimas under the impeachment proceedings, from implementing their "passive" right to elections for six years?

In case of affirmative response, could such situation be justified by the complexity of the existing circumstances, directly related to providing an opportunity to the legislative body to align the national provisions of the constitutional level with the international obligations?

(2) What are the requirements and criteria implied by Article 3 of Protocol No. 1 to the Convention, which determine the scope of the application of the principle of proportionality, and which the national court should take into account and verify whether they are complied with in the existing situation at issue?

In such situation, when assessing the proportionality of a general prohibition restricting the exercise

of the rights provided for in Article 3 of Protocol No. 1 to the Convention, should not only the introduction of the time-limit, but also the circumstances of each individual case, related to the nature of the office from which a person has been removed and the act which resulted in impeachment, be held crucial?"

Opinion

Preliminary considerations – The Court had regard to the most recent decision by the Committee of Ministers in which the Deputies had noted the Government's initial intention to wait for the delivery of the Court's advisory opinion before proceeding with further steps for the execution of the *Paksas* judgment and to resume the examination of its execution after the delivery of the advisory opinion. Consequently, the questions raised by the Supreme Administrative Court remained pertinent and had to be addressed. However, the Court also stressed that Protocol No. 16 had not been envisaged as an instrument to be used in the context of execution.

The Court considered it appropriate to first answer the second question, which related to the case pending before the Supreme Administrative Court, this circumstance being a requirement of Article 1 § 2 of Protocol No. 16.

The second question – This, in substance, concerned which criteria were to be applied by a competent Lithuanian court for the assessment of whether in the concrete circumstances of a given case the ban preventing an impeached former Member of the Seimas to stand for election to the Seimas had become disproportionate with the consequence that it breached Article 3 of Protocol No. 1.

The Supreme Administrative Court considered, in the light of the case-law of the Constitutional Court, that the law on impeachment which had been applied to Mr Paksas was equally applicable to the situation of Ms N.V. because both their functions had required the taking of an oath under the Constitution. However, the Court understood the second question as implying that the national court considered itself seized of the question whether, having regard to all relevant circumstances, the impact of the unlimited ban on the personal situation of Ms N.V. had become disproportionate or not for the purposes of Article 3 of Protocol No. 1. Against this background, it was thus a request for guidance on the criteria which were relevant for the purpose of that determination. In keeping with the object and purpose of Protocol No. 16, the Court's reply was from the perspective of the requesting Court, this being without prejudice to any legislative initiatives by the Seimas with a view to remedying the problem created by the failure to execute the *Paksas* judgment.

The Court first recapitulated its case-law relating to the issues involved in the case at hand, in the light of which the requirements flowing from the Court's judgment in *Paksas* were to be understood. This included its findings in the aforementioned judgment but also its case-law concerning the right to stand for election under Article 3 of Protocol No. 1, the concept of "implied limitations", the principle of a legitimate aim, the impact of the political and historical context and the requirement of procedural safeguards.

In this connection and with regard specifically to the facts relating to the present opinion, the Court recalled its finding in *Paksas* according to which in assessing the proportionality of a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1, decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the measure in question. The need for such a possibility was linked to the fact that the assessment of that issue must have regard to the evolving historical and political context in the State concerned. Further, while States enjoyed considerable latitude to establish in their constitutional order rules governing the status of parliamentarians, these rules should not be such as to exclude some persons or groups of persons from participating in the political life of a country and in the choice of the legislature. The Court has also recognised that, with the passage of time, general restrictions on electoral rights became more difficult to justify, thus requiring restrictive measures to be individualised.

It followed from this that the reference in *Paksas* to the weight to be attached to the existence of a time-limit and the possibility of reviewing the ban in question was not necessarily to be understood as requiring these two elements to be combined. Nor did it specify whether the time-limit applicable in a given case should be set in the abstract or on a case-by-case basis. What mattered in the end was for the ban in question to remain proportionate within the meaning of the *Paksas* judgment. This could be achieved by way of an appropriate legislative framework or judicial review of the duration, nature and extent of such a ban as applicable to the person concerned, performed on the basis of objective criteria and having regard to the particular circumstances of that person as they presented themselves at the time of the review. In this context the findings in *Paksas* that a life-long disqualification, due to its permanent and irreversible nature, was a disproportionate restriction did not in itself imply that a decision to refuse a person to stand for elections, at the time of such a refusal, would necessarily amount to a disproportionate restriction. Whether that was the case would depend on an

individual assessment of the refusal and the specific circumstances of the case based on objective criteria.

These criteria had to be objective in nature and allow relevant circumstances connected not only with the events which led to the impeachment of the person concerned, but also – and primarily – with the functions sought to be exercised in the future by that person, to be taken into account in a transparent way. This was because the purpose of the impeachment and the subsequent ban was not primarily to impose another sanction on the person concerned in addition to a criminal sanction which might already have been imposed, but to protect parliamentary institutions. The relevant criteria should therefore be identified mainly from the perspective of the requirements of the proper functioning of the institution of which that person sought to become a member, and indeed of the constitutional system and democracy as a whole in the State concerned.

This came down to evaluating the objective impact which that person's potential membership of the institution concerned would have on the latter's functioning, having regard to such considerations as the past and contemporary behaviour of the person who had been removed from office in impeachment proceedings, the nature of the wrongdoing which had led to his or her impeachment, but also – and more importantly – the institutional and democratic stability of the institution concerned, the nature of the latter's duties and responsibilities, and the likelihood of the person in question having the potential to significantly disrupt the functioning of that institution, or indeed of democracy as a whole in the State concerned. Aspects such as that person's loyalty to the State, encompassing his or her respect for the country's Constitution, laws, institutions and independence, might also be relevant in this respect. It was in the light of all those aspects that a determination should be made as to the appropriate and proportionate length of a ban precluding persons who had been removed from office in impeachment proceedings from being eligible for any function to which the ban applied.

Lastly, the procedure leading to such a determination in an individual case should be surrounded by sufficient safeguards designed to ensure respect for the rule of law and protection against arbitrariness. This would include the need for the procedure to be held before an independent body and for the person concerned to be heard by the latter and be provided with a reasoned decision.

The first question – In the light of its answer to the second question, the Court understood the first question essentially as asking whether the Supreme Administrative Court should take into account the difficulties encountered by the Lithuanian authorities in executing the judgment given in the *Paksas* case. In this connection, the Court noted the recent developments within the Seimas as regards the constitutional amendment process: the draft amendment to the Constitution would be scheduled for a second voting during the Seimas' spring session, beginning on 10 March 2022. Taking these elements into account, as well as the limitations inherent in the system of advisory opinions provided under Protocol No. 16 when it came to issues relating to the execution of the Court's judgments, it was not appropriate to give an answer to the first question.

Conclusion (unanimously): The criteria which were relevant in deciding whether or not a ban on the exercise of a parliamentary mandate in impeachment proceedings had exceeded what was proportionate under Article 3 of Protocol No. 1 should be objective in nature and allow relevant circumstances connected not only with the events which led to the impeachment of the person concerned but also – and primarily – with the functions sought to be exercised by that person in the future, to be taken into account in a transparent way. They should therefore be identified mainly from the perspective of the requirements of the proper functioning of the institution of which that person sought to become a member, and indeed of the constitutional system and democracy as a whole in the State concerned.

(See *Paksas v. Lithuania* [GC], 34932/04, 6 January 2011, Legal Summary; see also *Žd anoka v. Latvia* [GC], 58278/00, 16 March 2006, Legal Summary; *Ādamsons v. Latvia*, 3669/03, 24 June 2008, Legal Summary; *Tănase v. Moldova* [GC], 7/08, 27 April 2010, Legal Summary; and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], 14305/17, 22 December 2020, Legal Summary. See also *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* [GC], P16-2018-001, French Court of Cassation, 10 April 2019, Legal Summary)

ARTICLE 4 OF PROTOCOL No. 4/ DU PROTOCOLE N° 4

Prohibition of collective expulsion of aliens/Interdiction des expulsions collectives d'étrangers

Lack of individual removal decisions for migrants, arriving in large groups and circumventing

genuine and effective legal entry procedures without cogent reasons: *no violation*

Absence de décisions individuelles pour des migrants arrivés en grands groupes et ayant contourné, sans raisons impérieuses, des procédures réelles et effectives permettant d'entrer légalement : *non-violation*

A.A. and Others/et autres – North Macedonia/ Macédoine du Nord, 55798/16 et al., Judgment/ Arrêt 6.4.2022 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants, Afghan Iraqi and Syrian nationals, left their country of origin and arrived in Greece. In March 2016, the applicants crossed the border and entered Macedonian territory, by joining large groups of refugees and wading across a river in what become known as the "March of Hope". Shortly afterwards, they were intercepted by soldiers, who allegedly threatened or used violence and ordered them to return to Greece. They re-crossed the border into Greece on foot.

Law – Article 4 of Protocol No. 4: The migrants had been removed from the respondent State without being subjected to any identification procedure or examination of their personal situation by the authorities of North Macedonia. That should lead to the conclusion that their expulsion had been of a collective nature, unless the lack of examination of their situation could be attributed to their own conduct. The Court therefore proceeded to examine whether the lack of individual removal decisions could be justified by the applicants' own conduct.

The applicants had been part of two large groups of migrants, who had crossed the border of the respondent State in an unauthorised manner. However, there was no indication that the applicants, or other people in the group, had used any force or had resisted the officers. Therefore, even though the present case could be compared to the circumstances in *N.D. and N.T. v. Spain*, in the present case there had been no use of force.

The Court nevertheless examined whether, by crossing the border irregularly, the applicants had circumvented an effective procedure for legal entry.

Macedonian law had afforded the applicants a possibility of entering the territory of the respondent State at the border points, if they had fulfilled the entry criteria or, failing that, if they had sought asylum or at least stated that they had intended to apply for asylum. That entailed an examination of the individual circumstances of each claimant, and a decision on expulsion, if the circumstances warranted it, which decision could have been appealed. The respondent State had provided specific information as to how many certificates had been issued of an expressed intention to apply for asylum, and how many applications for asylum had been submitted, as well as specific information about the closest border crossing, the infrastructure available there, various organisations present on the spot, and information showing that intentions to apply for asylum had actually been expressed there:

– nearly 500,000 certificates of an expressed intention to apply for asylum had been issued between 19 June 2015 and 8 March 2016, of which a large majority had been issued to the same nationalities as the applicants in the present case;

– the nearest border crossing to the camp, the Bogorodica crossing, had also been one of the two busiest border crossings, at which more than 300,000 certificates had been issued by the end of December 2015;

– while there had not been specific information about the availability of interpreters, it was clear that some interpretation had been available.

There had therefore been not only a legal obligation to accept asylum applications and expressed intentions to apply for asylum at that border crossing point, but also an actual possibility of doing so.

The applicants had submitted that it had not been possible for them to seek asylum at the Bogorodica border crossing at the time of their summary deportation, that is on or around 14 and 15 March 2016, as the relevant data had confirmed that no certificates of an expressed intention to apply for asylum had been issued at that time. The Court noted that after 8 March 2016, transit had effectively no longer been possible because of the European Union's different approach to the issue of the ever-increasing number of migrants and the consequent reaction of other countries along the Balkan route. However, there was nothing to indicate that it had no longer been possible to claim asylum at the border crossing.

There was nothing to suggest that potential asylum-seekers had in any way been prevented from approaching the legitimate border crossing points and lodging an asylum claim or that the applicants had attempted to claim asylum at the border crossing and been returned. The applicants in the present case had not even alleged that they had ever tried to enter Macedonian territory by legal means. Hence, the Court was not persuaded that they had had the required cogent reasons for not using the Bogorodica or any other border crossing point at the material time, with a view to submitting rea-

sons against their expulsion in a proper and lawful manner. That indicated that they had not been interested in applying for asylum in the respondent State, but had rather been interested only in transiting through it, which had no longer been possible, and therefore had opted for illegally crossing into it.

For those reasons, in spite of some shortcomings in the asylum procedure and reported pushbacks, the Court was not convinced that the State had failed to provide genuine and effective access to procedures for legal entry into North Macedonia, in particular by putting into place international protection at the border crossing points, especially with a view to claims for protection under Article 3, or that the applicants had had cogent reasons, based on objective facts for which the respondent State had been responsible, not to make use of those procedures.

It had in fact been the applicants who had placed themselves in jeopardy by participating in the illegal entry into Macedonian territory, taking advantage of the group's large numbers. The lack of individual removal decisions had been a consequence of their own conduct.

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there had been no violation of Article 13 taken in conjunction with Article 4 of Protocol No. 4 concerning the availability of an effective remedy with suspensive effect by which to challenge the summary deportation. Macedonian law had provided a possibility of appeal against removal orders. However, by deliberately attempting to enter the territory as part of a large group and at an unauthorised location, the applicants had placed themselves in an unlawful situation and had thus chosen not to use the legal procedures which had existed.

(See *N.D. and N.T. v. Spain* [GC], 8675/15 and 8697/15, 13 February 2020, Legal Summary; see also *Shahzad v. Hungary*, 12625/17, 8 July 2021, Legal Summary, and *M.H. and Others v. Croatia*, 15670/18 and 43115/18, 18 November 2021, Legal Summary)

PROTOCOL No. 16/PROTOCOLE N° 16

Advisory opinions/Avis consultatifs

Advisory opinion on the assessment of the proportionality of a general prohibition on standing for election after removal from office in impeachment proceedings

Avis consultatif concernant l'appréciation de la proportionnalité d'une interdiction générale pour une personne de se porter candidate à une élection après une destitution dans le cadre d'une procédure d'*impeachment*

Advisory opinion requested by the Lithuanian Supreme Administrative Court/Avis consultatif demandé par la Cour administrative suprême lituanienne, P16-2020-002, Opinion/Avis 8.4.2022 [GC]

(See Article 3 of Protocol No. 1 above/Voir l'article 3 du Protocole n° 1 ci-dessus, page 31)

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Advisory opinion on the applicability of statutes of limitation to the prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture

Avis consultatif sur l'applicabilité de la prescription aux poursuites, condamnations et sanctions pour des infractions constitutives, en substance, d'actes de torture

Advisory opinion requested by the Armenian Court of cassation/Avis consultatif demandé par la Cour de cassation arménienne, P16-2021-001, Opinion/Avis 26.4.2022 [GC]

(See Article 7 above/Voir l'article 7 ci-dessus, page 31)

RULE 39 OF THE RULES OF COURT/ ARTICLE 39 DU RÈGLEMENT DE LA COUR

Interim measures/Mesures provisoires

Interim measures in another case of Polish Supreme Court judge's immunity

Mesures provisoires dans une nouvelle affaire concernant l'immunité d'un juge à la Cour suprême polonaise

Stępka – Poland/Pologne, 18001/22 [Section I]

ECHR press release – Communiqué de presse CEDH

GRAND CHAMBER (PENDING)/ GRANDE CHAMBRE (EN COURS)

Relinquishments/Dessaisissements

Verein KlimaSeniorinnen Schweiz and Others/et autres– Switzerland/Suisse, 53600/20

(See Article 13 above/Voir l'article 13 ci-dessus, page 26)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

European Union – Court of Justice (CJEU) and General Court/Union européenne – Cour de justice (CJUE) et Tribunal

According to EU law, the member States must take specific measures (i) ensuring that the quality of the interpretation and translations is sufficient to enable the suspect or accused person to understand the accusation against him or her, and (ii) enabling the national courts to ascertain that the interpretation was of sufficient quality, so that the fairness of the proceedings and the exercise of the rights of the defence are safeguarded

Selon le droit de l'UE, les États membres doivent adopter des mesures concrètes qui i) assurent que la qualité de l'interprétation et des traductions soit suffisante pour que le suspect ou la personne poursuivie comprenne l'accusation portée à son encontre, et ii) permettent aux juridictions nationales de vérifier la qualité suffisante de l'interprétation, afin que le caractère équitable de la procédure et l'exercice des droits de la défense soient garantis

Case/Affaire C564/19, Judgment/Arrêt 23.11.2021

CJEU Press release – Communiqué de presse CJUE

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EU law precludes a national rule under which national courts have no jurisdiction to examine the conformity with EU law of national legislation which has been held to be constitutional by a judgment of the constitutional court of the member State

Le droit de l'Union s'oppose à une règle nationale en vertu de laquelle les juridictions nationales ne sont pas habilitées à examiner la conformité avec le droit de l'Union d'une législation nationale qui a été jugée constitutionnelle par un arrêt de la cour constitutionnelle de l'État membre

Case/Affaire C430/21, Judgment/Arrêt 22.2.2022

CJEU Press release – Communiqué de presse CJUE

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Refusal to execute a European arrest warrant: the CJEU specifies the criteria permitting an executing judicial authority to assess whether there is any risk of breach of the requested person's fundamental right to a fair trial

Refus d'exécution d'un mandat d'arrêt européen : la CJUE précise les critères permettant à une autorité judiciaire d'exécution d'apprécier le risque éventuel de violation du droit fondamental de la personne recherchée à un procès équitable

Joint cases/Affaires jointes C562/22 PPU and/et C563/21 PPU, Judgment/Arrêt 22.2.2022

CJEU Press release – Communiqué de presse CJUE

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

The following publications have recently been published on the Court's website, under the Case-Law menu / Les publications suivantes ont récemment été mises en ligne sur le site web de la Cour, sous l'onglet « Jurisprudence ».

Publications in non-official languages/ Publications en langues non officielles

Persian/Persan

راهنمایی بر ماده 2 کنوانسیون – حق حیات

Romanian/Roumain

Ghid privind jurisprudența Convenției – Imigrația

Ghid privind art. 11 din Convenție – Libertatea de întrunire și de asociere

Ghid privind art. 17 din Convenție – interzicerea abuzului de drept

Ukrainian/Ukrainien

Огляд практики Суду за 2020 рік

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