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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
CONSEIL DE L'EUROPE

The Information Note contains legal summaries of the cases examined during the month in question which the Registry considers to be of particular interest. The summaries are drafted by Registry's lawyers and are not binding on the Court. They are normally drafted in the language of the case concerned. The translation of the legal summaries into the other official language can be accessed directly through hyperlinks in the Note. These hyperlinks lead to the HUDOC database, which is regularly updated with new translations. The electronic 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.

-ooOoo-

La Note d'information contient les résumés d'affaires dont le greffe de la Cour a indiqué qu'elles présentaient un intérêt particulier. Les résumés sont rédigés par des juristes du greffe et ne lient pas la Cour. Ils sont en principe rédigés dans la langue de l'affaire concernée. Les traductions des résumés vers l'autre langue officielle de la Cour sont accessibles directement à partir de la Note d'information, au moyen d'hyperliens pointant vers la base de données HUDOC qui est alimentée au fur et à mesure de la réception des traductions. 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.

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

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Cour européenne des droits de l'homme
(Conseil de l'Europe)
67075 Strasbourg Cedex – France
Tél. : + 33 (0)3 88 41 20 18
Fax : + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
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Carter – Russia/Russie, 20914/07, Judgment/Arrêt 21.9.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant is the widow of Mr Aleksandr Valterovich Litvinenko. Mr Litvinenko previously worked in the USSR Committee for State Security (KGB) and its successor agencies, including the Federal Security Service (FSB). He fled from Russia after going public with allegations that he had been asked to carry out unlawful operations, including to examine the possibility of assassinating a wealthy businessman, and was granted asylum along with his family in the United Kingdom. There, he carried out a number of activities, mainly focused on exposing corruption in Russian intelligence services and their links with organised crime.

In November 2006 Mr Litvinenko became ill and was hospitalised. He later died. The cause of death was established to be acute radiation syndrome, caused by very high levels of polonium 210, which had entered his body through ingestion. Mr Litvinenko had previously been visited three times by a long-standing acquaintance, Mr Lugovoy, and Mr Kovtun, who had flown from Moscow to London. On each occasion, polonium contamination was found in areas where the pair had visited.

In Russia, the Prosecutor General launched a domestic criminal investigation in 2006. In the UK, a police investigation was opened: both Mr Lugovoy and, later, Mr Kovtun, were charged with, and remain wanted for, the murder. An inquest and public inquiry were also carried out and in 2016 the inquiry found it established, beyond reasonable doubt, that Mr Litvinenko had been poisoned by polonium administrated by Mr Lugovoy and Mr Kovtun, acting under FSB direction.

Law – Article 2

(a) *Admissibility of the Litvinenko Inquiry report* – The respondent Government had contested the admissibility of the Litvinenko Inquiry report produced by the UK Government. After examination, the Court found that there was no reason to doubt the quality of the domestic investigative process, or the independence, fairness and transparency of the inquiry proceeding. It therefore considered that it could not disregard the findings of the inquiry solely because the authorities of the respondent State had abstained from exercising their right to participate in those proceedings, and that the inquiry report should be admitted into evidence.

(b) *Procedural limb* – The Court had to examine whether the application was admissible *ratione loci* in respect of the procedural limb. The Russian authorities had instituted their own criminal investigation into the death of the applicant's husband under domestic law provisions which had given them jurisdiction to investigate offences against Russian nationals wherever they were committed. The pursuance of those proceedings had established a "jurisdictional link" between the applicant and the Russian state. In addition, the suspects in the murder were two Russian nationals who, since their return to Russia, had enjoyed the constitutional protection from extradition. That protection had been relied upon by the Russian authorities to refuse the extradition of one of them to the UK. As a consequence, the UK authorities had been prevented from pursuing the criminal prosecution of the suspects. The fact that the Government had retained exclusive jurisdiction over an individual who was accused of a serious human rights violation constituted a "special feature" of the case establishing the respondent State's jurisdiction under Article 1 in respect of the applicant's complaint under the procedural limb. Any other finding would have undermined the fight against impunity for serious human-rights violations within the "legal space of the Convention", impeding the application of criminal laws put in place by the UK to protect the right to life of their citizens and, indeed, of any individuals within its jurisdiction. The Court therefore dismissed the Government's objection of incompatibility *ratione loci* in respect of the procedural limb.

Concerning the merits of the complaint under the procedural limb, the Court noted that the Russian investigative authorities had launched an investigation into the death of Mr Litvinenko two weeks after his death. However, the issue was not so much whether there had been an investigation, as to whether it had been "effective" and whether the authorities had been determined to identify and prosecute those responsible for his death.

The Government had provided the Court with an outline of the investigative steps which had been taken. However, they had repeatedly declined the Court's request, without justification, to provide a

copy of materials from the domestic investigation file and of documents to which they had referred and which had formed the basis of their assertions. On account of the Government's unjustified refusal to submit the requested documentation, the Court found that the respondent Government had failed to discharge their burden of proof so as to demonstrate that the Russian authorities had carried out an effective investigation capable of leading to the establishment of the facts and bringing to justice of those response for Mr Litvinenko's killing. It also appeared that the Russian authorities had attempted to thwart the efforts of the British investigators to establish the facts of the case.

Shortly after a magistrates' court issued a warrant for the arrest of Mr Lugovoy, a last-minute announcement had been made that he would run for election to the Duma. When he was elected two months' later, he acquired parliamentary immunity. That, however, was not an absolute bar to his being investigated or even prosecuted; the relevant legal provisions and the practice of their application indicated that he could have been deprived of his immunity with the consent of the lower chamber of Parliament of which he was a member. Yet there was no indication that the Russian authorities had sought to explore that possibility.

Finally, the Government had argued that the investigation in the present case had had a transnational dimension and that any failings on the part of the Russian authorities had been due to the UK authorities' failure to comply with their requests for legal assistance. As no complaint had been made against the UK, it did not fall to the Court to consider whether the UK authorities had complied with their obligation to cooperate with their Russian counterparts. Nonetheless, the Court did not accept that the actions of the UK authorities had displaced the inference that their Russian counterparts had failed to conduct an effective investigation into Mr Litvinenko's death.

As the Government had not submitted either the criminal investigation file or the requests to the UK for legal assistance, they had not demonstrated that the material requested from the UK had in fact been necessary for their own investigation to progress. This omission was of particular note given that, by the time the requests had been made, the Russian investigation had already concluded that there had been no leaks or thefts from the Russian facility manufacturing polonium 210, and had already "exonerated" Mr Lugovoy and Mr Kovtun of their involvement in the killing and indicated that no other suspects were being investigated.

(c) *Substantive limb* – The Court considered the admissibility *ratione loci* of the complaint in respect of the substantive limb. In its recent judgment in *Georgia v. Russia (II)* [GC], the Court had referred to cases concerning control over individuals on account of incursions and targeting of specific persons by armed forces or police of a respondent State abroad, which had brought the affected persons "under the authority and/or effective control of the respondent State through its agents". The line of those cases had concerned the actions of the respondent States' armed forces on or close to their borders. However, the principle that a State exercises extraterritorial jurisdiction in cases concerning specific acts involving an element of proximity should apply with equal force in cases of extrajudicial targeted killings by State agents acting in the territory of another Contracting State outside of the context of a military operation. That approach was consistent with the wording of Article 15 § 2 which allowed for no derogations from Article 2, except in respect of deaths resulting from lawful acts of war. The Government's objection *ratione loci* – that is to say, whether or not Mr Litvinenko had been under the control of Mr Lugovoy and others and whether or not Mr Lugovoy and others had acted as agents of the Russian State at the material time – was interlinked with the substance of the applicant's complaint and was examined together with the merits. The Court established the facts on the basis of the evidence available in the case file.

The circumstances of Mr Litvinenko's death were no longer a matter of speculation and assumption. It had been established, beyond reasonable doubt, that he had been poisoned with polonium 210, a rare radioactive isotope. It had been further established, also beyond reasonable doubt, that the poison had been administered by Mr Lugovoy and Mr Kovtun. The Court rejected the Government's assertion that the perpetrator or perpetrators of the assassination had not been identified.

The Court addressed the issue whether the assassination of Mr Litvinenko had amounted to the exercise of physical power and control over his life in a situation of proximate targeting. The evidence of premeditation strongly indicated that the death of Mr Litvinenko had been the result of a planned and complex operation. Mr Litvinenko had not been an accidental victim of the operation or merely adversely affected by it; the possibility that he might have ingested polonium 210 by accident was not borne out by the evidence. On the contrary, repeated and sustained attempts to put poison in his drink demonstrated that Mr Litvinenko had been the target of the planned operation for his assassination. The evidence had also established, beyond reasonable doubt, that Mr Lugovoy and Mr Kovtun knew that they had been using a deadly poison. When putting the poison in the teapot from which

Mr Litvinenko had poured a drink, they knew that, once ingested, the poison would kill him. The latter had been unable to do anything to escape the situation. In that sense, he had been under physical control of Mr Lugovoy and Mr Kovtun who had wielded power over his life. The administration of poison to Mr Litvinenko by Mr Lugovoy and Mr Kovtun had amounted to the exercise of physical power and control over his life in a situation of proximate targeting.

It had been found as a fact that when Mr Lugovoy and Mr Kovtun had committed the murder of Mr Litvinenko, they had not been acting on their own initiative, but on the direction of another entity. Not only the means by which the killing had been perpetrated (the use of a radioactive isotope which must have come from a reactor under State control) but also the motives pointed to State involvement. Having reviewed all evidence before him, the Chairman of the UK's Litvinenko Inquiry had considered that there existed a strong probability that when poisoning Mr Litvinenko, Mr Lugovoy and Mr Kovtun had been acting under the direction of the Russian security service. In a case of an extraterritorial extrajudicial targeted killing, the authorities of the State on whose soil it was carried out can only do so much. They can and should, circumstances permitting, identify the perpetrators of the execution and the elements linking them to the State allegedly responsible for the execution. This was what the United Kingdom authorities had done in the instant case.

While there existed a theoretical possibility that the assassination of Mr Litvinenko might have been a "rogue operation" not involving State responsibility, the information needed to corroborate that theory lay wholly, or in large part, within the exclusive knowledge of the Russian authorities which moreover had asserted exclusive jurisdiction over Mr Lugovoy and Mr Kovtun by invoking the constitutional protection against extradition. In those circumstances, the burden of proof had shifted onto the authorities of the respondent State which had been expected to carry out a meticulous investigation into that possibility, identify those involved in the operation and determine whether or not Mr Lugovoy's and Mr Kovtun's conduct had been directed or controlled by any State entity or official, which was a factor indicative of State responsibility. The Government, however, had not made any serious attempt either to elucidate the facts or to counter the findings arrived at by the UK authorities. In fact, they had failed to engage with any fact-finding efforts, whether those conducted in the UK or those undertaken by the Court. Most significantly, the Russian authorities had failed to carry out an effective investigation themselves. There was no evidence that, having full access to Mr Lugovoy and Mr Kovtun upon their return to Russia, the Russian authorities had undertaken a verification of the facts already established in the UK's public inquiry.

Consequently, the Court considered that adverse inferences might be drawn from the respondent State's refusal to disclose any documents relating to the domestic investigation. Noting the Government's failure to displace prima facie evidence of State involvement, the Court could not but conclude that Mr Litvinenko had been poisoned by Mr Lugovoy and Mr Kovtun acting as agents of the respondent State. The act complained of was attributable to that state. As the Government had not sought to argue that the killing of Mr Litvinenko could be justified by reference to any of the exceptions in the second paragraph of Article 2, the Court found that there had been a violation of the substantive limb of that provision.

Conclusion: violation under the substantive and procedural limbs (six votes to one).

The Court also held, unanimously, that the respondent Government had failed to comply with their obligations under Article 38 on account of its unjustified refusal to submit requested material relating to the domestic investigation into Mr Litvinenko's death.

Article 41: EUR 100,000 in respect of non-pecuniary damage.

(See *Georgia v. Russia (II)* [GC], 38263/08, 21 January 2021, Legal Summary)

Expulsion

Proposed expulsion to Syria: *expulsion would constitute a violation*

Expulsion envisagée vers la Syrie : *l'expulsion emporterait violation*

M.D. and Others/et autres – Russia/Russie, 71321/17 et al., Judgment/Arrêt 14.9.2021 [Section III]

(See Article 3 below/Voir l'article 3 ci-dessous, page 11)

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Extradition to the USA with alleged real risk of life imprisonment without parole: *relinquishment in favour of the Grand Chamber*

Extradition vers les États-Unis susceptible d'emporter un risque réel de réclusion à perpétuité incompressible : *dessaisissement en faveur de la Grande Chambre*

McCallum – Italy/Italie, 20863/21

Traduction française du résumé – Printable version

The applicant is an American national currently being detained in Italy. In 2020 the Italian courts granted a request for extradition to the United States of America (Michigan), where she is wanted for trial on charges of being the leader and co-conspirator in the homicide of her then husband and the removal and burning of his corpse.

The applicant complains under Article 3 that, if extradited, she faces a real risk of life imprisonment without parole (LWOP). Under Michigan, law a LWOP sentence may be commuted by the Governor in the exercise of unfettered discretionary clemency powers: while a Parole Board makes a recommendation to the Governor, the latter is not bound by a positive recommendation.

Under Rule 39 of the Rules of Court, the Court has indicated to the Italian Government that the applicant should not be extradited for the duration of the proceedings before it.

On 7 September 2021 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

(See also *Trabelsi v. Belgium*, 140/10, 4 September 2014, Legal Summary)

Expulsion

Proposed expulsion to Syria: *expulsion would constitute a violation*

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M.D. and Others/et autres – Russia/Russie, 71321/17 et al., Judgment/Arrêt 14.9.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants, who are Syrian nationals, entered Russia on different types of visas between 2011 and 2014 and did not leave when the permitted period of their stay had expired. They were independently found guilty of breaching migration regulations by the District Courts, which ordered their administrative expulsion. The applicants appealed unsuccessfully against the judgments.

Law – Articles 2 and 3

(a) *Presentation of substantial grounds for believing that the applicants face a real risk of death or ill-treatment* – The Court found that the national authorities had been presented with substantial grounds for believing that the applicants would face a real risk to their lives and personal integrity if they were expelled.

(b) *Assessment by the domestic authorities of the claims of a real risk of death or ill-treatment* – The applicants had provided the District Courts with incomplete information and little or no evidence with which to assess the risks that the applicants had been facing. However, the applicants could not meaningfully participate in those proceedings, and the Court considered that that inability to present their case – together with the fact that they had fled from a war-torn country and available information on security risks in Syria – had come to the attention of the District Courts. Moreover, a certain degree of speculation was inherent in the preventive purpose of Article 3 and it was not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment.

In those specific circumstances, it had been up to the District Courts, of their own motion, to ascertain and take into consideration information relating to Syria from "reliable and objective" international and national sources and to carry out a comprehensive analysis of whether substantial grounds had been shown for believing that there was a real risk that the applicants would face ill-treatment or death if the order for their expulsion were to be implemented. However, the District Courts had only reviewed and upheld the reasons put forward for the applicants' expulsion (that is to say, the illegality of their conduct); they had given no meaningful assessment of any general risks that the applicants would face in the event of their forced return to Syria. That approach could not be considered compatible with the need for independent and rigorous scrutiny required in cases concerning expulsion. It was especially regrettable in the light of the reported Convention-compliant examination of similar cases by courts in other regions of Russia (see *L.M. and Others v. Russia*). The courts examining the cases of the applicants in the appeal proceedings had dismissed their claims regarding the alleged risk of ill-treatment, without effectively considering them on the merits, while referring to certain international sources on asylum and *non-refoulement*. However, that reference had been cursory and had not had any influence on the resolution of the applicants' cases. Furthermore, even though the Appeal Court had given some individual consideration to some of the applicants' claims, it had nevertheless mainly referred to information from unidentified Russian State bodies regarding the de-escalation of military conflict in Syria, and had largely ignored the international reports submitted to it by the applicants

containing analysis suggesting that the contrary had in fact been the case and that the return of refugees had not been recommended.

The Court was not, therefore, persuaded that the applicants' allegations had been duly examined by the domestic authorities in any of the sets of relevant proceedings. It therefore had to examine independently whether the applicants would be exposed to a risk of ill-treatment proscribed by Articles 2 and 3 in the event of their removal to Syria.

(c) *Examination by the Court of the alleged risk of death or ill-treatment* – The Court noted that the applicants' submission had been based on more up-to-date data and had been corroborated by reliable and detailed reports by international bodies that unambiguously attested to daily ceasefire violations, country-wide hostilities, the devastating impact that armed conflict and indiscriminate attacks by the terrorist groups (including ISIL/Da'esh and Hay'at Tahrir al-Sham) and other non-State actors continued to have on the civilian population in all parts of the country, and the practice of arbitrary detentions and enforced disappearances of young men. The Court also took note of the latest available update from the Reconciliation Centre of the Russian Ministry of Defence's website that provided that, despite the ceasefire arrangements, illegal armed groups operating in the Idlib de-escalation area had continued to breach the relevant agreements and the insurgents had carried out armed attacks in the province[s] of Aleppo, Hama and Latakia. All those reports were consistent with the Court's findings in respect of the general security situation over the whole of Syria in *O.D. v. Bulgaria*.

Since, if the applicant has not already been deported, the material point in time for the assessment of risks in the country of destination must be that of the Court's consideration of the case, the Court considered the latest country material available. Major military escalations had been reported in north-western Syria in 2020-2021, and clashes in the north-east had intensified, leading to scores of civilian casualties and injuries. In the central and eastern parts of the country, the resurgence of ISIL/Da'esh had been reported, and unrest had intensified and security conditions had worsened in the south. Furthermore, in the first six months of 2020, new episodes of torture of persons held by the Syrian authorities had been documented. Moreover, members of Hay'at Tahrir al-Sham in the governorates of Aleppo and Idlib had continued to detain, torture and execute civilians opposing their oppressive rule. Returnees had been reported to have been among those who had been subjected to harassment, arbitrary arrest, detention incommunicado, torture and other forms of ill-treatment, as well as to confiscation of property, for reasons including perceived anti-Government opinion; and both pro-Government forces and armed groups in 2020-2021 had continued to arbitrarily detain individuals in areas under their effective control.

The Government's submissions focused on the events of 2017-2018 and did not contain a sufficiently detailed assessment of security and humanitarian conditions in any of the governorates from which the applicants originated. Neither had they detailed any internal-flight/relocation alternatives that might have been available to the applicants, any relevant transit risks, or conditions prevailing in the camps for internally displaced persons. The applicants' submissions, by contrast, clearly indicated that no reliance should be made by the states hosting Syrian citizens on the relocation of applicants in other areas of Syria, and the international reports that the Court had before it did not state that any particular part of Syria was safe for the involuntary return of refugees, despite the existence of ceasefire agreements and the perceived reduction in large-scale hostilities.

The Court noted the efforts made by the Russian Federation and other actors to find sustainable solutions for the return of Syrian refugees. However, in the light of the material that the Court had examined in the present case, the forced returns of refugees to Syria, at present and at least in the near future, did not appear feasible owing to the volatile security situation there.

Furthermore, in assessing the risks of ill-treatment for the applicant in the country of destination, the Court focuses on the foreseeable consequences of removal, in the light of the general situation there and of his or her personal circumstances. The applicants' own accounts of events in Syria were consistent with information from reliable and objective sources about the general situation, indicating that their personal circumstances had put them at a heightened risk of ill-treatment. In particular, all of the applicants, as returnees, risked being subjected to harassment, arbitrary arrest and incommunicado detention upon arrival despite having obtained security approval, torture and other forms of ill-treatment, as well as property confiscation and movement restrictions, including on account of individuals' perceived anti-Government opinion. Deaths in custody of returnees had also been reported. Lastly, all the applicants, being men of fighting age, had "risk profiles" and faced forced conscription into the army, with no exceptions allowed for conscientious objectors and harsh consequences for draft evasion. In addition, if they were to be considered by the authorities as real or perceived opponents of the Government, they would likely not benefit from the relevant amnesty decrees.

The Court accordingly found that substantial grounds had been shown for believing that at the time of the examination of the applicants' cases, there existed a real risk that the applicants would face ill-treatment or death if the orders for their expulsion to Syria were to be implemented.

Conclusion: violation in the event of expulsion to Syria (unanimously).

The Court also held, unanimously, that there had been: a violation of Article 5 § 1 in respect of M.D. and M.O., who had each been detained at least two years pending expulsion; no violation of Article 5 § 1 in respect of M.A., A.A. and A.K.A., whose detention of between just over one month and two and a half months pending expulsion had not been excessive; and a violation of Article 5 § 4 in respect of M.D. and M.O., who had not benefited from effective judicial review of their detention pending expulsion.

Article 41: EUR 5,000 to M.D. and M.O. each, in respect of non-pecuniary damage.

Rule 39 of the Rules of Court: The Court continued to indicate to the Government that it was desirable in the interests of the proper conduct of the proceedings not to expel the relevant applicants until such time as the present judgment became final or until further order.

(See also *L.M. and Others v. Russia*, 40081/14 et al., 15 October 2015, Legal Summary, and *O.D. v. Bulgaria*, 34016/18, 10 October 2019)

ARTICLE 5

Article 5 § 1

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

Pre-trial detention extended automatically without any decision by a judge in the context of emergency legislation at the start of the COVID-19 pandemic: *communicated*

Prolongation automatique de la détention provisoire sans intervention d'un juge, dans le cadre d'une législation d'urgence au début de la pandémie de covid-19 : *affaires communiquées*

Aït Oufella and Others/et autres – France, 51860/20 et al., Communication [Section V]

English translation of the summary – Version imprimable

Sur le fondement de la loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 fut adoptée l'ordonnance n° 2020-303 du 25 mars 2020 portant adaptation de certaines règles de procédure pénale. L'article 16 de cette ordonnance prévoyait notamment la prolongation de plein droit des détentions provisoires. Les quatre requêtes communiquées émanent de personnes qui se trouvaient alors en détention provisoire. Elles font essentiellement grief à ce mécanisme d'avoir entraîné la prolongation de leur détention sans décision d'un juge.

Affaires communiquées sous l'angle de l'article 5 §§ 1, 3, 4 et 5 de la Convention.

Article 5 § 3

Brought promptly before judge or other officer/Aussitôt traduit devant un juge ou autre magistrat

Pre-trial detention extended automatically without any decision by a judge in the context of emergency legislation at the start of the COVID-19 pandemic: *communicated*

Prolongation automatique de la détention provisoire sans intervention d'un juge, dans le cadre d'une législation d'urgence au début de la pandémie de covid-19 : *affaires communiquées*

Aït Oufella and Others/et autres – France, 51860/20 et al., Communication [Section V]

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

ARTICLE 6

Article 6 § 1 (criminal/pénal)

Access to court/Accès à un tribunal

Excessive formalism by the Court of Cassation in ruling appeals on points of law inadmissible on account of the lawyer's failure to refer to his requisite certification: *violation*

Formalisme excessif de la Cour de Cassation ayant décidé de l'irrecevabilité des pourvois en l'absence de la mention par l'avocat de son attestation requise : *violation*

Willems and/et Gorjon – Belgium/Belgique, 74209/16 et al., Judgment/Arrêt 21.9.2021 [Section III]

(See Article 37 below/Voir l'article 37 ci-dessous, page 29)

ARTICLE 8

Respect for private life/Respect de la vie privée
Respect for correspondence/Respect de la correspondance
Positive obligations/Obligations positives

Emails exchanged by the applicant on a dating website produced without her consent by her ex-husband in civil proceedings: *no violation*

Messages électroniques échangés par la requérante sur un site de rencontres produits sans son consentement par son ex-mari lors de procédures civiles : *non-violation*

M.P. – Portugal, 27516/14, Judgment/Arrêt 7.9.2021 [Section IV]

English translation of the summary – Version imprimable

En fait – L'ex-mari de la requérante a accédé à des messages électroniques qu'elle avait échangés sur un site de rencontres et il les a produits, sans son consentement, dans le cadre d'une part d'une procédure qu'il avait engagée en vue de la répartition de l'autorité parentale et, d'autre part, d'une procédure de divorce. Le tribunal aux affaires familiales n'a finalement pas tenu compte de ces messages. La requérante se plaint donc uniquement du fait que les juges n'aient pas sanctionné son mari pour les avoir divulgués.

En droit – Article 8

a) *Applicabilité* – La présente espèce concerne des messages électroniques que la requérante avait échangés avec des correspondants masculins sur un site de rencontres occasionnelles. Il s'agit de messages personnels dont un individu peut légitimement attendre qu'ils ne soient pas dévoilés sans son consentement, et dont la divulgation peut entraîner un sentiment très fort d'intrusion dans la « vie privée » et la « correspondance » visées à l'article 8. La gravité de l'atteinte à la jouissance personnelle du droit au respect à la vie privée dénoncée en l'espèce ne faisant pas de doute, de tels messages relèvent bien du champ d'application de cette disposition.

Conclusion : article 8 applicable.

b) *Fond* – L'ingérence dans la vie privée de la requérante étant réalisée par une personne privée, il y a lieu d'examiner les griefs de l'intéressée sous l'angle des obligations positives qui incombent à l'État en vertu de l'article 8.

En ce qui concerne le cadre juridique, le fait d'accéder au contenu de lettres ou de télécommunications sans le consentement des correspondants et le fait de divulguer le contenu ainsi obtenu sont sanctionnés pénalement. Faisant suite à la plainte pénale déposée par la requérante pour violation de sa correspondance, le parquet près le tribunal a ouvert une enquête. Par ailleurs, à sa demande, la requérante a été autorisée à intervenir dans le cadre de la procédure pénale en qualité d'*assistente*, ce qui lui a permis de jouer un rôle actif dans cette procédure. Elle a ainsi eu, notamment, la possibilité de présenter ses moyens de preuve, puis de demander l'ouverture d'une instruction lorsque le parquet a décidé de classer l'affaire sans suite. Par ailleurs, elle a renoncé à la possibilité d'introduire une demande d'indemnisation lorsqu'elle a sollicité l'ouverture de l'instruction. Elle a ainsi exprimé le souhait de voir se poursuivre la procédure pénale dans le seul but d'obtenir la reconnaissance de l'atteinte qu'elle estimait avoir été portée à ses droits. Au vu de ces constatations, la Cour est d'avis que le cadre juridique existant au Portugal offrait, dans les cas tels que celui de la requérante, une protection adéquate du droit au respect de la vie privée et au secret de la correspondance.

S'agissant de l'accès aux messages électroniques de la requérante, la cour d'appel a considéré que cette dernière avait donné à son mari un accès total à la messagerie qu'elle entretenait sur le site de rencontre et que ces messages faisaient donc partie de la vie privée du couple. La Cour estime que le raisonnement tenu par les autorités internes quant à l'accès mutuel à la correspondance des conjoints est sujet à caution, d'autant que tout porte à croire en l'espèce que le consentement finalement donné par la requérante à son mari est apparu dans un contexte conflictuel. Cela dit, la conclusion à laquelle les juridictions internes ont abouti quant à l'accès même auxdits messages n'apparaît pas arbitraire au point de justifier que la Cour substitue sa propre appréciation à la leur.

En ce qui concerne spécifiquement le versement des messages électroniques dans le cadre des procédures de divorce et de répartition de la responsabilité parentale, la cour d'appel a exclu toute responsabilité pénale du mari pour violation du secret de la correspondance après avoir conclu que la condition d'absence de consentement dans la divulgation posée par le code pénal n'était pas remplie. La Cour partage l'avis de la cour d'appel quant à la pertinence des messages litigieux dans le cadre des procédures civiles en cause, qui allaient donner lieu à une appréciation de la situation personnelle des conjoints et de la famille. Toutefois, dans une telle situation, l'ingérence dans la vie privée qui découle de la production de pareils éléments doit se limiter, autant que faire se peut, au strict nécessaire.

Souscrivant à l'approche de la cour d'appel, les effets de la divulgation des messages litigieux sur la vie privée de la requérante ont été limités. En effet, ces messages n'ont été divulgués que dans le cadre des procédures civiles. Or, l'accès du public aux dossiers de ce type de procédures est restreint. De plus, les messages n'ont pas été examinés concrètement, le tribunal aux affaires familiales n'ayant finalement pas statué sur le fond des demandes formulées par le mari.

La Cour ne voit donc pas de raison sérieuse qui justifierait en l'espèce qu'elle substitue son avis à celui des juridictions internes. D'une part, les autorités nationales ont mis en balance les intérêts en jeu en respectant les critères qu'elle a établis dans sa jurisprudence. D'autre part, dès lors que la requérante avait renoncé à toute prétention civile dans le cadre de la procédure pénale, seule restait à trancher la question de la responsabilité pénale du mari, question sur laquelle la Cour ne saurait statuer.

Au vu de ce qui précède, l'État s'est acquitté de l'obligation positive qui lui incombait de garantir les droits de la requérante au respect de sa vie privée et au secret de sa correspondance.

Conclusion : non-violation (unanimité).

Respect for private life/Respect de la vie privée
Positive obligations/Obligations positives

Authorities' failure to protect victim of domestic violence from repeated acts of cyberviolence and bring perpetrator to justice: *violation*

Manquement des autorités à protéger une victime de violences domestiques d'actes répétés de cyberviolence et à traduire en justice l'auteur des faits : *violation*

Volodina – Russia/Russie (no. 2/n° 2), 40419/19, Judgment/Arrêt 14.9.2021 [Section III]

Traduction française du résumé – Printable version

Facts – In its judgment in *Volodina v. Russia* the Court held that the applicant had been both physically and psychologically ill-treated by her former partner S. and that the authorities had failed to comply with their obligations under the Convention to protect her from his abuse. It concluded that the existing Russian legal framework had been deficient in several important respects and had failed to meet the requirements inherent in the State's positive obligation to establish and apply effectively a system punishing all forms of domestic violence.

In the present follow-up application, the applicant complained that the Russian authorities had failed to protect her from repeated acts of cyberviolence from S. for at least three years; this included the publication of her intimate photographs without consent, impersonation through the creation of fake social-media profiles and tracking her with the use of a GPS device. She also complained that the authorities had failed to conduct an effective investigation into these acts.

Law – Article 8: In its first judgment the Court had held that the publication of the applicant's intimate photographs had "undermined her dignity, conveying a message of humiliation and disrespect". In addition, this act, along with the impersonation and stalking, had interfered with her enjoyment of her private life, causing her to feel anxiety, distress and insecurity. Thus, the main question to be determined was whether the authorities, once aware of the interference with her rights, had discharged their obligations under that provision to take sufficient measures to put an end to that interference and prevent it from recurring.

(i) *Whether the respondent State had put in place an adequate legal framework providing the applicant with protection against the acts of cyberviolence* – It was not necessary for the Court to revisit the general finding in the first *Volodina* case as to the existing domestic legal framework, since the scope of its inquiry in the instant case was more limited; it had to determine whether or not the manner in which the private-life legislation had been applied in the circumstances of the applicant's case had given rise to a violation of the Convention. In this connection, it found that the existing framework, both in civil and criminal law, in the light of the State's margin of appreciation in choosing legal means to ensure compliance with the Convention, equipped the Russian authorities with legal tools for investigating the acts of cyberviolence of which the applicant had been the victim.

The domestic authorities had accepted that the acts in question had the requisite elements of prosecutable offences under the Criminal Code. Further, the acts had been sufficiently serious to require a criminal-law response on their part. Both the public interest and the interests of the protection of vulnerable victims from offences infringing on their physical or psychological integrity required the availability of a remedy enabling the perpetrator to be identified and brought to justice. Civil proceedings which might have been an appropriate remedy in situations of lesser gravity would not have been able to achieve these objectives in the present case.

The State authorities had a responsibility to provide adequate protection measures to the victims of domestic violence in the form of effective deter-

rence against serious breaches of their physical and psychological integrity. Whereas in a large majority of Council of Europe member States, victims of domestic violence might apply for immediate "restraining" or "protection" orders capable of forestalling the recurrence of domestic violence, Russia was among only a few member States whose national legislation did not provide victims of domestic violence with any comparable measures of protection. The respondent Government had not identified any effective remedies that the authorities could have used to ensure the applicant's protection against recurrent acts of cyberviolence. The civil law mechanism did not include the rigorous monitoring of the perpetrator's compliance with the terms of an injunction capable of ensuring the victim's safety from the risk of recurrent abuse. Nor did an order, under criminal law, prohibiting certain conduct, offer sufficient protection to victims of domestic violence in the applicant's situation given, *inter alia*, its limited nature, the conditions for its granting, the urgency required in domestic violence situations, and most significantly the fact that it was not directly accessible to the victim. Indeed, the applicant's petition for such an order had been refused by the investigator, who had full discretion in this matter, as had her application for judicial review without an independent scrutiny of the substantive grounds of the investigator's refusal.

In the first *Volodina* case the Court held that the authorities' response to the known risk of recurrent violence on the part of S. had been manifestly inadequate and that, through their inaction and failure to take measures of deterrence, they had allowed him to continue threatening, harassing and assaulting the applicant without hindrance and with impunity. This finding was also applicable in the circumstances of the present case in which the authorities had not considered at any point in time what could and should have been done to protect the applicant from recurrent online violence.

(ii) *As to the manner in which the Russian authorities had conducted an investigation into the applicant's reports* – The investigation had been opened late, that is almost two years after the applicant had first reported the fake profiles to the police. Before that, the police had sought to dispose hastily of the matter on formal grounds instead of making a serious and genuine attempt to establish the circumstances of the applicant's malicious impersonation on social media. Since States were responsible for delays, whether attributable to the conduct of their judicial or other authorities or due to structural deficiencies in their judicial system, it was immaterial whether the initial two-year delay was caused by a lack of clear rules on jurisdiction for investigating online offences – as had been claimed by the police – or by the reluctance of individual police officers to take up the case. Nor was the Court convinced by the Government's explanations for the delay as per S's unavailability for questioning. In any event, the police should have acted promptly and in good faith to secure forensic evidence of the alleged offences, such as the identification of phone numbers and Internet addresses which had been used to create the fake profiles and upload the applicant's photos. This had not been done, however, until two years later, resulting in a loss of time and undermining the authorities' ability to secure evidence relating to the acts of cyberviolence.

Further, the investigation which was conducted from 2018 onwards had been neither expeditious nor sufficiently thorough both as regards the fake and social media profiles and the other offences the applicant had reported to the police. As per the latter, a "pre-investigation inquiry" had not led to any criminal case being opened. Without undertaking any investigative steps, the police had concluded that no offence had been committed. As the Court found in the first *Volodina* case, the police would arbitrarily raise the bar for evidence required to launch criminal proceedings, claiming that threats of death had to be "real and specific" in order to be prosecutable. Most importantly, the authorities had failed to take a global view of the situation by considering whether those incidents could be said to be so connected in type and context with the physical assaults the applicant had reported as to justify the conclusion that they amounted to a single course of conduct.

As a consequence of the slow-paced investigation into the fake social media profiles, the prosecution eventually became time-barred. The criminal case against S. was discontinued by application of the statute of limitations on his initiative, although his involvement in the creation of the fake profiles appeared to have been established. By failing to conduct the proceedings with the requisite diligence, the authorities bore responsibility for their failure to ensure that the perpetrator of acts of cyberviolence be brought to justice. The resulting impunity had been enough to shed doubt on the ability of the State machinery to produce a sufficiently deterrent effect to protect women from cyberviolence.

Consequently, although the existing framework equipped the authorities with legal tools to prosecute the acts of cyberviolence of which the applicant was a victim, the manner in which they had actually handled the matter – notably a reluctance to open a criminal case and a slow pace of the investigation resulting in the perpetrator's impunity – disclosed a failure to discharge their positive obligations under Article 8 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 in respect of non-pecuniary damage.

(See also *Opuz v. Turkey*, 33401/02, 9 June 2009, Legal Summary; *Eremia v. the Republic of Moldova*, 3564/11, 28 May 2013, Legal Summary; *Volodina v. Russia*, 41261/17, 9 July 2019, Legal Summary; and *Buturugă v. Romania*, 56867/15, 11 February 2020, Legal Summary)

ARTICLE 10

Freedom of expression/Liberté d'expression

Criminal fine of EUR 1,000 for disclosing to the media confidential documents of a private-sector employer ("Luxleaks") of insufficient public interest to counterbalance the harm caused: *case referred to the Grand Chamber*

1 000 EUR d'amende pénale pour avoir divulgué aux médias de documents confidentiels de son employeur privé (« Luxleaks »), sans intérêt public suffisant pour pondérer le dommage causé : *affaire renvoyée devant la Grande Chambre*

Halet – Luxembourg, 21884/18, Judgment/Arrêt 11.5.2021 [Section III]

On 6 September 2021 the case was referred to the Grand Chamber at the applicant's request (see the Legal Summary of the Chamber judgment).

Le 6 septembre 2021, cette affaire a été renvoyée devant la Grande Chambre à la demande du requérant (voir le Résumé juridique de l'arrêt de chambre).

Freedom of expression/Liberté d'expression

Restrictions on publication and distribution of children's book depicting same-sex relationships: *relinquishment in favour of the Grand Chamber*

Restrictions à la publication et la distribution d'un livre pour enfants représentant des relations homosexuelles : *dessaisissement en faveur de la Grande Chambre*

Macatė – Lithuania/Lituanie, 61435/19

Traduction française du résumé – Printable version

The applicant, who is an author and openly homosexual, wrote a children's book of fairy tales, aimed at social inclusion of various marginalised groups. Several of the fairy tales depicted love between people of the same sex. Soon after the book's publication, the publisher stopped its distribution, on grounds that the depictions of same-sex family relationships might be harmful to children. It later renewed distribution, but added a warning that the book might have a negative effect on children under the age of fourteen.

The domestic court dismissed the applicant's civil proceedings against the publisher on the basis that, under Lithuanian law, and as understood by the majority in Lithuanian society, a family was created by the marriage of persons of different sexes, and information which promoted different concepts of family and marriage was considered harmful to minors.

The applicant complains under Article 10, taken alone and together with Article 14, that the publication and distribution of her book were restricted because of its positive depiction of same-sex relationships.

On 31 August 2021 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

Freedom of expression/Liberté d'expression

Association classed as a "political subject" not denied the opportunity to disseminate its opinions following cancellation of a political communication programme on public television: *no violation*

Suppression d'une émission de communication politique à la télévision publique n'ayant pas privé une association sujet politique de la possibilité de diffuser ses opinions : *non-violation*

Associazione Politica Nazionale Lista Marco Pannella and/et Radicali Italiani – Italy/Italie, 20002/13, Judgment/Arrêt 31.8.2021 [Section I]

English translation of the summary – Version imprimable

Imbalance in screen time to the disadvantage of association classed as a "political subject" in popular news programmes on public television: *violation*

Déséquilibre de présence en défaveur d'une association sujet politique dans des émissions d'information populaires de la télévision publique : *violation*

Associazione Politica Nazionale Lista Marco Pannella – Italy/Italie, 66984/14, Judgment/Arrêt 31.8.2021 [Section I]

English translation of the summary – Version imprimable

En fait – La première association politique requérante dans l'affaire 20002/13 se plaint de la suppres-

sion sur les trois chaînes publiques de la RAI d'une émission télévisée de communication politique dédiée au débat politique, les « tribunes politiques ».

Dans l'affaire 66984/14, la même association se plaint que ses représentants n'avaient pas été invités aux plus importantes émissions d'information diffusées par la RAI alors que ceux des autres tendances politiques y avaient participé.

Les associations politiques requérantes s'estiment victimes d'une violation de leur droit à la liberté de communiquer leurs opinions et idées politiques dans les médias hors période électorale.

En droit – Article 10 : Hors période électorale, le régime juridique italien encadrant la diffusion des opinions politiques à la télévision distingue les émissions de « communication politique », dont les « tribunes politiques », des émissions d'information. Les premières sont conçues comme un moyen de diffusion du message des partis politiques, les secondes incluent ce message dans un contexte dynamique lié à l'actualité. L'organisation des « tribunes politiques » sur les chaînes publiques nécessitait un acte d'impulsion émanant d'un organe parlementaire, la commission de vigilance, tandis que l'initiative des émissions d'information relève de l'autonomie éditoriale de chaque chaîne et de chaque rédaction. Ces dernières doivent néanmoins respecter les principes généraux d'impartialité et de pluralisme de l'information. Les dispositions légales fixent seulement les principes généraux applicables à l'accès des « sujets politiques » à la radio et à la télévision, en laissant à la commission de vigilance et à l'Autorité pour les garanties dans les communications (AGCOM) le soin d'adopter la réglementation secondaire mettant en œuvre ces principes. Le contrôle du respect de ces normes incombe à l'AGCOM qui est une autorité administrative indépendante devant : 1) assurer le respect du pluralisme et garantir l'égalité d'accès de tous les « sujets politiques » aux émissions d'information, de communication électorale et de communication politique, et l'impartialité de ces émissions ; 2) veiller au respect des orientations adressées à la RAI par la commission de vigilance, et pouvant fixer elle-même des règles complémentaires afin d'assurer le respect de la législation interne. Le rôle direct de l'État dans le contrôle du service public de radiotélédiffusion a donc progressivement été réduit, et une majeure autonomie éditoriale reconnue à chaque chaîne ainsi qu'aux rédactions responsables des émissions d'information, assure en principe une meilleure protection des principes d'impartialité et de pluralisme de l'information.

a) *S'agissant de l'affaire 20002/13* – L'ingérence alléguée par la première requérante découlerait de l'inertie de la commission de vigilance qui a entraîné la suppression d'une émission diffusée par le service public de radiotélédiffusion. S'il y a eu ingérence en l'espèce, celle-ci était « prévue par la loi » et poursuivait le but légitime consistant à protéger les « droits d'autrui ».

La première requérante est un « sujet politique » au sens du droit interne.

Les faits de la présente affaire ne sont pas comparables à ceux des arrêts *VgT Verein gegen Tierfabriken c. Suisse* et *TV Vest AS et Rogaland Pensjonistparti c. Norvège*, où il était question d'une interdiction absolue faite aux associations requérantes d'avoir recours à la publicité télévisée, politique ou d'intérêt social, pour diffuser leurs opinions et leurs idées. En l'espèce, la première requérante se plaint de ne pas avoir eu accès à une émission télévisée précise, les « tribunes politiques ». Même si la première requérante considère ladite émission comme le moyen privilégié de présentation et de diffusion de ses opinions, il ne s'agit pas ici d'une interdiction absolue d'accès aux émissions télévisées de nature politique, imposée à un parti politique, ce qui pourrait être incompatible avec l'article 10.

La suppression des « tribunes politiques » est la conséquence de l'inertie de la commission de vigilance qui n'a plus fourni à la RAI les instructions nécessaires à l'organisation de ces émissions. La commission de vigilance est un organe politique qui exprime la volonté du Parlement italien en matière de service public de radiotélédiffusion. Le choix de ne plus organiser les tribunes politiques est ainsi un choix politique, dont les raisons relèvent du pouvoir d'appréciation du Parlement.

Le format des « tribunes politiques » a été conçu au début des années 1970, dans un contexte sociétal complètement différent de l'actuel. Depuis lors, il existe un désintérêt du public pour ce type d'émissions et, d'autre part, une évolution de l'offre d'émissions d'information permettant aux partis politiques de véhiculer leurs opinions et leurs idées différemment.

Ensuite, toutes les forces politiques qui y participaient, sans distinction, ont subi les conséquences de la suppression des tribunes politiques. La situation aurait été différente si le refus d'accorder un temps d'antenne à un parti ou à un groupe spécifique s'était accompagné de la diffusion des opinions des autres forces politiques, en créant une disparité de traitement qui aurait pu soulever un problème au regard de l'article 10.

En outre, l'abandon des « tribunes politiques » doit être considéré dans le cadre de l'évolution générale du système public de radiotélédiffusion italien allant vers plus d'autonomie des chaînes.

Au vu de ces considérations, la suppression des « tribunes politiques » n'a pas privé la première requérante de la possibilité de diffuser ses opinions et, dans ces conditions, elle ne peut s'analyser en une atteinte disproportionnée au droit de l'intéressée à la liberté d'expression.

Conclusion : non-violation (unanimité).

La Cour conclut aussi, à l'unanimité, à la violation de l'article 13 combiné avec l'article 10, car la première requérante n'a pas disposé d'un recours lui permettant de se plaindre devant les autorités nationales de la suppression des « tribunes politiques » et de la violation alléguée de son droit à la liberté d'expression.

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

b) *S'agissant de l'affaire 66984/14* – L'absence de représentants de l'association requérante dans trois émissions d'information politique particulièrement populaires diffusées par la RAI s'analyse en une ingérence dans l'exercice par l'intéressée du droit garanti par l'article 10. L'ingérence était « prévue par la loi » qui vise notamment à garantir aux chaînes de télévision une autonomie éditoriale quant au choix des invités et du temps d'antenne qui leur est alloué. Et elle poursuivait le but légitime de la protection des « droits d'autrui », car les dispositions internes visent à garantir l'impartialité et le pluralisme de l'information et, plus spécifiquement, la liberté du débat politique, au bénéfice des citoyens et de la démocratie.

L'association requérante a saisi l'AGCOM pour se plaindre d'un déséquilibre de présence en sa défaveur dans les émissions d'information litigieuses. L'enjeu de la plainte portait sur la participation de l'intéressée à des débats touchant à l'intérêt général, et par conséquent la marge d'appréciation accordée à l'État doit être relativement réduite.

La plainte de l'association requérante a fait l'objet de deux classements sans suite par l'AGCOM. Mais le tribunal administratif régional (TAR) ayant enjoint à l'AGCOM d'exécuter son précédent jugement, l'autorité de contrôle a enfin ordonné à la RAI de corriger la situation de déséquilibre qui avait porté préjudice à l'association requérante.

Le refus de l'AGCOM de tenir compte de la conclusion du TAR que l'association requérante était un « sujet politique » au sens de la réglementation interne ne saurait se justifier par le statut quelque peu particulier de l'intéressée. Pour la Cour, l'AGCOM s'est montrée excessivement formaliste, d'autant que le TAR avait fondé son appréciation sur la réalité de la situation de l'association requérante qui avait signé un accord avec un parti politique lui ayant permis de présenter ses candidats aux élections et de créer ensuite une délégation autonome au sein du groupe parlementaire de ce même parti.

Par ailleurs, s'il est vrai que, contrairement aux émissions de communication politique, les émissions d'information politique ne sont pas soumises au strict respect d'une représentation proportionnelle des opinions de chaque force politique, mais simplement à l'obligation de représenter de manière équilibrée les différentes opinions politiques, la pratique de l'AGCOM et du TAR quant à l'application des principes généraux en matière de pluralisme témoignent d'une protection renforcée de l'accès des « sujets politiques » à une catégorie spécifique d'émissions d'information politique, à savoir celles qui sont caractérisées par une programmation saisonnière cyclique et par une structure et une articulation reconnaissables par le public. Ces émissions, dans lesquelles l'AGCOM inclut les trois en question, font ainsi l'objet d'une « appréciation autonome » lorsqu'il s'agit d'évaluer le respect du principe du pluralisme à l'égard d'un « sujet politique ». Cela signifie que des situations similaires doivent être traitées de manière similaire, dans le respect du principe d'égalité et dans le but de garantir le bon déroulement du débat politique et donc le pluralisme de l'information.

Or, sans avancer la moindre motivation, l'AGCOM a abandonné cette pratique et procédé à une appréciation globale du temps de présence de l'association requérante dans l'ensemble des émissions d'information de la chaîne, sans tenir compte de l'horaire de diffusion des émissions ni de leur popularité.

Lorsque l'association requérante a enfin pu obtenir une décision de l'AGCOM ordonnant à la RAI de prévoir des temps de parole en sa faveur, une des trois émissions avait été supprimée des programmes de la RAI. Bien que la suppression des émissions soit fréquente, l'obligation d'exécution aurait dû imposer une présence compensatrice à faveur de l'association requérante.

À cela vient s'ajouter l'inexécution partielle de la décision de l'AGCOM par la RAI, qui était tenue de l'observer afin d'assurer le respect du principe du pluralisme de l'information. En effet, il apparaît que l'association requérante a effectivement participé à l'une des deux émissions restantes, mais qu'aucun de ses représentants n'a participé à la seconde émission.

Enfin, le gouvernement défendeur argue que la RAI a rencontré « une certaine difficulté » dans l'exécution de la décision de l'AGCOM, liée selon lui aux circonstances spécifiques de l'évolution de l'association requérante depuis sa création en 1992. S'il est probable que l'accord politico-électoral qui a per-

mis l'élection de neuf représentants de l'association requérante présentait des aspects de nouveauté, le TAR, en 2011, avait indiqué que l'intéressée devait être considérée comme un « sujet politique » au sens des dispositions internes. Cela aurait dû permettre à l'AGCOM d'apprécier la situation de l'association requérante à partir de ce constat, et, par conséquent, à la RAI de résoudre les difficultés invoquées par le gouvernement défendeur.

Les considérations qui précèdent suffisent à la Cour pour conclure qu'en l'espèce les mesures prises par les autorités internes pour rééquilibrer la situation qui avait eu pour effet d'exclure l'association requérante du débat politique ont été insuffisantes.

Conclusion : violation (unanimité).

Article 41 : 12 000 EUR pour préjudice moral.

(Voir *VgT Verein gegen Tierfabriken c. Suisse*, 24699/94, 28 juin 2001, Résumé juridique, et *TV Vest AS et Rogaland Pensjonistparti c. Norvège*, 21132/05, 11 décembre 2008, Résumé juridique ; voir aussi *Manole et autres c. Moldova*, 13936/02, 17 septembre 2009, Résumé juridique, et *Animal Defenders International c. Royaume-Uni* [GC], 48876/08, 22 avril 2013, Résumé juridique)

Freedom of expression/Liberté d'expression

Conviction of a local councillor for failing to take prompt action in deleting illegal comments by others on the wall of his Facebook account, which was freely accessible to the public and used during his election campaign: *no violation*

Condamnation pénale d'un élu faute d'avoir promptement supprimé les propos illicites de tiers sur le mur de son compte Facebook librement accessible au public et utilisé lors de sa campagne électorale : *non-violation*

Sanchez – France, 45581/15, Judgment/Arrêt 2.9.2021 [Section V]

English translation of the summary – Version imprimable

En fait – Le requérant, à l'époque élu local et candidat aux élections législatives, a été condamné pénalement pour provocation à la haine ou à la violence à l'égard d'un groupe de personnes ou une personne à raison d'une religion déterminée, faute pour lui d'avoir promptement supprimé les commentaires publiés par des tiers sur le mur de son compte Facebook librement accessible au public et utilisé lors de sa campagne électorale.

En droit – Article 10 : La condamnation pénale du requérant a constitué une ingérence dans l'exercice de son droit à la liberté d'expression, prévue par une loi prévisible, et ayant pour but légitime de protéger la réputation ou les droits d'autrui.

a) *Le contexte des commentaires*

i. *La nature des commentaires litigieux* – Les commentaires étaient clairement illicites. Les juridictions nationales ont établi, dans des décisions motivées, que, d'une part, ils définissaient clairement le groupe de personnes concernées, à savoir les personnes de confession musulmane, et que l'assimilation de la communauté musulmane avec la délinquance et l'insécurité dans la ville de Nîmes, en assimilant ce groupe avec des « dealers et prostituées » qui « règnent en maître », « des racailles qui vendent leur drogue toute la journée » ou les auteurs de « caillassages sur des voitures appartenant à des blancs », tendait, tant par son sens que par sa portée, à susciter un fort sentiment de rejet et d'hostilité envers le groupe des personnes de confession musulmane, réelle ou supposée, et que, d'autre part, l'expression « Kiss à [L.] » désignant L.T., associée à F.P., adjoint à la mairie de la ville de Nîmes et désigné par les écrits comme ayant contribué à abandonner la ville aux mains des musulmans et donc à l'insécurité, était de nature à associer cette dernière, en raison de son appartenance, supposée en raison de son prénom, à une communauté musulmane, à la transformation de la ville et donc de susciter à son égard haine et violence.

Les commentaires ont été publiés sur le mur d'un compte Facebook librement accessible au public, utilisé dans le contexte d'une campagne électorale, forme d'expression visant à atteindre l'électorat au sens large, donc l'ensemble de la population.

Le langage employé dans les textes litigieux publiés par S.B. et L.R., qui n'étaient au demeurant pas eux-mêmes des hommes politiques ou les membres actifs d'un parti politique s'exprimant au nom de celui-ci, incitait clairement à la haine et à la violence à l'égard d'une personne à raison de son appartenance à une religion, ce qui ne peut être camouflé ou minimisé par le contexte électoral ou la volonté d'évoquer des problèmes locaux.

ii. *La responsabilité du requérant en raison de propos publiés par des tiers* – La qualité d'élu du requérant ne saurait être considérée comme une circonstance atténuant sa responsabilité.

Par ailleurs, le requérant ne s'est pas vu reprocher l'usage de son droit à la liberté d'expression, en particulier dans le débat politique, mais son manque de vigilance et de réaction concernant certains commentaires publiés sur le mur de son compte Facebook.

F.P. était précisément l'un des adversaires politiques du requérant et les faits s'inscrivaient dans un contexte politique local particulier, avec des

tensions manifestes au sein de la population, qui ressortent notamment des commentaires litigieux, mais également entre les protagonistes.

b) *Les mesures appliquées par le requérant* – Rien ne permettant d'établir que le requérant avait été informé de la teneur des commentaires avant leur publication, les juridictions ont examiné son comportement uniquement pour la période postérieure à leur publication.

– Le requérant avait sciemment rendu public le mur de son compte Facebook et donc autorisé ses amis, soit 1 829 personnes, à y publier des commentaires. Il avait donc l'obligation de contrôler la teneur des propos publiés. Par ailleurs, il ne pouvait ignorer le fait que son compte était de nature à attirer des commentaires ayant une teneur politique, par essence polémique, dont il devait assurer plus particulièrement encore la surveillance.

– Les propos litigieux visant L.T. ont été promptement retirés par leur auteur, à savoir moins de vingt-quatre heures après leur publication. Partant, à supposer que le requérant ait effectivement eu le temps et la possibilité d'en prendre préalablement connaissance, exiger de lui une intervention encore plus rapide, faute pour les autorités internes de pouvoir justifier d'une telle obligation au regard des circonstances particulières de l'espèce, reviendrait à exiger une réactivité excessive et irréaliste.

– Les commentaires de L.R. étaient encore visibles près de six semaines après leur publication. La suppression du caractère public du mur du compte Facebook du requérant n'est intervenue qu'environ trois mois après les faits. Certes, deux jours après, le requérant avait publié un message sur son mur pour inviter les intervenants à « surveiller le contenu de [leurs] commentaires », mais sans supprimer les commentaires litigieux et, compte tenu de ses déclarations quant à son ignorance des propos de L.R. avant sa convocation par les gendarmes, sans prendre la peine de vérifier ou faire vérifier le contenu des commentaires alors accessibles au public.

– Il existe une responsabilité partagée entre le titulaire d'un compte sur un réseau social et l'exploitant de ce dernier. Les conditions d'utilisation de Facebook soulignaient l'interdiction des propos haineux, l'accès à ce réseau social valant acceptation de cette règle pour tous les utilisateurs.

c) *La possibilité de retenir la responsabilité des auteurs des commentaires* – Le requérant a été jugé responsable en sa qualité de producteur d'un site de communication au public en ligne, mettant à la disposition du public des messages adressés par des internautes et engageant sa responsabilité, notamment, en s'abstenant de retirer des messages illicites dès qu'il en a connaissance. Bien que considéré comme « auteur » par la loi et sanctionné pénalement à ce titre par les juridictions internes, le requérant s'est en réalité vu reprocher un comportement distinct de celui des rédacteurs des commentaires également condamnés par ailleurs. Pour la Cour, il est légitime que le statut de titulaire du mur de son compte Facebook emporte des obligations spécifiques, en particulier lorsque, à l'instar du requérant, le titulaire décide de ne pas faire usage de la possibilité qui lui est offerte d'en limiter l'accès, choisissant au contraire de le rendre accessible à tout public. Un tel constat vaut particulièrement dans un contexte susceptible de voir apparaître des propos clairement illicites, comme en l'espèce.

Certes, le droit et la pratique internes devraient établir une claire distinction entre, d'une part, la responsabilité de l'auteur des expressions de discours de haine et, d'autre part, la responsabilité éventuelle des médias et des professionnels des médias qui contribuent à leur diffusion dans le cadre de leur mission de communiquer des informations et des idées sur des questions d'intérêt public. En l'espèce, toutefois, les propos étaient clairement illicites et au demeurant contraires aux conditions d'utilisation de Facebook.

d) *Les conséquences de la procédure interne pour le requérant* – Le requérant a été condamné à payer une amende de trois mille euros qui n'était pas disproportionnée, au vu de la peine encourue et de l'absence d'autre conséquence établie pour le requérant.

Ainsi, au vu des circonstances spécifiques de la présente affaire, la décision des juridictions internes de condamner le requérant reposait sur des motifs pertinents et suffisants, eu égard à la marge d'appréciation dont bénéficie l'État défendeur. Dès lors, l'ingérence litigieuse peut passer pour « nécessaire dans une société démocratique ».

Conclusion : non-violation (six voix contre une).

(Voir aussi *Delfi AS c. Estonie* [GC], 64569/09, 16 juin 2015, Résumé juridique ; *Pihl c. Suède* (déc.), 74742/14, 7 février 2017, Résumé juridique ; et *Kilin c. Russie*, 10271/12, 11 mai 2021, Résumé juridique)

Freedom of expression/Liberté d'expression

Conviction of the applicant for having slogans with a terrorist connotation printed on a T-shirt worn at his request by his three-year-old nephew at nursery school: *no violation*

Condamnation pénale du requérant pour l'apposition d'inscriptions à connotations

terroristes sur un tee-shirt porté à sa demande par son neveu, de trois ans, dans son école maternelle : *non-violation*

Z.B. – France, 46883/15, Judgment/Arrêt 2.9.2021 [Section V]

English translation of the summary – Version imprimable

En fait – Le requérant a été condamné pénalement pour apologie de crimes d'atteintes volontaires à la vie en raison des inscriptions à connotations terroristes, « je suis une bombe » et « Jihad, né le 11 septembre », apposées sur un tee-shirt qu'il avait offert à son neveu, alors âgé de trois ans, en référence au prénom et à la date de naissance de l'enfant. Ce tee-shirt fut porté par l'enfant dans l'enceinte d'une école maternelle.

En droit – Article 10

a) *Recevabilité* – Nonobstant la qualification d'apologie de crimes d'atteintes volontaires à la vie retenue par les juridictions nationales, les inscriptions litigieuses ne suffisent pas à révéler de manière immédiatement évidente que le requérant tendait par ce biais à la destruction des droits et libertés consacrés dans la Convention et ne sauraient en soi justifier l'application de l'article 17. La Cour a déjà jugé que « l'offense faite à la mémoire des victimes des attentats du 11 septembre » n'implique pas en soi que la teneur de propos controversés afférents à ces attentats ne puisse être examinée à la lumière de la liberté d'expression.

Partant, la présente requête ne constitue pas un abus de droit aux fins de l'article 17 et elle n'est pas incompatible *ratione materiae* avec les dispositions de la Convention. Il convient donc de rejeter l'exception préliminaire du Gouvernement. Cette conclusion ne saurait toutefois empêcher la Cour de s'appuyer sur l'article 17 pour interpréter l'article 10 § 2 au regard de l'appréciation de la nécessité de l'ingérence litigieuse.

Conclusion : recevable.

b) *Fond* – La condamnation litigieuse constituait une ingérence dans le droit du requérant à la liberté d'expression, prévue par la loi et poursuivant les buts légitimes de la défense de l'ordre et la prévention des infractions pénales.

Le requérant a sciemment recouru à un procédé énonciatif qui, reposant sur la polysémie du mot « bombe », tendait à décrire, dans un style familier propre au français courant, les caractéristiques physiques d'une personne séduisante tout en les associant aux informations d'identité de son neveu.

Les inscriptions litigieuses ne sauraient être considérées comme relevant d'un quelconque débat d'intérêt général au regard des attentats du 11 septembre 2001 ou d'autres sujets. D'ailleurs, le requérant ne prétend aucunement avoir voulu contribuer à ou susciter un débat de cette nature. La marge d'appréciation de l'État en l'espèce est en conséquence plus large.

Le contexte général des attentats terroristes ayant frappé la France, aussi grave fût-il, ne pouvait suffire à lui seul à justifier l'ingérence en cause. Pour autant, la Cour ne saurait ignorer l'importance et le poids que ce contexte général revêtait en l'espèce. En effet, si plus de onze ans séparent les attentats du 11 septembre 2001 et les faits à l'origine de la présente affaire, les inscriptions litigieuses ont été diffusées quelques mois seulement après d'autres attentats terroristes, ayant notamment causé la mort de trois enfants dans une école. Et l'on ne saurait considérer que l'écoulement du temps était susceptible d'atténuer la portée du message en cause. La circonstance que le requérant n'ait pas de liens avec une quelconque mouvance terroriste, ou n'ait pas souscrit à une idéologie terroriste ne saurait davantage atténuer la portée du message litigieux.

Quant au contexte spécifique dans lequel les inscriptions litigieuses avaient été rendues publiques, la cour d'appel a noté l'instrumentalisation d'un enfant de trois ans, porteur involontaire du message litigieux, sans possible conscience de la chose, et un message diffusé non seulement dans « un lieu public » mais aussi dans « une enceinte scolaire », où se trouvaient de jeunes enfants.

En outre, le tee-shirt floqué des inscriptions litigieuses n'était pas directement visible des tiers mais a été découvert au moment où l'enfant était rhabillé par des adultes. Il n'était pas davantage accessible à un grand public puisque porté uniquement dans l'enceinte d'une école. Le message litigieux ne fut ainsi lisible que par deux adultes. Si la Cour ne peut spéculer sur la nature exacte des intentions du requérant sur ce point, celui-ci ne nie pas avoir spécifiquement demandé que son neveu porte le tee-shirt litigieux à l'école ni avoir voulu partager son message. Il s'est au contraire prévalu d'un trait d'humour.

Or le requérant ne pouvait ignorer la résonance particulière, au-delà de la simple provocation ou du mauvais goût dont il se prévaut, de telles inscriptions dans l'enceinte d'une école maternelle, peu de temps après des attentats ayant coûté la vie à des enfants dans une autre école et dans un contexte de menace terroriste avérée.

La Cour ne voit aucun motif sérieux de substituer son appréciation à celle des instances nationales qui ont veillé à apprécier la culpabilité du requérant en se fondant sur les critères d'appréciation définis par la jurisprudence de la Cour et ce, après

avoir procédé à une mise en balance des différents intérêts en présence. Ainsi, les motifs retenus pour fonder la condamnation du requérant, reposant sur la lutte contre l'apologie de la violence de masse, étaient pertinents et suffisants, et répondaient en ce sens à un besoin social impérieux.

Cela étant, en dépit de la contribution qu'apporte en l'espèce l'avis de l'avocat général, tenant à l'émotion et aux tensions suscitées par le message litigieux ainsi que son impact sur la paix sociale, à la compréhension de la solution, une motivation plus développée de la décision aurait permis de mieux appréhender et comprendre le raisonnement tenu par la Cour de cassation en ce qui concerne le moyen du requérant tiré de l'article 10.

Enfin, le requérant a été condamné à une peine de deux mois d'emprisonnement avec sursis et 4 000 EUR d'amende non disproportionnée au regard du but légitime poursuivi.

Dès lors, au vu des circonstances spécifiques de la présente affaire, l'ingérence litigieuse peut passer pour « nécessaire dans une société démocratique ».

Conclusion : non-violation (unanimité).

(Voir aussi *Garaudy c. France* (déc.), 65831/01, 26 juin 2003, Résumé juridique ; *Leroy c. France*, 36109/03, 2 octobre 2008, Résumé juridique ; et *Ayoub et autres c. France*, 77400/14 et al., 8 octobre 2020, Résumé juridique)

Freedom of expression/Liberté d'expression
Freedom to impart information/Liberté de communiquer des informations

Unjustified ban on publication of opposition newspaper as a result of state of emergency declared in the context of massive post-election protests: *violation*

Interdiction injustifiée de publication d'un journal d'opposition motivée par l'état d'urgence proclamé dans le contexte de manifestations post-électorales massives : *violation*

Dareskizb Ltd – Armenia/Arménie, 61737/08, Judgment/Arrêt 21.9.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – On 1 March 2008, after the dispersal of opposition demonstrations that had followed the announcement of the preliminary results of the presidential election, the incumbent President of Armenia adopted a decree declaring a state of emergency in Yerevan and imposing, inter alia, restrictions on publication by mass media. An amending decree was adopted on 13 March 2008. The necessity of the introduced measures was confirmed by a parliamentary inquiry. In the meantime, on 6 March 2008, pursuant to Article 15 of the Convention, the Armenian authorities gave notice to the Secretary General of the Council of Europe of a derogation from a number of rights, including those protected by Article 10 § 1. The applicant company, which published a daily opposition newspaper, was prevented from publishing it during the state of emergency, with the national security officers prohibiting the printing of the newspaper's edition on two occasions. The applicant company unsuccessfully challenged the decree before the domestic courts.

Law

Article 15: In the present case, while accepting that weight must be attached to the judgment of Armenia's executive and Parliament, the Court noted that the necessity of declaring a state of emergency and the particular measures involved had apparently never been subjected to any judicial scrutiny at the domestic level. Further, the Court had already examined in a number of cases what had happened in Yerevan following the 2008 presidential election, the circumstances and nature of the demonstrations and the police intervention. The Government had not put forward any evidence which prompted the Court to doubt its relevant findings in its previous case-law.

After the dispersal of the peaceful assembly at Freedom Square a large crowd gathered in a different location. While tensions had been running high between the demonstrators and the law enforcement authorities at that point, the Court did not have at its disposal sufficient material to establish how the situation had evolved and eventually got out of hand so as to lead to an armed confrontation, damage of property and deaths. It was, however, mindful of its previous findings that the dispersal of the assembly at Freedom Square, as well as a number of other similar or uncontrollable events which had happened later that day, might have played a role in the eventual escalation of violence, as opposed to it being a planned and organised disorder or an attempt of coup (see *Myasnik Malkhasyan v. Armenia*). Furthermore, the large crowd of several thousand people had remained peaceful throughout that period, while the violence had been committed by small groups of protesters in a number of adjacent streets. No evidence had been submitted to demonstrate that the protesters who had committed violence were armed with anything but improvised objects as opposed to firearms or similar weapons as alleged by the Government. Nor was there any evidence to suggest that any of the deaths had occurred as a result of deliberate or even unintentional actions of the protesters.

Consequently, although the situation in Yerevan on 1 March 2008 had been undoubtedly very tense and could have been considered a serious public order situation, the Government had failed to demonstrate convincingly and to support with evidence their assertion that the opposition demonstrations, which, moreover, had been apparently confronted with a heavy-handed police intervention, could be characterised as a public emergency "threatening the life of the nation" within the meaning of Article 15. There was therefore insufficient evidence to conclude that the opposition protests, protected under Article 11, even if massive and at times accompanied by violence had represented a situation justifying a derogation.

Conclusion: derogation did not satisfy the requirements of Article 15 § 1.

Article 10: The restrictions that had been imposed on the applicant company's publication of its newspaper had amounted to an interference with its freedom of expression, including its right to impart information. Although, an issue arose as to whether the declaration of a state of emergency had been lawful, the Court left that question open. The contested measures sought to pursue the legitimate aims of preventing disorder and crime. With regard to the necessity of the restrictions imposed the Court first stressed that the "duties and responsibilities" which accompanied the exercise of the right to freedom of expression by media professionals assumed special significance in situations of conflict and tension. Where the views expressed did not constitute hate speech or incitement to violence, the Contracting States could not restrict the right of the public to be informed of them, even with reference to the aims set out in Article 10 § 2, namely the protection of territorial integrity or national security or the prevention of disorder or crime. Neither could the existence of a "public emergency threatening the life of the nation" serve as a pretext for limiting freedom of political debate, which was at the very core of the concept of a democratic society. Even in a state of emergency any measures taken should seek to protect the democratic order from the threats to it.

In the present case, the national security officers had prohibited the printing of the applicant company's newspaper's edition without providing reasons. There had been no suggestion nor had the Government argued that the material which the applicant company had intended to print contained any hate speech or incitement to violence or unrest. In fact, from the entirety of the materials before the Court it appeared that the only reason for the prohibition had been the fact that the applicant company was an opposition newspaper known to publish material critical of the authorities. Consequently, such restrictions, which had the effect of stifling political debate and silencing dissenting opinions, went against the very purpose of Article 10, and were not necessary in a democratic society.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 6 § 1 of the Convention in that the Administrative Court's refusal to examine the application against the presidential decree and the interference with the applicant company's Article 10 rights had impaired the very essence of its right of access to court.

Article 41: EUR 9,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Mehmet Hasan Altan v. Turkey*, 13237/17, 20 March 2018, Legal Summary; *Mushegh Saghatelyan v. Armenia*, 23086/08, 20 September 2018, Legal Summary; and *Myasnik Malkhasyan v. Armenia*, 49020/08, 15 October 2020)

ARTICLE 15

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

Declaration of national emergency in the context of 2008 massive post-election protests: *conditions for derogation not satisfied*

Proclamation de l'état d'urgence dans le contexte des manifestations post-électorales massives de 2008 : *non-réunion des conditions exigées pour une dérogation*

Dareskizb Ltd – Armenia/Arménie, 61737/08, Judgment/Arrêt 21.9.2021 [Section IV]

(See Article 10 above/Voir l'article 10 ci-dessus, page 23)

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

Placement under home curfew of far-left activists during the state of emergency declared following jihadist terror attacks: *communicated*

Assignation à résidence d'activistes d'ultra gauche sur le fondement de l'état d'urgence proclamé à la suite d'attentats djihadistes : *affaires communiquées*

Domenjoud – France, 34749/16 and/et 79607/17, Communication [Section V]

English translation of the summary – Version imprimable

Au lendemain des attentats meurtriers du 13 novembre 2015 à Paris, revendiqués par l'organisation dite « État islamique », un décret proclama l'état d'urgence. Le 21 novembre entra en vigueur une version modifiée de la loi de 1955 sur l'état d'urgence élargissant et renforçant le pouvoir ministériel de prononcer des assignations à résidence. Le 24 novembre, le Représentant permanent de la France en informa le Secrétaire Général du Conseil de l'Europe au titre de l'article 15 de la Convention.

Le 25 novembre 2015, le ministre de l'Intérieur prit à l'encontre de chacun des requérants – deux frères – un arrêté d'assignation à résidence jusqu'au 12 décembre 2015, impliquant trois pointages quotidiens au commissariat de police et l'interdiction de sortir de leur domicile la nuit (de 20 heures à 6 heures).

Cette décision était motivée par la tenue prochaine à Paris, du 30 novembre au 11 décembre 2015, de la Conférence des Parties à la convention-cadre des Nations unies sur le changement climatique (« COP21 »), qui devait accueillir de nombreux chefs d'État. Le ministre expliquait que la forte mobilisation des forces de sécurité pour lutter contre la menace terroriste ne devait pas être détournée pour répondre aux risques de troubles à l'ordre public liés aux manifestations revendicatives très radicales pressenties autour de cet événement.

Sur le plan individuel, les arrêtés litigieux reprochaient aux deux frères de prendre une part très active dans la préparation d'incidents destinés à perturber la COP21, et d'avoir déjà été impliqués dans diverses actions contestataires relevant de la mouvance d'ultra gauche. Il apparut par la suite que cette appréciation de la dangerosité des requérants était fondée sur une « note blanche » des services de renseignement intérieurs.

Leurs recours en référé-liberté échouèrent ; de même qu'un recours en annulation (du second requérant).

Devant la Cour, les requérants dénoncent une privation de liberté mise en œuvre sans contrôle juridictionnel préalable. À tout le moins, estiment-ils, leur assignation à résidence manquait de prévisibilité – la loi visant toute personne à l'égard de laquelle il existait des « raisons sérieuses de penser » que son comportement constitue une menace pour la sécurité et l'ordre publics – et n'était pas proportionnée aux fins poursuivies.

Ils dénoncent également une procédure inéquitable en raison du poids donné aux « notes blanches » des services de renseignement. Selon eux, ces notes manquent d'éléments tangibles, de sorte que la possibilité de les contredire devant les tribunaux serait illusoire.

L'article 15 de la Convention ne leur paraît pas valablement invocable en l'espèce, dès lors que leur cas ne relevait pas de la menace spécifique (le terrorisme djihadiste) qui sous-tendait la déclaration de l'état d'urgence.

Affaires communiquées sous l'angle des articles 5 et 6 de la Convention et de l'article 2 du Protocole n° 4, avec une question relative à l'incidence de l'article 15 de la Convention.

ARTICLE 17

Prohibition of abuse of rights/Interdiction de l'abus de droit

Conviction of the applicant for having slogans with a terrorist connotation printed on a T-shirt worn at his request by his three-year-old nephew at nursery school: *admissible*

Condamnation pénale du requérant pour l'apposition d'inscriptions à connotations terroristes sur un tee-shirt porté à sa demande par son neveu, de trois ans, dans son école maternelle : *recevable*

Z.B. – France, 46883/15, Judgment/Arrêt 2.9.2021 [Section V]

(See Article 10 above/Voir l'article 10 ci-dessus, page 22)

ARTICLE 35

Article 35 § 1

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

Prisoners' failure to exhaust a new remedy to vindicate their right to family life in the context of their allocation to remote penal facilities: *inadmissible*

Non-épuisement par des détenus d'un nouveau recours pour faire valoir leur droit au respect de la vie familiale dans le contexte de leur affectation dans un établissement pénitentiaire éloigné : *irrecevable*

Dadusenko and Others/et autres – Russia/Russie, 36027/19 et al, Decision/Décision 7.9.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The five applicants complained of a violation of their right to respect for family life on account of their or their relatives' allocation to remote penal facilities and their subsequent inability to obtain a transfer elsewhere, all their transfer requests having been refused by the Federal Service of Execution of Sentences ("the FSIN"). Only the fifth applicant challenged the refusal. He was successful at last instance before the Supreme Court which held it to be unlawful, quashed all previous courts' decisions confirming it and sent the case for re-examination. The latter proceedings were still pending on the date of the Court's examination of the present applications.

Law – Article 35 § 1: In 2020, in response to the Court's findings in the leading cases of *Polyakova and Others v. Russia* and *Voynov v. Russia* concerning the lack of adequate legal protection against abuses as concerned decisions on prisoners' allocation to penal facilities as well as the lack of an effective remedy regarding an alleged violation of the right to respect for family life stemming from such decisions, the Russian authorities adopted amendments to the relevant provisions of the Code on the Execution of Criminal Sentences ("the CES") to bring them into line with the Convention requirements.

In particular, the convicted persons' family situation was now expressly listed as one of the factors to be considered at the time of their initial allocation to a penitentiary facility (Article 73 §§ 1, 2 and 2.1 of the CES) and it was possible for convicted persons to request a transfer to another penitentiary institution located closer to the place of residence of their family members (Article 81 § 2). Such a request could also be lodged by a convicted person's relatives. A refusal by the FSIN to take account of prisoners' family situation either at the point of their initial allocation to a penitentiary institution or when examining their request for a subsequent transfer was amenable to a judicial review. With the inclusion of the specific reference to family-related reasons as a relevant decision-making factor on prisoners' allocation or transfer, the Russian courts were no longer prevented from exercising the review of the proportionality of the FSIN's decisions. Hence, applicants now had an avenue whereby they could adequately vindicate their right to respect for family life. Indeed, the Supreme Court's decision in the fifth applicant's case corroborated this assessment. That court had concluded that the inability of a convict to maintain family ties while serving his sentence constituted "exceptional circumstances" within the meaning of Article 81 § 2 of the CES and was one of the reasons for a prisoner to be relocated closer to his relatives' place of residence. The Court was particularly mindful of that example, which had been included in the Review of judicial practice in administrative cases issued by the Presidium of the Supreme Court, as the fifth applicant belonged to one of the specific categories which had been excluded from the general distribution rule (pursuant to that rule, those sentenced to deprivation of liberty, save for those falling under several specific categories, should serve their sentences in correctional penal facilities in the region where they resided prior to their conviction or where they were convicted). Consequently, now all prisoners, and notably those excluded from the general distribution rule, could vindicate their right to respect for family life at the domestic level.

It was true that the domestic proceedings in the fifth applicant's case had not yet been concluded, their outcome under the new provisions could not as yet be ascertained and, more generally, the domestic courts had not so far been able to develop any extensive case-law under the new amendments. At this stage, however, the Court could not see any reason for believing that the amended CES provisions, as interpreted and applied by the Supreme Court, would not afford the applicants the opportunity to remedy their grievances at the domestic level or that they would offer no reasonable prospects of success. In any event, once recourse had been made by the applicants to the relevant national remedy, the Court could then assess, in every individual case, the question of whether, in view of the outcome of the domestic proceedings, they had lost victim status.

Given its subsidiary role to the national systems safeguarding human rights, the Court considered that the applicants had at their disposal a new remedy allowing the national authorities to restore at the domestic level their rights envisaged by Article 8. The Court was particularly mindful of the fact that the aforementioned reform had been adopted in response to its previous judgments and in order to provide the national authorities with an opportunity to put matters right at domestic level, thus preventing numerous repetitive applications before it. This also justified departure from the rule that the assessment of whether domestic remedies had been exhausted was normally carried out with reference to the date on which the application was lodged. Lastly, as in the case of the present applicants, in virtually all the cases pending before it concerning this issue, convicts or their convicted relatives were still serving their sentences, and therefore retained possibility of lodging a transfer request with the FSIN and/or of challenging the proportionality of its refusal before the domestic courts.

Thus, the applicants had to exhaust this remedy before their complaints could be examined, including

those – in the instant case the first applicant – who had lodged their application before the adoption of the amendments.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

(See also *Polyakova and Others v. Russia*, 35090/09, 7 March 2017, Legal Summary; *Voynov v. Russia*, 39747/10, 3 July 2018; and *Shmelev and Others v. Russia* (dec.), 41743/17, 17 March 2020, Legal Summary)

Exhaustion of domestic remedies/ Épuisement des voies de recours internes

Complaint aimed at not applying a federal statutory provision in applicant's case lodged with a constitutional court of a *Land*, instead of the Federal Constitutional Court: *inadmissible*

Introduction devant la cour constitutionnelle d'un *Land* plutôt que devant la cour constitutionnelle fédérale d'une plainte visant à obtenir qu'une disposition législative fédérale ne soit pas appliquée : *irrecevable*

Köhler – Germany/Allemagne, 3443/18, Decision/Décision 7.9.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant was born in the former German Democratic Republic and taken into care by the then competent authorities. Following the German reunification and the applicant attaining full age, she was adopted by her foster mother. Some years later, after having found out about the particular circumstances of being taken into care and the unlawfulness of that order, she applied for an annulment of the adoption. This was dismissed by the family courts as being time-barred under Article 1762 § 2 of the Civil Code. The Berlin Constitutional Court dismissed her constitutional complaint. The applicant complained that the strict application of the time-limit for an annulment of her adoption violated her right to respect for her family life.

Law – Article 35 § 1: In view of the Government's non-exhaustion objection that the applicant ought to have complained directly to the Federal Constitutional Court instead of applying before the Berlin Constitutional Court, the Court had to determine whether they had submitted any arguments that would indicate that constitutional complaints before these two courts did not have "essentially the same objective", that is to say, whether the remedy at the federal level would have added any essential elements that were unavailable through the use of the remedy before the constitutional court of the *Land* of Berlin.

Pursuant to the uncontested submission of the Government, the Federal Constitutional Court had the sole prerogative to declare provisions of federal law unconstitutional and the pertinent provision of the Civil Code was federal law with an unequivocal wording, which left thus no leeway for divergent interpretations. The Federal Constitutional Court, in its decision of 15 October 1997 (clarifying the scope of constitutional review by the constitutional courts of *Länder*), on which the applicant had relied, had specified that a constitutional court of a *Land* was competent to review the courts' application of federal procedural law on the basis of the applicant's rights in the Basic Law and his or her rights in the constitution of the *Land*, provided that the respective rights had the same content . However, in the instant case the application of procedural law had not been in issue before the Berlin Constitutional Court as the applicant's complaint had rather aimed at not applying Article 1762 § 2 of the Civil Code in her case. This complaint had been closely linked to claiming the unconstitutionality of the pertinent provision. Further, according to her a hardship clause in the pertinent provision would have been necessary in view of the injustice suffered in the former GDR. The Government had thus demonstrated that the scope of review by the Federal Constitutional Court was wider and that a direct constitutional complaint at the federal level would have added essential elements that were unavailable through the use of the constitutional complaint to the Berlin Constitutional Court. At the same time, the applicant had failed to plausibly explain that a declaration of unconstitutionality by the Federal Constitutional Court would not have been relevant in the present case.

Consequently, the applicant had failed to exhaust the domestic remedies available to her.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

Exhaustion of domestic remedies/ Épuisement des voies de recours internes

Premature complaints on retrospective application of Constitutional Court case-law relating to inadequate prison condition remedies: *inadmissible*

Griefs prématurés relatifs à l'application rétroactive de la jurisprudence de la Cour constitutionnelle concernant les voies de recours pour conditions de détention inadéquates : *irrecevable*

Janković – Croatia/Croatie, 23244/16 et al., Decision/Décision 21.9.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicants alleged that they had been held in inadequate conditions of detention in several prison facilities. They all have proceedings currently pending before the domestic courts.

Law – Article 35 § 1: In the recent leading *Ulemek* judgment, the Court had elaborated extensively on the different aspects of its case-law concerning the effectiveness of remedies and compliance with the six-month rule in conditions of detention cases. Following a careful examination of the different practical aspects in the operation of those remedies at the relevant time, the Court had confirmed its earlier case-law as to the existence of effective remedies in Croatia concerning allegations of inadequate conditions of detention.

However, after the adoption of *Ulemek* there had been changes in the Constitutional Court's case-law. In decision no. U-III-2757/2018, adopted on 4 February 2020, the Constitutional Court had established the principle according to which an appellant cannot successfully raise his or her complaints of inadequate conditions of detention in a constitutional complaint after the use of a civil action for damages if he or she has not first properly exhausted the preventive remedy during his or her stay in detention. That contrasted with the Constitutional Court's earlier position – applicable at the time of the *Ulemek* assessment – according to which, for the purposes of the exhaustion requirement before lodging a constitutional complaint with it, appellants had not been required first to use the preventive remedy if they later availed themselves of a civil action for damages (the compensatory remedy) before the relevant civil court concerning allegations of inadequate conditions of detention.

The Court therefore had to determine whether the constitutional complaint was still an effective remedy which the applicants were required to exhaust for the purpose of Article 35 § 1.

The evolution of the Constitutional Court's case-law in the aforementioned decision was substantively in line with the Court's case-law in *Ulemek* concerning the complementary nature of the preventive and compensatory remedies in the context of conditions of detention. The effectiveness of the remedy before the Constitutional Court could not therefore be called into question from the perspective of the manner in which the Constitutional Court had construed the duty of exhaustion of the preventive and compensatory remedies available before the lower authorities.

However, the Court shared the applicants' concerns as regards the retroactive nature of the Constitutional Court's new case-law. The leading decision in the case no. U-III-2757/2018 had been adopted in February 2020 with regard to a case introduced in 2018.

The Court had held that in cases like the present one, where the remedy in question had been the result of interpretation by the courts, it normally took six months for such a development of the case-law to acquire a sufficient degree of legal certainty before the public might be considered to be effectively aware of the domestic decision which had established the remedy and the persons concerned be enabled and obliged to use it. As decision no. U-III-2757/2018 had been published on 10 March 2020, no issue as regards the effectiveness of the constitutional complaint arose for those applicants who would be in a position to use the relevant remedies after 10 September 2020.

On the other hand, in the absence of a transitionary period or any indication as regards the manner in which decision no. U-III-2757/2018 would apply in time, the retrospective application of the admissibility criteria for a constitutional complaint established in that decision raised an issue of effectiveness of the constitutional complaint for all applicants who would use the compensatory remedy but have not used the preventive remedy before 10 September 2020, and were no longer in a position to do so with respect to the particular conditions of detention. For those applicants, the retrospective application of the Constitutional Court's leading case-law raised an issue of foreseeability, and thus effectiveness, of the constitutional complaint as a remedy in the conditions of detention context.

However, despite those concerns, the Court found it inappropriate, at this stage, to consider the constitutional complaint to be an ineffective remedy due to the retrospective application of that case-law. In that connection the Court was in particular mindful of the evolving nature of the Constitutional Court's case-law in that context and the substantive adequacy of the findings in decision no. U-III-2757/2018. The primary responsibility for protecting the rights set out in the Convention lay with the domestic authorities and, in order to comply with the principle of subsidiarity, the applicants were in principle required to afford the Constitutional Court, as the highest court in Croatia, the opportunity to remedy their situation.

Nevertheless, the Court would be prepared to change its approach as to the effectiveness of the remedy in question for applicants in the situation described above, should the practice of the Constitutional Court show that constitutional complaints were being continually refused on the

basis of the retroactive application of the case-law in decision no. U-III-2757/2018, without the elaboration of a transitory period or any indication as regards the manner in which the case-law would apply in time.

Having regard to the above considerations, and the fact that the present applicants' cases were pending either before the civil courts or the Constitutional Court, the applicants' complaints under Articles 3 and/or 8 were premature.

Conclusion: inadmissible (failure to exhaust domestic remedies).

The Court also decided, unanimously, that the applicants' complaint under Article 13 was manifestly ill-founded.

(See also *Ulemek v. Croatia*, 21613/16, 31 October 2019, Legal Summary, and *Kirinčić and Others v. Croatia*, 31386/17, 30 July 2020)

ARTICLE 37

Restore to list/Réinscription au rôle

Rejection by the Court of Cassation of a request for reopening of the proceedings, rendering meaningless the Government's commitments in their unilateral declaration: *restoration to the list*

Rejet par la Cour de cassation de la demande en réouverture de la procédure rendant vain les engagements du Gouvernement contenus dans sa déclaration unilatérale : *réinscription au rôle*

Willems and/et Gorjon – Belgium/Belgique, 74209/16 et al., Judgment/Arrêt 21.9.2021 [Section III]

English translation of the summary – Version imprimable

En fait – Les requérants introduisirent chacun une requête devant la Cour alléguant que le rejet de leurs pourvois en cassation contre l'arrêt les ayant condamnés au pénal avait constitué un formalisme excessif et les avait privés de leur droit d'accès à la Cour de cassation.

Par sa déclaration du 5 septembre 2017, le Gouvernement a reconnu que « le rejet par la Cour de cassation des pourvois des requérants comme étant irrecevables au motif que l'avocat signataire n'avait pas mentionné être titulaire de l'attestation de formation requise n'a pas garanti le respect de leur droit d'accès à un tribunal tel que prévu par l'article 6 de la Convention ». Il s'est en outre engagé à verser à chacun des requérants la somme de 8 000 euros, somme qui couvrirait le préjudice moral ainsi que les frais et dépens.

Par sa décision du 13 mars 2018, la Cour a pris acte de la déclaration du Gouvernement, en indiquant qu'elle pouvait réinscrire les requêtes au rôle dans le cas où le Gouvernement ne respecterait pas les termes de sa déclaration unilatérale.

Le 7 novembre 2018, la Cour de cassation déclara les demandes de réouverture introduites par les requérants à la suite de la décision de radiation de la Cour du 13 mars 2018 sans fondement et dit n'y avoir pas lieu à ordonner la réouverture de la procédure. La haute juridiction a aussi considéré qu'exiger que la qualité d'avocat attesté soit ainsi prouvée ne posait pas de problème en termes de droit d'accès à un tribunal. Son arrêt du 1er juin 2016 déclarant les pourvois irrecevables était donc conforme aux exigences de la Convention.

Le 28 mai 2019, la Cour accéda à la demande des requérants et réinscrit leur affaire au rôle.

Dans le même temps, les requérants saisirent la Cour de nouvelles requêtes, se plaignant que l'arrêt de la Cour de cassation du 7 novembre 2018 les avait mis dans l'impossibilité d'obtenir la réouverture des procédures pénales dirigées contre eux et les avait donc privés de leur droit d'accès à un tribunal au sens de l'article 6 § 1 de la Convention.

En droit

Article 37 § 1 : La présente affaire soulève la question de savoir quels sont les effets de la déclaration faite par le Gouvernement et de la décision de la Cour prenant acte de cette déclaration. La particularité de la déclaration litigieuse est qu'elle a été faite par le Gouvernement, mais que sa mise en œuvre dépendait en partie d'une décision à prendre par un organe du pouvoir judiciaire, en l'espèce la Cour de cassation. Celle-ci a estimé qu'elle n'était liée ni par la déclaration unilatérale du Gouvernement ni par la décision de la Cour qui en avait pris acte.

Quant à la déclaration unilatérale du Gouvernement, la Cour de cassation a considéré que « le principe de la séparation des pouvoirs implique que le pouvoir judiciaire n'est lié ni par l'interprétation que l'administration donne de la Convention ni par son affirmation suivant laquelle un juge aurait méconnu celle-ci ». Même si la notion de séparation des pouvoirs exécutif et judiciaire a pris une importance particulière dans la jurisprudence de la Cour, il s'agit en l'espèce d'un principe général de droit interne belge auquel la Cour de cassation se réfère. La détermination du contenu exact de ce principe relève de la marge d'appréciation dont disposent les États contractants. Il n'appartient pas à la Cour de s'immiscer dans cette question de droit interne. Elle ne peut que prendre acte de la position adoptée par la Cour de cassation et en tirer

les conséquences qui s'imposent sous l'angle de la Convention.

Quant à la décision de la Cour prenant acte de la déclaration unilatérale, la Cour de cassation a considéré que « la décision de radiation du 13 mars 2018 n'est pas revêtue de l'autorité de la chose interprétée. La Cour européenne ne décide pas que l'article 425 § 1er alinéa 2 du code d'instruction criminelle (CIC) méconnaît le droit d'accès à un tribunal. Elle n'interdit pas d'exiger que la preuve de l'attestation prévue par cet article soit fournie par une mention portée dans les écrits de procédures visés aux articles 423 et 429 dudit code et déposés dans les formes prescrites par ceux-ci. »

Il est vrai que dans sa décision, la Cour n'a pas examiné les griefs des requérants aux fins de déterminer s'ils étaient recevables et fondés, et elle n'a pas pris de décision à cet égard. Sur ce point, sa décision n'avait donc pas l'autorité de la chose jugée ou de la chose interprétée. La Cour a toutefois examiné « la nature des concessions figurant dans la déclaration unilatérale, le caractère adéquat de l'indemnité proposée et la question de savoir si le respect des droits de l'homme exige qu'elle poursuive l'examen de la requête conformément aux critères susmentionnés ».

Certes, la décision du 13 mars 2018 ne constituant pas un arrêt constatant une violation de la Convention, elle ne tombe pas sous l'empire de l'article 46 de la Convention. Néanmoins, dans l'esprit d'une responsabilité partagée des États et de la Cour pour le respect des droits de la Convention, les requérants sont en droit d'attendre des autorités nationales, y compris des juridictions nationales, qu'elles donnent effet de bonne foi à tout engagement pris par le Gouvernement dans des déclarations unilatérales et a fortiori dans des règlements amiables. Cette attente sera d'autant plus forte que les questions juridiques en jeu font partie de la jurisprudence établie de la Cour concernant l'État défendeur ou d'autres principes généralement applicables. De plus, en l'espèce, il y a des parallèles entre la décision précitée et un arrêt constatant une violation.

Lorsqu'elle constate une violation de la Convention, la Cour n'a pas compétence pour ordonner la réouverture d'une procédure interne. Toutefois, lorsqu'un particulier a été condamné à l'issue d'une procédure entachée de manquements aux exigences de l'article 6 de la Convention, la Cour peut indiquer qu'un nouveau procès ou une réouverture de la procédure, à la demande de l'intéressé, représente en principe un moyen approprié de redresser la violation constatée. Cependant, les mesures de réparation spécifiques à prendre, le cas échéant, par un État défendeur pour s'acquitter des obligations qui lui incombent en vertu de l'article 46 dépendent nécessairement des circonstances particulières de la cause. En particulier, il n'appartient pas à la Cour d'indiquer les modalités et la forme d'un nouveau procès éventuel. L'État défendeur demeure libre de choisir les moyens de s'acquitter de son obligation de placer le requérant, le plus possible, dans une situation équivalant à celle dans laquelle il se trouverait s'il n'y avait pas eu manquement aux exigences de la Convention, pour autant que ces moyens soient compatibles avec les conclusions contenues dans l'arrêt de la Cour et avec les droits de la défense.

En l'espèce, dans sa décision du 13 mars 2018, la Cour s'est référée à sa jurisprudence sous l'article 46, selon laquelle « la réouverture de la procédure devant les juridictions nationales est le moyen le plus approprié, sinon le seul, d'assurer la *restitutio in integrum* et de redresser les violations du droit à un procès équitable ». Elle a également constaté que le droit interne ne s'opposait pas par principe à une réouverture de la procédure en cas de radiation de l'affaire de son rôle sur base d'une déclaration unilatérale du Gouvernement.

Les requérants ayant demandé la réouverture de la procédure pénale menée contre eux, il incombait aux organes compétents, en l'espèce la Cour de cassation, de tirer les conséquences dans l'ordre juridique interne de la déclaration unilatérale du Gouvernement et de la décision de la Cour qui en avait pris acte. Cette tâche s'inscrivait dans le partage des responsabilités entre les autorités nationales et la Cour en ce qui concerne la garantie du respect des droits et libertés définis dans la Convention et ses protocoles, et plus particulièrement dans la responsabilité primaire des autorités nationales à cet égard.

Or, en l'espèce, la Cour de cassation s'est livrée à un examen du grief dirigé par les requérants contre son arrêt du 1er juin 2016. Elle a conclu qu'il n'apparaissait pas de cet examen que cet arrêt soit contraire sur le fond à la Convention ni qu'il soit entaché d'une violation résultant d'une erreur ou d'une défaillance grave.

Le rejet par la Cour de cassation de la demande en réouverture de la procédure a pour effet que les engagements du Gouvernement contenus dans sa déclaration unilatérale sont restés sans effet utile dans l'ordre juridique interne. Il s'agit là d'une « circonstance exceptionnelle » qui a conduit la Cour, le 28 mai 2019, à réinscrire les requêtes initiales au rôle, à la demande des requérants. La Cour est ainsi appelée à examiner la recevabilité et le bien-fondé des griefs initiaux des requérants dirigés contre l'arrêt de la Cour de cassation du 1er juin 2016. Elle examinera ces griefs à la lumière notamment des

considérations développées par la Cour de cassation dans son arrêt du 7 novembre 2018, poursuivant ainsi le « dialogue judiciaire » que la haute juridiction a entamé avec ce dernier arrêt.

Article 6 § 1 : L'avocat des requérants disposait de l'attestation requise pour introduire des pourvois en cassation au moment où il avait formé ceux des requérants. Il a été reproché aux requérants d'avoir commis une erreur procédurale en ne prouvant pas la qualité d'avocat attesté de leur représentant par la mention de sa possession dans les écrits auxquels la Cour de cassation pouvait avoir égard.

Les termes de l'article 425 § 1er alinéa 2 du CIC n'imposent pas qu'il apparaisse des pièces de la procédure que l'avocat est titulaire de l'attestation de la formation requise. Ni le site internet de la Cour de cassation ni le règlement de la formation ne contient d'information au sujet d'une telle exigence. De plus, au moment où leur avocat a formé les pourvois – soit dix jours après l'entrée en vigueur des modifications apportées à l'article 425 § 1er alinéa 2 du CIC – et pendant les deux mois qui ont suivi, aucune autre décision n'est intervenue qui aurait permis de prévoir la nécessité d'indiquer que leur avocat était titulaire de l'attestation.

Cela étant dit, un élément qui pèse lourdement dans l'appréciation de la proportionnalité de la sanction est que le site internet de la Cour de cassation explique que la liste des avocats titulaires de l'attestation peut être consultée sur les sites internet respectifs des ordres des barreaux des avocats et contient un lien direct vers lesdits sites. En d'autres termes, la Cour de cassation fournissait elle-même la possibilité de rechercher par une simple consultation via son propre site internet si la règle nouvellement introduite pour accéder à son office était respectée en l'espèce.

Dans ces circonstances, au vu des conséquences qu'a entraînées l'irrecevabilité des pourvois en cassation pour les requérants – lesquels n'ont pas pu dans le contexte d'un procès pénal faire entendre leurs moyens de cassation par la haute juridiction interne –, lorsqu'elle a ainsi sanctionné l'erreur procédurale commise par eux, la Cour de cassation a rompu le juste équilibre entre, d'une part, le souci légitime d'assurer le respect des exigences procédurales entourant l'introduction d'un pourvoi en cassation et, d'autre part, le droit d'accès au juge, faisant ainsi preuve d'un formalisme excessif en ce qui concerne les exigences procédurales entourant la recevabilité des pourvois en cassation.

Dans la mesure où les requérants se plaignent du refus même de la réouverture de la procédure, il s'agit de griefs nouveaux et détachables de ceux qui ont été invoqués dans leurs requêtes initiales. Toutefois, eu égard à sa décision concernant la procédure initiale devant la Cour de cassation, la Cour estime qu'il n'est pas nécessaire d'en examiner la recevabilité ni le bien-fondé.

Conclusion : violation (unanimité).

Article 46 : Lorsqu'un particulier a été condamné à l'issue d'une procédure entachée de manquements aux exigences de l'article 6, un nouveau procès ou une réouverture de la procédure à la demande de l'intéressé représente en principe un moyen approprié de redresser la violation constatée. Pour autant encore que de besoin, l'article 442*bis* du CIC ouvre la possibilité d'une réouverture de la procédure menée contre un condamné, en ce qui concerne la seule action publique, s'il a été établi par un arrêt définitif de la Cour que la Convention a été violée. La mise en œuvre de cette possibilité en l'espèce sera examinée, le cas échéant, par la Cour de cassation au regard du droit national et des circonstances particulières de la présente affaire.

Article 41 : demande de dommage matériel rejetée.

(Voir aussi *Jeronovičs c. Lettonie* [GC], 44898/10, 5 juillet 2016, Résumé juridique)

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

Peaceful enjoyment of possessions/ Respect des biens

Supreme Court's failure to follow its own clear line of case-law resulting in applicants' inability to obtain statutory additional compensation for expropriated property: *violation*

Impossibilité pour les requérants d'obtenir l'indemnité complémentaire légale d'expropriation, en raison d'un manquement de la Cour suprême à suivre sa propre jurisprudence constante : *violation*

Aliyeva and Others/et autres – Azerbaijan/ Azerbaïdjan, 66249/16 et al., Judgment/Arrêt 21.9.2021 [Section V]

Traduction française du résumé – Printable version

Facts – In 2011 the Head of the Baku City Executive Authority ("the BCEA") issued orders requiring the applicants to vacate their properties. On the basis of those orders, the applicants concluded sale and purchase contracts with the Deputy Head of the BCEA. The applicants wrote to the BCEA several years later that their flats had been expropriated for State needs and asking for additional compensation under Article 2.3 of Presidential Decree no. 689 of 26 December 2007 and under Article 66 of the

Law on the Expropriation of Land for State Needs. The BCEA refused to pay any additional compensation. The applicants subsequently initiated separate proceedings before the domestic courts against the BCEA and the Ministry of Finance as a third party. At first instance, some of the applicants' claims were successful, either fully or partially, while others were dismissed in full. The cases were appealed up to the Supreme Court, which ruled against the applicants.

Law – Article 1 of Protocol No. 1

(a) *Applicability*

(i) *Additional 20% compensation under the 2007 Presidential Decree* – Article 2.3 of the 2007 Presidential Decree entitled a person whose property had been expropriated for State needs to additional compensation. The compensation appeared to be essentially a fixed premium calculated at the rate of 20% of the market price of the expropriated property.

While the applicants' claims for additional compensation had been refused by final decisions of the Supreme Court on the basis of the conclusion that their properties had not been expropriated for State needs, in a number of other cases, the Supreme Court had upheld the lower courts' judgments allowing additional compensation claims lodged by other individuals living in the same neighbourhood as the applicants who had similarly been affected by the BCEA's order and had claimed the same compensation relying on the same grounds. In those latter cases, the Supreme Court had concluded that, despite the authorities' failure to follow the relevant expropriation procedure and, in particular, the absence of an expropriation order by the Cabinet of Ministers, the property in question had indeed been expropriated for State needs. Moreover, in one of its decisions the Supreme Court had also referred to the existence of previous similar cases in which compensation claims had been allowed. The Government had not argued that such an approach, which appeared to recognise the existence of a legitimate expectation for the applicants to obtain the 20% compensation they claimed, had been the result of an isolated judicial error or that it had for some reason been irrelevant to the applicants' cases. The applicants' claim to additional 20% compensation had been supported by a clearly identifiable line of Supreme Court case-law.

Further, in the cases of *Akhverdiyev* and *Khalikova*, the applicants' house and flat respectively had been demolished following similar orders issued by the BCEA. Particularly in the *Akhverdiyev* case, the Government had expressly argued before the Court that the applicants' properties had been lawfully "expropriated … for public needs" by the BCEA. Having regard to the fact that the circumstances in which the alienation of privately owned properties had occurred in those cases and in the present cases had to a large extent been similar (that is, the alienation and deprivation of title had been initiated pursuant to orders by the BCEA and in *Khalikova* a sale and purchase contract had eventually been signed), the Government's position on the question whether the alienation could be characterised under domestic law as expropriation for State or public needs had been inconsistent.

The refusal to award compensation to the applicants had not been due to any long-standing divergence of domestic case-law resulting from various interpretations by the domestic courts of the relevant legal provision, as it had not been demonstrated that there had been any conflicting interpretations of that provision. The refusal had stemmed from the domestic courts', and notably the Supreme Court's conclusions in those particular cases, departing from its findings in previous similar cases, that the Decree had been inapplicable in the applicants' situation because that situation had not amounted to expropriation for State needs.

In the light of the above, for the purposes of the present complaint, the applicants' position that their flats had, in fact, been expropriated for State needs by the BCEA, acting on behalf of the State, and that therefore they had been entitled to the additional 20% compensation, had amounted to a "legitimate expectation" which had been sufficiently established in domestic law and a sufficient body of domestic case-law to give rise to the notion of "possessions" within the meaning of Article 1 of Protocol No. 1.

(ii) *Compensation for hardship under the Law on Expropriation* – Under the relevant provisions of the Law on Expropriation, the "expropriating authority" was an authority appointed by the Cabinet of Ministers in its expropriation order. No such order had been issued in the present cases and the applicants had eventually submitted their claims to the BCEA, which had no competence to expropriate private property of its own motion. The applicants had also brought their claims for compensation long after any period for doing so would have expired. Further, while there had existed a sufficient body of domestic case-law which, together with the applicable domestic legal provisions, had constituted a sufficient basis for the applicants' claims under the Presidential Decree, the same could not be said in respect of their claims for compensation under the Law on Expropriation. In fact, in only three cases brought by other individuals affected by the BCEA's orders had similar claims been eventually allowed.

In sum, the applicants had failed to demonstrate convincingly that at the time of lodging their claims they could have a "legitimate expectation" of obtaining compensation for hardship under the law on Expropriation.

(b) *Merits* – The Court had to decide whether the refusal to pay the additional 20% compensation had itself constituted an interference with the applicants' right to peaceful enjoyment of their possessions. The applicants' complaints were mainly focused on the inconsistent approach of the domestic courts and alleged arbitrariness of their decisions. Therefore, the existence of interference depended on whether the domestic courts had indeed decided arbitrarily.

The parties had disagreed as to whether the situation at hand could be regarded as expropriation for State needs. As seen, the Court had concluded that the applicants' claim that the flats had been expropriated for State needs had at least been supported by a line of Supreme Court case-law. In those circumstances, it had been essential that the domestic courts to which the applicants turned for protection would provide a clear and comprehensive answer regarding the question whether the applicants were entitled to the additional 20% compensation payment they claimed.

However, the domestic courts, and more specifically the Supreme Court, which was the highest judicial body to which the applicants had ordinary recourse, had delivered judgments containing conflicting assessments of the same situation in the applicants' cases and in cases brought by other individuals.

Moreover, despite the applicants' direct references to previous final decisions in which similar claims had been allowed, the Supreme Court had remained silent in its decisions concerning their cases and had not made any clarifications as to why it had reached a different conclusion in the present cases.

The Court had already stressed that the role of a supreme court is precisely to resolve such conflicts and if conflicting practice develops within one of the highest judicial authorities in a country, that court itself becomes a source of legal uncertainty, thereby undermining the principle of legal certainty and weakening public confidence in the judicial system. It had also held that where such manifestly conflicting decisions interfered with the right to peaceful enjoyment of possessions and no reasonable explanation was given for the divergence, such interferences could not be considered lawful for the purpose of Article 1 of Protocol No. 1 because they lead to inconsistent case-law which lacks the required precision to enable individuals to foresee the consequences of their actions.

In the light of the above, the domestic courts' decisions, and in particular the relevant decisions of the Supreme Court, refusing the applicants' claims, had constituted an interference with their right to peaceful enjoyment of their possessions under Article 1 of Protocol No. 1. Such interference was incompatible with the principle of lawfulness and hence contravened Article 1 of Protocol No. 1.

Conclusion: violation (unanimously).

Article 41: Sums ranging between EUR 3,640 and EUR 7,930 to each applicant in respect of pecuniary damage; EUR 3,000 to each applicant in respect of non-pecuniary damage.

(See *Khalikova v. Azerbaijan*, 42883/11, 22 October 2015, and *Akhverdiyev v. Azerbaijan*, 76254/11, 21 March 2019)

Control of the use of property/Réglementer l'usage des biens

No reasonable opportunity to challenge or seek compensation for national bank's extraordinary measures cancelling shares and bonds: *violation*

Absence de possibilité raisonnable de contester ou de demander réparation pour des mesures extraordinaires par lesquelles la banque nationale avait annulé des parts et des titres : *violation*

Pintar and Others/et autres – Slovenia/Slovénie, 49969/14 et al., Judgment/Arrêt 14.9.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants were holders of shares or subordinated bonds in three Slovenian banks which had applied for State aid. In 2013 and 2014, the Bank of Slovenia adopted decisions putting in place extraordinary measures, including in respect of the three banks, which reduced their share capital to zero. The decisions were adopted within the framework of domestic legislation, following a communication from the European Commission. They referred to an EU Council Recommendation, as well as asset quality review ("the AQR") and stress test results carried out under the leadership of a steering committee, which included the Commission, the European Banking Authority and the European Central Bank. The former holders were not granted access to several documents underpinning the decisions. The applicants brought various, unsuccessful and pending legal actions at domestic level.

In 2016 the Constitutional Court found that certain relevant provisions of the domestic law were inconsistent with the Constitution, including in rela-

tion to the lack of availability of a legal avenue for former holders. Subsequently, the Act on Judicial Protection Procedure for Former Holders of Eligible Liabilities of Banks ("the 2020 Remedy Act") was adopted – its implementation has been suspended by the Constitutional Court pending a review of its constitutionality.

Law – Article 1 of Protocol No. 1

(a) *Existence of "possessions" and interference with the right to property* – The shares could be considered a "possession" within the meaning of Article 1 of Protocol No. 1, even on the assumption that the Government's view that they had no economic value was valid. As regards the bonds, the bondholders in principle had had a "legitimate expectation" to have their claims met in accordance with the contractual clauses (see, *mutatis mutandis*, *Mamatas and Others v. Greece*). The Government had suggested that, due to their financial situation, the banks would not be able to honour their obligations towards the bondholders to any degree. However, in the absence of any domestic judicial ruling on that point and having regard to the limited information in its possession, the Court was not in a position to conclude that the bonds in question had no economic value. Article 1 of Protocol No. 1 was therefore applicable to the present case and the cancellation of the applicants' shares or bonds had amounted to an interference with their right guaranteed by that provision.

(b) *Compliance with Article 1 of Protocol No. 1* – The impugned decisions of the Bank of Slovenia had clearly been taken with the aim of controlling the banking sector in the country. While they might have involved a deprivation of property, in the circumstances, the deprivation had formed a constituent element of a scheme for controlling the banking industry. The measure in question therefore had constituted control of the use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1. The Court assessed it in the light of the general principle of the peaceful enjoyment of property, with which it was connected.

The Bank of Slovenia's decisions had had a basis in domestic law, which had been found by the Constitutional Court to be compatible with the Constitution and which met the qualitative requirements of accessibility and foreseeability. However, the requirement of lawfulness also presupposed that the domestic law had to provide a measure of legal protection against arbitrary interferences by the public authorities with the rights safeguarded by the Convention. The Court had to determine, taking a comprehensive view of the applicable procedures, whether the interference had been accompanied by procedural guarantees affording a reasonable opportunity for the applicants to present their case to the responsible authorities for the purpose of effectively challenging the impugned measures.

The Constitutional Court had assessed the legal provisions on which the extraordinary measures had been based, however, it had not assessed whether the impugned measures had in fact been justified in the circumstances pertaining at the relevant time with respect to each of the banks in question. According to the Government, the only way for the applicants to challenge the decisions interfering with their possessions had been to lodge a compensation claim against the Bank of Slovenia under section 350a of the Banking Act. However, as found by the Constitutional Court, the former holders had not been in a position to effectively dispute the grounds on which the Bank of Slovenia's decisions had been based as they had lacked access to crucial information, such as the reports of an AQR and the stress tests. The Constitutional Court had also found several further shortcomings in the proceedings under the then applicable legislation and had concluded that it had not provided the former holders with effective judicial protection. It had ruled that specific legislation would need to be adopted in order to provide an effective remedy. The Court saw no reason to depart from the Constitutional Court's finding that the legislation, without further appropriate regulation of the proceedings, had not provided the applicants with a legal avenue to effectively challenge the measures in question. Further, although the Constitutional Court had given the legislator a deadline of six months to bring about the appropriate legislation, the law implementing its decision – the 2020 Remedy Act – had been adopted only three years later. The Act, while representing an important development, had so far had no real consequences for the former holders, including the applicants. That was so because, further to the petition lodged by the Bank of Slovenia, the Constitutional Court had suspended its implementation in March 2020.

The Court was mindful of the fact that the provision of an effective remedy in the present case had been bound up with complex questions regarding the respect for various principles under EU law; and that the Court of Justice of the European Union (CJEU) had provided a preliminary ruling within the proceedings leading to the 2016 decision of the Constitutional Court and had again been requested to do so in the proceedings concerning the review of the constitutionality of the 2020 Remedy Act. However, the respondent State had remained responsible for securing the former holders' rights under Article 1 of Protocol No. 1. That obligation, including its procedural aspect, had been triggered

when the bank's extraordinary measures had been envisaged, and yet those measures had not been accompanied by sufficient procedural guarantees against arbitrariness. The former holders, who had lost their shares or bonds in 2013 or 2014, had so far had no effective access to a meaningful legal avenue to dispute the grounds for such measures and claim compensation, let alone obtain a final determination of their claims.

Having regard to the above considerations, four of the applicants could not be reproached for not lodging the compensatory remedy – a possibility which remained open to them in view of the 2016 Decision and the provisions of the 2020 Remedy Act. Indeed, access to such a remedy had thus far been theoretical at most.

The Court found that neither the compensatory remedy nor any of the other remedies which had been tried by some applicants had provided for a reasonable opportunity to challenge the Bank of Slovenia's impugned decisions and/or seek compensation. Given that finding, the Court would not address specific elements of the remedy provided by the 2020 Remedy Act, even more so since the review of that Act was currently pending before the Constitutional Court.

The interference with the applicants' possessions had not been accompanied by sufficient procedural guarantees against arbitrariness and had thus not been lawful within the meaning of Article 1 of Protocol No. 1. It was thus neither necessary nor, due to the lack of relevant information, possible, for the Court to ascertain whether the other requirements of that provision had been complied with. The Court accordingly refrained from expressing any opinion as to whether the extraordinary measures, as a result of which the applicants' shares and bonds had been cancelled, had been in the general interest and, if so, whether a fair balance had been struck between the demands of the general interest of the community, and the protection of the applicants' right to peaceful enjoyment of their possessions (see, *mutatis mutandis*, *Project-Trade d.o.o v. Croatia*).

Conclusion: violation (unanimously).

Article 46: The violation affected thousands of former holders of the cancelled shares and bonds. It was therefore essential that they had access to a legal avenue enabling them to effectively challenge the interference with their right to property. Such access had to be provided in practice as soon as that became possible. Having regard to the time that had elapsed since the impugned measures had been taken, it was particularly important that the appropriate arrangements were made in order to ensure that the proceedings, once initiated or resumed, were conducted without any further unnecessary delays.

Article 41: Sums ranging between EUR 1,000 and EUR 3,000 to each applicant in respect of non-pecuniary damage.

(See *Mamatas and Others v. Greece*, 63066/14 et al., 21 July 2016, Legal Summary, and *Project-Trade d.o.o. v. Croatia*, 1920/14, 19 November 2020, Legal Summary)

ARTICLE 2 OF PROTOCOL No. 4/ DU PROTOCOLE N° 4

Article 2 § 1

Freedom of movement/Liberté de circulation

Placement under home curfew of far-left activists during the state of emergency declared following jihadist terror attacks: *communicated*

Assignation à résidence d'activistes d'ultra gauche dans le contexte de l'état d'urgence proclamé à la suite d'attentats djihadistes : *affaires communiquées*

Domenjoud – France, 34749/16 and/et 79607/17, Communication [Section V]

(See Article 15 below/Voir l'article 15 ci-dessous, page 24)

ARTICLE 4 OF PROTOCOL No. 7/ DU PROTOCOLE N° 7

Right not to be tried or punished twice/ Droit à ne pas être jugé ou puni deux fois

Proceedings and penalties forming part of a coherent and proportionate whole to punish individual acts and patterns of domestic violence: *no violation*

Dualité de procédures et de peines s'inscrivant dans un ensemble cohérent et proportionné visant à réprimer des actes individuels et systématiques de violence domestique : *non-violation*

Galović – Croatia/Croatie, 45512/11, Judgment/ Arrêt 31.8.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant was found guilty of a series of minor offences of domestic violence under the Pro-

tection against Domestic Violence Act against his wife and children over the course of a number of years, and, in particular, for two incidents occurring in January 2008 and on 3 November 2008. He was subsequently also convicted for several counts of domestic violence, as defined in the Criminal Code, for events taking place between February 2005 and 3 November 2008. He appealed unsuccessfully.

Law – Article 4 of Protocol No. 7: All of the proceedings concerned had been criminal in nature. The Court also accepted that the facts in the subsequent criminal proceedings had in part been identical to the facts in the two sets of minor-offence proceedings complained of. The domestic courts had sought to show that the applicant's conduct, which had been sanctioned on a number of occasions in minor-offence proceedings, had eventually reached the threshold of seriousness so as to be considered and punished under criminal law: the facts for which the applicant had already been convicted had formed an integral part of those subsequent proceedings on indictment. The Court therefore had to examine whether there had been a duplication (*bis*) of the proceedings.

The purpose of the minor-offence proceedings had been to provide a prompt reaction to a particular incident of domestic violence that in itself had not amounted to any criminal offence under the Criminal Code in order to timely and effectively prevent further escalation of violence within the family and to protect the victim. That is what had been done in the applicant's case on a number of separate occasions. Once the applicant's unlawful behaviour had reached a certain level of severity, the proceedings on indictment had been initiated against him, aimed at addressing an ongoing situation of violence in a comprehensive manner. The individual incidents sanctioned in two sets of minor-offence proceedings complained of, taken together with other incidents, had demonstrated a pattern of behaviour and contributed to the assessment of the seriousness of the applicant's criminal conduct and only in their entirety had they reflected the cumulative impact on his victims. In those circumstances the Court had no cause to call into question the reasons for such partial duplication of the proceedings.

As regards the question of whether duality of the proceedings had been foreseeable for the applicant, having behaved violently towards close family members on a number of occasions, the applicant should have been aware that his conduct could have entailed consequences such as the institution of minor-offence proceedings for a particular individual incident under the Protection against Domestic Violence Act and criminal proceedings for continuous and repeated behaviour of domestic violence criminalised under the Criminal Code.

As to the manner of conducting the proceedings, the criminal court had taken note of all the previous minor-offence judgments against the applicant and had used certain documentary evidence from those proceedings. The fact that the criminal court decided again to hear certain witnesses at the trial might be regarded as an inherent feature of proceedings on indictment and a requirement safeguarding the rights of the accused under Article 6. The interaction and coordination between the two courts had therefore been adequate and that the two sets of proceedings had formed a coherent whole. Consequently, the applicant had not suffered a disadvantage associated with the duplication of proceedings, beyond what had been strictly necessary.

As regards the sanctions imposed, each of the applicant's minor-offence convictions had taken into account the penalty imposed on him in the previous minor-offence proceedings. Subsequently, the criminal court had expressly acknowledged that the applicant had already been punished in five sets of minor offence proceedings. It had also deducted from his sentence the period which the applicant had spent in detention on the basis of the two minor offence convictions complained of. Consequently, the domestic courts had applied the principle of deduction and ensured that the overall amount of penalties imposed on the applicant had been proportionate to the seriousness of the offence concerned. It could not therefore be said that the applicant had been made to bear an excessive burden.

Finally, turning to the connection in time between the various sets of proceedings, the Court noted that the time element in the specific context of domestic violence bearing in mind its specific dynamics took on a particular meaning. What was important was for the domestic criminal-law system to effectively deal with instances of domestic violence, individually and in their aggregate, by producing adequate deterrent effects capable of ensuring the effective prevention of unlawful acts. The authorities had intervened, when informed, each time there had been an isolated incident of domestic violence in the family in order to provide immediate relief to its victims. After a number of incidents occurring relatively close together in time (over a period of some three years) had reached a certain degree of severity and "culminated" in the event of 3 November 2008, the authorities had initiated the last set of minor-offence proceedings, and, about a month thereafter, the proceedings on indictment for the continuous offence of domestic violence under the Criminal Code. In fact, the criminal investigation had started in December 2009 after the domestic court had found the applicant

guilty of domestic violence in respect of the last incident and he had been indicted in January 2009, two days before the judgment in the minor offence proceedings had become final. Any disadvantage that might have ensued for the applicant from conducting those two proceedings in parallel for such a short period of time had thus been negligible. The criminal proceedings thereafter had continued for eight months at first instance and another two and half years on appeal and before the Constitutional Court. Thus, the various proceedings had been sufficiently connected in time so that the subsequent institution of criminal proceedings could not be seen as abusive.

Overall, the proceedings and penalties had formed a coherent and proportionate whole which had enabled punishing both the individual acts committed by the applicant and his pattern of behaviour in an effective, proportionate and dissuasive manner.

Conclusion: no violation (unanimously).

The Court also found that there had been no violation of Article 6 §§ 1 and 3 (b) and (c) as regards the brevity of the period during which the applicant had had to prepare his defence before the appeal court session; and a violation of Article 6 §§ 1 and 3 (c) as regards the applicant's absence from the appeal court session.

Article 41: EUR 1,500 in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

(See also *A and B v. Norway* [GC], 24130/11 and 29758/11, 15 November 2016, Legal Summary)

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

Interim measures/Mesures provisoires

Refusal of requests for interim measures in respect of the Greek law on compulsory vaccination of health-sector staff against Covid-19

Les demandes de mesures provisoires concernant la loi grecque sur l'obligation vaccinale du personnel de santé contre le Covid-19 ont été refusées

Press release – Communiqué de presse

ADVISORY OPINIONS/AVIS CONSULTATIFS

Court's advisory jurisdiction/Compétence consultative de la Cour

Questions concerning specification of the minimum requirements of protection of persons with mental disorders that States need to regulate: *request rejected as outside Court competence*

Demande de précision des exigences minimales de protection des personnes souffrant de troubles mentaux que les États doivent prévoir dans leur législation : *rejetée car ne relève pas de la compétence de la Cour*

Request for an advisory opinion under Article 29 of the Oviedo Convention/Demande d'avis consultatif au titre de l'article 29 de la Convention d'Oviedo, Decision/Décision 15.9.2021 [GC]

Traduction française du résumé – Printable version

Background – The Chair of the Council of Europe's Committee on Bioethics ("the DH-BIO") sought an advisory opinion under Article 29 of the Convention on Human Rights and Biomedicine ("the Oviedo Convention"), which provides that the European Court of Human Rights may give "advisory opinions on legal questions concerning the interpretation of the present Convention". The request posed two questions, both relating to persons who have a mental disorder:

(1) In light of the Oviedo Convention's objective "to guarantee everyone, without discrimination, respect for their integrity" (Article 1), which "protective conditions" referred to in Article 7 of the Oviedo Convention [protection of persons who have a mental disorder] does a Member State need to regulate to meet minimum requirements of protection?

(2) In case of treatment of a mental disorder to be given without the consent of the person concerned and with the aim of protecting others from serious harm (which is not covered by Article 7 but falls within the remit of Article 26(1) of the Oviedo Convention), should the same protective conditions apply as those referred to in question 1?

Decision – This was the first occasion on which use had been made of the procedure provided for in Article 29 of the Oviedo Convention.

(a) *The Court's jurisdiction under Article 29 of the Oviedo Convention* – The Court's constitutive instrument – the European Convention on Human Rights ("the Convention") – determines its function and jurisdiction through Articles 19, 32 and 47, and is silent regarding any jurisdiction for the Court outside the Convention system. However, those provisions did not expressly preclude, nor was it necessary to interpret them as completely precluding, the granting of jurisdiction to the Court by and in relation to another, closely-related human-rights treaty concluded within the framework of the Council of Europe.

In interpreting the Convention, the Court had to take into account any relevant rules of international law applicable in relations between the parties, in this context the provisions of Article 29 of the Oviedo Convention. While that interpretative principle had mostly been applied to the substantive provisions of the Convention, it was not without relevance to other types of provision, including the provisions on the jurisdiction of the Court. Furthermore, although the Oviedo Convention had not been ratified by all Contracting Parties to the Convention, as a Council of Europe treaty it had received the approval of and its text had been adopted by the Committee of Ministers. Moreover, there had been a common understanding among the relevant institutions that the intended advisory role for the Court was both legitimate and justified. The Court itself had been receptive to that in its opinion on the draft version of the Oviedo Convention, in which it had underlined the significant degree of common ground between that instrument and the Convention. It had considered at the time that, because of the shared concepts between the two instruments, an interpretative function for the Court in relation to the Oviedo Convention could promote a uniform interpretation of those concepts and avoid divergent interpretations of them under each convention.

While there were no specific procedural rules governing the present procedure in the Rules of Court, this was not determinative of the question of its jurisdiction under Article 29 of the Oviedo Convention. Given the silence of the Oviedo Convention in this respect, it was for the Court to regulate the procedure, by analogy with Article 25(d) of the Convention, which conferred rule-making power on the Court alone.

The Convention therefore did not preclude the granting of jurisdiction to it by the Oviedo Convention and the Court had jurisdiction to give advisory opinions under Article 29 of the latter.

(b) *The nature, scope and the limits of the Court's advisory jurisdiction* – Article 29 of the Oviedo Convention provides that the Court may give advisory opinions on "legal questions" that concern the "interpretation" of the "present Convention". It was necessary to establish the meaning of those terms in the context in which they are used.

The Court had already had occasion to clarify the nature of its advisory jurisdiction under the Convention, observing that the use of the adjective "legal" in Article 47 § 1 denoted the intention of the drafters to rule out any jurisdiction on the Court's part regarding matters of policy (see the advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights [GC], 12 February 2008). Furthermore, according to the Explanatory Report to Protocol No. 2, the term "legal questions" ruled out questions which would go beyond the mere interpretation of the text and tend by additions, improvements or corrections to modify its substance. The Court considered that a request under Article 29 of the Oviedo Convention was subject to a similar limitation.

With reference to the other terms used in Article 29 – "interpretation", "present Convention" – the Court's methodological approach entailed an exercise in treaty interpretation, applying the methods set out in the Vienna Convention. The Convention, over the interpretation and application of which Article 32 grants the Court full jurisdiction, is to be treated as a living instrument interpreted in the light of present-day conditions. The Court underlined that that particular interpretative approach, which is integral to its contentious jurisdiction, had to be regarded as specific to the Convention and the Protocols thereto. There was no similar basis in Article 29 to take the same approach. Rather, it is the "present Convention" that the Court might be requested to interpret. Compared to the Convention, the Oviedo Convention represented a different normative model, being a framework instrument setting out the most important principles, to be developed further with respect to specific fields through protocols (Article 31 of the Oviedo Convention).

Moreover, the Court could not operate the procedure provided for in Article 29 of the Oviedo Convention in a manner incompatible with the purpose of Article 47 § 2 of the Convention, which is to preserve its primary judicial function as an international court administering justice under the Convention. Notably, the concern was to reduce the risk of an interpretation that might hamper the Court at a later stage if the request originated in domestic proceedings that subsequently led to an application under the Convention.

At the same time, the advisory jurisdiction that had subsequently been conferred on the Court by Protocol No. 16 was to be clearly distinguished from that granted by the Oviedo Convention. In particular, the limits which applied to the latter and which were designed to preserve the judicial function of the Court could not apply in the same way to the Court's jurisdiction under Protocol No. 16, which served the purpose of reinforcing the implementation of the Convention in concrete cases pending before national courts, thereby enhancing the implementation of the principle of subsidiarity.

In sum, while the relevant provisions of the Convention did not completely preclude the confer-

ral of a judicial function on the Court in relation to other human rights treaties concluded within the framework of the Council of Europe, this was subject to the proviso that its jurisdiction under its constitutive instrument remained unaffected.

(c) *The Court's competence in respect of the present request* – While the request made no direct reference to any specific proceedings pending in a court, it remained to be determined whether it respected the nature, scope and limits of the Court's advisory jurisdiction. In order for the Court to be in a position to satisfy itself that it was indeed competent to accept a request, it needed to consider not only its wording and explanation, but also the background and context of the request.

The first question posed by the DH-BIO asked the Court to interpret the term "protective conditions", as used in Article 7 of the Oviedo Convention, so as to specify the minimum requirements of protection that the Parties need to regulate under that provision. However, the term could not be further specified by a process of abstract judicial interpretation. It was clear that that provision reflected the deliberate choice of the drafters to leave it to the Parties to determine, in further and fuller detail, the protective conditions applying in their domestic law in that context. The further elaboration and specification of the most important human rights and principles in the area of biomedicine, as set out in the Oviedo Convention, was, by its very nature, a legislative exercise, rooted in policymaking at the international level, aiming at the adoption of new international legal standards. In relation to non-consensual interventions for the purpose of treating persons with a mental disorder, that process was ongoing. A degree of latitude thus left to the States Parties could not, in the Court's view, be restricted by an interpretation of that provision by the Court in the sense requested. Its jurisdiction in that context excluded matters of policy and questions which would go beyond the mere interpretation of the text.

The DH-BIO had intimated that the Court should have regard to the Convention and to the relevant case-law. However, even though the procedure concerned the Oviedo Convention, and the Court's opinions under Article 29 are advisory, i.e. non-binding, a reply in such terms would still be an authoritative judicial pronouncement focused at least as much on the Convention itself as on the Oviedo Convention. The Court could not take such an approach, which had the potential to hamper its preeminent contentious jurisdiction under the Convention. The Court should not, as part of this exercise, interpret any substantive provisions or jurisprudential principles of the Convention. It followed that the Court could not, as suggested by the intervening organisations, treat the present request for an advisory opinion as an opportunity for it to modify its interpretation of certain provisions of the Convention for the sake of aligning it with the Convention on the Rights of Persons with Disabilities (CRPD), and then interpret Article 7 of the Oviedo Convention in like manner.

The Court nevertheless observed that the safeguards in domestic law that correspond to the "protective conditions" of Article 7 of the Oviedo Convention needed to be such as to satisfy, at the very least, the requirements of the relevant provisions of the Convention, as developed by the Court through its case-law and including those that imposed positive obligations on States. In relation to the treatment of mental disorder, the case-law was extensive and was characterised by the Court's dynamic approach to interpreting the Convention, which in this field was guided *inter alia* by evolving legal and medical standards, national and international.

Accordingly, question 1 was not within the competence of the Court.

Question 2, which followed on from the first and was closely related to it, was likewise not within the Court's competence to answer it.

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

Referrals/Renvois

Halet – Luxembourg, 21884/18, Judgment/Arrêt 11.5.2021 [Section III]

(See Article 10 above/Voir l'article 10 ci-dessus, page 17)

Relinquishments/Dessaisissements

McCallum – Italy/Italie, 20863/21

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

Macatė – Lithuania/Lituanie, 61435/19

(See Article 10 above/Voir l'article 10 ci-dessus, page 17)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

The disciplinary regime for judges in Poland is not compatible with EU law

Le régime disciplinaire des juges en Pologne n'est pas conforme au droit de l'Union

Case/Affaire C-791/19, Judgment/Arrêt 15.7.2021

Press release – Communiqué de presse

A prohibition on wearing any visible form of expression of political, philosophical or religious beliefs in the workplace may be justified by the employer's need to present a neutral image towards customers or to prevent social disputes

L'interdiction de porter toute forme visible d'expression des convictions politiques, philosophiques ou religieuses sur le lieu de travail peut être justifiée par le besoin de l'employeur de se présenter de manière neutre à l'égard des clients ou de prévenir des conflits sociaux

Joined Cases/Affaires jointes C-804/18 and/et C-341/19, Judgment/Arrêt 15.7.2021

Press release – Communiqué de presse

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

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Greek/Grec

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Korean/Coréen

유럽데이터보호법 (2018년)

Serbian/Serbe

Vodič kroz član 11 Konvencije - Sloboda okupljanja i udruživanja

Slovenian/Slovène

Priročnik o evropskem protidiskriminacijskem pravu – Izdaja iz leta 2018

Turkish/Turc

Avrupa İnsan Hakları Sözleşmesi'ne Ek 7 No'lu Protokol'ün 1. Maddesi'ne ilişkin Rehber

Ukrainian/Ukrainien

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