265

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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

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

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

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

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TABLE OF CONTENTS / TABLE DES MATIÈRES

ARTICLE 2

Use of force / Recours à la force
Effective investigation / Enquête effective

Use of lethal force during police operation against individual, wrongly identified as dangerous fugitive, not absolutely necessary, and ineffective investigation: *violations*

Recours à la force meurtrière, alors que celui-ci n'avait pas été rendu absolument nécessaire, au cours d'une opération de police menée contre un individu ayant été identifié à tort comme un dangereux fugitif, et enquête ineffective : *violations*

Pârvu – Romania/Roumanie, 13326/18, Judgment/Arrêt 30.8.2022 [Section IV]

Traduction française – Printable version

Facts – The applicant's husband (Mr Pârvu) was fatally shot in the head while driving a car by a police officer (D.G). The incident happened during a planned intervention by police officers in order to arrest an international fugitive subject to a European arrest warrant and who was considered to be dangerous due to the crimes attributed to him, namely murder and robbery. Mr Pârvu was wrongly identified as that individual.

A criminal investigation into the killing of the applicant's husband was opened. Overall, it lasted more than eleven years and ended with the prosecutor's decision that D.G. had acted in legitimate self-defence to stop Mr Pârvu endangering the life of other police at the scene, while also maintaining that the shooting was accidental. The applicant unsuccessfully appealed against that decision.

Law – Article 2

(a) *Substantive limb* –A dual explanation had been provided for D.G.'s actions leading up to and including the fatal shooting, combining:

– the legitimate self-defence argument, valid in the first moments of the police operation when, it was alleged, Mr Pârvu's actions had created a danger for the police officers of being hit by his car, and when D.G. had cocked his pistol, followed by;

– the subsequent accidental shooting of Mr Pârvu in the head, when D.G. had lost his balance after the opening car-door had hit his elbow and the cocked pistol had been unintentionally discharged.

Given the deficiencies in the domestic investigation, as elaborated below, the Court had doubts as to whether the use of lethal force could be regarded as absolutely necessary and justified, and whether D.G., who had coordinated the police operation, could be considered as honestly having believed that other police officers, who themselves had been armed, had been exposed to a clear and immediate danger. Indeed, at the moment that D.G. had fired the fatal shot, the car had already stopped and the police officers who had been perceived to be in danger of being hit had managed to avoid an impact. An opinion by the National Institute of Forensic Medicine, issued nearly seven years after the beginning of the investigation into the death, also seemed to support the Court's doubts as to the accidental nature of the shooting. Moreover, investigators had failed to seek the expert opinion of a neurologist to determine if a hit to the elbow as described could have led to the fatal shooting, despite this act being ordered by two domestic courts.

Concerning the conduct of the operation itself, the investigation had not adequately addressed why D.G. had intervened. He had not been part of the squad of specially trained policemen participating and whose mission had been to immobilise the suspect, and he had apparently acted outside his own mission of identifying the suspect.

The operation had also not been planned so as to reduce to a minimum any recourse to lethal force. It had deployed significant police forces, but which had acted upon unreliable information that the person driving the car was the fugitive. That was a significant error which had become obvious to the police only after the fatal shooting. There had been insufficiencies in the investigation of that error and the prosecutor's decision had only superficially explained how it had been possible. That identification error was an important factor engaging the responsibility of the authorities in respect of Mr Pârvu's death. Moreover, there was nothing to show what kind of mitigating measures had been considered in the preparation of the police operation in order to apply the principle of proportionality and to avoid the risk of mistakenly killing an innocent person. In addition, it had not been clear whether the police officers taking part in the events in question had been clearly identifiable as being from the police. They had also failed to arrange for an ambulance to be present and the victim had had to wait for about fifteen minutes for one to arrive.

Finally, the Government had not explained whether an adequate legislative and administrative framework had been put in place to safeguard citizens against arbitrariness and abuse of force.

Accordingly, the manner in which the police had responded could not be considered to have been "no more than absolutely necessary" to achieve the aim of preventing Mr Pârvu's escape and arresting him or averting the perceived threat posed by him.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – In examining the incident and proceedings as a whole, the Court found that, among other things, there had been striking omissions in the conduct of the investigation which had been identified by the relevant domestic courts and a number of questions as to the crucial factual elements of the case had been left open. Furthermore, the criminal investigation into Mr Pârvu's fatal gunshot injury had lasted for more than eleven years, with the case being sent back to the prosecutor four times because of significant omissions in the investigation. Moreover, the investigation authorities had only superficially addressed the issue of the planning and control of the operation. Lastly, more than six years after the incident, a domestic court had established that the police operational procedures had been contained in a secret document, to which the prosecutor had not been given access.

Conclusion: violation (unanimously).

Article 41: EUR 65,000 in respect of non-pecuniary damage.

Article 46: The finding in the present case of a violation of the right to an effective investigation under Article 2 was similar to those found in previous cases against Romania. General measures at the national level were undoubtedly called for in the execution of the present judgment and concerning the right to an effective investigation into the use of potentially lethal force by the police. The respondent State therefore had to comply with the requirements of Article 46, taking into account the principles set out in the Court's case-law in that area, as described in the present judgment. The Court also referred to indications made by the Committee of Ministers and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in respect of Romania. However, it was left to respondent State, subject to supervision by the Committee of Ministers, to take the practical steps it deemed appropriate to pursue those indications in a manner compatible with the conclusions of this judgment.

(See also *Wasilewska and Kałucka v. Poland*, 28975/04 and 33406/04, 23 February 2010; *Soare and Others v. Romania*, 24329/02, 22 February 2011, Legal Summary; *Gheorghe Cobzaru v. Romania,* 6978/08, 25 June 2013)

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

Death of participant in clinical trial of new medicine, failure to effectively implement regulatory framework and ensure informed consent: *violation*

Décès d'une participante à un essai clinique sur un nouveau médicament, défaut de mise en œuvre effective du cadre réglementaire et absence de consentement éclairé : *violation*

Traskunova – Russia/Russie, 21648/11, Judgment/Arrêt 30.8.2022 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant's daughter (Ms A.T.) died while participating in a clinical trial for a new medicinal product intended for treatment of schizophrenia, a mental illness from which she had suffered for many years. It was the second clinical trial of this kind in which she had participated.

The applicant's attempt to have disciplinary proceedings brought against those responsible was unsuccessful. An expert clinical commission examined the case and found that the clinical trials had been conducted in compliance with all required conditions and that there was no direct causal link between the death and the taking of the drug. The authorities also refused to open criminal proceedings and the applicant's challenge to this decision was dismissed by the domestic courts. During the pre-investigation inquiry, however, expert reports revealed that Ms A.T. had an undetected cardiovascular disease and that the taking of the experimental medicine in question could have aggravated her condition and thus could have indirectly led to her death.

Law – Article 2

(a) *Substantive aspect* – The circumstances of the present case had gone beyond the scope of a mere medical negligence. What was at stake was Ms A.T.'s safety during clinical trials of a new medicine approved by the authorities. Clinical trials of such products entailed inherent risks to their participants' health and lives, and were, as such, a form of dangerous activity which must engage States' positive obligation to adopt and implement measures designed to ensure the safety of those involved in such trials.

The key question was thus whether, when engaging the applicant's daughter in clinical trials of a new medicinal product, the authorities had fulfilled their positive obligation to ensure, through a system of rules and through sufficient control, that the risk to her life had been reduced to a reasonable minimum.

No deficiencies in the regulatory framework applicable in the respondent State at the relevant time could be discerned, but its practical implementation in the present case was open to doubt:

Firstly, it did not appear that a comprehensive medical check-up, as required by the relevant domestic

protocols, had been carried out on Ms A.T. before she had been admitted to the clinical trials and there was a lack of any information regarding monitoring of her state of health throughout the whole period of both clinical trials. Despite displaying symptoms after the first clinical trial which had argued against her participation in the second trial, she had nevertheless been invited to take part therein without the state of her health being duly examined.

It was not for the Court to speculate whether Ms A.T.'s cardiovascular disease could have been detected if she had undergone the relevant medical examination and monitoring. However, bearing in mind what had been at stake for her, it was unacceptable that she had been admitted to, and continued to participate in, the clinical trials in breach of the rules and safeguards created by the domestic system itself.

Secondly, the Court took issue with Ms A.T.'s consent to her participation in the trials. Although in the circumstances she could be regarded as having been duly informed about general risks inherent in the trials, the health professionals in charge of the clinical trials had remained unaware of her actual state of health, including her cardiovascular disease, as a result of their failure to perform the most basic medical check-ups. Ms A.T. had therefore not received full information which would have enabled her to assess potential risks in her particular situation, and to make an informed choice regarding her participation in either of the clinical trials.

Further, in view of their vulnerability, it was important that mentally ill patients enjoyed a heightened protection and that their participation in clinical trials be accompanied by particularly strong safeguards, with due account given to the particularities of their mental condition and its evolution over time. It was essential, in particular, that such patients' decision-making capacity be objectively established in order to remove the risk that they have given their consent without a full understanding of what was involved. Ms A.T. had suffered from a serious mental illness for many years which had worsened during the first clinical trial. A mental illness such as the one from which she had suffered could manifest itself, among other things, by disordered thinking and difficulties in communicating with others. Yet there was no evidence that, when inviting her to take part in the second trial and accepting her consent thereto, the doctors in charge had duly assessed whether Ms A.T. had indeed been able to take rational decisions regarding her continued participation.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – For the assessment of the case, it had been relevant to examine whether the clinical trials in question had been carried out in compliance with the relevant legal framework and in particular had respected the safeguards in place. However, the authorities had not done so. Among other things, they had not considered the experts' conclusions regarding the apparent lack of a comprehensive medical examination or health monitoring of Ms A.T. before or during either of the two trials. They had also made no assessment of the experts' findings in so far as they had pointed to counter-indications to Ms A.T.'s participation in the second clinical trial. Accordingly, the criminal-law remedy in question could not be said to have been effective in the circumstances of the present case.

The applicant had never brought a civil claim against the relevant healthcare professionals or the institution. It was unclear whether any such avenue had been available to the applicant and, if so, whether it would have achieved the result sought by Article 2 by establishing the circumstances surrounding the death of her daughter, holding those responsible accountable and providing appropriate redress to the applicant. It was also unclear whether a civil-law remedy would have pursued the same objective as the criminal-law remedy, or, in other words, whether it would have added any essential elements unavailable through the use of the criminal-law remedy.

Conclusion: violation (unanimously).

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

(See also *Arskaya v. Ukraine*, 45076/05, 5 December 2013)

ARTICLE 6

Article 6 § 1 (administrative / administratif)

Access to court / Accès à un tribunal
Adversarial trial / Procédure contradictoire

Bank unable to properly seek judicial review of licence withdrawal, or to state its case and protect its interests in insolvency and winding-up proceedings: *violations*

Banque dans l'incapacité d'obtenir un contrôle juridictionnel approprié du retrait de son agrément, de présenter sa cause et de protéger ses intérêts lors de procédures d'insolvabilité et de liquidation : *violations*

Korporativna Targovska Banka AD – Bulgaria/Bulgarie, 46564/15 and/et 68140/16, Judgment/Arrêt 30.8.2022 [Section IV]

Traduction française – Printable version

Facts – The applicants are former executive directors of KTB, which was a bank in Bulgaria. The Bulgarian National Bank (BNB) placed KTB under special administration, removed all members of its management and supervisory boards from office, and appointed special administrators to run the bank. The applicants unsuccessfully sought a judicial declaration that that decision was null and void.

Several months later, the BNB withdrew KTB's banking licence and extended the special administrators' mandate, until the appointment of liquidators by the Sofia City Court. A number of persons and/or bodies, including KTB's shareholders and the former executive directors, unsuccessfully attempted to seek judicial review of the licence withdrawal decision before the Supreme Administrative Court.

Finally, the Sofia City Court allowed an application by BNB, declaring KTB insolvent and ordering that it be wound up. During those proceedings, KTB was represented by the special administrators. KTB's shareholders unsuccessfully sought permission to intervene in the proceedings and, along with the former executive directors, appealed unsuccessfully against the Sofia City Court's rulings.

Law – (a) *Standing* – KTB's former executive directors had been exceptionally entitled to apply to the Court on behalf of KTB, even though they had done so when they had already been removed from office, and KTB had had to be represented, under Bulgarian law, by liquidators. That was because those liquidators had had a disincentive to apply to the Court on behalf of KTB in relation to the matters under consideration in the case, as well as a potential conflict of interest in that regard.

(b) Article 6 § 1

(i) *Alleged impossibility for KTB to obtain judicial review of the withdrawal of its licence* – Since 2007, Bulgarian law had provided for the possibility of seeking judicial review of a decision by the BNB to withdraw a bank's licence, but the relevant provision did not specify who could seek a review, or lay down a procedure for doing so. That gave rise to a difficulty because, from the very moment of the licence withdrawal, the power to act on KTB's behalf, including to bring proceedings on its behalf, had been conferred on its special administrators. Accordingly, even if KTB had obtained judicial decisions quashing the BNB's earlier decisions to appoint special administrators and extend their mandate, it would have still been placed under the stewardship of special administrators when it had its licence withdrawn.

Before KTB's case, the Supreme Administrative Court had not had occasion to interpret the relevant domestic legal provision. It had thus been unclear whether, the immediate appointment of special administrators notwithstanding, the management could retain a residual power to seek judicial review of the decision to withdraw the bank's licence. Nor had it been clear whether such a review could be sought by others, such as the bank's shareholders. Faced with that uncertainty, a number of shareholders had attempted to seek judicial review, as well as a member of KTB's supervisory board, its depositors, other clients and bondholders, all of which, the Supreme Administrative Court had held, had had no standing to do so.

KTB's former executive directors had likewise attempted to seek judicial review of the decision, but since they had been removed from office, they had sought to justify their standing to do so with reference to the effects of that decision on them personally. Although the Government had argued that they should have tried to convince the Supreme Administrative Court that they should be permitted to act on KTB's behalf, the Court was not persuaded that that argument was readily apparently at the relevant time.

It was clear that the special administrators could apply on KTB's behalf for judicial review of the decision. However, the special administrators had been dependent on and accountable to the BNB, and had had little if any incentive to challenge its decision. Moreover, the right of access to a court entailed that the person whose civil rights and obligations were at stake be able to bring proceedings before the courts directly and independently. Indeed, it appeared highly unlikely that the Supreme Administrative Court would have acceded to a residual-power argument when examining the former executive directors' claim for judicial review of the licence withdrawal decision.

KTB had thus been left in a situation where there had been no one with both standing and an interest in seeking judicial review of its licence withdrawal. The civil courts dealing with the BNB's ensuing application for KTB to be declared insolvent and wound up had also refused to examine the BNB's decision to withdraw KTB's licence.

The relevant legislation and the way in which it had been applied by the Bulgarian courts therefore had not offered KTB itself, by proper representation, a clear and practical possibility of seeking and obtaining proper judicial review of the withdrawal of its licence. KTB's situation had thus been effectively the same as those of the applicant banks in the cases of *Capital Bank AD v. Bulgaria* and *International Bank*

for Commerce and Development AD and Others v. Bulgaria, even though the statutory bar on judicial review of decisions by the BNB to withdraw a bank's licence had been lifted in 2007.

Conclusion: violation (unanimously).

(ii) *KTC's representation in the proceedings relating to the BNB's application for KTB to be wound up* – In the above-mentioned cases concerning Bulgaria, the Court had found that if a bank facing an application by the BNB to be declared insolvent and wound up was represented in those proceedings by its special administrators and liquidators, who were all dependent to varying degrees on the BNB, the bank could not properly state its case and protect its interests, in breach of the rights of access to a court and of adversarial proceedings enshrined by Article 6 § 1.

Despite some differences in the way in which the proceedings relating to KTB had unfolded, the present case did not present any material difference. KTB had likewise been unable to properly state its case and protect its interests, as it had seen them. At the outset, it had been represented by the special administrators who had been dependent on the opposing party, the BNB: it had appointed them and fixed their remuneration, and could dismiss them without any external scrutiny. Later, the Sofia City Court had appointed provisional liquidators (who were then appointed as permanent ones after the court declared KTB insolvent and ordered that it be wound up), who took on the role of representing KTB in the proceedings. Although to a lesser degree, they had been likewise dependent on the BNB, since it could strike them off its lists of persons qualified to act as bank liquidators and thus bring about their automatic discharge.

Conclusion: violation (unanimously).

(c) *Article 1 of Protocol No. 1:* The withdrawal of KTB's licence, which had been almost automatically followed by the Sofia City Court decision to declare KTB insolvent and order that it be wound up, had amounted to an interference with its possessions.

There had been no opportunity for KTB to challenge the grounds for BNB's decision to withdraw its licence. It had already been established that KTB could not clearly and practically obtain judicial review of the BNB's decision by proper representation. Further, no other procedural safeguards had surrounded the BNB's decision. KTB had not been informed that the BNB would adopt the decision or given it an opportunity to object to it, either before or after the decision had been made – those procedural safeguards had been expressly excluded in domestic law. Nor had there been any possibility of contesting the BNB's decision before a non-judicial authority.

KTB's situation had thus been effectively the same as those of the applicants in the aforementioned cases against Bulgaria, in that the withdrawal of its licence had not been surrounded by any safeguards against arbitrariness. The interference had therefore not been lawful within the meaning of Article 1 of Protocol No. 1.

Conclusion: violation (unanimously).

Article 41: Claim in respect of pecuniary damage dismissed.

Article 46: Concerning individual measures, the only way to put right the breach of Article 6 § 1, relating to KTB's inability to seek and obtain proper judicial review of the licence withdrawal, was to give it such a possibility. It did not necessarily follow that the form of redress, following a possible finding that the licence withdrawal decision had been unlawful or unjustified, should consist in the annulment of that decision and a reversal of its effects, rather than an award of compensation. The decision to withdraw the KTB's licence and the ensuing judicial declaration of insolvency and winding-up order, made more than seven years ago, had affected many other persons, such as the KTB's clients and creditors, as well as Bulgaria's financial system as a whole. Nonetheless, any such review proceedings, had to be organised in a way that gave KTB an effective opportunity to contest the findings which had prompted the BNB to withdraw its licence by proper representation. In particular, KTB had to be able to access any reports or other material which had had a bearing on those findings.

Concerning general measures, since this was the third case against Bulgaria in which issues had arisen regarding the way in which the withdrawal of a bank's licence on grounds of insolvency and the ensuing winding-up proceedings were regulated under domestic law, it was appropriate for the Court to give some indications on how the breaches found here were to be avoided in the future:

– Regarding the breach of Article 6 § 1 concerning the possibility for KTB itself to seek and obtain judicial review of the licence withdrawal: it was not for the Court to say whether the legislation or its interpretation and application had to change to avoid future such breaches. However, Bulgaria had to take steps to ensure that a bank whose licence was subject to withdrawal could directly and independently seek and obtain effective judicial review of that measure.

– Regarding the breach of Article 6 § 1, concerning the manner in which KTB had been represented in proceedings relating to BNB's application for it to be declared insolvent and wound up: Bulgaria had to amend the relevant domestic law provisions in a way which permitted a bank facing such an application to be represented in those proceedings, both at first instance and on appeal, in a way which enabled it to properly state its case and protect its interests.

– Regarding the breach of Article 1 of Protocol No. 1: As the statutory provision removing all procedural safeguards from the BNB's decision-making process in relation to a bank's licence withdrawal had been recently repealed, it was superfluous to indicate any measures, in addition to the above indications relating to the possibility to properly obtain judicial review.

(See also *Capital Bank AD v. Bulgaria,* 49429/99, 24 November 2005, Legal Summary; *International Bank for Commerce and Development AD and Others v.* Bulgaria, 7031/05, 2 June 2016)

ARTICLE 8

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

Significant flaws in criminal investigation concerning alleged sexual harassment at the workplace: *violation*

Lacunes importantes dans une enquête pénale concernant des allégations de harcèlement sexuel sur le lieu de travail : *violation*

C. – Romania/Roumanie, 47358/20, Judgment/Arrêt 30.8.2022 [Section IV]

Traduction française – Printable version

Facts – The applicant was employed in a cleaning company which provided services to a railway station belonging to a State-owned railway company. She filed a criminal complaint against the station manager (C.P.) for sexual harassment. After an investigation, the prosecutor's office closed the case on the grounds that the acts committed did not meet the requirements provided for by the criminal law to constitute the offence of sexual harassment. This decision was upheld by the chief prosecutor of the same office and then by a District Court. The main reason permeating both the first decision and that of the court was the absence of humiliation of the applicant by the acts in question, an element required by domestic law in order for the acts to constitute the said offence.

Law – Article 8

(a) *Applicability* – The facts underlying the application concerned the applicant's psychological integrity and her sexual life, both of which fell within the personal sphere protected by Article 8. Bearing in mind the severity of the acts concerned and, more generally, what was at stake for the applicant, who had alleged an attack on her sexual integrity, the Court found that the treatment complained of by her reached the threshold of applicability of that provision.

(b) *Merits* – The case concerned the application of the system put in place to protect against sexual harassment in the workplace. Its facts fell within a category of acts for which the Court had already found in its case-law that an adequate legal framework affording protection did not always require that an efficient criminal-law provision covering the specific act be in place.

The railway company, being State-owned, represented a public authority whose acts might engage the State's responsibility under the Convention. Although it had been informed of the applicant's sexual harassment allegations it had done little in response and it appeared that no internal inquiry had taken place. It was thus impossible for the Court to assess whether any mechanisms had been put in place at employer level to deal with sexual harassment in the workplace. This, in itself, might run counter to the requirements of Article 8. In this regard, the Court reiterated that relevant EU instruments unequivocally condemned sexual harassment urging States to take preventive measures against it. They had also acknowledged that harassment in the workplace was a matter of health and safety and should be treated and prevented as such and called for further measures to effectively prevent and end sexual harassment in the workplace and elsewhere.

Nevertheless, as the main focus of the applicant's complaint was the deficient response given to her complaints by the prosecutors and courts, the Court examined the mechanisms that the State authorities had put in place and that the applicant had been able to use in order to seek redress for her grievances.

Under domestic law sexual harassment was criminalised and was considered to be the most serious form of harassment, carrying a harsher sentence than other forms of prohibited harassment. Indeed, in the present case, the police and prosecutor had considered that a criminal investigation had been required. The applicant had thus no reason to doubt that the criminal investigation would be effective and capable of providing redress. If deemed effective, criminal-law remedies would by themselves be capable of satisfying the procedural obligation of Article 8. Accordingly, and bearing in mind the conclusion of both the prosecutor's office and court that she had not been humiliated by C.P. as she had alleged, the applicant could not be required to have tried other remedies, such as a civil action, that had also been available but probably no more likely to be successful.

Consequently, the question was whether, in the criminal proceedings concerning the allegations of sexual harassment perpetrated against the

applicant, the State had sufficiently protected her right to respect for her private life, in particular her personal integrity.

The investigation into the complaint had started promptly and it had been confirmed by all the domestic decisions that C.P. had committed the alleged acts. However, there was nothing in those decisions allowing the Court to ascertain how the authorities had reached their final conclusion. The prosecutor's office had only described in detail the evidence submitted, without explaining how this supported its decision. It also appears that it had not placed the applicant's statements into context or considered them as pertinent evidence. In this regard, the Court reiterated that, like domestic violence, cases of sexual harassment did not always surface as they continued to be significantly underreported – it often took place withing personal relationships and behind closed doors, which made it even more difficult for victims to prove. Those lacunae had not been fixed by the subsequent decisions which did not contain reasons capable of explaining the manner in which the law had been interpreted and applied to the facts of the case. Moreover, neither the prosecutors' office nor the court had given an explanation for their finding that the applicant had not felt humiliated and had not tried to place into context evidence before them as to her feelings after her encounters with C.P., for instance by assessing the relationship of power and subordination between them or the threats allegedly made by him against her.

The authorities had made no attempt to relate their findings to domestic law even though respect for dignity was a prominent feature in the domestic legislation, nor had they taken active steps to ascertain the consequences that C.P.'s actions had had on the applicant. Bearing in mind the relevance that the element of victim's intimidation or humiliation had for establishing the existence of the crime of sexual harassment, the authorities could have ordered a psychological assessment of the applicant for a specialist analysis of her reactions after the encounters with C.P. and the possible psychological consequences. They could have also verified whether any reasons existed for the applicant to have made false accusations against C.P., as that had been hinted at by some of the witness statements.

In addition, the Court noted with concern the inclusion in the prosecutor's office's decision of a detailed account of the insinuations made by C.P. in his statements about the applicant's private life and the alleged motives for her actions and accusations. While reference to certain aspects of those statements might have been necessary, it was difficult to see which purpose for the examination of the criminal offence was served by their extensive reproduction in that decision. Besides being insensitive and irreverent towards the applicant, their presence stigmatised her and might be seen as an infringement of her rights guaranteed by Article 8. Similarly, no explanation had been given by the prosecutor as to the necessity of the witness confrontation that had taken place between her and the head of passenger safety of the company's regional branch concerning the meeting in his office with C.P. and its impact on the applicant. In this connection, the Court reiterated that the necessity of a confrontation had to be carefully weighed by the authorities, and that the victim's dignity and sensitivity had to be considered and protected.

In the international arena, sexual harassment was unequivocally condemned and States were urged to effectively punish perpetrators and thus put an end to impunity. At the same time, international instruments required the Contracting Parties to take the necessary legislative and other measures to protect the rights and interests of victims. Such measures involved, *inter alia*, protection from secondary victimisation, a duty that the authorities had failed to perform in the present case.

Lastly, even after the railway company had become aware of the claims of sexual harassment, the applicant had continued to suffer its consequences as she had been eventually forced to leave her employment. This element, which undoubtedly had added to her distress and feelings of powerlessness, had had no bearing on the manner in which the authorities had assessed her grievances.

For those reasons, the Court found that the investigation of the applicant's case had had such significant flaws as to amount to a breach of the States' positive obligations under Article 8.

Conclusion: violation (unanimously).

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

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

Authorities' failure to adequately protect confidentiality of applicant's health data and to investigate its disclosure through a database being sold in a market: *violation*

Manquement des autorités à protéger de manière adéquate la confidentialité des données relatives à la santé du requérant et à enquêter sur leur divulgation, intervenue par la vente d'une base de données sur un marché : *violation*

Y.G. – Russia/Russie, 8647/12, Judgment/Arrêt 30.8.2022 [Section III]

Traduction française – Printable version

Facts – The applicant, who is HIV-positive and suffers from hepatitis, purchased a database from a Moscow market containing personal data in respect of more than 400,000 people registered as living in that city and its region, as well as information on people with HIV, AIDS and hepatitis. It also contained a compilation of the applicant's personal data, including his health data. The applicant complained to the Investigative Committee of the Russian Federation ("Investigative Committee") which refused to carry out a pre-investigation inquiry. His judicial complaint against that decision was dismissed.

Law – Article 8: As the database purchased by the applicant had contained a compilation of his personal data, including his health data, the circumstances of the present case fell within the scope of the applicant's private life protected under Article 8 § 1. Further, the mere storing of data relating to the private life of an individual amounted to an interference within the meaning of Article 8.

It was uncontested that only the authorities had access to most of the data on the database, such as criminal records and preventive measures that had been applied, and that, in the past, in the context of criminal proceedings against the applicant, the investigator in charge had sought information about the applicant's health condition from the Hospital for Infectious Diseases. Although it was in dispute whether the Ministry of the Interior had compiled the database, in the context of the case, there was no explanation other than that the State authorities, who had access to the data in question, had failed to prevent a breach of confidentiality. As a result, that data had become publicly available, thus engaging the responsibility of the respondent State. The circumstances of this major privacy breach had never been elucidated. The Court had repeatedly stressed the importance of appropriate safeguards to prevent the communication and disclosure of health data. The authorities had therefore failed to protect the confidentiality of the applicant's health data, also in breach of the relevant domestic provisions.

Furthermore, whilst in cases concerning alleged privacy violations, a criminal-law remedy was not always required, and civil-law remedies could be seen as sufficient, no civil remedy had been available to the applicant prior to lodging his application with the Court. In addition, the applicant's allegations had concerned the disclosure of his health data, as a part of the compilation of a vast amount of data and had been supported by prima facie evidence. In the face of such a major privacy breach, in practical terms, the applicant acting on his own, without the benefit of the State's assistance in the form of an official inquiry, had no effective means of establishing the perpetrators of these acts, proving their involvement and bringing proceedings against them in the domestic courts. Accordingly, the complaint to the Investigative Committee could not be considered an inappropriate avenue of protection of his rights.

The authorities had never investigated the matter despite the evidence at hand, the existence of a legal framework for prosecuting intrusion into one's private life and the absence of any reasons precluding an investigation.

Consequently, the authorities had failed to comply with their positive obligation to ensure adequate protection of the applicant's right to respect for his private life.

Conclusion: violation (unanimously).

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

Positive obligations / Obligations positives

All available procedural avenues ineffective for applicant claiming medical negligence after breast removal surgery performed on basis of oncologist's mistaken cancer diagnosis: *violation*

Inefficacité de toutes les procédures à disposition de la requérante alléguant des fautes médicales pour l'ablation d'un sein par un chirurgien suite au diagnostic erroné de cancer d'un oncologue : *violation*

Tusă – Romania/Roumanie, 21854/18, Judgment/Arrêt 30.8.2022 [Section IV]

Traduction française – Version imprimable

En fait – La requérante a subi l'ablation d'un sein par un chirurgien suite au diagnostic de cancer posé par un oncologue qui s'est révélé erroné par la suite.

Estimant avoir été victime d'une faute médicale, elle fit usage de toutes les procédures disponibles en droit interne pour mettre en cause la responsabilité individuelle des deux médecins et viser les personnes morales qui les employaient. Elle a utilisé la voie pénale, elle a fait une action en responsabilité médicale fondée sur la loi n° 95/2006 et une action en responsabilité civile délictuelle fondée sur le droit commun qui est toujours pendante, et elle a aussi introduit une plainte disciplinaire.

En droit – Article 8

1. *Les procédures disponibles à la requérante* – La requérante a pu soulever devant les autorités internes ses allégations relatives à la faute médicale dont elle estimait avoir été victime.

Cette affaire présente la particularité que la requérante a choisi de faire usage de tous les recours que le droit interne mettait à sa disposition. Et elle en-

tend poursuivre l'action en responsabilité civile délictuelle, toujours pendante devant les tribunaux internes, même si elle émet des doutes sur son issue. Dans ce contexte, la Cour réaffirme que l'exercice d'une procédure permettant d'obtenir une réparation pécuniaire est à privilégier dans une affaire de négligence médicale.

2. *La procédure pénale* – Des contradictions sont relevées entre les différents rapports d'expertise rendus successivement par l'organisme compétent : une faute médicale a été premièrement relevée pour les deux médecins puis l'inverse a été exprimé.

Le parquet a essayé de clarifier les circonstances de l'espèce. Il s'est ainsi référé aux décisions rendues, dans le cadre de la procédure fondée sur la loi n° 95/2006, par la commission de suivi. Il a constaté que seul l'oncologue avait commis une faute médicale.

Toutefois, les constatations du parquet ont été limitées par l'intervention de la prescription quant à la responsabilité pénale de l'oncologue. À cet égard, les rapports de l'organisme ont été produits lentement, notamment le rapport initial délivré environ trois ans après le déclenchement de la procédure pénale. Et l'examen des tribunaux internes a été limité n'ayant pas pu porter sur les questions de fond soulevées. En matière de négligence médicale, il appartient au Gouvernement de fournir des justifications convaincantes et plausibles pour expliquer les retards et la durée de la procédure interne ce qu'il n'a pas fait en l'espèce.

3. *Les procédures visant à établir la responsabilité des médecins pour faute médicale ou civile délictuelle* – La personne souhaitant engager la responsabilité médicale en cas de négligence a trois options : la saisine de la commission de suivi régie par la loi n° 95/2006, dont la décision peut ensuite être contestée devant les tribunaux ; la saisine directe des tribunaux sur le fondement de la loi n° 95/2006 ; et la saisine directe des tribunaux sur le fondement des dispositions du code civil régissant la responsabilité civile délictuelle. Toutefois, la compétence des autorités saisies d'une demande fondée sur les dispositions de la loi n° 95/2006 est limitée au constat d'une faute médicale, sans possibilité de demander la réparation du préjudice subi en raison d'une faute médicale. Et les tribunaux ne peuvent examiner ces demandes que sur la base des dispositions du code civil. Ce mécanisme, même s'il a le mérite de donner à la personne intéressée le choix de la voie à suivre, semble lourd, ce qui signifie qu'il prendra forcément du temps. Un problème de coordination pourrait également se poser si la personne intéressée fait usage de toutes les voies de droit que la législation met à sa disposition.

Dans le cas de la requérante, la saisine de la commission de suivi a donné lieu à deux procédures distinctes, en raison des contestations formées par les deux médecins, qui se sont étalées sur plus de neuf ans pour la procédure en responsabilité civile, toujours pendante, et sept ans pour la procédure fondée sur la loi n° 95/2006. La requérante, en choisissant d'exercer toutes les procédures que le droit interne mettait à sa disposition a pu contribuer, d'une certaine manière, à ce retard, dans la mesure où des sursis ont été prononcés en raison du déroulement de la procédure pénale. Toutefois, aucun autre élément ne pourrait justifier la lenteur de ces deux procédures.

Plus important encore, dans le cadre de la procédure fondée sur la loi n° 95/2006, les avis de la commission de suivi, qui avait initialement conclu à l'existence d'une faute médicale sans motivation, différaient de ceux des tribunaux, qui ont infirmé les décisions de cette commission. Par ailleurs, les tribunaux n'ont pas expliqué de manière convaincante les incohérences entre les expertises médicolégales et les opinions médicales recueillies dans le cas de la requérante. Cela est manifeste dans le cas de la procédure visant l'oncologue, notamment au sujet de savoir si celle-ci avait posé de manière correcte le diagnostic de cancer, compte tenu des opinions différentes recueillies à cet égard. La cour d'appel a tantôt considéré qu'il y avait des contradictions entre ces opinions tantôt estimé que ces contradictions étaient « supposées ». Or, dans le cadre de la procédure disciplinaire, la commission supérieure de discipline du collège des médecins de Roumanie avait jugé qu'une biopsie était nécessaire pour déterminer le diagnostic de la requérante. Et lors de la procédure fondée sur la loi n° 95/2006, les tribunaux ont rendu des conclusions différentes de celles dans les autres procédures, pénale et disciplinaire relativement à la responsabilité de l'oncologue. Les autorités n'ont fait aucun effort pour expliquer et justifier cette divergence. La procédure fondée sur la loi n° 95/2006 n'a pas été à même de clarifier s'il y avait ou pas faute médicale en l'espèce.

Enfin, la procédure fondée sur la loi n° 95/2006 visant à établir l'existence d'une faute médicale et celle en responsabilité civile délictuelle ont des éléments communs, notamment en ce qui concerne l'examen des quatre critères en fonction desquels la responsabilité du médecin peut être engagée : l'existence d'un fait illicite, l'existence d'un préjudice, le lien de causalité entre le fait et le préjudice et la culpabilité de l'auteur. La requérante a fait le choix non critiquable en principe d'exercer tous les recours à sa disposition. Or, dans les deux procédures fondées sur la loi n° 95/2006, les cours d'appel ont conclu que les deux médecins n'avaient pas commis de faute médicale et qu'on ne saurait donc leur reprocher un fait illicite. Or, la commission d'un fait illicite est l'un des quatre critères en fonction desquels peut être engagée la responsabilité civile délictuelle.

L'argument de la requérante, qui soutient que l'action civile, actuellement pendante, a peu de chances de succès compte tenu de l'issue de la procédure fondée sur la loi n° 95/2006, revêt un poids certain. En cas d'allégations de négligence médicale, la voie civile est à privilégier. Toutefois, le Gouvernement n'a pas soutenu que l'action en responsabilité civile délictuelle pourrait permettre un nouvel examen sur le fond de la question de la responsabilité civile des deux médecins mis en cause. La Cour estime qu'une éventuelle issue favorable à la requérante dans le cadre de la procédure civile pendante ne saurait modifier ses constats parce que la question qui se pose à elle est celle de savoir si, quatorze années après la consultation médicale et l'intervention chirurgicale qu'a subie la requérante, la totalité des procédures disponibles ont offert à l'intéressée une réponse adéquate à ses allégations.

Le mécanisme légal lourd et lent des deux procédures n'a pas permis de clarifier les circonstances factuelles relatives au diagnostic posé et à l'adéquation de l'intervention chirurgicale ultérieure.

4. *La procédure disciplinaire* – La commission supérieure de discipline du collège des médecins de Roumanie a examiné la question de la responsabilité disciplinaire de l'oncologue et lui a appliqué une sanction. Toutefois, cette procédure s'est étalée sur une longue période de dix ans. De plus, la commission de discipline a dû mettre fin à la procédure à l'encontre du chirurgien, celui-ci étant décédé dans l'intervalle.

Ensuite, la procédure disciplinaire est limitée à l'examen de l'existence d'une faute disciplinaire et, dans l'hypothèse où la procédure aboutit à un tel constat et à l'éventuelle sanction du médecin visé, la personne intéressée ne peut pas obtenir la réparation de son préjudice dans ce cadre. Elle ne pourrait l'obtenir que par le biais d'une action civile séparée.

La procédure disciplinaire a pu clarifier la question de la responsabilité disciplinaire de l'un des médecins mis en cause, mais en raison de sa nature et du temps qu'elle a pris, cette procédure a présenté des limites qui ont affecté son efficacité.

5. *Conclusion* – Le cadre règlementaire, qui permet un choix parmi plusieurs procédures à engager, peut apparaître favorable aux justiciables. Toutefois, les procédures introduites ont abouti à des résultats divergents. Ainsi, nonobstant leurs issues respectives, tant la procédure pénale que la procédure disciplinaire ont conclu que l'oncologue avait accompli ses obligations professionnelles de manière déficiente. Toutefois, la procédure fondée sur la loi spéciale n° 95/2006 a écarté une telle responsabilité.

Ensuite, le mécanisme légal s'est révélé lent et lourd. Les tribunaux ont prononcé des sursis alors que d'autres procédures étaient pendantes, ce qui a pu entraîner l'intervention de la prescription quant à la responsabilité pénale de l'oncologue ou la fin de la procédure disciplinaire en raison du décès du chirurgien mis en cause. La requérante a certes choisi d'exercer toutes les procédures mises à sa disposition par le cadre règlementaire, mais la Cour ne saurait le lui reprocher. Il est compréhensible qu'elle ait voulu obtenir la clarification de sa situation factuelle ainsi que la réparation du préjudice qu'elle estimait avoir subi. Or, la procédure en responsabilité civile délictuelle, la seule procédure susceptible en théorie de lui procurer une réparation, est toujours pendante, neuf ans après la saisine des tribunaux par la requérante et quatorze ans après la consultation médicale et l'intervention subie par elle. Le mécanisme légal mis en place par le droit interne n'a pas présenté, dans le cas de la requérante, l'efficacité voulue par la jurisprudence de la Cour.

Conclusion : violation (unanimité).

Article 41 : 7 500 EUR pour préjudice moral ; demande de dommage matériel rejetée.

(Voir aussi *Eugenia Lazăr c. Roumanie*, 32146/05, 16 février 2010, Résumé juridique ; *Lopes de Sousa Fernandes c. Portugal* [GC], 56080/13, 19 décembre 2017, Résumé juridique)

ARTICLE 10

Freedom of expression / Liberté d'expression

Unjustified search of journalist's home and seizure of his electronic devices without procedural safeguards protecting confidentiality of journalist sources: *violation*

Perquisition injustifiée du domicile d'un journaliste et saisie de ses appareils électroniques sans garanties procédurales protégeant la confidentialité des sources journalistiques : *violation*

Sorokin – Russia/Russie, 52808/09,
Judgment/Arrêt 30.8.2022 [Section III]

Traduction française – Printable version

Facts – The applicant is a journalist who published an interview with Mr L., a deputy head of the regional Ministry of the Interior, in relation to a scandal involving high-ranking public officials. A criminal case was subsequently opened up against one of them, Mr L., for disclosing information about operational activities which were considered a State secret by law. The Town Court authorised the search of the applicant's flat and seizure of devices containing information relating to the interview of Mr L. The applicant's computer, four hard drives and an audio cas-

sette were seized. The applicant appealed unsuccessfully to the Supreme Court of the Republic of Komi.

Law – Article 10: The search of the applicant's home and seizure of his electronic devices had constituted an interference with the exercise of his right to freedom of expression. The impugned measures had had a general legal basis in domestic law, however, there was a lack of procedural safeguards protecting journalistic sources and addressing the seizure and examination of data carriers:

– Although under the criminal procedure law there had been certain safeguards in place relating to searches and seizures in general, it did not expressly provide for any protection of confidential journalistic sources in that context;

– Further, it had not been clear how, if at all, domestic law provisions, imposing an obligation on editors of a mass media outlet not to disclose any information/sources provided on condition of confidentiality/anonymity, applied in the context of search and seizure measures in respect of a journalist. Although the Supreme Court of the Russian Federation had since provided guidance to the lower courts on the matter, that ruling had been issued after the events of the present case.

Accordingly, the Court was not convinced that the domestic legal framework at the relevant time had ensured a requisite legal protection of journalistic sources from arbitrary interferences. However, it did not need to determine the matter, since the interference had in any event not been "necessary in a democratic society" for the following reasons.

That interference had pursued the legitimate aim of preventing crime, since the search and seizure had been ordered in the context of a criminal investigation opened into Mr L.'s alleged disclosure of State information. However, the search had been carried out in the absence of procedural safeguards against interference with the confidentiality of the applicant's journalistic sources:

– While authorising the search warrant, the Town Court's reasoning had not contained any balancing exercise, that is, an examination of the question whether the interests of investigation in securing evidence had been sufficient to override the general public interest in the protection of journalistic sources;

– The Supreme Court of the Republic of Komi had limited its review to the examination of the formal lawfulness of the search instead of assessing the necessity and proportionality of the investigating authorities' actions;

– While authorising the search and seizure measures, the Town Court had not instructed the investigative authorities to use any sifting procedures or otherwise ensure that the unrelated personal and professional information of the applicant had not been accessed by the authorities. Nor had it given any specific reasons for its finding that a search of all the applicant's data had been necessary for the investigation;

– Reflecting the wording of the warrant, the investigator had seized all of the applicant's electronic devices which must have contained information unrelated to the criminal case. There was nothing to show that the entirety of that information had not been accessed immediately by the investigative authorities in the absence of any sifting procedure or other methods which could protect the confidentiality of the applicant's journalistic sources and of other information unrelated to the criminal case.

Conclusion: violation (unanimously).

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

ARTICLE 46

Execution of judgment – General and individual measures / Exécution de l'arrêt – Mesures générales et individuelles

Reopening of judicial review proceedings required, but not necessarily leading to reversal of reviewed decision's effects, rather than damages; need for general measures

La réouverture de la procédure de contrôle juridictionnel est requise mais ne devra pas nécessairement conduire à l'annulation des effets de la décision contrôlée plutôt qu'à l'octroi de dommages-intérêts ; nécessité de mesures générales

Korporativna Targovska Banka AD – Bulgaria/Bulgarie, 46564/15 and/et 68140/16, Judgment/Arrêt 30.8.2022 [Section IV]

See under Article 6 § 1 – Voir sous l'article 6 § 1

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

Peaceful enjoyment of possessions / Respect des biens

No safeguards against arbitrariness surrounding decision to withdraw a bank's licence: *violation*

Absence de garanties contre l'arbitraire dans une décision de retirer son agrément à une banque : *violation*

Korporativna Targovska Banka AD – Bulgaria/Bulgarie, 46564/15 and/et 68140/16, Judgment/Arrêt 30.8.2022 [Section IV]

See under Article 6 § 1 – Voir sous l'article 6 § 1

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

Article 2 § 1

Freedom of movement / Droit de circulation

Obligation to wear a mask in public places in the context of the COVID-19 pandemic: *communicated*

Obligation de porter un masque dans les espaces publics au titre de la pandémie de Covid-19 : *affaire communiquée*

Árus – Romania/Roumanie, 39647/21, Communication 25.7.2022 [Section IV]

English translation – Version imprimable

The application concerns the obligation to wear a mask in public places in the context of the COVID-19 pandemic. The applicant unsuccessful lodged administrative proceedings against the decision of a local Emergency Committee rendering the mask obligatory in certain public places.

Communicated under Article 2 of Protocol No. 4.

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

Interim measures / Mesures provisoires

Request for urgent measures concerning Ukrainian prisoners of war

Demande de mesures urgentes concernant les prisonniers de guerre ukrainiens

ECHR press release – Communiqué de presse CEDH

-ooo-

Interim measures amended in cases concerning judges' immunity

Mesures provisoires dans des affaires concernant l'immunité de juges

ECHR press release – Communiqué de presse CEDH

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Court rejects request for suspension of Mr Iquioussen's deportation to Morocco

La Cour rejette la demande de suspension de la mesure d'expulsion de M. Iquioussen vers le Maroc

ECHR press release – Communiqué de presse CEDH

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Request for interim measures refused in case concerning the withdrawal of life sustaining treatment

Demande de mesures provisoires rejetée dans une affaire concernant la cessation de soins de soutien des fonctions vitales

ECHR press release – Communiqué de presse CEDH