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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

The Court's monthly round-up of case-law

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

COUNCIL OF EUROPE
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The Information Note contains legal summaries of the cases examined during the month in question which the Registry considers to be of particular interest. The summaries are drafted by 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.

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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 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.

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(See Article 46 below/Voir l'article 46 ci-dessous, page 26)

Expulsion

Expulsion of foreign national with schizophrenia to his country of origin, without health risks reaching the high threshold for application of Article 3: *no violation*

Expulsion vers son pays d'origine d'un ressortissant étranger souffrant de schizophrénie, sans que les risques pour sa santé n'aient atteint le seuil élevé d'application de l'article 3 : *non-violation*

Savran – Denmark/Danemark, 57467/15, Judgment/Arrêt 7.12.2021 [GC]

Traduction française du résumé – Printable version

Facts – The applicant, a Turkish national diagnosed with paranoid schizophrenia, entered Denmark in 1991 when he was six years old. In 2008 he was convicted of assault and exempt from punishment on account of his mental illness. He was sentenced to committal to forensic psychiatric care. In 2009 he was made subject to an expulsion order with a permanent ban on re-entry. In 2014 the City Court held that, regardless of the nature and gravity of the crime committed, the applicant's health made it conclusively inappropriate to enforce the expulsion order. In 2015 that decision was reversed by the High Court and the applicant was subsequently refused leave to appeal and deported to Turkey.

In a judgment of 1 October 2019 (see Legal Summary), a Chamber of the Court found, by four votes to three, that the applicant's expulsion would constitute a violation of Article 3 should it be carried out without the Danish authorities having obtained individual and sufficient assurances that appropriate treatment would be available.

On 20 January 2020 the case was referred to the Grand Chamber at the Government's request.

Law

Article 3

(a) *Considerations on the criteria laid down in the* Paposhvili *judgment* – The Grand Chamber noted that, in its judgment in the case of *Paposhvili v. Belgium* [GC], the Court had reviewed the applicable principles in its case-law concerning the extradition, expulsion or deportation of individuals. There had been no further development in the relevant case-law since that judgment. The Grand Chamber confirmed that the *Paposhvili* judgment had offered a comprehensive standard taking account of all the considerations that were relevant for the purposes of Article 3 and reaffirmed the standard and principles as established therein.

The Court reiterated that the evidence adduced had to be "capable of demonstrating that there are substantial grounds" for believing that as a "seriously ill person", the applicant "would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy". It was only after that threshold test had been met, and thus Article 3 was applicable, that the returning States' obligations listed in the *Paposhvili* judgment became of relevance. The Court also emphasised the procedural nature of the Contracting States' obligations under Article 3 in cases involving the expulsion of seriously ill aliens: the Court does not itself examine the applications for international protection or verify how States control the entry, residence and expulsion of aliens.

Regarding the relevance of the *Paposhvili* threshold test in the context of the removal of mentally ill aliens, the standard was sufficiently flexible to be applied in all situations involving the removal of a seriously ill person which would constitute treatment proscribed by Article 3, irrespective of the nature of the illness. Indeed, it was not limited to any specific category of illness, let alone physical ones, but might extend to any category, including mental illnesses, provided that the situation of the ill person concerned was covered by the *Paposhvili* criteria taken as a whole. In particu-

lar, in its relevant part, the threshold test, rather than mentioning any particular disease, broadly referred to the "irreversibility" of the "decline in [a person's] state of health", a wider concept that was capable of encompassing a multitude of factors, including the direct effects of an illness as well as its more remote consequences. Moreover, it would be wrong to dissociate the various fragments of the test from each other, given that a "decline in health" was linked to "intense suffering". It was on the basis of all those elements taken together and viewed as a whole that the assessment of a particular case should be made.

(b) *Application of the relevant principles in the present case* – In its judgment, the Chamber had not assessed the circumstances of the present case from the standpoint of the threshold test established in the *Paposhvili* judgment. As noted, it was only after that test was met that any other questions, such as the availability and accessibility of appropriate treatment, became relevant.

While, admittedly, schizophrenia was a serious mental illness, that condition could not in itself be regarded as sufficient to bring the applicant's complaint within the scope of Article 3.

While the Court found it unnecessary to decide in the abstract whether a person suffering from a severe form of schizophrenia might be subjected to "intense suffering" within the meaning of the *Paposhvili* threshold test, it had not been demonstrated in the present case that the applicant's removal to Turkey had exposed him to a serious, rapid and irreversible decline in his state of health resulting in intense suffering, let alone to a significant reduction in life expectancy. According to some of the relevant medical statements, a relapse was likely to result in "aggressive behaviour" and "a significantly higher risk of offences against the person of others" as a result of the worsening of psychotic symptoms. Whilst those would have been very serious and detrimental effects, they could not be described as "resulting in intense suffering" for the applicant himself. It did not appear that any risk had ever existed of the applicant harming himself. As regards any risk to the applicant's physical health owing to immune defects that might be caused by his medication, that appeared to have been neither real nor immediate in the applicant's case. In any event, the relevant evidence had not indicated that such immune deficiencies, should they occur, would be "irreversible" and would result in the "intense suffering" or "significant reduction in life expectancy" necessary to satisfy the *Paposhvili* test.

The Court was not convinced that in the present case, the applicant had shown substantial grounds for believing that, in the absence of appropriate treatment in Turkey or the lack of access to such treatment, he would be exposed to a risk of bearing the consequences set out in the *Paposhvili* judgment. The foregoing was sufficient to enable the Court to conclude that the circumstances of the present case had not reached the threshold set by Article 3 to bring the applicant's complaint within its scope. That threshold should remain high for this type of case. Against that background, there was no call to address the question of the returning State's obligations under Article 3 in the circumstances of the present case.

Conclusion: no violation (sixteen votes to one).

Article 8

(a) *The scope of the case* – The Court examined the complaint under Article 8 only in so far as it related to the authorities' refusal to revoke the expulsion order, and the implementation of that order, entailing as a consequence a permanent re-entry ban. Its task was therefore not to assess, from the standpoint of Article 8, the original order and the criminal proceedings in the context of which it had been issued, but rather to review whether the revocation proceedings had complied with the relevant criteria established by the Court's case-law.

(b) *Whether there was an interference with the applicant's right to respect for his private and family life* – The Court accepted that the applicant had been a "settled migrant" and therefore Article 8 under its "private life" aspect was engaged. Whilst the Court saw no reason to doubt that the applicant's relationship with his mother and siblings had involved normal ties of affection, it considered that it would be appropriate to focus its review on the "private life" rather than "family life" aspect under Article 8. Indeed, from his early years the applicant had not been living full time with his family. Moreover, his mental illness, albeit serious, had not incapacitated him to the extent that he had been compelled to rely on his family's care and support in his daily life. The refusal to revoke the applicant's expulsion order in the revocation proceedings and his expulsion to Turkey had constituted an interference with his right to respect for his private life.

(c) *Whether the interference was justified* – The impugned interference had been "in accordance with the law" and had pursued the legitimate aim of preventing disorder and crime. The Court therefore had to determine whether it had been "necessary in a democratic society".

The Court saw no reason to question that very thorough consideration had been given to the medical aspects of the applicant's case at the domestic level.

As regards the nature and seriousness of the criminal offence committed by the applicant, the fact that his criminal culpability had been officially recognised at the relevant time as being excluded on account of mental illness at the point in time when the criminal act had been perpetrated might have the effect of limiting the weight that could be attached to that criterion in the overall balancing of interests required under Article 8 § 2 and, consequently, the extent to which the respondent State could legitimately rely on the applicant's criminal acts as the basis for his expulsion and permanent ban on reentry. However, in the 2015 revocation proceedings, no account had been taken of that fact.

Furthermore, a significant period had elapsed between the date on which the expulsion order had become final (in 2009) and the date of the final decision in the revocation proceedings (in 2015). During that period, the applicant had undergone medical treatment for his mental disorder. Despite that, the High Court had not considered the positive changes in the applicant's personal circumstances with a view to assessing the risk of his reoffending against the background of his mental state at the time of the commission of the offence and the apparent beneficial effects of his treatment. Indeed, he had made progress during those years, which had led to his being discharged from forensic psychiatric care.

Nor had the High Court had due regard to the strength of the applicant's ties to Denmark as compared to those to Turkey. He had been a settled migrant living in Denmark since the age of six, had received most of his education there and his close family members all lived there. He had also been attached to the Danish labour market for about five years.

Further, under the domestic law, the administrative and judicial authorities had had no possibility of making an individual assessment of the duration of the applicant's exclusion from Danish territory, which had been both irreducible and permanent. Therefore, and notwithstanding the respondent State's margin of appreciation, the Court considered that, in the particular circumstances of the present case, the domestic authorities had failed to take into account and to properly balance the interests at stake.

Conclusion: violation (eleven votes to six).

Article 41: finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

(See *Maslov v. Austria* [GC], 1638/03, 23 June 2008, Legal Summary, and *Paposhvili v. Belgium* [GC], 41738/10, 13 December 2016, Legal Summary)

ARTICLE 4

Article 4 § 1

Trafficking in human beings/Traite d'êtres humains
Positive obligations/Obligations positives

Adult victim of trafficking unable to appeal her conviction for importing drugs, compulsion not reaching exculpatory level: *inadmissible*

Adulte victime de la traite des êtres humains dans l'impossibilité de faire appel de sa condamnation pour importation de stupéfiants, le degré de contrainte n'étant pas suffisant pour la disculper : *irrecevable*

G.S. – United Kingdom/Royaume-Uni, 7604/19, Decision/Décision 23.11.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant was charged and convicted on offences relating to the importation of cocaine in 2007. Several years later, she was recognised as a victim of trafficking in human beings. She unsuccessfully sought an extension of time to appeal against her conviction, on the basis that new evidence had undermined the safety of her conviction. This new evidence comprised, *inter alia*, her recognition as a victim of trafficking.

Law – Article 4 § 1: The applicant had not complained about the failure to take operational measures to protect her in 2007. Rather, her complaints before the Court related solely to the refusal by the Court of Appeal in 2018 – some eleven years later – to grant her leave to appeal her conviction.

The applicant had been charged, tried, convicted and sentenced without a trafficking assessment having first been made by a qualified person. Nevertheless, on appeal the Court of Appeal had recognised that she had in fact been a victim of trafficking. Consequently, it had not refused the applicant leave to appeal because it had disagreed with the finding that she had been a victim of trafficking, but rather because it had found that at the time of the offence she had not been under such a level of compulsion that her criminality or culpability had been reduced to or below a point where it had not been in the public interest for her to be prosecuted.

The member States' positive obligations under Article 4 of the Convention are to be construed in light of the Council of Europe Convention on Action against Trafficking in Human Beings. Both the Convention ("the Anti-Trafficking Convention") and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its

victims only provided for the possibility of not imposing penalties on victims of trafficking for their involvement in unlawful activities to the extent that they had been compelled to do so. In the present case, the Court of Appeal had clearly considered the extent to which the applicant had been compelled to commit the offence and had concluded that the level of compulsion had not been such as to extinguish her culpability. The Court of Appeal had asked itself the correct question and its conclusion had been one that had been open to it to make on the facts before it. While compulsion might not be necessary to bring a child within the scope of either the Anti-Trafficking Convention or relevant Directive, as in *V.C.L. and A.N. v. the United Kingdom*, the applicant in the present case had at all material times been an adult.

Therefore, in refusing to grant permission to appeal, the Court of appeal had not failed to fulfil any duty that might have arisen under Article 4 to take operational measures to protect the applicant, as a victim of trafficking.

Conclusion: inadmissible (manifestly ill-founded).

(See *V.C.L. and A.N. v. the United Kingdom*, 77587/12 and 74603/12, 16 February 2021, Legal Summary)

ARTICLE 8

Respect for private life/Respect de la vie privée
Expulsion

Permanent exclusion order on long-term settled migrant with schizophrenia, despite progress after years of compulsory care, on account of violent offences: *violation*

Mesure d'interdiction définitive du territoire ordonnée contre un immigré établi de longue date atteint de schizophrénie et ayant commis des infractions violentes, en dépit de progrès consécutifs à plusieurs années de soins obligatoires : *violation*

Savran – Denmark/Danemark, 57467/15, Judgment/Arrêt 7.12.2021 [GC]

(See Article 3 above/Voir l'article 3 ci-dessus, page 6)

Respect for private life/Respect de la vie privée
Respect for home/Respect du domicile

Justified dismissal of claim about disclosure of applicant's declared income data by television report on criminal case against her retired prosecutor husband: *no violation*

Rejet justifié d'une action concernant la divulgation d'informations sur la déclaration de revenus de la requérante dans un reportage télévisé consacré à une affaire pénale visant son époux, un procureur retraité : *non-violation*

Unjustified dismissal of claim about disclosure of applicant's address, tax ID number and house interior images by television report on criminal case against her retired prosecutor husband: *violation*

Rejet non justifié d'une action concernant la divulgation de l'adresse de la requérante, de son numéro de contribuable et d'images de son intérieur dans un reportage télévisé consacré à une affaire pénale visant son époux, un procureur retraité : *violation*

Samoylova – Russia/Russie, 49108/11, Judgment/Arrêt 14.12.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant complained about the non-consensual disclosure of her private data by a popular nationwide television-show. More specifically, in 2009, this had broadcast a report concerning the ongoing criminal proceedings against a group of public officials and others, including her husband, a retired Moscow prosecutor, on account of alleged criminal activities in early 2007. The report had shown a tax authority's letter in reply to a request for information from the investigator in her husband's criminal case which contained their full names, official registration address in Moscow, official taxpayer identification numbers and their declared income data for 2004-07. It had also focused on the family's country house with assertions about its high value and had shown photographs of its interior. The civil proceedings brought by the applicant and her husband were dismissed at all instances.

Law – Article 8: This provision was applicable. An individual's full name and home address fell within the scope of "private life" as did, in the circumstances, the applicant's taxpayer identification number. This constituted information relating to an identified or identifiable natural person, and could, depending on the modalities and the use under national law, constitute relatively sensitive data closely linked to a person's identity. Lastly, the images of the country house, in the circumstances, fell within the scope of both "private life" and "home"; they had been disseminated without the applicant's consent and had been taken either by the investigating officers during and in relation

to the investigation of the criminal case against the husband or, perhaps, by the journalists during their visit to the house when filming for the impugned television report. As to the merits of the case, the Court found as follows.

(a) *Contribution to a debate on a matter of general interest* – The Court had already declared inadmissible the complaint by the applicant's husband in relation to his defamation in the same television report and the same domestic proceedings (see *Samoylov v. Russia* [Committee], 1750/11, 28 May 2019). The impugned report had been aired on national television at the time when the criminal case had been submitted for trial by jury. In addition to the circumstances underlying the criminal charges, the report had touched upon a wider context relating to the allegedly luxurious lifestyles of the main protagonists, particularly those who had held public office and the possible origins of their wealth. In this context it had targeted the applicant's husband. The report's narrative that the dissemination of the income information had been meant to demonstrate that his officially declared income (mostly, during and in relation to his office as a prosecutor prior to his retirement in 2006) taken alone or even in conjunction with his family members' income would not have sufficed to acquire a country house in a prestigious area. The principal purpose thus of this aspect of the report, along with the reporting on the ongoing criminal proceedings, had been to contribute to a debate of general interest.

(b) *How well known the applicant was and her conduct prior to the broadcasting of the television report* – It was not necessary to determine whether the applicant had been a "public figure" as she had been affected by the impugned report solely by reason of her marriage to a retired high-ranking public official. The Court took note of the national courts' and the Government's argument based on the anti-corruption legislation passed since 2008 which included declaration and disclosure of income obtained by spouses of officials holding certain public offices; such requirements had been widely employed in the fight against official corruption. In the context of the report on the ongoing criminal proceedings against her husband, a bona fide journalistic investigation into a prima facie disparity between his assets or lifestyle and declared income could legitimately have regard to the financial situation of his household, specifically his spouse's declared income. This was especially so where the public official had relied on the spouse's income to justify the household's assets.

(c) *Method of obtaining the information and its veracity* – The civil courts had considered that the relevant information had been received lawfully. At the time the Criminal Procedure Code allowed the disclosure of the "data" contained in a criminal case if, *inter alia*, it did not violate the rights or legitimate interests of the persons involved in the proceedings. The applicant, however, had not challenged the applicable legislative framework. In the absence of more detailed submissions and, in view of the fact that her complaints concerning the investigator's actions had been declared inadmissible, the Court was not in a position to assess whether these had been in compliance with domestic law.

As to the accuracy and reliability of the information, it had not been clearly established in the civil proceedings that the information about the applicant's low income had been incorrect. The applicant had been afforded the opportunity, however, to challenge its veracity and the courts had taken the amended data into account. The civil courts had chosen not to take a stance on the correctness of the data presented in the report as the applicant's (relatively low) income data for 2004-06 or as the (high) value of the country house. Instead, they had concluded that even taking into account the higher income as indicated in the document submitted by the applicant, the statement about the disparity between that corrected income and the overall expenditure on the house had still "corresponded to reality" in the meaning of Russian law and thus could not give rise to a retraction. On the basis of the evidence the courts had considered, in substance, that there had been a sufficient factual basis for the allegation made. There was no reason to disagree with this assessment, in particular as regards the "significance" of the income-expenditure disparity as it was established in the civil proceedings.

(d) *The content, form and consequences of the television report*

(i) *With regard to the alleged defamation and the showing of the data presented as the applicant's declared income* – In the circumstances, the prejudice caused to the enjoyment of the applicant's right to respect for her reputation by the showing of the tax authority's letter and its interpretation by the narrator, had been limited and had not extended beyond mere association, as a spouse, in the context of the media outlet's contribution to the debate on the matter of public interest concerning her husband. Further, there was no reason to doubt the journalists' choice of investigative and reporting techniques. Similarly, the Court took note of the technique focusing on the disparity between declared income of the household and expenditure. In conclusion, the Court found that both in so far as the association mentioned above had been limited to the applicant's declared income and as regards the alleged defamation, the civil courts in dismissing her claim had examined the relevant issues and

had struck a fair balance between the Article 8 and 10 rights at stake.

Conclusion: no violation (four votes to three).

(ii) *With regard to the showing of the applicant's address, her taxpayer identification number and the images of the interior of the country house* – The civil courts had neither carried out an adequate examination nor given sufficient reasoning regarding the disclosure of these aspects of the applicant's private data. They had failed to delve into the "necessity" of their disclosure and had thus not struck a balance between the rights at stake.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of the applicant's right to a fair hearing Article 6 § 1 in that the civil courts had failed to adequately deal with the applicant's claims of invasion of privacy.

Article 41: EUR 6,000 in respect of non-pecuniary damage.

(See also *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], 931/13, 27 June 2017, Legal Summary)

Respect for family life/Respect de la vie familiale

Shortcomings in decision-making process resulting in severance of mother-child ties, in a context of different cultural and religious backgrounds of mother and adoptive parents: *violation*

Insuffisances dans le processus décisionnel ayant entraîné la rupture des liens mère-enfant, dans un contexte de différences culturelles et religieuses entre la mère et les parents adoptifs : *violation*

Abdi Ibrahim – Norway/Norvège, 15379/16, Judgment/Arrêt 10.12.2021 [GC]

Traduction française du résumé – Printable version

Facts – The applicant, a Somali national, was granted refugee status in Norway in June 2010; she was accompanied by her son, X, who had been born a few months earlier in Kenya. In December 2010, X was placed in emergency care by the social services. Following a decision of the County Social Welfare Board ("the Board") that same month he was placed into ordinary foster care with a Christian family, while the applicant had argued he should go either to her cousins or to a Somali or Muslim family. The applicant was granted four supervised contact sessions with X per year. She appealed and in September 2011 the District Court upheld the care order but increased her contact rights to one hour, six times per year. She did not lodge a further appeal. In September 2013 the social-welfare authorities applied to allow the foster family to adopt X, which would lead to the applicant having no contact, and for the applicant's parental rights to be removed. The applicant appealed: she did not ask for X's return as he had spent a long time with foster parents to whom he had become attached, but she sought contact so that he could maintain his cultural and religious roots. At final instance, in May 2015, the High Court authorised X's adoption, after having examined, among other questions, the ethnic, cultural and religious aspects of the proposed adoption. The applicant was refused leave to appeal to the Supreme Court.

The applicant complained under Articles 8 and 9 of the Convention. She also relied on Article 2 of Protocol No. 1. In a judgment of 17 December 2019, a Chamber of the European Court held, unanimously, that there had been a violation of Article 8. The case was referred to the Grand Chamber at the applicant's request.

Law – Article 8

(a) *Scope of the case* – As delimited by the Chamber's admissibility decision, the case only concerned the applicants' complaints as to the deprivation of parental responsibility and the authorisation for the adoption of her son and thus the domestic proceedings and decisions from 2013 to 2015. However, some regard had to be had to the preceding proceedings and decisions from 2010 to 2011 as to foster care and the applicant's contact rights.

(b) *Legal characterisation of the applicant's complaint* – The applicant's complaints under the provisions invoked all concerned the same measures, which, according to the Court's case-law, was invariably considered under Article 8 of the Convention. The question arose as to whether and to what extent they attracted the application of Article 9 of the Convention and/or Article 2 of Protocol No. 1. The Convention institutions had on certain occasions been called upon to examine complaints formulated under the latter provision, in addition to the complaint under Article 8, in regard to the choice of foster home. However, they had not elucidated the reach of this provision beyond affirming that the authorities must have due regard to the parents' right thereunder. No review of the instant case was required with reference to Article 2 of Protocol No. 1 bearing in mind first, that most cases examined under that provision and the principles developed in the Court's case-law concerned the obligations of the State in relation to institutionalised education and teaching; and second, that the applicant had not relied on that provision in her ini-

tial application to the Court as declared admissible by the Chamber.

As per Article 9, for a parent to bring his or her child up in line with one's own religious or philosophical convictions may be regarded as a way to "manifest his religion or belief, in ... teaching, practice and observance". It was clear that when a child lived with his or her biological parent, the latter might exercise Article 9 rights in everyday life through the manner of enjoyment of his or her Article 8 rights. To some degree he or she might also be able to continue doing so where the child has been compulsorily taken into public care, for example through the manner of assuming parental responsibilities or contact rights aimed at facilitating reunion. The compulsory taking into care of a child inevitably entailed limitations on the freedom of the biological parent to manifest his or her religious or other philosophical convictions in his or her own upbringing of the child. It was, however, appropriate to examine the applicant's complaint relating to the adverse effect of the choice of foster home in regard to her wish that her son be brought up in line with her Muslim faith, as an integral part of her complaint concerning her right to respect for her family life as guaranteed by Article 8, interpreted and applied in the light of Article 9, rather than as a separate issue.

(c) *Article 8 read in the light of Article 9* – The impugned measures had entailed an interference with the applicant's right to respect for her family life, had been accordance with the law, and pursued the legitimate aims of the protection of her son's "health and morals" and his "rights". Hence, the crucial question was whether they had been "necessary in a democratic society", including whether the domestic authorities had had due regard to the applicant's interests protected by the Article 9 freedom. This approach was consonant with the standard reflected, *inter alia*, in the UN Convention on the Rights of the Child, notably its Article 20(3), whereby due regard shall be paid, *inter alia*, to the child's religious, ethnic and cultural background. That standard in substance corresponded to and was in compliance with the requirements of the Convention.

The High Court had accepted the applicant's view at the relevant time that continued foster care would have been in X's best interests. Thus, it appeared that at the time of the impugned proceedings the applicant's interest in avoiding adoption primarily stemmed from the final and definitive nature of the measure and that it would lead to her son's religious conversion, contrary to her own wishes. Since the foster parents did not wish a so-called "open adoption", an arrangement which included post-adoption contact visits, adoption would have as a consequence the loss, *de facto* and *de jure*, for the applicant of any right to future contact with her child. Regardless, however, of the applicant's acceptance that X's foster care could continue and of whether the domestic authorities had been justified in considering long-term foster care for X were he not to be adopted, she and her son retained a right to respect for family life under Article 8. The fact that she had not applied for family reunification had not dispensed the authorities from their general obligation to consider the best interests of X in maintaining family ties with the applicant, to preserve their personal relations and, by implication, to provide for a possibility for them to have contact with one another in so far as reasonably feasible and compatible with X's best interests.

The proceedings before the Board and the courts had been extensive and thorough with, *inter alia*, expert testimony by psychologists. However, the process leading to the withdrawal of parental responsibility and consent to adoption showed that the domestic authorities had not attempted to perform a genuine balancing exercise between the interests of the child and those of his biological family. Instead of trying to combine both sets of interests, they had focused on the child's interests and had not attached sufficient weight to the applicant's right to respect for family life, in particular to the mother and child's mutual interest in maintaining their family ties and personal relations and hence the possibility for them to maintain contact. In this context, the Court was not persuaded that the competent domestic authorities had duly considered the potential significance of the fact that the applicant had not applied to have the care order lifted, but had merely opposed adoption on the grounds that she wished to maintain a right of contact with her child.

As the High Court's decision had been largely premised on an assessment of X's attachment to his foster home, the factual basis on which it had relied in making that assessment appeared to disclose shortcomings in the decision-making process. Its decision had been taken in a context where there had in fact been very little contact between the applicant and X from the outset following his placement in care. The sparse contact between them after the issuance of the care order provided limited evidence from which to draw clear conclusions about whether it would have been in X's best interests, when the impugned decision had been taken, that the applicant be given no right to future contact with him. Further, the decision had focused essentially on the potential effects of removing X from his foster parents and returning him to the applicant, rather than on the grounds for terminating all contact between X and the applicant. Thus,

it appeared that the High Court had given more importance to the foster parents' opposition to "open adoption" than to the applicant's interest in the possibility of a continued family life with her child through contact with him. The Court also had reservations regarding the emphasis that had been placed on the need to pre-empt the applicant from resorting at some future point to legal remedies to contest the care order or the arrangements for visiting rights; the exercise of judicial remedies by biological parents could not automatically count as a factor in favour of adoption and the exercise of procedural rights formed an integral part of their right to respect for their family life under Article 8.

The High Court had acknowledged that the interest in ensuring X's attachment to the foster home environment had to be balanced also against aspects relating to ethnicity, culture and religion, and religious conversion, particularly in the light of the differences between the applicant's and the prospective adoptive parents' religious faiths. In this connection, it had taken evidence from two expert witnesses, examined sources of international law - relying in particular on Article 20(3) of the United Nations Convention on the Rights of the Child -, and how the applicant would have perceived adoption given her religious values. It had presumed - as there had been a serious shortage of foster parents from minority backgrounds - that there had been no foster parents available who had a cultural background more similar to that of the applicant. Furthermore, the High Court had looked into what could be considered as X's own values at the time of the possible adoption, in the light of his upbringing by his foster parents and had observed that the religious differences in question could have also created difficulties with regard to continuing the foster home arrangement. It had concluded that decisive importance ought to be attached to how adoption would create clarity, strengthen the development of X's identity, and make him an equal member of the family with which he lived. Lastly, it also transpired from the High Court's reasoning, that the choice of foster home made in 2010 had had a significant bearing on what was considered to be in X's best interests for its 2015 assessment of the authorisation for adoption.

The Court noted that the applicant's rights under Article 8 of the Convention, as interpreted in the light of Article 9, could not be complied with only by ultimately finding a foster home which corresponded to her cultural and religious background. In this connection, domestic authorities were bound by an obligation of means, not one of result. It also did not question the fact that, on the basis of the information available, the actions of the authorities had included efforts, which ultimately proved unsuccessful, to find a foster home for X at the outset that had been more suitable from this perspective. However, as found by the Chamber, the arrangements made thereafter as to the applicant's ability to have regular contact with her child, culminating in the decision to allow for X's adoption, had failed to take due account of the applicant's interest in allowing X to retain at least some ties to his cultural and religious origins.

Consequently, the reasons advanced in support of the impugned decision had not been sufficient to demonstrate that the circumstances of the case had been so exceptional as to justify a complete and definite severance of the ties between X and the applicant, or that the decision to that effect had been motivated by an overriding requirement pertaining to X's best interests. In view of the gravity of the interference and the seriousness of the interests at stake, the decision-making process leading to the applicant's ties with X being definitively cut off, had not been conducted in such a way as to ensure that all of her views and interests had been duly taken into account.

Conclusion: violation (unanimously).

Article 41: no claim made.

Article 46: In a case of this type, in general the best interests of the child must be a paramount consideration also when the Court was deciding whether to indicate any individual measures to be taken under this provision. X and his adoptive parents currently enjoyed family life together and individual measures could ultimately entail an interference with their respect for that family life. Thus, the facts and circumstances relevant to Article 46 could raise new issues which were not addressed by the present judgment on the merits. Moreover, although the applicant had not requested any measure of a more general character, in so far as there might be a certain systemic issue in question, the respondent Government had shown that they had made efforts to implement the judgments rendered by the Court concerning various types of child welfare measures in which violations of Article 8 had been found and that the respondent State was in the process of enacting new legislation. In view of the above, the Court did not find that any measures were to be indicated under Article 46.

(See also *Strand Lobben and Others v. Norway* [GC], 37283/13, 10 September 2019, Legal Summary)

Respect for family life/Respect de la vie familiale

Justified temporary suspension of parental authority and limitation of contact with

vulnerable child, in context of uncooperative parent: *no violation*

Mesures temporaires de suspension de l'autorité parentale et de limitation des contacts avec un enfant vulnérable justifiées dans le cas d'un parent non coopératif : *non-violation*

R.M. – Latvia/Lettonie, 53487/13, Judgment/Arrêt 9.12.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant is the mother of X, a minor at the relevant time. After a fight in the family home in February 2013, the applicant's parental authority over X was suspended and her contact rights with him were limited. X was placed in care.

X was initially placed in the psychiatric unit of a children's hospital after becoming agitated on the night of the February 2013 incident, and later placed in a children's home after being discharged in March. He was placed in a psychiatric hospital again in May after having been aggressive towards other children. Two days later the applicant and X left the hospital and the applicant refused to disclose the latter's whereabouts to the authorities. Although the applicant was found at the applicant's usual place of residence and returned to the psychiatric unit, he later ran away. The applicant returned to his mother on several further occasions and the latter refused to cooperate with the authorities in the matter.

During this time, the applicant's parental authority over X remained suspended, although it was considered by the guardianship institution and domestic courts on several occasions. It was eventually restored in November 2014.

Law – Article 8: The suspension of the applicant's parental authority and the limitations imposed on her contacts with her child had interfered with her right to respect for family life. The impugned measures had conformed to the requirements of domestic law and pursued the legitimate aim of protecting the rights and freedoms of others, namely those of X.

With respect to the incident in February 2013, the police had picked up an inappropriately dressed, 12-year-old boy on the street at night, with him claiming to have had a fight with his mother. The Court accepted that the authorities had been called upon to adopt urgent measures temporarily separating the mother and child.

The measures taken by the domestic authorities had been prompt and far-reaching. On the day following the incident, the applicant's parental authority had been suspended and two weeks later her contact rights with X had been removed in their entirety. No temporal limits for the suspension had been set, but – if her parental authority had not been restored within a period of one year – the applicant had risked having it completely removed. As X's maternal relatives had been considered to have played an active role in his mother's failure to cooperate with the specialists, their contact rights with X had also been removed. Despite the far-reaching nature of the measures taken by the domestic authorities, they could not be criticised for having made the choice to separate the applicant from her son, given the urgency of the situation.

As to the decision-making process, the initial decision to suspend the applicant's parental authority had been taken by the director of the relevant guardianship institution on the day following the incident of February 2013. All subsequent decisions not to restore her parental authority had been taken collegially by the relevant guardianship institutions after having heard the applicant and reviewing the available material. There was no basis for considering that the applicant, who had attended with her lawyer or other representative, had not been allowed to fully participate in the decision-making process or that the process had not allowed her rights and interests to be taken into account. The applicant had also brought several sets of proceedings to seek restoration of her parental authority and the matter had been examined in three court instances. She had also applied for an interim measure which had been examined in expedited proceedings in two court instances.

Regarding the reasons for the impugned measures, the first-instance court had essentially found that the suspension of the applicant's parental authority had been necessary because there had been fears that she had committed physical and emotional abuse against X and given her inability to understand his needs. The appellate court and the court of cassation had also relied on the fact that the applicant had been hiding the child; they had grounded their decisions on her repeated refusals to cooperate with the domestic authorities despite the child's need for specialist help. The Court also could not lose sight of the context in which the domestic authorities had been operating: the applicant's son had come to the attention of the authorities at a very young age and had made several attempts to harm himself and others, as a result of which he had been an inpatient in the psychiatric unit of a children's hospital. His custody had been the subject of proceedings involving different guardianship institutions with which the applicant had refused to cooperate, changing her address twelve times between 2009 and 2012. The Court

therefore accepted that those had been "relevant" considerations.

As to whether those considerations had been "sufficient" to justify the impugned measures, the Court noted that, while the initial allegations by X of physical abuse by the applicant had not been confirmed, concerns about emotional abuse had remained. Regarding the applicant's inability to understand the needs of her child and the suspected emotional abuse, the administrative courts had referred extensively to various expert reports which had been relatively recent and rather comprehensive. On the basis of those reports, the domestic courts had had a solid basis for concern about the applicant's relationship with her child and the effect it had had on his development and well-being. Moreover, the domestic courts had also examined the family situation as a whole over an extended period of time.

The material before the Court revealed a particularly worrying trend in Latvia for dealing with emotionally vulnerable children with behavioural problems – it appeared that the authorities had considered placing these children in psychiatric institutions as a first resort. Placement in psychiatric institutions could not be considered conducive to the well-being of the child or in his or her best interests in the absence of a psychiatric illness or any indication that his or her state of health necessitated particular treatment. The Court also referred to the conclusions of the Ombudsperson concerning the fundamental deficiencies in Latvian children's homes including recourse to psychiatric hospitals in order to handle behavioural problems, placement in distant children's homes, failure to address individual behavioural issues, and the lack of alternative out-of-family care arrangements. While mindful of the complexity of the situation facing the authorities at the time, and considering the context in which they had been operating, the Court considered that the authorities might not have sufficiently considered the possibility of other placement arrangements more protective of a vulnerable child.

The Court noted the importance of parents' cooperation when measures to ensure the well-being of a child are undertaken by the competent authorities. The applicant's action of taking X away from the hospital, flagrantly disregarding the decision to suspend her parental authority, had been an unlawful act of particular gravity which had brought about an escalation of the situation. Even if the applicant had assumed that X's health and well-being had been at risk in the children's home, there could be no justification for her taking matters into her own hands in such a way. Instead she should have sought urgent intervention by the competent authorities.

The Court rejected the applicant's argument that the refusals to restore her parental authority had been aimed at punishing her for her conduct. The applicant's failure to cooperate over many years had been a central factor which had objectively limited the options that the authorities had had in finding the right balance between the interests involved, and her living in hiding with X had harmed him.

The Court also had to examine whether the Latvian authorities had duly weighed the different interests involved. The administrative courts had not invited the applicant's son to express his wishes, on the basis of the view that he had been traumatised by the whole situation and various expert conclusions that he should not be repeatedly questioned or participate in court proceedings. Taking into account the margin of appreciation enjoyed by the domestic authorities, their view had been reasonable. While the appellate court had taken note of X's wish to stay with the applicant, it had considered that those views had been unduly influenced by the applicant. The Court could not agree with the applicant that the domestic courts had not taken into account what had appeared to be X's best interests at the relevant time and had done so against a background of her sustained refusal to cooperate with the authorities. The domestic authorities had weighed X's interests against those of the applicant and had given precedence to the child's interests in reaching their conclusions.

Further, the domestic courts had ruled on the applicant's claim in the light of circumstances that had prevailed at that time and had made it clear that they might reconsider the situation if some of the circumstances weighing in favour of separating the family would cease to exist. When the applicant had started to cooperate with the domestic authorities, seeking to engage with measures in the best interests of X, the situation had been reassessed and her parental authority had been restored.

In sum, the authorities had given relevant and sufficient reasons for the impugned measures, which had fallen within the margin of appreciation afforded to the respondent State.

Conclusion: no violation (six votes to one).

(See also *Strand Lobben and Others v. Norway* [GC], 37283/13, 10 September 2019, Legal Summary)

Respect for family life/Respect de la vie familiale

Inability to obtain Polish nationality by descent by children born through surrogacy in USA to

same-sex couple and residing in Israel, where legal parent-child link is recognised: *inadmissible*

Impossibilité d'obtenir la nationalité polonaise par filiation pour les enfants d'un couple homosexuel nés aux États-Unis au terme d'une gestation pour autrui et résidant en Israël, où le lien juridique parent-enfant a été reconnu : *irrecevable*

S.-H. – Poland/Pologne, 56846/15 and/et 56849/15, Decision/Décision 16.11.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicants are twin brothers born in 2010 through surrogacy in the USA. They have Israeli and American citizenship and live in Israel. Their "intended parents" are two men, living in a same-sex relationship in Israel and parenting the boys since their birth. One of the intended parents, the boys' biological father, is also a Polish citizen. However, the boys' application to confirm the acquisition of Polish nationality by descent was dismissed by Polish authorities/courts. The applicants were born *via* surrogacy which was not allowed in Poland and the American birth certificates indicated two men as the applicants' parents which contravened the principles of the Polish legal order.

Law – Article 8: The Court had to determine whether the refusal to recognise the legal parent-child relationship with the applicants' biological father and the ensuing refusal to confirm the acquisition of Polish citizenship by descent had affected the applicants' private life thus rendering Article 8 applicable.

The Court employed a consequence-based approach and examined whether the impugned decisions had had sufficiently serious negative consequences for the applicants (compare *Denisov v. Ukraine* [GC]). It was further for the applicants to show convincingly that the threshold had been attained in their case.

The applicants had contended that they had been Polish Jews whose family members had been killed in the Holocaust and that that heritage had been extremely important to them. Allegedly, due to Israel's difficult geopolitical situation, the family had been considering moving to Europe. However, the Court had not been provided with any specific information or details about the family's plans to relocate to Poland and such a move had not been imminent. Whatever the degree of potential risk to the applicants' family or private life, the Court had to determine the issue having regard to the practical obstacles which they had had to overcome on account of the lack of recognition in Poland of the legal parent-child relationship between the applicants and their legal parents.

As regards the direct consequences of the refusal to confirm the acquisition of Polish citizenship, the applicants had never lived in Poland. Since birth they had been living in Israel as a family unit with their intended parents. They already had dual US/Israeli citizenship and the domestic decisions had not rendered them stateless. In addition, they had not had any negative consequences or practical difficulties which they might encounter in their chosen country of residence, resulting from the Polish courts' refusal to confirm the acquisition of Polish citizenship.

Furthermore, the applicants could benefit, in the State where they lived, from the legal parent-child relationship with their biological father where the recognition of that relationship was not put into doubt. Moreover, the decisions of the Polish authorities had not left them in a legal vacuum both as to their citizenship and as to the recognition of the legal parent-child relationship with their biological father.

The present case had to be clearly distinguished from *Mennesson v. France* and *Labassee v. France* in which the Court had expressly held that a lack of possibility of recognition of the legal relationship between a child born *via* surrogacy abroad and the intended father, where he had been the biological father, had entailed a violation of the child's right to respect for his or her private life. In the present case, the Polish authorities had refused to give effect to the foreign birth certificates establishing the legal parent-child relationship between the applicants and their biological father. However, that link was recognised in the country where the family resided.

Moreover, pursuant to the Directive 2004/38/EC the applicants, as family members of an EU citizen, were entitled to free movement within the EU and enjoyed the right to move and reside in the territory of another Member State.

The Court was mindful that the domestic decisions had clearly had some repercussions on the applicants' personal identity. In addition, on a more practical level, as the situation stood to date, the applicants must have experienced some obstacles resulting from the fact that they did not have Polish (and consequently European) citizenship. Nevertheless, it did not appear that the negative effect which the impugned decisions had had on the applicants' private life had crossed the threshold of seriousness for an issue to be raised under Article 8. Moreover, the applicants had not set forth, either to the Court or in the domestic proceedings, any other specific personal circumstances indicating that those decisions had had a serious impact on their private life.

Even taking into account their complaint that the domestic authorities had determined *de novo* their legal parentage in accordance with the principles of Polish family law, considering that the applicants did not live in Poland, the Court was unable to find any factual basis for concluding that there had been an interference with the right to respect for family life in the present case.

Furthermore, it did not appear that so far the family had had to overcome any practical obstacles on account of the Polish authorities' decisions. Most importantly, since the applicants' family resided in Israel, the inability to obtain confirmation of acquisition of Polish citizenship had not prevented them from enjoying, in the country where they lived, their right to respect for their family life. The applicants and their intended parents all had Israeli citizenship, and their legal relationship was recognised in Israel. The fact that the applicants were not recognised as Polish citizens would not have any bearing on their family life, for example in the event of their intended parents' death or separation. Thus, any potential risk to their family life should be regarded in this particular case as purely speculative and hypothetical and could only possibly materialise if they took up residence in Poland.

In view of the above considerations, Article 8 was not applicable.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See *Labassee v. France*, 65941/11, 26 June 2014, Legal Summary; *Mennesson v. France*, 65192/11, 26 June 2014, Legal summary; and *Denisov v. Ukraine* [GC], 76639/11, 25 September 2018, Legal summary)

ARTICLE 9

Manifest religion or belief/Manifester sa religion ou sa conviction

Rejection of identity photos of Pastafarian wearing a colander, due to non-recognition of Pastafarianism as a religion or belief: *Article 9 not applicable; inadmissible*

Photos d'identité d'une pastafarienne portant une passoire non acceptées, le pastafarisme n'étant pas reconnu comme religion ou croyance : *article 9 non applicable ; irrecevable*

De Wilde – Netherlands/Pays-Bas, 9476/19, Decision/Décision 9.11.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant is a so-called "Pastafarian", a follower of the "Church of the Flying Spaghetti Monster". When she tried to renew her identity card and her driving licence, she submitted identity photographs of herself on which, allegedly in line with the prescriptions of her belief, she was wearing a colander. These were rejected, in accordance with the delegated legislation in force, which required the identity photograph on official identity documents to show the bearer bareheaded unless a head covering was prescribed by the bearer's religion. Her challenges were unsuccessful; the administrative and judicial authorities found that Pastafarianism did not qualify as a "religion".

The applicant complained, *inter alia*, that the domestic authorities, in particular the Administrative Jurisdiction Division of the Council of State, had misapplied the standards developed by the Court and that no account had been taken of her *forum internum*.

Law – Article 9: Given the applicant's complaints, the core question was whether Pastafarianism could be regarded as a "religion" or "belief" to be protected by Article 9. The Court replied in the negative. In particular, it found no reason to deviate from the findings of the Administrative Jurisdiction Division, whose decision appeared carefully measured and did not seem in any way arbitrary or illogical. That court had duly applied the standards set out in the Court's case-law and noted a lack of the required conditions of seriousness and cohesion. While accepting that the applicant had been consistent in wearing her colander out of doors, it found that she had not shown that she belonged to a Pastafarian denomination that met the above preconditions. In this context, the Court noted that the original aim for which the Pastafarian movement had been founded had been to protest against the introduction into the school curriculum of the state of Kansas of the doctrine of "intelligent design" alongside the theory of evolution; this had inspired a movement critical of the influence and privileged position afforded to established religions in some contemporary societies. That movement had sought to express this criticism by parodying aspects of those religions and by claiming the same privileges for itself with a view to propagating its message. This understanding was supported not only by the form and content of Pastafarian teaching but also by the appearance in one of its "canonical" texts of the outright statement to that effect.

In these circumstances, and in particular given the very aims for which the Pastafarian movement had been founded, the Court did not consider Pastafarianism to be a "religion" or "belief" within the meaning of Article 9. Consequently, the wearing of a colander by followers of Pastafarianism could not

be considered a manifestation of a "religion" or "belief", even if the person concerned submitted that he or she chose to do so out of a conviction that was genuine and sincerely held. It followed that Article 9 could not apply either to the "Church of the Flying Spaghetti Monster" or to those who claimed to profess its doctrines.

Conclusion: inadmissible (incompatible *ratione materiae*).

ARTICLE 10

Freedom of expression/Liberté d'expression

Unjustified court orders against media company to disclose data of authors of offensive comments posted on its internet news portal as part of a political debate: *violation*

Décisions de justice injustifiées ayant ordonné à un media de divulguer les données relatives aux auteurs de commentaires injurieux mis en ligne sur son portail d'actualités dans le cadre d'un débat politique : *violation*

Standard Verlagsgesellschaft MBH – Austria/Autriche (no. 3/n° 3), 39378/15, Judgment/Arrêt 7.12.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant is a limited liability company which owns and publishes a daily newspaper published in print format, in digital format (as an "e-paper") and in an online version. Its online news portal carries articles assigned to it by the editorial office and discussion forums relating to those articles on which registered users are allowed to post comments. Following the posting of offensive comments under two articles the applicant company had published on its portal regarding two politicians and a political party, it was ordered, in two sets of proceedings on appeal, to disclose the data of the comments' authors. The domestic courts refused to consider the latter as journalistic sources. The applicant company complained that this had infringed its Article 10 right to freedom of expression.

Law – Article 10: At the outset, the Court noted that the case concerned the applicant company's duty as a host provider to disclose user data in certain circumstances and not its own liability for the users' comments.

(a) *Existence of an interference* – The applicant company, in its role as an editor of journalistic work, used the discussion forums on its news portal to participate in the dissemination of ideas with regard to topics of public interest, as protected by freedom of the press. As the comments posted on the forum by readers of the news portal were clearly addressed to the public rather than to a journalist, they could not be considered a journalistic source. The applicant company could not thus rely on editorial confidentiality. However, an interference with Article 10 could also occur in ways other than by ordering the disclosure of a journalistic source. The question of whether there might be an interference also did not depend on the legal categorisation of a provider by the domestic courts but rather on the circumstances of the case as a whole. In the present case, the applicant company's role and interlinked activities as a media company extended beyond being a host provider; it also published a daily newspaper and maintained a news portal which provided a forum for users. It took an active role in guiding users to write comments which it described as an essential and valuable part of the news portal. User-generated content on its portal was at least partly moderated. It was thus apparent that the applicant company's overall function was to further open discussion and to disseminate ideas with regard to topics of public interest as protected by freedom of the press. An obligation to disclose the data of authors of online comments could deter them from contributing to debate, leading therefore to a chilling effect among users posting in forums in general, and affecting, indirectly, also the applicant company's right to freedom of press.

The applicant company had awarded its users a certain degree of anonymity not only in order to protect its freedom of the press but also to protect users' private sphere and freedom of expression – rights all protected by Articles 8 and 10 of the Convention. This anonymity would not be effective if the applicant company could not defend it by its own means. It would be difficult for users to defend their anonymity themselves should their identities have been disclosed to the civil courts. The interference lay thus in the lifting of anonymity and the effects thereof, irrespective of the outcome of any subsequent proceedings as to the content of the comments. Consequently, the domestic courts' orders to disclose the requested user data constituted an interference with the applicant company's right to enjoy freedom of the press.

(b) *Whether the interference was justified* – It had not been disputed between the parties that the interference had been prescribed by law and that it had served the legitimate aim of the protecting the reputation and rights of others. The Court, however, found that the interference had not been necessary in a democratic society.

There was no absolute right to anonymity. And anonymity on the Internet, although an important value, had to be balanced against other rights and interests. The importance of a sufficient balancing of interests arose from this awareness, in particular, if political speech and debates of public interest were concerned. This issue was not only reflected in the Court's longstanding case-law but also in international-law material concerning Internet intermediaries according to which the disclosure of user data had to be necessary and proportionate to the legitimate aim pursued. A potential victim of a defamatory statement had to be awarded effective access to a court in order to assert his or her claims before that court. The domestic courts, before deciding whether the data relating to the author's identity should be disclosed, would have to weigh – in accordance with their positive obligations under Articles 8 and 10 of the Convention – conflicting interests at stake. In the instant case, those interests comprised the plaintiffs' right to protect their reputation and the applicant company's right to freedom of press as well as its role in protecting the personal data of the comment's authors and the freedom to express their opinions publicly.

In the Court's view, the impugned interference in the instant case (duty to disclose user data) would weigh less heavily in the proportionality assessment than the interference in a case where a media company was held liable, under civil or criminal law, for the content of a particular comment by being fined or obliged to delete it. Consequently, the Court accepted that for a balancing exercise in proceedings concerning the disclosure of user data, a prima facie examination might suffice, and that domestic courts enjoyed a certain margin of appreciation, even if it was narrow when political speech was concerned. Still, even a prima facie examination required some reasoning and balancing.

The comments made about the plaintiffs, although seriously offensive, had not amounted to hate speech or incitement to violence, nor had they been otherwise clearly unlawful. They had been expressed in the context of a public debate on issues of legitimate public interest, namely the conduct of the politicians in question acting in their public capacities and their own comments published on the same news portal. Since such comments could be characterised as political speech, it was of particular concern that the appeal courts and the Supreme Court had not conducted any balancing exercise. Referring to the Supreme Court's case-law, which in fact did not preclude a balancing of interests, they had considered that such a balancing should be carried out during proceedings against the author of the allegedly defamatory comments and not in those against the relevant service provider. The lack of any such balancing had overlooked the function of anonymity as a means of avoiding reprisals or unwanted attention and thus the role of anonymity in promoting the free flow of opinions, ideas and information. Accordingly, in the absence of the requisite balancing the decisions of the appeal courts and of the Supreme Court had not been supported by relevant and sufficient reasons to justify the interference.

Conclusion: violation (unanimously).

Article 41: given the circumstances of the case the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage the applicant company might have sustained. Claim in respect of pecuniary damage dismissed.

(See also *Sanoma Uitgevers B.V. v. the Netherlands* [GC], 38224/03, 14 September 2010, Legal Summary; *Delfi AS v. Estonia* [GC], 64569/09, 16 June 2015, Legal Summary; and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 22947/13, 2 February 2016, Legal Summary)

Freedom of expression/Liberté d'expression

Unjustified prosecution for hate speech and placement on list of terrorists and extremists for publishing a note criticising the Russian Orthodox Church: *violation*

Poursuites injustifiées pour discours de haine et inscription sur une liste de terroristes et d'extrémistes en raison de la publication d'une note qui critiquait l'Église orthodoxe russe : *violation*

Yefimov and/et Youth Human Rights Group/Groupe de la jeunesse pour la défense des droits de l'homme – Russia/Russie, 12385/15 and/et 51619/15, Judgment/Arrêt 7.12.2021 [Section III]

(See Article 11 below/Voir l'article 11 ci-dessous, page 23)

Freedom of expression/Liberté d'expression

Unjustified conviction of newspaper editor and termination of newspaper's media-outlet status under anti-extremism laws: *violations*

Absence de justification pour la condamnation d'un rédacteur en chef et la révocation du statut de média de son journal en application de la législation anti-extrémiste : *violations*

Mukhin – Russia/Russie, 3642/10, Judgment/Arrêt 14.12.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant was editor-in-chief of a newspaper and founder of an informal not-for-profit organisation which campaigned to amend legislation in order to provide for the personal liability of certain elected officials.

A text relating to one of the organisation's manifestos, entitled "You voted, you have the right to judge", was published in the newspaper on numerous occasions for over a decade. In 2006 the newspaper received two anti-extremism cautions from the media regulator in relation to the text. The media regulator subsequently brought successful court proceedings, seeking the newspaper's divestment of its mass-media-outlet status and ban from being distributed. The Editorial Board of the newspaper appealed unsuccessfully.

Separately, the newspaper published a series of texts from D. and another party, including a piece entitled "Death to Russia!" in 2006. The applicant was subsequently subject to criminal proceedings and convicted under domestic anti-extremism legislation, for publication of the piece. He appealed unsuccessfully.

Law – Article 10

(a) *The applicant's criminal conviction and sentencing* – The applicant's prosecution and conviction had amounted to an "interference" under Article 10 § 1. Although there was a lack of clarity as to the scope of the criminal charge against the applicant, the Court proceeded on the understanding that he had been convicted of public calls to others to engage in activities within the scope of two specific "extremist activities" mentioned in the relevant domestic law: activities aimed at the forcible change of the foundations of the constitutional regime, and at the undermining of national security.

The Court left open the question of whether the application of the domestic law provisions to the applicant's case had been reasonably foreseeable and thus "prescribed by law" within the meaning of Article 10 § 2. It considered that the applicant's conviction, at least prima facie, had pursued the legitimate aims of the interests of national security, public safety and prevention of disorder and crime.

The Court therefore had to determine whether the applicant's conviction had been "necessary in a democratic society". The criminal conduct imputed to the applicant had consisted of his actions taken as a newspaper editor, specifically by way of adding a headline "Death to Russia!" to D.'s text and of publishing that material as a newspaper article.

The problematic part of D.'s text had called for the "destruction" of the current political regime in Russia. The text had left little doubt as to its meaning: it had clearly stated that the path of reforms had proved to be ineffective and that the only solution would consist in the total destruction of that "State" through its replacement by another State rather than a "change of regime".

As regards the applicant, the domestic courts had considered that his editorial choices, including the wording and addition of the headline "Death to Russia!", had been guided by his negative attitude towards the existing social and political regime in Russia. It had been incumbent on the criminal courts to elaborate on that general assertion regarding the specific criminal charge of incitement to extremist activities, and in particular as regards the applicant's motivation for disseminating D.'s views. The courts had not considered the context surrounding the publication, including whether the applicant, by publishing D.'s text, had expressed any endorsement, approval or support for the content; the applicant had argued that he had intended to (further) expose and discredit views held by D. It was also to be noted that the publication had formed part of an ongoing debate between D. and another individual.

Even accepting that it had been established that the applicant had disagreed with certain State policies, that factor alone would not necessarily be sufficient to prove his intention to incite others to engage in activities aiming at a violent overthrow of the government or at otherwise undermining national security. The applicant's choice to add the headline "Death to Russia!" would not necessarily be conclusive in that connection either; it was obvious that it had reproduced verbatim the concluding remark from D.'s text. The criminal courts had not convincingly established that the principal purpose of the applicant's editorial choices had not been to thereby contribute to a discussion of general interest, or that the manner in which he had discharged his relevant duties and responsibilities had not been in compliance with the standards of responsible journalism.

The Court stressed that its findings in the present case should not be taken as an approval of the language used in D.'s text or the views put forward in it. They had been limited to the fact that the domestic courts had provided insufficient reasons to justify the applicant's conviction under the domestic law.

The applicant had been sentenced to two years' imprisonment with the sentence suspended and a two-year ban on holding leadership positions in a mass-media outlet. It had not been convincingly shown that the sentence was proportionate in the circumstances of the case, which had concerned a

single instance of publishing another person's controversial views.

Conclusion: violation (unanimously).

(b) *Termination of the newspaper's media-outlet status* – The newspaper had been divested of its mass-media status, originally conferred in 1995, and its certificate of registration as a mass-media outlet had been annulled. That had put an end to its operation as a mass-media outlet and thereby to the applicant's participation, as an editor-in-chief, in the newspaper's exercise of freedom of expression, and specifically the freedom of the press. It had amounted to a complete and permanent ban on the distribution of the newspaper in Russia.

The impugned measures constituted an "interference" under Article 10 § 1, which had been aimed, at least on the face of it, at ensuring national security and preventing (future) disorder and crime. In view of the findings below, the Court did not need to determine whether it had been sufficiently foreseeable so as to be "prescribed by law" within the meaning of Article 10 § 2.

The Court had to determine whether the interference had been "necessary in a democratic society". The termination of the distribution of the newspaper had been ordered by a court, which was a valuable safeguard of freedom of the press. However, the decisions given by the national courts also had to conform to the principles of Article 10.

The decision to terminate the newspaper's media-outlet status had been based on two official anti-extremism cautions, issued in 2006 by the media regulator to the newspaper and applicant as editor, and in relation to the publication of the text "You voted, you have the right to judge". The issuance of cautions amounted to less intrusive measures than immediate termination of a media outlet's status. However, the termination of a media outlet's status could be sought and ordered any time after issuing the cautions; the lack of any ascertainable time-limit had been conducive to creating and maintaining an adverse chilling effect on a media outlet's legitimate exercise of its right to freedom of expression. Moreover, it had not been argued that the operation of the media outlet could be, or had been, later suspended on a temporary basis.

The parties had not taken a clear stance as to the scope of judicial assessment in proceedings concerning the termination of the newspaper's media-outlet status. However, it was clear that the essential factual and legal elements had been limited to the formal fact of the issuance, within a year, of two cautions and their validity at the time when an application for terminating a media outlet's distribution had been lodged. The particularly drastic measure of terminating a newspaper media-outlet's status had to be justified. No such justification had been established or put forward by the national courts in the present case. There had been no judicial assessment of the underlying factual and legal elements pertaining to whether there had been a "pressing social need" for ending the newspaper's distribution and whether it had been "necessary in a democracy society" in pursuit of certain legitimate aims.

The text, which had given rise to the termination of the newspaper's distribution, had been published on numerous occasions over many years prior to 2006, without giving rise to the application of the relevant domestic law on extremism or any concerns relating to the interests of national security and prevention of disorder or crime. The court decisions in the termination case had provided no insight into any change of circumstances that might have occurred in 2006. The Government had seemed to suggest that the newspaper had been used as the mouthpiece for an organisation, pursuing ends contrary to the values of the Convention. However, no relevant factual or legal findings had been made by the courts during the termination proceedings.

The narrow scope of the judicial assessment had made the termination of media-outlet status an automatic outcome resulting from the mere existence of at least two official cautions. Given the domestic courts' omission – whether by operation of the law or on the facts of the case – to provide sufficient reasons to justify the interference, the Court found that they had not convincingly demonstrated that the interference had been proportionate to the legitimate aims pursued.

Conclusion: violation (unanimously).

Article 41: EUR 10,000 in respect of non-pecuniary damage.

(See also *Karastelev and Others v. Russia*, 16435/10, 6 October 2020, Legal Summary, and *RID Novaya Gazeta and ZAO Novaya Gazeta v. Russia*, 44561/11, 11 May 2021)

Freedom to receive information/Liberté de recevoir des informations
Freedom to impart information/Liberté de communiquer des informations

Unlawful refusal to provide a journalist access to information of public interest on the environmental and health impact of a former Soviet military radar station: *violation*

Refus illégal de donner à un journaliste accès à des informations d'intérêt public relatives à

l'impact sur l'environnement et la santé d'une ancienne station radar de l'armée soviétique : *violation*

Rovshan Hajiyev – Azerbaijan/Azerbaïdjan, 19925/12 and/et 47532/13, Judgment/Arrêt 9.12.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant was a journalist and editor of the newspaper *Azadliq*. He sent requests to the Ministry of Healthcare and the Cabinet of Ministers for information concerning the environmental and public-health impact of the Gabala Radar Station, a Soviet military early warning radar located in Azerbaijani territory. After the Soviet Union's dissolution, this station had become the property of Azerbaijan but had been operated by Russia under a lease agreement until its closure in 2012. The applicant mainly inquired whether the Commission appointed to carry out the impact assessment was still active and requested copies of any reports. The Ministry of Healthcare replied that a report had been prepared by the Commission and transmitted to the Cabinet of Ministers. The latter did not respond at all to the applicant's request. As he was not provided with the requested information, the applicant instituted two separate sets of proceedings against the mentioned authorities but was unsuccessful.

The applicant complained under Article 10.

Law – Article 10

(a) *Applicability* – Both requests concerned access to the same State-held information and, as such, constituted essentially the same information request. Although Article 10 did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information, such a right or obligation could arise where access to the information was instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constituted an interference with that right. The Court, applying the criteria for right of access to State-held information laid down in *Magyar Helsinki Bizottság v. Hungary* [GC] was satisfied that the information requested by the applicant, which had been ready and available, constituted a matter of public interest. Access to this information had been instrumental for the applicant, as a journalist, to exercise his right to receive and impart information. Article 10 was therefore applicable.

(b) *Merits* – As the applicant had not received the Commission's report, there had been an interference with his rights enshrined in Article 10 § 1. The Court then found that the interference had not been "prescribed by law" for the following reasons:

First, the crux of the applicant's claim had not concerned any failure by the State authorities to disclose the contents of the report of their own accord, but rather the alleged breach of the legal requirements applicable to processing individual requests for information. The domestic courts, however, had failed to duly examine the lawfulness of the denial of access to the requested information by either of the two authorities, even though arguably that denial had not complied with the procedural requirements of the applicable domestic law.

Second, the domestic courts had dismissed the applicant's claim against the Cabinet of Ministers solely on the basis of Article 29.1 of the 2005 Law on Access to Information, finding that this provision "[did] not provide for an obligation of an information owner to disclose reports of commissions created for a specific purpose". This reasoning, however, had been based on a manifestly unreasonable interpretation and application of the domestic law. Further, the courts had not dealt with the scope of applicability and exact meaning of the above provision which in fact did not, as such, limit access by members of the public to State-held information but facilitated such access by requiring information owners to disclose certain types of often-sought information. Moreover, it appeared that access to information, which, as in the present case, did not belong to the types that information owners were obligated to "disclose" under in Article 29.1, could be sought by individual request. The information owners were then required to provide such access unless the information was lawfully restricted or there were other specifically defined grounds for refusing to provide access. However, the existence of any such substantive grounds for denial was not put forward by the domestic courts or, for that matter, by the authorities or the Government.

Conclusion: violation (unanimously).

Article 41: In the specific circumstances of the case the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage which the applicant might have suffered.

(See *Magyar Helsinki Bizottság v. Hungary* [GC], 18030/11, 8 November 2016, Legal Summary, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], 931/13, 27 June 2017, Legal Summary)

ARTICLE 11

Freedom of association/Liberté d'association

Requirement to remove person suspected of an extremist offence from participation in the

applicant association and its dissolution not prescribed by law: *violation*

Ordre donné d'exclure de l'association requérante une personne soupçonnée d'une infraction à caractère extrémiste, et dissolution de l'association, mesures non prévues par la loi : *violation*

Yefimov and/et Youth Human Rights Group/Groupe de la jeunesse pour la défense des droits de l'homme – Russia/Russie, 12385/15 and/et 51619/15, Judgment/Arrêt 7.12.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The first applicant was the founder and director of the applicant association. In 2011 he posted a short note on the applicant association's newspaper website concerning the Russian Orthodox Church, and for which he was, *inter alia*, prosecuted for hate speech and placed on the list of terrorists and extremists. The applicant association subsequently received a notice from the Ministry of Justice requiring it to remove the first applicant as its founder or member, and was later dissolved. The applicants appealed unsuccessfully up to the Supreme Court.

Law

Article 10: The first applicant had complained that his prosecution for an expression of his views had been in breach of Article 10.

(a) *Existence of an interference* – The pursuance of criminal proceedings against the first applicant in connection with his publication and the placement of his name on the list of terrorists and extremists had amounted to an interference with his right to freedom of expression.

(b) *Justification for the interference* – The Court left open the issue of whether the interference had been "prescribed by law" with a view to examining the complaint from the standpoint of the necessity of the interference. It was also prepared to accept that the protection of the rights of others might be a legitimate aim of the interference.

The decision to institute criminal proceedings and the decision to declare the first applicant a suspect had said very little, if anything, about the factual basis for the prosecution or the legal characterisation attributed to the acts. The Court accordingly proceeded to apply the criteria laid down in its case-law to the extent that the domestic authorities had omitted to consider the matter in the light of the requirements of Article 10.

The first applicant's note had concerned a supposedly growing anti-clerical sentiment in the Republic of Karelia. In setting out his views on what might have adversely affected attitudes towards the Russian Orthodox Church, he had referred to the Church's close links with the political party in power, the continued construction of religious buildings at public expense, the allocation of former kindergartens for use by the church, and the pervasive presence of priests on public television. He had cited anti-clerical graffiti on the walls of a former kindergarten converted into a religious centre as evidence of negative attitudes towards the Church. Admittedly, the criticism had been strongly worded and some people might have taken offence at the language. However, that did not mean that it constituted "hate speech". The key issue in the present case was thus whether the applicant's comments, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance.

The first applicant had expressed his concern about what he saw as the encroachment of one particular religious organisation on public facilities and its unjust enrichment at the expense of society as a whole. His criticism had focused on the religious organisation rather than on individual believers and had not called for anyone's exclusion or discrimination, let alone incite to acts of violence or intimidation. Nor had it been claimed that any factual allegations in the publication, such as the building of churches at public expense, the conversion of kindergartens into religious facilities or the existence of graffiti, had been untrue or slanderous in nature.

As regards the aims of protecting national security and preventing disorder to which the Government had referred, they had not put forward any evidence of a sensitive social or political background, a tense security situation, an atmosphere of hostility and hatred, or any other particular circumstances in which the publication had been liable to produce imminent unlawful actions against Orthodox priests and to expose them to an actual or even remote risk of violence.

Lastly, in so far as the nature and severity of the penalties imposed were factors to be taken into account when assessing the proportionality of an interference, the Court noted that the first applicant had been prosecuted on charges punishable with a deprivation of liberty.

In view of the above, the publication had not been shown to be capable of inciting violence, hatred or intolerance or causing public disturbances, and the grounds for levelling criminal charges against the applicant had been inconsistent with the Article 10 standards.

Conclusion: violation (unanimously).

Article 11 in the light of Article 10

(a) *Existence of an interference* – The requirement to expel the first applicant from the applicant association and the decision on its dissolution had amounted to an interference with both applicants' right to freedom of association protected by Article 11. Furthermore, to the extent that the measures taken against the applicant association had been prompted by the views expressed by the first applicant, the interference had to be examined in the light of the principles established under Article 10.

(b) *Justification for the interference* – The statutory basis for the measures against the applicants could be found at the junction of two provisions of Russian law. The Court examined them in turn to ascertain whether they were sufficiently foreseeable to meet the "quality of law" requirement and necessary in a democratic society to achieve any of the legitimate aims.

(i) *Prohibition on persons suspected of extremist offences from participating in an association* – From the relevant domestic law provisions, it appeared that an investigator's decision that a person was suspected of an extremist offence constituted a necessary but also self-sufficient legal basis for barring the suspected individual from participating in any association, whether existing or future. That decision triggered the adding of the person's name to the list of terrorists and extremists which, in turn, resulted in a legal ban on his or her participation in associations. That sequence of restrictive measures was put in motion automatically, without any judicial control or review of the investigator's decision. It followed that the relevant provisions conferred on an investigator the legal authority and full discretion over the exercise of a fundamental right to freedom of association. An unqualified restriction on the exercise of that right was an extremely severe measure which would need to be justified by serious and compelling reasons even in the case of a convicted person, let alone someone who had been merely suspected of a certain type of offence and still benefitted from the presumption of innocence.

However, an assessment of proportionality and of a link between the restrictive measure and the conduct and circumstances of the person concerned was not required by Russian law. Courts reviewing a complaint about the inclusion of the person's name on the list only needed to satisfy themselves that it had been based on an appropriate procedural document drawn up by an investigator. It followed that Russian law did not offer any procedural safeguards against potentially abusive use of the discretion to declare suspicion and the resulting restriction on freedom of association.

(ii) *Dissolution of an association for "indicators of extremist activities"* – The second domestic law provision lay down a procedure for dissolution of an association which had failed to eliminate "indicators of extremist activities".

In the case of *Vona v. Hungary* on which the Government had relied, but also in other similar cases, the Court had found the dissolution of applicant associations justified because of their members' involvement in intimidation, violence or disturbances of public order. In contrast, in the present case, during the thirteen years of the applicant association's legal existence, no irregularities in its activities and no misconduct attributable to it had been identified. The only ground for its dissolution had been the failure to comply with the Ministry of Justice's request to expel the first applicant from its membership after his name had been added to the list of terrorists and extremists. Given the formal nature of the ground for dissolution, the courts had not been required to check whether the allegedly unlawful conduct by the first applicant could be imputable to the applicant association.

It followed that the applicant association had been dissolved not for any "indicators of extremist activities" in its own conduct – because it had not been claimed that there had been any – but for the fact that its founder had been suspected of an extremist offence. That measure could be interpreted in several ways, all of which led the Court to the conclusion that the interference had not been "prescribed by law":

Domestic law established that a letter of warning might be issued to an association in whose conduct "indicators of extremist activities" had been identified. The legislation provided no definition of the concept of "indicators of extremist activities". The Court had already found that a distinction could not be ascertained between "extremist activities" as such, and the conduct that did not amount to such activities, but contained their "indicators" and could give rise to the warning procedure. The resulting uncertainty had adversely affected the foreseeability of the regulatory framework, while being conducive to creating a chilling effect on freedom of expression and leaving too much discretion to the executive (see *Karastelev and Others v. Russia*).

In addition, the legislation appeared had been imprecise in terms of how such activities should be imputed to various actors. Since the applicant association's engagement in any "extremist activities" had not been shown, and since no indicators of such activities had been identified in its own conduct, the decision to hold it responsible for the allegedly unlawful conduct of its founder had been arbitrary.

Lastly, the dissolution of the applicant association had been a direct consequence of the investigator's decision to declare the first applicant a suspect in an extremist offence. The Court referred to its above finding that conferring unchecked discretion on the investigative authorities without judicial control and without due regard for the presumption of innocence was, in itself, incompatible with the "quality of law" requirements.

Accordingly, the dissolution of the applicant association had not had a clear and foreseeable legal basis. The finding that the interference had not been "prescribed by law" dispensed the Court from examining whether it had also pursued a legitimate aim and had been "necessary in a democratic society".

Conclusion: violation in respect of both applicants (unanimously).

Article 41: EUR 10,000 to the first applicant in respect of non-pecuniary damage.

(See *Vona v. Hungary*, 35943/10, 9 July 2013, Legal Summary, and *Karastelev and Others v. Russia*, 16435/10, 6 October 2020, Legal Summary; see also *Perinçek v. Switzerland* [GC], 27510/08, 15 October 2015, Legal Summary)

Form and join trade unions/Fonder et s'affilier à des syndicats

Trade-union federation ordered to expel a grassroots union of working prisoners because of a statutory ban on their unionisation: *no violation*

Fédération de syndicats condamnée à exclure une organisation syndicale de terrain rassemblant des détenus exerçant un travail parce que la loi interdit à ceux-ci de se syndiquer : *non-violation*

Yakut Republican Trade-Union Federation/Fédération syndicale de la république de Iakoutie – Russia/Russie, 29582/09, Judgment/Arrêt 7.12.2021 [Section III]

Traduction française du résumé – Printable version

Facts – A trade-union federation was ordered to oust a grassroots union of working prisoners because of a statutory ban on the unionisation of prisoners.

Law – Article 11

(a) *Admissibility* – As to the compatibility *ratione personae* with the Convention, Article 11 protected both workers and unions. As a worker should be free to join a union, so should the union be free to choose its members. By extension, as a union should be free to join a federation, so should the federation be free to admit the union.

(b) *Merits* – The court order, which obliged the applicant federation to expel the trade union, had restricted the applicant's right under Article 11. That restriction had been prescribed by law. Like prisoners' other Convention rights, their right to form and to join trade unions could be restricted for security, in particular, for the prevention of crime and disorder.

Although the Convention did not precisely define the concept of "trade union" beyond a general indication that it was an association formed for the purpose of defending the interests of its members, most of the cases considered by the Court had concerned employees and, more broadly, persons in an "employment relationship".

However, prison work could not be equated with employment. Indeed, prison work differed from the work performed by ordinary employees in many aspects. It served the primary aim of rehabilitation and resocialisation, was aimed at reintegration, and was obligatory. A similar view had been expressed by the Russian Constitutional Court.

It was true that prisoners in general continued to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty. However, trade-union freedom might be difficult to exercise in detention.

Nevertheless, the Convention was a "living instrument" and it might well be, therefore, that developments in that field might at some point in future necessitate the extension of the trade-union freedom to working inmates, especially if they worked for a private employer. Indeed, paragraph 2 of Article 11 did not exclude any occupational group from the scope of that Article. At most the national authorities were entitled to impose "lawful restrictions" on certain of their employees in accordance with Article 11 § 2.

However, having regard to the current practice of the member States of the Council of Europe, there was no sufficient consensus to give Article 11 the interpretation advocated by the applicant.

In sum, the domestic courts' order to the applicant federation to expel the union of the working inmates had not exceeded the wide margin of appreciation available to the national authorities in that sphere, and the restriction complained of had therefore been necessary in a democratic society.

Conclusion: no violation (five votes to two).

(Also see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, 11002/05, 27 February 2007, Legal Summary; *Stummer v. Austria* [GC], 37452/02, 7 July 2011, Legal Summary; and *Manole and "Romanian Farmers Direct" v. Romania*, 46551/06, 16 June 2015, Legal Summary)

ARTICLE 14

Discrimination (Article 3)

Discriminatory effects on women of continued failure to adopt legislation to combat domestic violence and provide any protective measures: *violation*

Effets discriminatoires sur les femmes d'une absence continue de législation visant à lutter contre les violences domestiques et de mesures de protection : *violation*

Tunikova and Others/et autres – Russia/Russie, 55974/16 et al, Judgment/Arrêt 14.12.2021 [Section III]

(See Article 46 below/Voir l'article 46 ci-après)

ARTICLE 46

Pilot judgment – General measures/Arrêt pilote – Mesures générales

Respondent State required to take comprehensive measures to address structural and discriminatory lack of protection of women against domestic violence

État défendeur tenu de prendre des mesures exhaustives en vue de remédier à une absence structurelle et discriminatoire de protection des femmes contre les violences domestiques

Tunikova and Others/et autres – Russia/Russie, 55974/16 et al, Judgment/Arrêt 14.12.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The four applicants were victims of domestic violence, from their partners or (former) husbands, ranging from an assault on Ms Tunikova's life (application no. 55974/16) to recurrent violence in the cases of Ms Petrakova (application no. 53118/17), Ms Gershman (application no. 27484/18) and Ms Gracheva (application no. 28011/19) and, eventually, to an extreme form of mutilation in Ms Gracheva's case, leaving her disabled for life (her hands were chopped off). The applicants complained that the Russian authorities had failed to protect them from acts of domestic violence due to a deficient domestic legal framework, to carry out an effective investigation into these acts and to put in place specific measure to combat gender-based violence against women.

Law

Article 3: The treatment inflicted on the applicants had attained the necessary threshold of severity to fall within the scope of Article 3. This was the case not only in respect of the physical violence but also the psychological violence, which had been sufficiently serious to amount, in its own right, to treatment falling within the scope of Article 3. In particular, the perpetrators' threatening behaviour had caused them to fear a repetition of the violence for extended periods of time. The feelings of anxiety and powerlessness they had been experiencing due to that behaviour must have been exacerbated by the dismissive attitude of the authorities which had offered the applicants no protection, often in the face of urgent requests for help. Further, the unpredictable escalation of violence and uncertainty about what might happen to them had increased their vulnerability and put them in a state of fear and emotional and psychological distress. The Court did not consider it necessary to examine whether the impugned treatment could also be characterised as constituting "torture".

The Court therefore had to examine whether the State authorities had discharged their positive obligations under Article 3.

(a) *The obligation to establish and apply a legal framework* – It was not necessary for the Court to revisit its findings in *Volodina v. Russia*, in which it had first identified structural defects of Russian law, as the domestic legislative framework had not evolved in the two years since that judgment's adoption. Indeed, the existing Russian legal framework – which lacked a definition of "domestic violence", adequate substantive and procedural provisions to prosecute its various forms, and any form of protection orders – fell short of the requirements inherent in the State's positive obligation to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims. The circumstances of the present case provided a further example that the existing domestic-law provisions were not capable of adequately covering the many forms which domestic violence took.

(b) *The obligation to prevent the known risk of ill-treatment* – Bearing in mind the factors set out in its case-law and the circumstances of the case at hand, the Court found that the domestic authorities had been aware, or ought to have been aware, of the violence to which the applicants had been subjected and had an obligation to assess a risk of its recurrence and take adequate and sufficient measures for their protection. In this respect, the Court had regard to the requirements outlined recently in *Kurt v. Austria* [GC] for the risk assessment in the domes-

tic violence context. It found that the authorities had failed in their duty to carry out an immediate, autonomous, proactive and comprehensive assessment of the risk of recurrent violence against the applicants and to take operational and preventive measures to mitigate that risk, to protect the applicants and to censure the perpetrators' conduct. They had remained passive in the face of serious risk of ill-treatment to the applicants and, through their inaction and failure to take measures of deterrence, even within the scope of the existing legal framework, had allowed perpetrators to continue threatening, harassing and assaulting the applicants without hindrance and with impunity. As a result, the applicants had been denied the effective protection against violence to which they were entitled under the Convention. Notwithstanding, even if the risks had been properly assessed and documented, no adequate and effective mechanisms in Russian law were available to ensure the victims' safety. The Court emphasised that imposing a severe penalty for a violent offence after it has been committed – as it happened in the case of Ms Gracheva – did not eliminate or attenuate the responsibility of the domestic authorities for their earlier failure to provide her with adequate protection measures.

(c) *The obligation to carry out an effective investigation* – In view of the above, the authorities' obligation to carry out an investigation satisfying the requirements of Article 3 was triggered. Responding to the applicants' assault allegations, the police had limited their intervention to short "pre-investigation inquiries" which had invariably concluded with a refusal to institute criminal proceedings on the grounds that no publicly prosecutable offence had been committed. No serious attempt had been made to establish the circumstances of the assaults or to take a comprehensive view of a series of violent incidents which was required in domestic-violence cases. The scope of the "pre-investigation inquiries" had been confined chiefly to hearing the perpetrator's version of the events with no statements from witnesses, forensic examination of injuries and collection of any other relevant evidence. Further, as per the Court's well-established case-law, a "pre-investigation inquiry" alone did not meet the requirement for an effective investigation under Article 3.

In most instances, due to the lacunae in substantive a law, a refusal to initiate a criminal investigation referred to the fact that the injuries sustained by the applicants had not been severe enough for launching public prosecution. This had left the applicants with the only viable legal option to seek redress through private prosecution of the perpetrators for which they could not benefit from any assistance by the State authorities. Leaving the applicants to their own devices in a situation of known domestic violence had been tantamount to relinquishing the State's obligation to investigate all instances of ill-treatment. In addition, the magistrates dealing with private prosecution claims had shown no awareness of the particular features of domestic violence cases and no genuine will to have perpetrators brought to account. Even when confronted with indications of publicly prosecutable offences, such as recorded injuries or death threats, the authorities had balked at, or prevaricated in, the obligation to institute criminal proceedings and had relied on hasty and ill-founded conclusions to close their inquiries. In view of the authorities' failure to investigate effectively credible claims of ill-treatment and ensure the prosecution and punishment of the perpetrators, the State had failed to discharge its duty to investigate the ill-treatment that the applicants had suffered.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 3: The Court's findings in *Volodina* on the generalised problem of domestic violence in Russia and the continued failure to take any measures to counter the discriminatory treatment of women and protect them from abuse were also applicable in the circumstances of the present case. Since a structural bias had been shown to exist, the applicants did not need to prove that they were also victims of individual prejudice.

Conclusion: violation (unanimously).

Article 41: EUR 330,660 in respect of pecuniary damage and EUR 40,000 in respect of non-pecuniary damage to Ms Gracheva; and EUR 20,000 to each other applicant for non-pecuniary damage.

Article 46: The problem underlying Convention violations which the Court had found in the present case stemmed from the legislation itself, and the findings extended beyond the sole interests of the applicants in the instant case. Several years after the events in this case and more than two years after the *Volodina* judgment the situation had not changed. Moreover, due to the lack of protection measures in any form, domestic violence victims had been applying to the Court for an indication of interim measures under Rule 39 of the Rules of Court. The COVID-19 pandemic had further aggravated the situation and brought about a substantial increase in the number of domestic violence complaints. In view of the continued absence of legislation addressing the issue of domestic violence at national level and the urgency of the matter concerning, as it did, the possibility for victims to live a life free from violence, the Government's obligations under the Convention compelled it to introduce legislative and other changes without

further delay. The need for such amendments was all the more pressing as large numbers of people affected by violations of a fundamental Convention right had no other choice but to seek relief through time-consuming international litigation. For the respondent Government to comply with its Convention obligations, clear and specific changes were required in the domestic legal system that would allow all persons in the applicants' position to obtain adequate and sufficient redress for such violations at domestic level. The domestic authorities had thus to develop a comprehensive and targeted response encompassing all areas of State action including the prompt revision or amendment of legislation to bring it into compliance with the Convention and international standards on prevention and punishment of domestic violence legislation, public policy, programmes, and institutional frameworks and monitoring mechanisms.

The Court gave detailed and specific indications as to the measures to be taken under this provision by the Respondent State. These had to include, *inter alia*, a legal and comprehensive definition of domestic violence to cover acts of violence in various forms, acts that had to be considered as a single course of conduct or a series of related incidents and never in isolation; the criminalisation of such acts and the punishment by appropriate penalties, covering all current and former members, spouses or partners of a family or domestic unit, whether living under the same roof or separated; a comprehensive framework for the protection of, and assistance to, all victims; creating an interagency mechanism for cooperation between State agencies and other stakeholders to prevent domestic violence; the establishment of legal mechanisms for protecting and compensating victim; funding rehabilitation programmes for perpetrators of domestic violence; the prompt, thorough and impartial investigation of complaints by the authorities of their own motion with criminal proceedings being initiated in all cases of domestic violence and perpetrators brought to trial timely and expeditiously; putting into place protocols and instructions for handling and investigating domestic violence complaints; consideration by the authorities of the reasons of the withdrawal of a domestic complaint and whether the seriousness of the attacks required them to in any event pursue the proceedings; and "autonomous", "proactive" and "comprehensive" risk assessment. Furthermore, adequate and effective measures of protection (extrajudicial and judicial) for victims of domestic violence, had to be made available without further delay. Such protection measures (whether "restraining orders", "protection orders" or "safety orders") should possess the key features identified by the United Nations Committee on the Elimination of Discrimination against Women and the United Nations Special Rapporteur on violence against women. In particular, protection orders: should be made available independently of any other legal proceedings, such as a criminal case against the perpetrator, and based on a standard of proof with respect to the victim's evidence which was not the criminal standard of proof; require the perpetrator to maintain a specified distance from the victim at all times; and prohibit the perpetrator from attempting to contact the victim in any way (offline or online). Compliance with their terms should be rigorously and continually monitored by the authorities, and failure to comply should be criminalised and accompanied by sufficiently dissuasive and deterrent sanctions.

Lastly, with a view to addressing the situation of inequality and de facto discrimination against women, the domestic authorities should put into place an action plan for changing the public perception of gender-based violence against women and disseminate information on available legal and other remedies to victims. In this connection, the respondent State should provide mandatory training in domestic-violence dynamics for judges, police officers, prosecutors, medical professionals, social workers and other officials who might come into contact with victim. It should also design a monitoring mechanism for accurate collection of comprehensive statistics on prevention and punishment of domestic violence and recording of statistical data on domestic violence disaggregated by sex and age and nature of the relationship between the perpetrator and the victim or victims, including the complaints of domestic violence which did not result in the institution of administrative or criminal proceedings.

Pending the implementation of the indicated measures, the Court would continue to deal with similar cases in a simplified and accelerated form in accordance with its well-established case-law.

(See *Volodina v. Russia*, 41261/17, 9 July 2019, Legal Summary, and *Kurt v. Austria* [GC], 62903/15, 15 June 2021, Legal Summary; see also *Opuz v. Turkey*, 33401/02, 9 June 2009, Legal Summary, and *Eremia v. the Republic of Moldova*, 3564/11, 28 May 2013, Legal Summary)

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

Peaceful enjoyment of possessions/ Respect des biens

Prolonged stay of proceedings in the context of succession of States preventing applicant from recovering money temporarily confiscated by the

former Socialist Federal Republic of Yugoslavia: *violation*

Suspension prolongée d'une procédure, dans le contexte d'une succession d'États, ayant empêché le requérant de recouvrer une somme d'argent temporairement confisquée par l'ancienne République fédérative socialiste de Yougoslavie : *violation*

Zaklan – Croatia/Croatie, 57239/13, Judgment/Arrêt 16.12.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant is a Croatian national. In 1991 the customs authorities for the former Socialist Federal Republic of Yugoslavia ("the SFRY") temporarily confiscated sums of foreign currency from him at the border between the then SFRY (now Croatia) and Hungary for attempting to take the money across the State border, in contravention of the law. Administrative-offence proceedings were instated against him in the same year.

Thereafter, Croatia declared independence and severed all ties with the SFRY. In 1992 the Government of Croatia issued a decree whereby it stayed all relevant, pending administrative-offence proceedings until the completion of the succession process following the dissolution of the SFRY. In 2004 the Agreement on Succession Issues between the successor States to the SFRY entered into force.

In the meantime, the applicant's administrative-offence proceedings became time-barred. The applicant brought unsuccessful civil proceedings requesting a return of the money. The domestic court considered that the applicant could only bring such an action after the administrative-offence proceedings had been concluded, and only in the event that the final decision had not ordered permanent confiscation of those sums. As the applicant's case had been stayed, those proceedings had not ended and his action against the State had therefore been premature. The applicant appealed unsuccessfully.

Law – Article 1 of Protocol No. 1

(a) *Whether the violation complained of could be attributed to the respondent State* – The Government had argued that the alleged violation could not have been attributed to the respondent State as it had resulted from actions undertaken by the federal authorities for the former SFRY before Croatia had declared independence, and because Croatia had not taken over the administrative-offence proceedings that the former federal authorities had instituted against the applicant.

In that connection, the Court firstly noted that the applicant had not complained of the temporary confiscation itself, but rather, his inability to recover the confiscated sums once the administrative offence that he had been charged with had become time-barred.

The situation complained of was attributable to the Croatian authorities, based on the following conclusions of the Court:

– The Croatian authorities had taken over the administrative-offence proceedings against the applicant from the federal authorities of the former SFRY. The Government's argument to the contrary was unconvincing in view of the overwhelming evidence to that effect, including relevant domestic law references and correspondence between various Croatian financial authorities and Serbia's Minister of Finance.

– From that moment the proceedings had been conducted in accordance with Croatian substantive and procedural law governing administrative offences.

– Those proceedings had been stayed by the Croatian authorities and had remained stayed until the present day, which had resulted in the administrative offence with which the applicant had been charged becoming time-barred.

– Under Croatian and Serbian law, temporarily confiscated items had to be retuned once the offence in question had become time-barred.

– However, the stay of proceedings imposed by Croatian legislation had been preventing the relevant authorities from issuing a decision to discontinue the administrative-offence proceedings against the applicant, which had prevented him from recovering the temporarily confiscated money both from the Croatian and from the Serbian authorities.

As Serbia was not a party to the proceedings that the applicant had instituted before the Court, the Court therefore could not pronounce itself on the issue of whether Serbia might also be held responsible for that situation.

The Government's inadmissibility objection as to the incompatibility *ratione materiae* had to therefore be dismissed.

(b) *Whether the prolonged inability by the applicant to recover temporarily confiscated money was in compliance with Article 1 of Protocol No. 1* – The applicant's prolonged inability to recover the money had to be examined in the light of the general principle laid down in the first rule of Article 1 of Protocol No. 1 (peaceful enjoyment of property). It was not necessary to categorise that inability as an interference, a failure to discharge the State's posi-

tive obligations under Article 1 of Protocol No. 1, or a combination of both. Regardless of the category it fell into, the Court had to examine whether it had been in compliance with that Article – namely, whether it had been lawful, pursued an aim that had been in the general interest and whether a "fair balance" had been struck between the general interest in question and the applicant's property rights.

The applicant's inability to recover the money resulting from the stay of the administrative-offence proceedings had been prescribed by law and pursued an aim that had been in the general interest, namely that of protecting the public purse and the national economy.

Whereas some delays might be justified in exceptional circumstances, the applicant had been made to wait too long. What is more, the prolonged stay of the proceedings had prevented him from seeking the return of the temporarily confiscated sums not only from Croatian but also from Serbian authorities. Preventing the applicant from seeking the return of that money from Serbia could hardly be justified by the above aim of protecting the public purse and the national economy.

Further, in the case of *Ališić and Others*, the succession negotiations had not prevented the successor States from undertaking measures at the national level aimed at protecting the interests of individuals within their respective jurisdictions. For the purposes of the present case, it was important that Croatia had also assumed liability for damage caused by the authorities of the former SFRY in so far as it had the closest connection with the damage – notably, where the wrongful act had occurred on its territory, and the victim had been a Croatian national. That showed that solutions have been found as regards some categories of individuals whose rights had been affected by the dissolution of the former SFRY, but not with regard to the present applicant.

The Court was therefore not satisfied that the Croatian authorities, notwithstanding their wide margin of appreciation, had struck a fair balance between the general interest of the community and the property rights of the applicant who had been made to bear a disproportionate burden.

Conclusion: violation (unanimously).

Article 41: EUR 1,327 in respect of non-pecuniary damage.

(See *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "the former Yugoslav Republic of Macedonia"* [GC], 60642/08, 16 July 2014, Legal Summary)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

EU law precludes the regime in force in Poland which permits the Minister for Justice to second judges to higher criminal courts; secondments which that minister – who is also the Public Prosecutor General – may terminate at any time without stating reasons

Le droit de l'Union fait obstacle au régime en vigueur en Pologne permettant au ministre de la Justice de déléguer des juges dans des juridictions pénales supérieures, délégation à laquelle ce ministre, qui est en même temps le procureur général, peut à tout moment mettre fin sans motivation

Joined Cases/Affaires jointes C-748/19 to/à C-754/19, Judgment/Arrêt 16.11.2021

Press release – Communiqué de presse

-oOo-

The Common European Asylum System does not, in principle, preclude a member State from automatically extending, as a derived right and for the purposes of maintaining family unity, refugee status to the minor child of a parent who has been granted that status

Le régime d'asile européen commun ne s'oppose, en principe, pas à ce qu'un État membre étende automatiquement, à titre dérivé et aux fins du maintien de l'unité familiale, le statut de réfugié à l'enfant mineur d'un parent auquel a été octroyé ce statut

Case/Affaire C-91/20, Judgment/Arrêt 9.11.2021

Press release – Communiqué de presse

-oOo-

By criminalising organising activities in relation to the initiation of a procedure for international protection by persons not fulfilling the national criteria for granting that protection, Hungary infringed EU law

En sanctionnant pénalement l'activité d'organisation visant à permettre l'ouverture d'une procédure de protection internationale par des personnes ne remplissant pas les critères nationaux d'octroi de cette protection, la Hongrie a violé le droit de l'Union

Case/Affaire C-821/19, Judgment/Arrêt 16.11.2021

Press release – Communiqué de presse

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

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

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

Russian/Russe

Руководство по статье 18 Конвенции о защите прав человека

Swedish/Suédois

Handbok i europeisk icke-diskrimineringsrätt – 2018