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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, news and publications

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

European Court of Human Rights

Cour européenne des droits de l'homme

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

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 versions of the Note (in PDF, EPUB and MOBI formats) 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. Les versions électroniques de la Note (en format PDF, EPUB et MOBI) peuvent être téléchargées à l'adresse suivante : www.echr.coe.int/NoteInformation/fr.

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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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Juridiction et responsabilité pour organiser le rapatriement de ressortissants depuis le Proche-Orient après la chute de l'« État islamique » : *affaire communiquée*

H.F. and/et M.F. – France, 24384/19, Communication [Section V]

English translation of the summary – Version imprimable

Les requérants sont les parents d'une ressortissante française qui a quitté la France en 2014 pour rejoindre, avec son compagnon, le territoire alors contrôlé par l'organisation dite État islamique, où elle eut par la suite des enfants. Ces enfants et leur mère – visée en France par un mandat d'arrêt pour association de malfaiteurs en lien avec une entreprise terroriste – se trouveraient détenus depuis février 2019 dans un camp du nord-est de la Syrie administré par les Forces démocratiques syriennes (FDS, coalition de milices kurdes et de combattants arabes opposés au gouvernement de Damas).

Les requérants demandèrent vainement aux autorités françaises, d'organiser, d'une façon ou d'une autre – la France n'ayant actuellement plus de relations diplomatiques avec la Syrie –, le rapatriement de leurs fille et petits-enfants. Leur recours en référé d'urgence fut rejeté aux motifs : que le rapatriement demandé supposait l'engagement de négociations avec des autorités étrangères, ou une intervention sur un territoire étranger ; et que pareilles mesures n'étaient pas détachables de la conduite des relations internationales de la France, dont aucun tribunal n'avait compétence pour connaître.

La politique de la France en la matière, telle qu'elle ressort de diverses prises de positions, est inspirée entre autres par la volonté de laisser d'abord les autorités des pays victimes de l'organisation susmentionnée se prononcer sur la responsabilité pénale de ses ressortissants majeurs, dans un double souci de non-ingérence et de sécurité.

Affaire communiquée sous l'angle de l'article 3 de la Convention et de l'article 3 du Protocole n° 4, seuls ou combinés avec l'article 13 de la Convention, les questions posées aux parties portant également, entre autres : sur la juridiction et la responsabilité de la France au sens de l'article 1 de la Convention, dans ce contexte extraterritorial ; et sur la qualité des requérants pour agir au nom de leur fille et de ses enfants, en plus de leur nom personnel.

ARTICLE 2

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

Failure to investigate explosion of grenade in a residential area causing severe injuries: *violation*

Manquement à l'obligation d'enquêter sur l'explosion d'une grenade dans un quartier résidentiel ayant causé de graves blessures : *violation*

Vovk and/et Bogdanov – Russia/Russie, 15613/10, Judgment/Arrêt 11.2.2020 [Section III]

Traduction française du résumé – Printable version

Facts – In April 2008 a grenade was found by children on a building site in a residential area. The grenade exploded as a result of careless handling by the applicants (at the time aged thirteen and seven), causing grievous harm to their health.

A criminal investigation into the explosion was initiated. It was found that: (i) the grenade had been brought to the building site in a sand delivery; it was a VOG-17 grenade, which had been lost unexploded after having been fired through the bore of a grenade launcher; (ii) this entailed that, at an unidentified place, an unidentified person entrusted with guarding firearms, ammunition and explosive devices, had failed to carry out his duties properly.

The investigation was suspended many times for failure to identify a person to be charged and eventually discontinued as time-barred.

Law – Article 2 (*procedural limb*): For the following reasons, the Court reached the conclusion that the criminal and civil remedies in the applicants' case, taken together, did not constitute an effective judicial response promptly establishing the facts, holding accountable those at fault and providing appropriate redress to the victims, essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts.

(a) *Criminal proceedings* – The Court found no indication that the investigating authorities had made all reasonable efforts to collect relevant evidence that would have enabled clarification of the nature of any liability to satisfy the authorities that there

were no grounds to continue a criminal investigation. They had further failed to elucidate the extent of any negligence on the part of military personnel in taking "measures that were necessary and sufficient to avert the risks inherent in a dangerous activity", which might constitute exceptional circumstances where an effective criminal investigation is necessary to satisfy the procedural obligation imposed by Article 2.

Indeed, the above version of the facts, as well as the classification of the crime as criminal negligence on the part of personnel entrusted with guarding battlefield arms and ammunition, remained unchanged until the end of the investigation. If the investigation considered – as it thus did – that there had been possible negligence on the part of military personnel in ensuring that ammunition had not been lost, then it had to establish, for example, whether the fired but unexploded VOG-17 grenade could have been abandoned after military training activities.

In particular, since ammunition such as VOG-17 grenades could only be lawfully used by State-authorised organisations operating, *inter alia*, in the spheres of defence and internal affairs – the investigation should have identified such State organisations and their officials or service personnel, and verified whether the procedure provided for by the legislation for cases of the loss or damage of ammunition had been carried out by them.

However, there is no indication in the case file as to what actions had been carried out and what the results of those actions had been in order to conclude that the involvement of military personnel in the loss of the grenade had not been established. Nor even is there any indication as to what investigative actions, if any, had been carried out in order to establish the place where the grenade in question had been stored and the person responsible for its loss.

As to the alleged failure to exhaust domestic remedies, the Court could not but dismiss the Government's objection, given that: (i) a court appeal against one or more decisions to suspend the investigation could only have had the same effect as the multiple requests by the prosecutor's office which were regularly followed by the annulment of such suspensions; (ii) challenging the acts or omissions of the investigating authorities before a court was out of reach without access to the case file or proper information on the progress of the investigation

(b) *Civil proceedings* – While the applicants then sought compensation on the ground that the State had to assume responsibility for its failure to ensure that the unexploded grenade was not lost and – had it indeed been lost – to identify and prosecute those at fault, the effectiveness of this remedy had been jeopardised by the civil courts' choosing to rely unreservedly on the results of the investigation, stating that there was no evidence that the grenade had belonged to the State or that it had not been properly guarded.

Conclusion: violation (unanimously).

Article 41: EUR 40,000 to each applicant in respect of non-pecuniary damage.

(See also *Nicolae Virgiliu Tănase v. Romania* [GC], 41720/13, 25 June 2019, Information Note 230)

Expulsion

Lack of effective guarantees against refoulement to China of Muslim Uighurs at risk of arbitrary detention, ill-treatment and death: *expulsion would constitute a violation*

Absence de garanties effectives contre un refoulement vers la Chine de musulmans ouïghours risquant une détention arbitraire, des mauvais traitements, voire la mort : *l'expulsion emporterait violation*

M.A. and Others/et autres – Bulgaria/Bulgarie, 5115/18, Judgment/Arrêt 20.2.2020 [Section V]

Traduction française du résumé – Printable version

Facts – The applicants, five Muslim Uighurs from the Xinjiang Uighur Autonomous Region (XUAR) of China, fled their country of origin, being suspected of terrorism there. They were arrested in Bulgaria after having illegally crossed the Bulgarian-Turkish border. Subsequently, they were refused asylum, and the authorities took decisions for their repatriation and expulsion on national security grounds. The applicants' removal is currently only blocked by the Court's decision to impose an interim measure under Rule 39 of the Rules of Court.

Law – Articles 2 and 3: According to the domestic authorities, the applicants had not shown that they had had to leave China due to persecution based on their ethnicity or religion; they had received education and had led normal lives before breaching the law; the Chinese authorities had been taking anti-terrorist action in response to violence by Uighur separatists. However, in the subsequent proceedings which were directly relevant for the applicants' *refoulement,* the Supreme Administrative Court had failed to examine their allegations that they faced a risk of ill-treatment in the case of expulsion.

The relevant information on the current situation in the XUAR showed that the Chinese authorities had

proceeded with the detention of hundreds of thousands or even millions of Uighurs in "re-education camps", where instances of ill-treatment, torture, and death of the detainees had been reported. That had been the case of many Uighurs who had returned to China after leaving the country, or who had been forcibly repatriated. The governmental repression against Uighurs was being justified by the need to combat terrorism and extremism. Suspicions of separatism or endangering State security could lead to long prison terms or the death penalty without due process. According to the Bulgarian authorities, prior to arriving in Bulgaria, the applicants had undergone training for the East Turkistan Islamic Movement, a separatist organisation active in Western China, which was considered to be a terrorist organisation.

In view of the above, in light of the information about the general situation in the XUAR and the applicants' individual circumstances (their being suspected of terrorism and having fled China), there were substantial grounds for believing that they would be at real risk of arbitrary detention and imprisonment, as well as ill-treatment and even death, if they were removed to their country of origin.

The Court had therefore to examine whether any effective guarantees existed that protected the applicants against arbitrary *refoulement* by the Bulgarian authorities to China, be it direct or indirect. No destination country had been indicated in the initial decisions for the applicants' repatriation or in the expulsion decisions. According to the Supreme Administrative Court, the determination of such a country and the assessment of any risk the applicants would face if returned to China fell to be carried out in the process of implementation of the expulsion decisions. However, such an approach offered no guarantees that the Bulgarian authorities would examine with the necessary rigour the question of the risk the applicants would face if returned to the country they had fled. It was unclear by reference to what standards and on the basis of what information the authorities would determine, if at all, the relevant risk. Lastly, there was no indication as to whether, if the authorities chose to send the applicants to a third country, they would properly examine whether they would in turn be sent from there to China without due consideration for the risk of ill-treatment and even death. In sum, there were no effective guarantees, in the process of implementation of the repatriation or the expulsion decisions against the applicants, that they would not be sent back to China.

Conclusion: expulsion would constitute a violation (unanimously).

Article 41: no claim made in respect of damage.

(See also *Ismoilov and Others v. Russia*, 2947/06, 24 April 2008, Information Note 107; *Auad v. Bulgaria*, 46390/10, 11 October 2011, Information Note 145; *L.M. and Others v. Russia*, 40081/14 et al., 15 October 2015, Information Note 189; *J.K. and Others v. Sweden* [GC], 59166/12, 23 August 2016, Information Note 199)

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain et dégradant

Refusal to repatriate a national who left the country for the former territory of "Islamic State", and her young children: *communicated*

Refus d'organiser le rapatriement d'une ressortissante partie rejoindre l'ancien territoire de l'« État islamique », et de ses jeunes enfants : *affaire communiquée*

H.F. and/et M.F. – France, 24384/19, Communication [Section V]

(See Article 1 above/Voir l'article 1 ci-dessus, page 7)

Effective investigation/Enquête effective Positive obligations (procedural aspect)/ Obligations positives (volet procédural)

Failure of the authorities to address a criminal investigation from the angle of domestic violence: *violation*

Manquement des autorités à aborder l'enquête pénale sous l'angle de la violence conjugale : *violation*

Buturugă – Romania/Roumanie, 56867/15, Judgment/Arrêt 11.2.2020 [Section IV]

English translation of the summary – Version imprimable

En fait – En s'appuyant sur un certificat médico-légal, la requérante saisit les autorités pour dénoncer le comportement violent de son ex-époux. Elle demanda, comme élément de preuve dans le cadre de la procédure pénale, une perquisition électronique de l'ordinateur de la famille, alléguant que son ex-mari avait abusivement consulté ses comptes électroniques, dont son compte Facebook, et qu'il avait fait des copies de ses conversations privées, de ses documents et de ses photos. Cette demande fut rejetée au motif que les éléments susceptibles

d'être ainsi recueillis étaient sans rapport avec les infractions de menaces et de violences reprochées à son ex-mari. Par la suite, la requérante déposa une nouvelle plainte contre son ex-époux pour violation du secret de sa correspondance, qui fut rejetée pour tardiveté. Le parquet infligea une amende administrative à son ex-époux et classa l'affaire en se fondant sur les dispositions du code pénal qui répriment les violences entre particuliers et non pas sur celles qui répriment la violence conjugale. Le tribunal confirma les conclusions du parquet, selon lesquelles les menaces subies par la requérante ne présentaient pas le degré de péril social nécessaire pour être qualifiées d'infractions et qu'il n'y avait pas de preuve directe que les lésions que l'intéressée avait subies avaient été causées par son ex-époux. S'agissant de la violation alléguée du secret de la correspondance, le tribunal jugea qu'elle était sans rapport avec l'objet de l'affaire et que les données publiées sur les réseaux sociaux étaient publiques.

En droit – Articles 3 et 8

a) *Sur l'enquête relative aux mauvais traitements* – Les autorités n'ont pas abordé les faits litigieux du point de vue de la violence conjugale. En effet, l'enquête n'a pas pris en compte les spécificités des faits de violences domestiques telles que reconnues dans la Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique (« la Convention d'Istanbul »). La Cour n'est pas convaincue que les conclusions du tribunal en l'espèce aient l'effet dissuasif apte à enrayer un phénomène aussi grave que la violence conjugale. De plus, si aucune autorité interne n'a contesté la réalité et la gravité des lésions subies par la requérante, aucun élément d'enquête n'a permis d'identifier la personne responsable. Ainsi, les autorités de l'enquête se sont limitées à entendre comme témoins les proches de la requérante, mais aucun autre élément de preuve n'a été recueilli afin d'identifier l'origine des lésions subies par l'intéressée et, le cas échéant, les personnes responsables. Dans une affaire qui concerne des actes allégués de violence familiale, il revenait aux autorités d'enquête de prendre les mesures nécessaires pour éclaircir les circonstances de la cause. Dès lors, même si le cadre juridique mis en place par l'État défendeur a offert une forme de protection à la requérante, celle-ci est intervenue après les faits violents dénoncés et n'a pas pu remédier aux carences de l'enquête.

b) *Sur l'enquête relative à la violation du secret de la correspondance* – Tant en droit interne qu'en droit international, le phénomène de la violence domestique n'est pas perçu comme étant limité aux seuls faits de violence physique mais il inclut, entre autres, la violence psychologique ou le harcèlement. De plus, la cyberviolence est actuellement reconnue comme un aspect de la violence à l'encontre des femmes et des filles et peut se présenter sous diverses formes, dont les violations informatiques de la vie privée, l'intrusion dans l'ordinateur de la victime et la prise, le partage et la manipulation des données et des images, y compris des données intimes. Dans le contexte de la violence domestique, la cybersurveillance est souvent le fait des partenaires intimes. La Cour accepte donc que des actes tels que surveiller, accéder à ou sauvegarder sans droit la correspondance du conjoint peuvent être pris en compte lorsque les autorités nationales enquêtent sur des faits de violence domestique. De telles allégations de violation de la correspondance appellent de la part des autorités un examen sur le fond afin de pouvoir appréhender de manière globale le phénomène de violence conjugale dans toutes ses formes.

Or l'examen sur le fond n'a pas eu lieu en l'espèce. Les autorités nationales n'ont pas procédé à des actes de procédure afin de recueillir des preuves permettant d'établir la réalité des faits ou leur qualification juridique. Elles ont fait preuve d'un formalisme excessif en écartant tout rapport avec les faits de violence conjugale que la requérante avait déjà portés à leur attention, et elles ont ainsi failli à prendre en considération les diverses formes que peut prendre la violence conjugale.

Il y a dès lors eu manquement aux obligations positives découlant des articles 3 et 8 de la Convention.

Conclusion : violation (unanimité).

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

(Voir les fiches thématiques Violence domestique et Violence à l'égard des femmes. Voir aussi *Opuz c. Turquie*, 33401/02, 9 juin 2009, Note d'information 120 ; *E.S. et autres c. Slovaquie*, 8227/04, 15 septembre 2009, Note d'information 122 ; *E.M. c. Roumanie*, 43994/05, 30 octobre 2012, Note d'information 156 ; *Valiulienė c. Lituanie*, 33234/07, 26 mars 2013, Note d'information 161 ; *T.M. et C.M. c. République de Moldova*, 26608/11, 28 janvier 2014 ; et *Bălşan c. Roumanie*, 49645/09, 23 mai 2017, Note d'information 207)

Expulsion

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M.A. and Others/et autres – Bulgaria/Bulgarie, 5115/18, Judgment/Arrêt 20.2.2020 [Section V]]

(See Article 2 above/Voir l'article 2 ci-dessus, page 8)

ARTICLE 5

Article 5 § 1 (c)

Reasonable suspicion/Raisons plausibles de soupçonner

Minimum standard of "reasonableness" of suspicion not met in view of applicants' status, sequence of events, investigations and authorities' conduct: *violation*

Degré minimum de « plausibilité » des soupçons non atteint au vu de la qualité des requérants, de la chronologique des événements, des investigations entreprises et de la conduite des autorités : *violation*

Ibrahimov and/et Mammadov – Azerbaijan/Azerbaïdjan, 63571/16, Judgment/Arrêt 13.2.2020 [Section V]

(See Article 18 below/Voir l'article 18 ci-dessous, page 24)

Article 5 § 1 (e)

Persons of unsound mind/Aliéné

Compulsory confinement maintained on the basis of judicial decisions which had become final, after legislation narrowing the conditions for the use of confinement by the criminal courts: *case referred to the Grand Chamber*

Internement maintenu sur la base de décisions de justice passées en force de chose jugée, après un resserrement législatif des conditions du recours à l'internement par les tribunaux pénaux : *affaire renvoyée devant la Grande Chambre*

Denis and/et Irvine – Belgium/Belgique, 62819/17 and/et 63921/17, Judgment/Arrêt 8.10.2019 [Section IV]

English translation of the summary – Version imprimable

Après avoir commis respectivement un vol et une tentative de vol avec effraction, les requérants, qui présentaient des troubles mentaux, furent internés par les tribunaux pénaux sur le fondement la « loi de défense sociale » de 1930.

En 2016 entra en vigueur une nouvelle loi, adoptée en 2014, réservant l'internement aux cas de crimes ou délits contre « l'intégrité physique ou psychique » de tiers. Les requérants sollicitèrent alors leur mise en liberté définitive, arguant que les faits qu'ils avaient commis à l'époque ne constituaient plus un motif valable d'internement selon la nouvelle loi.

Leur demande fut rejetée au motif que leur trouble mental n'était pas suffisamment stabilisé et qu'ils n'avaient pas accompli le délai d'épreuve prévu par la loi pour bénéficier d'une libération définitive. La Cour de cassation rejeta leurs pourvois, considérant :

– que l'article 5 § 1 e) de la Convention n'empêchait pas qu'une mesure d'internement imposée par une décision coulée en force de chose jugée soit définitive et donne lieu à partir de ce moment à une phase d'exécution à laquelle ne s'appliquent pas les mêmes règles que celles en vigueur pour imposer cette mesure ;

– que l'évaluation de l'état mental de l'interné et de la dangerosité sociale en découlant ne se fait pas simplement en fonction du fait pour lequel il a été interné, mais également en fonction d'un ensemble de facteurs de risque soumis à l'appréciation de la chambre de protection sociale ;

– que la condition d'accomplissement d'un délai d'épreuve n'était pas contraire à l'article 5 § 4 de la Convention.

Par un arrêt du 8 octobre 2019, une chambre de la Cour européenne des droits de l'homme a conclu, à l'unanimité :

– à la non-violation de l'article 5 § 1, considérant notamment : que l'interprétation faite par la Cour de cassation de la nouvelle loi sur l'internement, qui s'accordait avec les travaux préparatoires de celle-ci, n'était ni arbitraire ni manifestement déraisonnable ; que les requérants n'avaient pas contesté qu'ils remplissaient les trois critères de l'arrêt *Winterwerp c. Pays-Bas* (1979) ; et que la détention des requérants trouvait donc toujours un fondement valable dans les décisions judiciaires prises sous l'empire de l'ancienne loi de défense sociale ;

– à la non-violation de l'article 5 § 4, considérant notamment : qu'en vertu de l'article 66 de la nouvelle loi de 2014, la libération définitive ne pouvait être octroyée qu'à l'expiration d'une période de libération à l'essai de trois ans et à condition que

le trouble mental soit suffisamment stabilisé pour qu'il n'y ait raisonnablement plus à craindre que la personne internée commette de nouvelles infractions portant atteinte à ou menaçant l'intégrité physique ou psychique de tiers ; que la condition des trois ans n'avait constitué en l'espèce qu'un motif surabondant, puisque la condition relative à l'état de santé mentale n'était pas remplie (les requérants eux-mêmes ne prétendant pas que leur état de santé mentale s'était suffisamment amélioré) ; sachant qu'il ressortait d'une autre affaire récemment portée devant la Cour de cassation que la non-expiration du délai d'épreuve de trois ans ne faisait pas obstacle à la libération définitive d'un interné si sa dangerosité apparaissait avoir disparu.

Le 24 février 2020, l'affaire a été renvoyée devant la Grande Chambre à la demande des requérants.

Article 5 § 4

Review of lawfulness of detention/Contrôle de la légalité de la détention
Speediness of review/Contrôle à bref délai

Three-year probation period imposed as prerequisite for the final release of a person placed in compulsory confinement by a criminal court: *case referred to the Grand Chamber*

Période d'essai de trois ans imposée comme condition préalable à la libération définitive d'une personne internée par un tribunal pénal : *affaire renvoyée devant la Grande Chambre*

Denis and/et Irvine – Belgium/Belgique, 62819/17 and/et 63921/17, Judgment/Arrêt 8.10.2019 [Section IV]

(See Article 5 § 1 (e) above/Voir l'article 5 § 1 e) ci-dessus, page 11)

ARTICLE 6

Article 6 § 1 (civil)

Fair hearing/Procès équitable

Starting point of the prescription period for compensation proceedings held to be the date that the illness became consolidated, in the context of a progressive illness: *no violation*

Point de départ du délai de prescription d'une action en indemnisation à partir de la consolidation de la maladie dans le cadre d'une maladie évolutive : *non-violation*

Sanofi Pasteur – France, 25137/16, Judgment/Arrêt 13.2.2020 [Section V]

English translation of the summary – Version imprimable

En fait – À la suite de l'inoculation d'un vaccin fabriqué par la société requérante, une personne (ci-après nommée « X ») développa diverses maladies, dont une sclérose en plaques, une maladie évolutive insusceptible de consolidation. Elle engagea une action en responsabilité civile contre la société requérante et obtint une réparation.

La société requérante soutenait que le délai légal de prescription de l'action en réparation à raison d'un défaut du vaccin (dix ans) courait à partir de la vente de celui-ci. Pour la cour d'appel, toutefois, le délai de prescription courait à partir de la consolidation de la maladie. En l'absence de consolidation en l'espèce, s'agissant d'une maladie chronique évolutive, l'action en réparation n'était donc pas prescrite.

La société requérante demanda la saisine de la Cour de Justice de l'Union européenne (CJUE). La Cour de cassation s'est limitée à indiquer qu'elle concluait au rejet du pourvoi sans qu'il y ait lieu de poser une question préjudicielle à la CJUE.

En droit – Article 6 § 1 (*s'agissant des modalités de fixation du point de départ de la prescription de l'action en réparation*)

L'action en réparation n'était pas prescrite lorsque la sclérose en plaques dont souffre X a été diagnostiquée. Ceci étant, le droit à un tribunal est en cause lorsque l'action en réparation d'une victime d'atteinte à l'intégrité physique se heurte à la prescription avant qu'elle ait été effectivement en mesure d'évaluer son préjudice. Or, compte tenu du caractère évolutif de la maladie dont X souffre et en l'absence de consolidation de cette maladie, elle ne peut évaluer pleinement son préjudice et, de ce fait, n'est pas en mesure d'agir en justice contre la société ayant fabriqué le vaccin à une date antérieure à ladite consolidation en vue d'une complète réparation.

On est donc dans une situation où un droit qu'une personne tire de la Convention se trouve confronté à un droit qu'une autre personne tire également de la Convention : le droit de la société requérante à la sécurité juridique , d'un côté ; le droit de X à un tribunal, de l'autre.

Dans un tel cas de figure, la mise en balance des intérêts contradictoires des uns et des autres est difficile à faire, ce qui plaide en faveur de la reconnaissance d'une marge d'appréciation importante

au bénéfice de l'État. S'agissant en particulier de la balance à faire dans le contexte de la prescription de l'action en réparation entre le droit d'accès à la justice de la victime et le droit à la sécurité juridique du défendeur, en appliquant les règles de procédure pertinentes, les juridictions internes devaient éviter à la fois un excès de formalisme, qui porterait atteinte à l'équité de la procédure, et une souplesse excessive, qui aboutirait à supprimer les conditions de procédure établies par les lois.

Le droit français prévoit la prescription de l'action en responsabilité civile extracontractuelle. À l'époque des faits de la cause, le délai de prescription était de dix ans, et la Cour de cassation avait précisé qu'il courait à partir de la date de la consolidation lorsque l'action visait à l'indemnisation d'un préjudice corporel. Le droit positif entendait permettre à la victime d'obtenir l'entière réparation de son préjudice corporel, dont l'étendue ne peut être connue qu'après consolidation. La Cour estime qu'elle ne saurait mettre en cause en tant que tel le choix opéré par le droit interne de donner plus de poids au droit des victimes de dommages corporels à un tribunal qu'au droit des personnes responsables de ces dommages à la sécurité juridique. La Cour rappelle à cet égard l'importance que la Convention accorde à la protection de l'intégrité physique, qui relève des articles 3 et 8 de la Convention. En outre, cette modalité, mise en œuvre dans le système juridique français, permet de prendre en compte le fait que les besoins des personnes atteintes d'une maladie évolutive telle que la sclérose en plaques, en termes par exemple d'assistance, sont susceptibles d'augmenter au fil de la progression de leur affection.

Le droit positif prévoyait un délai de prescription et fixait le point de départ de ce délai, lequel était toutefois décalé tant que la consolidation n'était pas constatée. De plus, en l'absence de consolidation, le point de départ du délai de prescription commençait à courir au plus tard à la date du décès de la victime du dommage corporel, l'action des ayants droit étant alors prescrite dix ans après le décès. Il n'y avait donc pas à proprement parler imprescriptibilité.

Conclusion : non-violation (unanimité).

La Cour conclut également, à l'unanimité, à la violation de l'article 6 § 1 à raison du défaut de motivation du rejet de la demande de renvoi préjudiciel à la CJUE.

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

(Voir aussi *Oleksandr Volkov c. Ukraine*, 21722/11, 9 janvier 2013, Note d'information 159 ; *Eşim c. Turquie*, 59601/09, 17 septembre 2013 ; *Howald Moor et autres c. Suisse*, 52067/10 et 41072/11, 11 mars 2014, Note d'information 172)

Article 6 § 1 (criminal/pénal)

Impartial tribunal/Tribunal impartial

Same judge sitting in two-judge appeal panels in both related sets of proceedings against applicant: *no violation*

Même magistrat siégeant au sein de formations de deux juges dans deux procédures connexes dirigées contre le requérant : *non-violation*

Alexandru Marian Iancu – Romania/Roumanie, 60858/15, Judgment/Arrêt 4.2.2020 [Section IV]

Traduction française du résumé – Printable version

Facts – Two sets of criminal proceedings were instituted against the applicant in respect of various financial crimes, all committed in the same timeframe. During the second set of proceedings, the file from the first case was joined to that of the second case, as certain evidence was common to the two cases. The applicant was convicted in both sets. His convictions were upheld on appeal by a panel of two judges. One of the judges, M.A.M., sat on both panels.

Law – Article 6 § 1: The Court was not persuaded that there was evidence that Judge M.A.M. (or the other member of the panel) had displayed personal bias against the applicant in the framework of the second set of criminal proceedings. The case had therefore to be examined from the perspective of the objective impartiality test, and more specifically it had to address whether the applicant's doubts, stemming from the specific situation, might be regarded as objectively justified in the circumstances of the case.

Judge C.B., who had taken part in the first set of proceedings alongside Judge M.A.M., had been disqualified from sitting in the second set of proceedings. However, the decision had been based on a number of elements related to the behaviour of this judge during the first appeal hearing in the second set of proceedings, in addition to the connection between the two cases being implied from the decision of the appeal panel to join the two files and use evidence common to both cases.

For his part, Judge M.A.M. had sought to withdraw from the case in order to eliminate any suspicions as to his possible lack of impartiality. Since he had not referred to any specific reasons for his withdrawal in his request, M.A.M. had sought leave to withdraw merely as a precautionary measure.

Judge M.A.M.'s application to withdraw had been examined by a panel of two judges who had delivered a reasoned decision which had replied to all arguments raised by the applicant, finding that the mere fact that he had taken part in the examination of the previous case against the applicant could not raise a reasonable suspicion that his impartiality would be affected. The judges examining the withdrawal application had concluded, after consideration of the two sets of proceedings in question, that there had been no proof to support the idea that Judge M.A.M. had expressed, in the first case, an opinion on the guilt of any of the accused in the case currently on trial.

Complaints concerning Judge M.A.M.'s alleged lack of impartiality had also been examined and rejected by judges of the High Court of Cassation and Justice as well as by members of the disciplinary body of the Superior Council of Magistracy. They had examined the arguments raised before them as well as the proceedings concluded by the final judgment of June 2015 and determined, on the one hand, that there had been no reasons to justify a change of venue of the appeal and, on the other hand, that all requests for recusal or withdrawal had been examined and resolved in accordance with the law in thoroughly reasoned decisions and that the conviction judgment had been thoroughly reasoned and based on the relevant legal provisions.

Against that background, aside from the alleged similarity between the two sets of proceedings, Judge M.A.M.'s behaviour both in the first and second set of proceedings had not been such as to objectively justify the applicant's fears as to his impartiality. In addition, in dismissing the withdrawal request, the Court of Appeal had given sufficient and relevant reasons for its decision, which had been compatible with the Court's case-law. The applicant's misgivings about the impartiality of the judge presiding over the trial panel examining his case could not be regarded as objectively justified.

Conclusion: no violation (unanimously).

ARTICLE 7

Heavier penalty/Peine plus forte

New law opening possibility of a more lenient sentence under certain conditions that sentencing court did not find to have been met: *no violation*

Loi nouvelle ouvrant la possibilité d'une peine plus clémente sous certaines conditions, jugées non remplies par le tribunal ayant prononcé la condamnation : *non-violation*

Jidic – Romania/Roumanie, 45776/16, Judgment/Arrêt 18.2.2020 [Section IV]

Traduction française du résumé – Printable version

Facts – In 2016 the applicant, a professional driver, was convicted of drink driving and given a suspended prison sentence of three years and four months, with a driving ban for the supervision period. The last-instance court applied the old criminal law, which was in force in 2012 when the offence had been committed. In its view, it was more lenient in the applicant's case than the new law, which came into force in 2014, given the conditions to be met for suspending the sentence. In particular, under the new law, any prison sentence over three years, like in the applicant's case, had to be served.

The applicant argued, however, that the new law was more lenient in his case. While under the old law the only presumed penalty which could be imposed in his case was imprisonment for a term of one to five years, under the new law, by contrast, the domestic courts could choose between imprisonment for the same term and a fine. Moreover, even though both criminal laws provided, subject to certain conditions, that the sentence could be suspended and/or reduced, only the new criminal law provided that the imposition of the sentence could be waived or postponed. Had this been the case, in the applicant's view, his driving licence would not have been revoked. In addition, a decision by the court to postpone the imposition of his sentence would have enabled him to recover his driving licence immediately after the proceedings had ended because a ban on him driving his car during the period of probation could no longer have been imposed.

Law – Article 7: The assessment of which criminal law was more lenient or favourable to a defendant – the law in force when the defendant had committed the act or the law in force when he or she had been found guilty – did not depend on an abstract comparison of the two criminal laws in question. What was crucial was whether, following concrete assessment of the specific acts, the application of one law rather than the other had put the defendant at a disadvantage as concerned the sentencing.

No issue arose in the present case as regards the definition of the offence, which was practically the same under both laws. The question now was whether the specific assessment made in the applicant's case, which had led to the application of the old criminal law, could reasonably be considered the most favourable for him in terms of sentencing.

Unlike in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, in the applicant's case the domestic courts had taken into account in their as-

sessment of the more lenient criminal law not only the statutory maximum and minimum prison sentence that could have been imposed on him, but also the possibility provided for by the new law to impose a fine and the manner in which a sentence was to be served under both the new and the old law – more specifically, whether the serving of the sentence could be suspended or the imposition of a penalty postponed. The above elements had a bearing on the applicant's effective right to drive a car, which was of paramount importance for him, given that his earning a living depended on that. What was important for the Court was whether there was a real possibility that the applicant could have received a more favourable sentence had the new criminal law been applied in his case.

While under the new law the courts had the option to sentence the applicant to a fine, none of the courts which had examined his case had considered that possibility in view of the seriousness of the offence committed by him. Regarding the options to have one's sentence suspended, waived or postponed, the new law required that the offence under examination be minor or that the prison sentences set for or imposed on defendants be three years or less. However, the applicant had been sentenced to three years and four months' imprisonment. Had the new criminal law been applied, the maximum prison sentence imposed on the applicant would have been the same and, moreover, he would have been forced to serve his prison sentence.

Accordingly, the Court found nothing to support the applicant's allegation that the last-instance court had applied the more stringent criminal law in his case. On the contrary, since there was no obvious possibility that the application of the new criminal law would have operated to his advantage as concerns sentencing, it could not be said that he had not been afforded effective safeguards against the imposition of a heavier penalty.

Conclusion: no violation (unanimously).

(See also *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2312/08 and 34179/08, 18 July 2013, Information Note 165; and *Felloni v. Italy*, 44221/14, 6 February 2020)

ARTICLE 8

Respect for private life/Respect de la vie privée

Disproportionate character of indefinite retention of DNA profile, fingerprints and photograph of person convicted of minor offence, in the absence of any real review: *violation*

Caractère disproportionné de la détention, sans limitation de durée et sans possibilité de réexamen de la situation, du profil ADN, des empreintes digitales et de la photographie d'une personne reconnue coupable d'une infraction mineure : *violation*

Gaughran – United Kingdom/Royaume-Uni, 45245/15, Judgment/Arrêt 13.2.2020 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant was convicted of a minor offence in Northern Ireland. He complained about the taking and indefinite retention of his DNA profile, fingerprints and photo by the police.

Law – Article 8: The retention of the applicant's DNA profile and fingerprints amounted to an interference with the applicant's private life. Given that the applicant's custody photograph had been taken upon his arrest and would be held indefinitely in a local database for use by the police, with the police possibly also applying facial recognition and facial mapping techniques to the photograph, the taking and retention of the applicant's photograph amounted to an interference with his right to private life.

The interference was in accordance with the law and pursued the legitimate purpose of prevention of crime. While the original taking of this information pursued the aim of linking a particular person to the particular crime of which he or she was suspected, its retention pursued the broader purpose of assisting in the identification of persons who might offend in the future.

There was a narrowed margin of appreciation available to States when setting retention limits for the biometric data of convicted persons. However, the duration of the retention period was not necessarily conclusive in assessing whether a State overstepped the acceptable margin of appreciation in establishing the relevant regime. Also of importance was whether the regime took into account the seriousness of the offence and the need to retain the data, and the safeguards available to the individual. Where a State put itself at the limit of the margin of appreciation in allocating to itself the most extensive power of indefinite retention, the existence and functioning of certain safeguards became decisive.

The Government had submitted that the more data was retained, the more crime was prevented. Accepting such an argument in the context of a scheme of indefinite retention would in practice be

tantamount to justifying the storage of information on the whole population and their deceased relatives, which would definitely be excessive and irrelevant. The Government had also highlighted that those who had been convicted were in fact most likely to be convicted again after a relatively short period of two years.

Investigating "cold cases" was in the public interest, in the general sense of combating crime. However the police had to discharge their duties in a manner which was compatible with the rights and freedoms of other individuals.

Having chosen to put in place a regime of indefinite retention, there had been a need for the State to ensure that certain safeguards had been present and effective for the applicant, someone convicted of an offence. However, the applicant's biometric data and photographs had been retained without reference to the seriousness of his offence and without regard to any continuing need to retain that data indefinitely. Moreover, the police were vested with the power to delete biometric data and photographs only in exceptional circumstances. There was no provision allowing the applicant to apply to have the data concerning him deleted if conserving the data no longer appeared necessary in view of the nature of the offence, the age of the person concerned, the length of time that had elapsed and the person's current personality. Accordingly, the review available to the individual would appear to be so narrow as to be almost hypothetical.

The indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as a person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention, and in the absence of any real possibility of review, had failed to strike a fair balance between the competing public and private interests. The State had retained a slightly wider margin of appreciation in respect of the retention of fingerprints and photographs. However, that widened margin was not sufficient to conclude that the retention of such data could be proportionate in the circumstances, which included the lack of any relevant safeguards including the absence of any real review.

Accordingly, the respondent State had overstepped the acceptable margin of appreciation in this regard, and the retention in issue constituted a disproportionate interference with the applicant's right to respect for private life and could not be regarded as necessary in a democratic society.

Conclusion: violation (unanimously).

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

(See also *Trajkovski and Chipovski v. North Macedonia*, 53205/13 and 63320/13, 13 February 2020; *S. and Marper v. the United Kingdom* [GC], 30562/04 and 30566/04, 4 December 2008, Information Note 114; *Gardel v. France*, 16428/05, 17 December 2009, Information Note 125; *M.K. v. France*, 19522/09, 18 April 2013, Information Note 162; *Peruzzo and Martens v. Germany* (dec.), 7841/08 and 57900/12, 4 June 2013, Information Note 164; *Aycaguer v. France*, 8806/12, 22 June 2017, Information Note 208; and *Catt v. the United Kingdom*, 43514/15, 24 January 2019, Information Note 225)

Respect for private life/Respect de la vie privée

Complaint about passive attitude of authorities regarding air pollution from industrial plant lacking substantiation of nature of emissions or applicants' concrete suffering: *inadmissible*

Passivité alléguée des autorités face à la pollution de l'air par un établissement industriel avoisinant, sans précision du contenu des émissions ou de leur impact individuel concret : *irrecevable*

Çiçek and Others/et autres – Turkey/Turquie, 44837/07, Decision/Décision 4.2.2020 [Section II]

Traduction française du résumé – Printable version

Facts – A lime production plant with a quarry was operational in the vicinity of the applicants' town. In a petition to the local governor in July 2006, the applicants submitted that the plant was operating without the necessary permits and licences, and that the regulations on unhygienic facilities provided in such case for the closure of the plant. In January 2007 the local administrative court set aside the reply given to this complaint, in that the governor's office had limited itself to asking the plant to produce an air quality report instead of acting as required by law – namely, carrying out verifications and drawing the consequences thereof, including the closure of the plant if the conditions for closure appeared to be met. The applicants complain that the administration then failed to take the ensuing steps, until the plant eventually moved to another location three years later. They emphasise the pungent smells and risks for health to which they were allegedly exposed for seven years.

Law

Article 8: The question is whether the alleged pollution had been serious enough to affect adversely,

to a sufficient extent, the applicants' family and private lives and their enjoyment of their homes during the relevant time-frame. However, this cannot be established from the material in the case file, as:

– the applicants had not provided any specific information concerning the plant's operations but referred in general to scientific studies with respect to the hazardous effects of petroleum coke, lignite and the burning of waste automobile tyres in lime production. Nor had they provided medical or environmental expert reports relevant to their situation or any other evidence of air pollution or nuisance caused by the operation of the plant;

– none of the parties had provided reliable data on the subject, such as the nature of emissions emitted from the plant, whether it exceeded the safe levels set by the applicable regulations or air pollution levels in the applicants' town.

It is true that the applicants' misgivings about the operation of the plant had been brought to the attention of the domestic authorities and their subsequent reply had been found by the administrative court to be inadequate with respect to the steps and the procedure that needed to be followed; however, that finding had been made strictly on the basis of the domestic environmental legislation and contained no assessment as to whether the applicants had been affected by the alleged pollution and nuisance caused by the plant.

The ruling given by the administrative court had not determined the substantive issue brought before it. It had not made a finding as to whether the plant caused pollution, or whether its operations caused any nuisance to the quality of the applicants' lives. Neither had it established whether the plant was operating in breach of the statutory regulations. No expert reports, discovery hearings or other procedural means to determine adequately the facts of the dispute had been employed by that court.

The domestic court had instead shifted that responsibility back to the administration without determining whether the plant should be closed in keeping with the applicants' request. That being so, the applicants had failed to clarify the matter by lodging an appeal on the grounds that their closure-related claims had been left undecided. In fact, the applicants claimed that the decision of the administrative court should be interpreted as an obligation on the part of the administration to shut down the plant. The Court was, however, unable to agree on that point in the light of the reasoning of the administrative court and the lack of any such order in the operative part of its decision.

In sum, in the absence of proof of any direct impact on the applicants or their quality of life, the Court was not persuaded that the nuisance complained of amounted to an interference with the applicants' private lives.

Conclusion: inadmissible (manifestly ill-founded).

Respect for private life/Respect de la vie privée

HIV blood test at start of active military service without prior notice: *communicated*

Dépistage sérologique du VIH à l'entrée du service militaire actif, sans information préalable : *affaire communiquée*

Lenoir Rizzo – France, 58481/18, Communication [Section V]

English translation of the summary – Version imprimable

Lors de son incorporation dans la marine nationale en 1995, le requérant fut soumis à un dépistage sérologique du virus de l'immunodéficience humaine (HIV) sans en être informé au préalable ni par la suite.

L'ayant découvert fortuitement en 2008, il engagea vainement un recours en indemnisation pour défaut d'information et de consentement quant au test pratiqué. Sa requête aborde également la question de la protection des données personnelles.

Affaire communiquée sous l'angle de l'article 8 de la Convention.

Respect for family life/Respect de la vie familiale

Restriction on applicant's contact rights based on his mental disorder, without assessing the latter's impact on his caring skills or child's safety: *violation*

Restriction du droit de visite fondée sur la santé mentale du requérant sans évaluation de l'impact de celle-ci sur les aptitudes parentales de l'intéressé ou sur la sécurité de l'enfant : *violation*

Cînța – Romania/Roumanie, 3891/19, Judgment/Arrêt 18.2.2020 [Section IV]

Traduction française du résumé – Printable version

Facts – The application concerned restrictions placed by the courts on the applicant's contact rights in respect of his four-year-old daughter during divorce and custody proceedings. The appli-

cant argued that the contact schedule, which limited his time with his daughter to two two-hourly meetings per week, in the mother's presence, did not allow him to maintain and develop a personal relationship with her and to participate effectively in her education. He also alleged that his mental illness had played a significant role in that restriction, even though there had been no evidence before the courts that he would pose a threat to his daughter's well-being.

Law

Article 8: The decisions taken by the domestic courts concerning the applicant's contact with his child had entailed an interference with his right to respect for his family life, which was in accordance with the law and had pursued a legitimate aim, namely the protection of the rights of others.

No evidence had been produced to support the allegation that the applicant had been unable to care for his daughter or represented a threat for her. More importantly, the Court could not see what evidence the applicant could have adduced to prove to the domestic courts that his mental condition had posed no danger to his daughter's safety. In assessing the applicant's mental health the courts had not relied on any recent expert evaluation. And that fact had substantially limited the factual assessment of the applicant's caring skills, vulnerability and mental state at the material time.

Moreover, there had been no elements in the decisions that would explain how the courts had established or assessed the child's best interests. It was unclear whether they had considered and had tried to mitigate the potential distress the child might suffer if her only contact with her father took place in both parents' presence, despite their ongoing conflicts. There had been no arguments indicating the benefits for the child of such a contact arrangement. No alternative means had been explored by the domestic authorities, such as, for example, supervised contact involving the child-protection authority.

The courts had not sufficiently explored the allegations that the child had suffered at the hands of her father. The child had been interviewed by the judge in camera, without the presence of an expert psychologist from the child-protection authority. It was not clear from the court decisions to what extent the child's allegations of negative behaviour on the part of her father had been taken into account and whether and how the contact schedule had been affected by that threat. The assessment, or lack thereof, of the threat to the child seemed to run counter to the very prohibition of domestic abuse against children, prohibited in absolute terms by the domestic law, and cast doubt on the decision-making process.

The domestic courts had acted with expedition, in three and a half months, as required in cases concerning rights of children. However, the promptness of the proceedings should not have come at the expense of the assessment of all relevant evidence by the courts.

In sum, the decision-making process leading to the impugned decision had not been conducted so as to ensure that the applicant's current state of health had been properly assessed and that all views and interests had been duly taken into account. The procedure had not been accompanied by safeguards that had been commensurate with the gravity of the interference and the seriousness of the interests at stake.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 8: Mental illness might be a relevant factor to be taken into account when assessing parents' capability of caring for their child. However, relying on mental illness as the decisive element or even as one element among others might amount to discrimination when, in the specific circumstances of the case, the mental illness did not have a bearing on the parents' ability to take care of the child. In accordance with the international standards, persons with mental illness or disabilities had to receive appropriate assistance from the State in the performance of their child-rearing responsibilities, and children should not be separated from their parents without a proper judicial review of the matter by the competent authorities.

In the present case, although the applicant's mental illness had not been the only element taken into account by the courts, it had been present at all stages of the decision-making process. Its influence on the assessment of his application had been a decisive factor leading to the decision to limit his contact with his child. The applicant had thus suffered a difference in treatment from other parents seeking contact with their estranged children. This difference had been based on his mental health, a ground covered by "other status". The Court had to examine whether the domestic authorities had provided sufficient reasons for taking the applicant's mental illness into account in their assessment. The applicant had been perceived as a threat because of his mental illness without further consideration given to the concrete circumstances of the case and the family situation. In this respect, the case differed from the situation examined by the Court in *S.S. v. Slovenia*, where the applicant had been divested of her parental rights not based on her psychiatric diagnosis, but on her consequent inability

to take care of the child, which had been confirmed by all the expert reports produced in the proceedings.

The domestic courts had not properly assessed the applicant's mental health. There had been no element in their decisions allowing them to determine whether it was a relevant issue to be considered. The fact that the applicant suffered from a mental illness could not in itself justify treating him differently from other parents seeking contact with their children. In particular, at the time the domestic decisions were taken, the applicant had been taking his medication regularly and for the previous two years, there had been no episodes of psychiatric decompensation caused by his illness. Consequently, in restricting the applicant's contact with his child, the domestic courts had made a distinction based on his mental health for which they had not provided relevant and sufficient reasons.

In these circumstances, a prima facie case of discrimination had been established. The burden then shifted to the respondent State to convincingly show that the applicant's contact with his child had not been restricted on discriminatory grounds, but rather that his mental illness had indeed impaired his ability to take care of his child or that there had been other reasonable grounds for such a restriction. Regard being had to the specificity of the facts and the nature of the allegations made in this type of case, it would be extremely difficult in practice for the applicant to prove discrimination without such a shift in the burden of proof. However the respondent State had not brought forward convincing reasons such as to rebut the presumption of discrimination against the applicant on the grounds of his mental health.

Conclusion: violation (five votes to two).

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

(See also *K. and T. v. Finland* [GC], 25702/94, 17 July 2001, Information Note 32; *B. v. Romania (no. 2)*, 1285/03, 19 February 2013, Information Note 160; *X v. Latvia* [GC], 27853/09, 26 November 2013, Information Note 168; *Kocherov and Sergeyeva v. Russia*, 16899/13, 29 March 2016, Information Note 194; *S.S. v. Slovenia*, 40938/16, 30 October 2018, Information Note 222)

Respect for family life/Respect de la vie familiale

Drug addict on treatment disproportionately deprived of parental authority over her children who were not neglected or in danger, and the youngest two of whom placed in public care: *violation*

Mère toxicomane sous traitement déchue de manière disproportionnée de l'autorité parentale sur ses enfants, qui n'étaient ni négligés ni en danger, les deux plus jeunes ayant été confiés à l'assistance publique : *violation*

Y. I. – Russia/Russie, 68868/14, Judgment/Arrêt 25.2.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant was deprived of parental authority in respect of her three children and the two youngest were placed in public care. The domestic courts referred to the fact that the mother was a drug addict and unemployed and decided that it would be dangerous to leave the children in her care. Her appeals against this decision were unsuccessful.

Law – Article 8: Depriving the applicant of her parental authority in respect of her children had constituted an interference with her right to respect for family life. That interference was in accordance with law and had pursued the aim of protecting the rights of the applicant's children.

The children's removal and initial placement in public care at the beginning of the criminal proceedings against the applicant on suspicion of her involvement in drug trafficking had been justified, because she had been intoxicated on the date in question, had suffered from withdrawal symptoms on the following days, and had clearly been unable to take care of her children. It did not follow, however, that that fact, in itself, had constituted sufficient grounds for such a far-reaching measure as deprivation of parental authority.

Prior to the criminal proceedings against the applicant, she had not been monitored by a social welfare authority, or warned about her behaviour and the consequences it might entail. And once the applicant's situation had come to their attention, the competent authorities had made no attempt to provide her with appropriate assistance. There was also no evidence that, in their relevant decisions, the domestic courts had considered any of those factors.

Furthermore, the domestic courts had failed to refer to any particular situations or events where the applicant had left her children unattended, had not provided care for them or had neglected them in any way, let alone endangered their health or life by her actions or inaction. They had merely relied on the applicant's own statement, made in the context of the criminal proceedings against her, that she had allowed her acquaintances to use her flat for taking drugs, and the oral evidence of a police officer who had stated that the applicant

would allow her acquaintances to take drugs in her kitchen, in her children's presence.

Nevertheless, firstly, it did not follow from the applicant's statement that she or her acquaintances had ever taken drugs in front of her children. The domestic courts had not explored what the basis for the police officer's relevant statement had been. Secondly, the applicant, her elder son and her mother had consistently stated that the applicant had not demonstrated her addiction to her family members. The domestic courts had made no attempt to obtain more information in order to clarify the important contradiction with the police officer's statements.

The applicant had consistently reaffirmed her intention to resolve her drug-addiction problem and, moreover, had taken steps to that end. Yet, the domestic authorities had not sought any independent evidence, such as an assessment by a psychologist, to evaluate the applicant's emotional maturity and motivation to act as a responsible parent and to resolve her drug-addiction problem. Moreover, the applicant's arguments and evidence that she had commenced rehabilitation treatment had been ignored by the domestic courts. That was striking in a situation where the applicant's drug addiction appeared to have been the main, if not the only, ground for depriving her of parental authority.

The domestic courts had relied on the fact that the applicant had been unemployed, but their relevant decisions had not explained how it had affected her ability and capacity to take care of her children. In fact, a report, relied on by the domestic courts, had not revealed any major defects in the living conditions of the applicant's family; the children had separate sleeping places and there had been sufficient food supplies. Moreover, a following report had clearly shown subsequent improvements, stating, in particular, that the flat had been tidy, cosy and well ventilated. However, no assessment of those changes, in particular whether they could be regarded as a genuine attempt on the part of the applicant to improve her situation after the children's removal, had been made by the domestic courts.

The domestic authorities had not considered the alternative of applying a less drastic measure and to order restriction rather than deprivation of her parental authority, despite the fact that the applicant had not had a history of neglecting her children. They had not given the applicant any warnings regarding the possible consequences of her allegedly negligent behaviour in respect of her children.

The applicant had consistently expressed her attachment to the children and her wish to maintain her relationship with them. The children had been also deeply attached to her and their maternal grandmother, and the maternal grandmother had been willing to keep the children in her care. Yet, the domestic courts had not given due consideration to any of those aspects. In particular, when choosing the measure to be applied in the applicant's case, they had not assessed the impact that the children's separation from their mother and grandmother might have on their well-being.

As a result of the impugned measure, the children had not only been separated from the applicant, their mother, but they themselves had been split up, given that the oldest child had been transferred into his father's care whereas the two youngest children had been placed in public care.

In sum, the reasons relied on by the domestic courts had been insufficient to justify depriving the applicant of her parental authority over her three children, and placing the two youngest children in public care. The domestic authorities had failed to demonstrate convincingly that, despite the availability of less radical solutions, the impugned measure had constituted the most appropriate option corresponding to the children's best interests. Notwithstanding the domestic authorities' margin of appreciation, the interference with the applicant's family life had therefore not been proportionate to the legitimate aim pursued.

Conclusion: violation (unanimously).

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

(See also *Kutzner v. Germany*, 46544/99, 26 February 2002, Information Note 39; *Saviny v. Ukraine*, 39948/06, 18 December 2008, Information Note 114; *M.D. and Others v. Malta*, 64791/10, 17 July 2012, Information Note 154; *A.K. and L. v. Croatia*, 37956/11, 8 January 2013, Information Note 159; *R.M.S. v. Spain*, 28775/12, 18 June 2013, Information Note 164; *S.H. v. Italy*, 52557/14, 13 October 2015, Information Note 189; *Kocherov and Sergeyeva*, 16899/13, 29 March 2016, Information Note 194; *S.S. v. Slovenia*, 40938/16, 30 October 2018, Information Note 222; *Haddad v. Spain*, 16572/17, 18 June 2019, Information Note 230; *Strand Lobben and Others v. Norway* [GC], 37283/13, 10 September 2019, Information Note 232)

Respect for correspondence/Respect de la correspondance
Positive obligations/Obligations positives

Failure of the courts to examine the merits of a complaint of cyberbullying closely linked to a complaint about domestic violence: *violation*

Absence d'examen sur le fond de la plainte pour cyberviolence étroitement liée à la plainte pour violences conjugales : *violation*

Buturugă – Romania/Roumanie, 56867/15, Judgment/Arrêt 11.2.2020 [Section IV]

(See Article 3 above/Voir l'article 3 ci-dessus, page 8)

ARTICLE 10

Freedom of expression/Liberté d'expression

Criminal conviction, fine and two-year ban on journalistic or publishing activities imposed on businessman for hate speech against ethnicities: *no violation*

Condamnation pénale d'un homme d'affaires pour discours de haine contre des groupes ethniques, assortie d'une amende et d'une interdiction d'exercer pendant deux ans des activités en lien avec le journalisme ou l'édition : *non-violation*

Atamanchuk – Russia/Russie, 4493/11, Judgment/Arrêt 11.2.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, an entrepreneur and owner of a local newspaper, was convicted of inciting hatred on account of an article containing offensive remarks about non-Russian ethnic groups. He stated in particular that these groups were prone to crime, would "slaughter, rape, rob and enslave, in line with their barbaric ideas" and "participate[d] in the destruction of the country". The impugned article was published twice, in two local newspapers with distribution figures of 8,000 and 10,000, in a multi-ethnic region. For each publication of the article the applicant was sentenced to a fine of some 5,100 euros and to a two-year ban on exercising any journalistic or publishing activities. The sentence in respect of the first publication was not enforced. As regards the second publication, the fine was converted into two hundred hours of community work, on account of the applicant's failure to pay the fine.

Law – Article 10: The reasons adduced by the domestic courts for convicting the applicant had been relevant. Importantly, the sentences had been imposed in the context of the legislation aimed at fighting hate speech and they had been aimed at protecting the rights of others, specifically the dignity of people of non-Russian ethnicity residing in the applicant's region. Furthermore, the Court expressed doubts as to whether the content of the applicant's article had been "capable of contributing to the public debate" on the relevant issue or that its "principal purpose" had been to do so. It could not be reasonably perceived as comments criticising any specific policy of the government, for instance as regards migration.

The impugned statements, lacking any factual basis, could be reasonably assessed as stirring up base emotions or embedded prejudices in relation to the local population of non-Russian ethnicity. Thus, even though the article had not been considered as containing any explicit call for acts of violence or other criminal acts, it had been within the national authorities' margin of appreciation to react in some manner.

Moreover, the applicant had been founder of a local newspaper and only occasionally published articles in other local newspapers, apparently, as a freelancer, apart from his main professional activity as an entrepreneur. So it would not appear from the circumstances of the case that the prohibition to exercise journalistic or publishing activities for two years had had any significant practical consequences for the applicant.

In view of the foregoing, the present case disclosed exceptional circumstances justifying the sentences imposed on the applicant. In particular, by prohibiting the applicant from carrying out a journalistic or publishing activity for two years, the domestic courts had not contravened the principle that the press had to be able to perform the role of a public watchdog in a democratic society.

The Court did not find it necessary to decide whether the applicant's complaint should be dismissed with reference to Article 17 of the Convention.

Conclusion: no violation (six votes to one).

The Court also found, by six votes to one, no violation of Article 6 § 1 on the ground that the unmotivated refusal of the applicant's request to summon a philology specialist for examination in court had not offended the overall fairness of the criminal proceedings.

(See the Factsheet on Hate speech; see also *Cumpănă and Mazăre v. Romania* [GC], 33348/96, 17 December 2004, Information Note 70; *Féret v. Belgium*, 15615/07, 16 July 2009, Information Note 121; and *Stomakhin v. Russia*, 52273/07, 9 May 2018, Information Note 218)

Freedom of expression/Liberté d'expression

Grossly arbitrary prosecution for drug-related crimes in retaliation for political expression: *violation*

Ouverture grossièrement arbitraire de poursuites pénales pour trafic de stupéfiants en représailles de formes d'expressions politiques : *violation*

Ibrahimov and/et Mammadov – Azerbaijan/Azerbaïdjan, 63571/16, Judgment/Arrêt 13.2.2020 [Section V]

(See Article 18 below/Voir l'article 18 ci-dessous, page 24)

ARTICLE 13

Effective remedy/Recours effectif

Systemic flaws rendering constitutional redress proceedings ineffective in respect of length-of-proceedings complaints: *violation*

Défauts systémiques privant d'effectivité le recours offert par les juridictions constitutionnelles pour les griefs de durée de procédure : *violation*

Marshall and Others/et autres – Malta/Malte, 79177/16, Judgment/Arrêt 11.2.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants are owners of a real estate property that for decades has been subject to a lease under a "protected rent" regime. The lease had been contracted in 1958 with a bank. In 1989 the applicants lodged a restitution claim on ground that the special rent regime in issue could not apply to a commercial entity. But the courts found for the bank. That set of proceedings lasted until 2010.

Constitutional redress was then sought by the applicants in respect of the following complaints; after a first instance, the Constitutional delivered a final judgement in 2016:

(i) *Length of the civil proceedings*: no award was made, as the applicants were held responsible for most of the delays.

(ii) *Controlled rent regime*: the Constitutional Court did accept that the effect of this regime was disproportionate given the striking difference between the rent the applicants received and its rental value on the market.

As to redress, though, the Constitutional Court considered that it was not the adequate forum to decide on the eviction of a tenant. In 2009 admittedly, the Civil Code had been amended to provide owners with a possibility of regaining their property, but this could only come to play after a twenty-year transition period ending in 2008. Instead, it however ruled that the impugned rent-control laws could no longer be relied on as a basis for the occupation of the premises in the present case.

As to compensation, having considered that the applicants had waited twenty-three years to lodge constitutional redress proceedings as well as the above ruling invalidating the effects of the impugned laws between the parties at issue, the Constitutional Court awarded EUR 25,000. Costs were to be paid in the ratio of 2/5 by the Government and 3/5 by the applicants (amounting to about EUR 4,500).

Law

Article 13 in conjunction with Article 1 of Protocol No. 1: Although constitutional redress proceedings – the sole remedy available – are an effective remedy in theory, they are not so in practice, concerning arguable complaints in respect of the rent laws in place, which, though lawful and pursuing legitimate objectives, impose an excessive individual burden on applicants.

In the absence of an award covering future rent until 2028, the only remedy capable of giving adequate and speedy redress to the applicants in the present case was for the Constitutional Court to order eviction of the tenants, a course of action it had failed to undertake, as was its normal practice. Instead it had ordered that the tenants could no longer rely on the relevant law provisions to retain title to the property. While the Court will refrain from adjudicating on the matter in general, the effectiveness of such a measure appears unsatisfactory in the present case.

Indeed, it transpires from the case file that so far: (i) neither have any eviction proceedings been undertaken (or, if so, been concluded); (ii) nor have the tenants voluntarily vacated the property. The inaction of both parties has thus led to the status quo remaining that which existed on the date of the Constitutional Court judgment, more than three years ago.

Be that as it may, there was little justification for delaying redress in the present case, given that : (i) unlike in similar cases where the interferences had been justified by the legitimate aim of providing social housing, in the present case the interference applied in favour of a commercial entity, namely a bank; (ii) as the law stood, the bank would in any

event lose the protection of the law and therefore would have to vacate the property when the lease came to an end in 2028.

Furthermore, the financial redress offered to the present applicants was not adequate. The Court is concerned that the Maltese courts often fail: (i) as to pecuniary damage, to bear in mind that awards must be intended to put the applicant, as far as possible, in the position he would have enjoyed had the breach not occurred; (ii) to accompany such awards by an adequate award in respect of non-pecuniary damage and/or an order for the payment of the relevant costs.

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 6 § 1: While constitutional redress proceedings are an effective remedy in theory for length of proceedings complaints, they appeared to lack such effectiveness in practice at the relevant time, given the following systemic flaws identified: lack of speediness and regular practice of unreasonably low compensation awards. Moreover, whereas the applicants' claims in connection with the length of proceedings were upheld, the Constitutional Court nevertheless ordered the applicants to pay 3/5 of the costs of the proceedings. While such costs did not impede access to such a remedy in the present case, they, at the very least, often have an impact on the compensation awarded.

Conclusion: violation (unanimously).

The Court also found, unanimously, violations

– of Article 1 of Protocol No. 1: as established by the domestic courts themselves, the applicants were made to bear a disproportionate burden. In addition, while the overall measure may be in the general interest, the fact that there also exists an underlying private interest of a commercial nature cannot be disregarded; and

– of Article 6 § 1 in account of the excessive length of proceedings.

Article 41: EUR 500,000 jointly in respect of pecuniary damage; claim for non-pecuniary damage dismissed.

ARTICLE 14

Discrimination (Article 8)

Restriction on applicant's contact rights based on his mental disorder, without assessing the latter's impact on his caring skills or child's safety: *violation*

Restriction du droit de visite fondée sur la santé mentale du requérant sans évaluation de l'impact de celle-ci sur les aptitudes parentales de l'intéressé ou sur la sécurité de l'enfant : *violation*

Cînța – Romania/Roumanie, 3891/19, Judgment/Arrêt 18.2.2020 [Section IV]

(See Article 8 above/Voir l'article 8 ci-dessus, page 17)

Discrimination (Article 8)

Homosexual denied employment by private company: *communicated*

Refus d'une société privée de recruter un homosexuel : *affaire communiquée*

Oleynik – Russia/Russie, 4086/18, Communication [Section III]

Traduction française du résumé – Printable version

After a job interview, Ms P, a person in charge of an educational project in a private foundation confirmed that the foundation was willing to hire the applicant as a training manager. Then they continued to correspond via a social network. Ms P asked the applicant if he was gay, and specified that the foundation "adheres to traditional views" and that it would not hire a homosexual person. As the applicant confirmed that he was gay, she put an end to the conversation. The applicant received an e-mail from Ms P confirming that he could not be employed by the foundation. No explicit reasons were given for the refusal to employ the applicant.

The applicant brought a civil claim against the foundation, claiming that he had been denied employment on discriminatory grounds. He provided to the court copies, certified by a public notary, of his conversations with Ms P, together with a screenshot of the foundation's home webpage, where Ms P was listed as a person in charge of an educational project. The foundation submitted, without providing any evidence, that Ms P had never worked for it.

The domestic courts concluded that no infringement of the applicant's rights could be established.

The applicant complains that his denial of employment was of a discriminatory nature and that the domestic courts did not answer his arguments in this respect.

Case communicated under Article 14 in conjunction with Article 8 and under Article 6 of the Convention.

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Detention of opposition activists in order to punish them for painting anti-government graffiti on statue of former president: *violation*

Détention de militants d'un mouvement d'opposition dans le but de les punir pour avoir peint des graffiti anti-gouvernementaux sur la statue de l'ancien président : *violation*

Ibrahimov and/et Mammadov – Azerbaijan/ Azerbaïdjan, 63571/16, Judgment/Arrêt 13.2.2020 [Section V]

Traduction française du résumé – Printable version

Facts – Both applicants were members of NIDA, a youth organisation which actively participated in organising and conducting anti-government demonstrations, portrayed by authorities as "radically destructive". One night in May 2016 the applicants, in order to express their opposition to the government, sprayed graffiti with anti-government slogans on the statue of the former president of Azerbaijan and afterwards disseminated photographs thereof on social networks.

The following afternoon, both applicants were taken to police premises. According to the domestic authorities:

(i) Earlier that day, the police had received, in a separate and unrelated manner, operational information according to which unidentified persons named "Giyas" and "Bayram" (as the applicants) were involved in drug trafficking in Baku, carried drugs and stored them at their homes (the information did not contain any details capable of identifying those persons);

(ii) In order to verify that information and identify the suspects, the police had decided to conduct operational search measures, as the sole means available to identify the aforesaid persons.

The investigative measures carried out into the applicants' alleged involvement in drug trafficking consisted mainly of personal searches, searches of their flats and the seizure of narcotic substances allegedly discovered as a result of those searches. After their police custody, criminal proceedings were opened against them and they were detained on remand.

Law

Article 5 § 1: Although the criminal proceedings against each of the applicants were not formally interrelated in any way and were based on separate sets of facts, it is apparent from the documents in the case files that those proceedings followed the same pattern, as regards notably: i. the criminal charges and the description of the way in which the applicants had allegedly acquired and stored the drugs; ii. the investigative measures taken (in substance as well as in scope); iii. the timing of the relevant inquiries and the measures taken against the applicants.

In view of the following elements and the inferences which may be drawn therefrom – in particular, as regards the applicants' status, the sequence of events, the manner in which the investigations were carried out and the authorities' conduct –, the material put before the Court does not meet the minimum standard for the reasonableness of a suspicion required for an individual's arrest.

(a) *Operational information leading to the applicants' arrest* – Serious questions as to the credibility of this information and the measures carried out in this context arise seeing as: i. the applicants had no criminal history whatsoever prior to the events at stake; ii. the collection and receipt of the operational information in question (its source, etc.) remained unspecified; iii. most importantly, the fact that the authorities were able to identify the applicants as being the two allegedly suspected traffickers within a matter of hours without any specific measures having been taken (given, especially, the fact that the operational information had not specifically singled out the applicants in a manner capable of identifying them, for example, by indicating their full name or other personal details).

(b) *Investigative measures taken following the applicants' arrest* – The following shortcomings cast doubt on the reliability and accuracy of the evidence obtained as a result of the searches carried out:

– *Personal searches of the applicants* – The absence of a personal search on the spot is all the more surprising as the alleged operational information upstream was that the two individuals mentioned therein were carrying illicit drugs.

Moreover, the applicants were subjected to inhuman and degrading treatment in police custody and made confessions while undergoing such treatment; this coincides with the time when they were searched by the police and narcotic substances were found, forming the evidence against them.

– *Searches of the applicants' flats* – Whereas the applicants were not merely accused of possessing drugs but rather of being involved in drug traffick-

ing, the only evidence allegedly found and seized were the packets containing heroin. The police did not attempt to search for other potential evidence – such as cash, information concerning possible suppliers or buyers, or items relating to drug paraphernalia, including scales and packaging material.

Even assuming that those searches took place in the presence of attesting witnesses, such argument cannot be given decisive weight in the absence of any other evidence, such as video recordings. Moreover, the Committee for the Prevention of Torture has reported a number of consistent accounts when incriminating evidence was introduced into detained persons' personal belongings before calling in witnesses for official searches and seizure.

Finally, an inconsistency can be discerned in that, whereas the searches of the applicants' flats had taken place without the presence of defence lawyers, the relevant records state the contrary.

– *Scope of the criminal investigations* – The circumstances relating to the applicants' alleged acquisition and selling of drugs, the alleged existence of organised criminal groups and the applicants' alleged role therein were completely left aside by the investigating authorities. Besides, the applicants, who were members of an opposition-oriented movement, constantly complained that the drugs in question had been planted by the police in retaliation for their painting political slogans; however, at no stage during the proceedings did the domestic authorities endeavour to verify and investigate those complaints.

Conclusion: violation (unanimously).

Article 18 in conjunction with Article 5: In the eye of the Court, it is clear that the actual purpose of the restriction of the applicants' liberty was to punish them for painting graffiti on the statue of the former president of the country and expressing thereby political slogans against the government. That conclusion was reached in view of the following elements: i. the applicants' status (members of an opposition-oriented organisation); ii. the sequence of the events (their arrest shortly after their painting graffiti with political slogans and dissemination of photographs thereof) without a "reasonable suspicion" of their having committed the crime put forward for that purpose; iii. the fact that the law-enforcement authorities clearly had targeted NIDA and its members; iv. the events reflecting the pattern of arbitrary arrest and detention of government critics, civil society activists and human-rights defenders through retaliatory prosecutions and misuse of the criminal law identified in the case of *Aliyev v. Azerbaijan*).

Conclusion: violation (unanimously).

Article 10: The applicants' criminal prosecution was not formally related to their having sprayed graffiti on the statue: instead of acting within the constraints of the law, the authorities chose to prosecute the applicants for drug-related crimes in retaliation for their actions.

In the eyes of the Court, such interference with the applicants' freedom of expression was not only unlawful, but also grossly arbitrary and incompatible with the principle of the rule of law which is expressly mentioned in the Preamble to the Convention and is inherent in all the Articles of the Convention.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 3 (both in its substantive and procedural limbs) and a violation of Article 5 § 4.

Article 41: EUR 30,000 to each applicant in respect of non-pecuniary damage.

(See also *Aliyev v. Azerbaijan*, 68762/14 and 71200/14, 20 September 2018, Information Note 221; and *Rashad Hasanov and Others v. Azerbaijan*, 48653/13 et al., 7 June 2018)

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

Peaceful enjoyment of possessions/ Respect des biens
Positive obligations/Obligations positives

Inconclusive criminal investigation into arson of applicants' house, without "flagrant and serious" deficiencies: *no violation*

Inaboutissement de l'enquête criminelle, sans carences « graves et flagrantes », sur l'incendie de la maison des requérants : *non-violation*

Abukauskai – Lithuania/Lituanie, 72065/17, Judgment/Arrêt 25.2.2020 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants' house was intentionally set on fire at night, while the first and second applicants were inside; they escaped through a window. A pre-trial investigation was opened immediately after the arson attack and lasted approximately seven months before being suspended. A neighbour was suspected, but no evidence could be found. The prosecutor later accepted in disciplinary proceedings that certain investigative measures had not been carried out properly. When rejecting

the applicants' civil claim against the State, the domestic courts found, however, that that there was no direct causal link between the alleged shortcomings and the investigation's failure to identify the perpetrator. Indeed, one of the main reasons why it had not been possible was the lack of any traces of flammable liquids on the fire debris taken from the house; thus, without identifying the flammable material that had been used to set the house on fire, other investigative measures – even if they had been carried out properly – would not have yielded any information that would have helped the identification of the perpetrator.

Law

Article 1 of Protocol No. 1: In cases concerning life-threatening attacks on individuals, the State authorities had an obligation to act of their own motion once the matter had come to their attention. However, in the absence of any such complaints made by the applicants, as well as any other circumstances which would require the Court to assess the complaints as focused on the lack of an effective investigation into a life-threatening attack on the applicants themselves, the Court's examination would be limited to establishing whether there had been flagrant and serious deficiencies in the criminal investigation, in accordance with its case-law under Article 1 of Protocol No. 1 (see *Blumberga v. Latvia,* a case concerning burglary*)*. At the same time, the Court was of the view that the principles laid down in *Blumberga* could not be readily applied in cases where the interference with property rights had been carried out in a manner that was potentially dangerous to the applicants' life or health.

It was true that the domestic authorities had considered that the damage to the applicants' property had been caused "in a dangerous manner". That distinguished the present case from *Blumberga* , in which the interference with the applicant's property rights had not been carried out in a manner that could have put her life or health in danger.

However, the applicants had not alleged, throughout the domestic proceedings, that they had suffered any injuries, or that their life or health had been at risk because of the dangerous nature of the arson attack. There was also no indication that they had required medical attention as a result of the arson attack. Nor had the applicants made any complaints under Articles 2 or 3 of the Convention in their initial application to the Court.

In those circumstances, the Court's examination was limited to establishing whether there had been flagrant and serious deficiencies in the criminal investigation.

The fact that the pre-trial investigation had not identified the perpetrator of the arson was not sufficient to find that it had been ineffective. In particular, the Court was satisfied that the evidence which the domestic courts had considered to be of key importance had been taken and preserved properly, and that identifying the flammable material had been impossible, through no fault of the authorities. During the domestic proceedings the applicants had not asked the authorities to carry out any additional investigative measures, such as obtaining or examining any other objects or questioning any more witnesses. Nor had they appealed against the prosecutor's decisions to discontinue the investigation against their neighbour and to suspend the investigation. Indeed, the applicants had explicitly acknowledged that, in their view, all the necessary investigative measures had been carried out. The Court had no reason to hold otherwise. Moreover, the applicants had not complained about the length of the investigation, nor had they alleged that there had been any periods of inactivity. Therefore, the Court did not find it established that the failure to bring the criminal proceedings to a successful conclusion had been the result of flagrant and serious deficiencies in the conduct of the authorities.

It was true that instituting civil proceedings against the suspected neighbour would have been futile because of insufficient evidence linking him to the fire. However, the Court was unable to find that the lack of prospects of success of such civil proceedings had been the direct consequence of exceptionally serious and flagrant deficiencies in the conduct of the criminal proceedings.

The State had therefore complied with its positive obligations.

Conclusion: no violation (unanimously).

(See also *Blumberga v. Latvia*, 70930/01, 14 October 2008, Information Note 112)

ARTICLE 3 OF PROTOCOL No. 4/ DU PROTOCOLE N° 4

Enter own country/Entrer dans son pays

Refusal to repatriate a national who left the country for the former territory of "Islamic State", and her young children: *communicated*

Refus d'organiser le rapatriement d'une ressortissante partie rejoindre l'ancien territoire de l'« État islamique », et de ses jeunes enfants : *affaire communiquée*

H.F. and/et M.F. – France, 24384/19, Communication [Section V]

(See Article 1 above/Voir l'article 1 ci-dessus, page 6)

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

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

Immediate and forcible return of aliens from a land border, following an attempt by a large number of migrants to cross it in an unauthorised manner and en masse: *no violation*

Renvoi immédiat et forcé d'étrangers depuis une frontière terrestre, à la suite d'une tentative de la franchir de façon irrégulière et en masse par un nombre important de migrants : *non-violation*

N.D. and/et N.T. – Spain/Espagne, 8675/15, Judgment/Arrêt 13.1.2020 [GC]

English translation of the summary – Version imprimable

En fait – En août 2014, un groupe de plusieurs centaines de migrants subsahariens, dont faisaient partie les requérants, tenta d'entrer en Espagne en escaladant les clôtures entourant la ville de Melilla, enclave espagnole sur la côte de l'Afrique du Nord. Une fois les clôtures franchies, ils furent appréhendés par des membres de la *Guardia Civil*, qui les aurait menottés et ramenés de l'autre côté de la frontière, sans procédure d'identification ni possibilité d'exposer leur situation personnelle. Parvenus à nouveau à entrer irrégulièrement en Espagne par la suite, les requérants firent l'objet d'arrêtés d'expulsion. Leurs recours administratifs, de même que la demande d'asile que l'un d'eux déposa, furent rejetés.

Par un arrêt du 3 octobre 2017 (voir la Note d'information 211), une chambre de la Cour a conclu à l'unanimité à la violation de l'article 4 du Protocole n° 4, faute d'examen individualisé de la situation de chacun des requérants, ainsi que de l'article 13 de la Convention combiné avec le même article.

Le 29 janvier 2018, l'affaire a été renvoyée devant la Grande Chambre à la demande du Gouvernement.

En droit – Article 4 du Protocole n° 4

a) *Sur l'applicabilité* – La Cour est appelée pour la première fois à examiner la question de l'applicabilité de l'article 4 du Protocole n° 4 à un renvoi immédiat et forcé d'étrangers depuis une frontière terrestre, à la suite d'une tentative, effectuée par un nombre important de migrants, de franchir cette frontière de façon irrégulière et en masse. Le Gouvernement ayant soutenu que les requérants avaient fait l'objet d'un refus d'admission sur le territoire national plutôt que d'une expulsion, la Cour doit rechercher si la notion d'« expulsion » recouvre également la non-admission d'étrangers à la frontière d'un État contractant ou – s'agissant d'États faisant partie de l'espace Schengen – à une frontière extérieure de cet espace, selon le cas.

La Cour ne s'est pas, à ce jour, prononcée sur la distinction entre la non-admission et l'expulsion d'étrangers, en particulier de migrants ou de demandeurs d'asile, relevant de la juridiction d'un État qui les éloignait de force de son territoire. En effet, pour les personnes menacées de subir des mauvais traitements dans le pays de destination, le risque est le même dans les deux cas, à savoir celui d'en être victimes. L'examen des éléments du droit international et du droit de l'Union européenne conforte la position de la Cour selon laquelle la protection de la Convention, qui est à interpréter de façon autonome, ne saurait dépendre de considérations formelles. La thèse contraire comporterait de sérieux risques d'arbitraire, dans la mesure où des personnes ayant droit à la protection de la Convention pourraient s'en voir privées, par exemple, au motif que, n'ayant pas franchi légalement la frontière de l'État, elles n'ont pas pu valablement réclamer le bénéfice de la protection de la Convention. En effet, le souci légitime des États de déjouer les tentatives de plus en plus fréquentes de contourner les restrictions à l'immigration ne saurait aller jusqu'à rendre ineffective la protection accordée par la Convention, notamment celle de l'article 3 qui englobe l'interdiction du refoulement au sens de la Convention de Genève relative au statut des réfugiés.

Ces raisons ont amené la Cour à interpréter le terme « expulsion » dans le sens générique que lui reconnaît le langage courant (« chasser hors d'un endroit »), comme désignant tout éloignement forcé d'un étranger du territoire d'un État, indépendamment de la légalité du séjour de la personne concernée, du temps qu'elle a passé sur ce territoire, du lieu où elle a été appréhendée, de sa qualité de migrant ou de demandeur d'asile ou de son comportement lors du franchissement de la frontière. Il en est résulté l'application des articles 3 de la Convention et 4 du Protocole n° 4 à toute situation ressortissant à la juridiction d'un État contractant, même à l'égard de situations ou de moments où l'existence de motifs habilitant les personnes concernées à demander la protection de ces dispositions n'avait pas encore pu être examinée par

les autorités de l'État en cause. De l'avis de la Cour, les considérations, sur lesquelles étaient fondés ses récents arrêts *Hirsi Jamaa et autres*, *Sharifi et autres* et *Khlaifia et autres* concernant des requérants qui avaient tenté d'accéder au territoire d'un État par la voie maritime, n'ont rien perdu de leur pertinence. Il n'y a donc pas lieu d'adopter une interprétation différente du terme « expulsion » s'agissant d'éloignements forcés du territoire, effectués dans le cadre d'une tentative de franchissement d'une frontière nationale par la voie terrestre.

En l'espèce, les requérants ont été éloignés du territoire espagnol et renvoyés vers le Maroc de force, contre leur gré et menottés, par des agents de la *Guardia Civil*. Il y a donc bien eu « expulsion » au sens de l'article 4 du Protocole n° 4.

b) *Sur le fond* – Si l'article 4 du Protocole n° 4 exige des autorités de l'État qu'elles permettent à chacun des étrangers en cause, de façon réelle et effective, d'exposer ses arguments s'opposant à son expulsion, la propre conduite du requérant constitue un élément pertinent dans l'appréciation de la protection due à ce titre. Selon une jurisprudence constante de la Cour, il n'y a pas violation de l'article 4 du Protocole n° 4 si l'absence de décision individuelle d'éloignement est la conséquence du propre comportement du requérant. Notamment, le défaut de coopération active à la procédure d'examen individuel de la situation des requérants a amené la Cour à juger que le Gouvernement ne pouvait être tenu pour responsable de cette absence d'examen. De l'avis de la Cour, le même principe doit également s'appliquer lorsque le comportement de personnes qui franchissent une frontière terrestre de façon irrégulière, tirent délibérément parti de l'effet de masse et recourent à la force, est de nature à engendrer des désordres manifestement difficiles à maîtriser et à menacer la sécurité publique.

À cet égard, toutefois, la Cour attachera une grande importance à la question de savoir si, dans les circonstances de l'espèce, l'État défendeur a offert un accès réel et effectif à des possibilités d'entrée régulières, et en particulier à des procédures à la frontière. Lorsque l'État défendeur a offrait pareil accès mais qu'un requérant n'en a pas fait usage, la Cour devra alors rechercher, dans le contexte de la cause et sans préjudice de l'application des articles 2 et 3 de la Convention, si des raisons impérieuses reposant sur des faits objectifs dont l'État défendeur était responsable ont empêché l'intéressé d'y recourir.

Les possibilités d'entrée régulières doivent permettre à toute personne persécutée d'introduire une demande de protection, fondée notamment sur l'article 3, dans des conditions qui en assurent un traitement conforme aux normes internationales. Dans le contexte du cas d'espèce, l'application du code frontières Schengen suppose précisément l'existence d'un nombre suffisant de points de passage frontaliers. En l'absence d'un dispositif adéquat, les États pourraient refuser l'entrée sur leur territoire, ce qui risquerait de priver d'effectivité toutes les dispositions de la Convention destinées à assurer la protection des personnes réellement exposées à un danger de persécution.

En revanche, là où un dispositif assurant l'effectivité réelle du droit de demander la protection de la Convention, notamment de son article 3, existe, la Convention ne s'oppose pas à ce que les États, dans le cadre de la gestion des frontières qui leur incombe, exigent que les demandes d'une telle protection soient présentées auprès de ces points de passage frontaliers. En conséquence, ils peuvent refuser l'accès à leur territoire aux étrangers, y compris les demandeurs d'asile potentiels qui se sont abstenus, sans raisons impérieuses reposant sur des faits objectifs dont l'État défendeur était responsable, de respecter ces exigences en cherchant à franchir la frontière à un autre endroit et en particulier, comme cela s'est produit en l'espèce, en utilisant l'effet de masse et la force dans le cadre d'une opération préalablement organisée.

Le droit espagnol offrait aux requérants plusieurs possibilités pour solliciter leur admission en territoire national. Il est établi que le 1er septembre 2014, peu après les événements survenus en l'espèce, les autorités espagnoles ont mis en place un bureau d'enregistrement des demandes d'asile, au poste-frontière international de Beni-Enzar. De plus, avant même la mise en place de ce bureau, il existait non seulement une obligation légale d'accepter les demandes d'asile déposées à ce poste-frontière mais aussi une possibilité réelle de présenter pareilles demandes.

Les requérants ont manqué à recourir à cette possibilité aux fins d'exposer de façon régulière et légale les motifs qui, selon eux, s'opposaient à leur expulsion. Par conséquent, seule l'absence de raisons impérieuses reposant sur des faits objectifs dont l'État défendeur était responsable et empêchant de recourir à cette voie légale pourrait conduire à considérer ce manquement comme la conséquence du propre comportement des requérants, justifiant que les gardes-frontières espagnols n'eussent pas procédé à leur identification individuelle. Or la Cour n'est pas convaincue que les requérants aient eu les raisons impérieuses pour s'abstenir de s'adresser au poste-frontière de Beni-Enzar. En l'espèce, même à supposer qu'il fût difficile de s'en approcher physiquement du côté marocain, il n'est pas établi que le gouvernement défendeur eût une quelconque responsabilité dans cette situation. Ce

constat suffit pour conclure à une non-violation de l'article 4 du Protocole n° 4 en l'espèce.

La Cour prend note de l'argument du Gouvernement selon lequel, en plus de disposer d'un accès réel et effectif au territoire espagnol au poste-frontière de Beni-Enzar, les requérants pouvaient demander soit un visa soit une protection internationale auprès des représentations consulaires et diplomatiques espagnoles dans leurs pays d'origine respectifs ou dans les pays par lesquels ils avaient transité ou encore au Maroc. Notamment, si les requérants avaient voulu demander une telle protection, ils auraient facilement pu se rendre au consulat d'Espagne à Nador qui se trouve à proximité de l'endroit où l'assaut a été donné contre les clôtures frontalières. Ils n'ont pas expliqué à la Cour pour quelles raisons ils ne l'avaient pas fait. En particulier, ils n'allèguent même pas avoir été empêchés de faire usage de ces possibilités. En tout état de cause, les représentants des requérants n'ont pas été en mesure de mentionner le moindre motif factuel ou juridique concret qui, selon le droit international ou le droit national, aurait pu, si enregistrement individuel il y avait eu, faire obstacle au renvoi des requérants. Par ailleurs, les griefs des requérants sur le terrain de l'article 3 ont été déclarés irrecevables par la chambre.

Dès lors, au regard de sa jurisprudence constante, la Cour estime que l'absence de décision individuelle d'éloignement peut être imputée au fait que, à supposer effectivement qu'ils aient voulu faire valoir des droits tirés de la Convention, les requérants n'ont pas utilisé les procédures d'entrée officielles existant à cet effet, et qu'elle est donc la conséquence de leur propre comportement.

Cela étant, il y a lieu de préciser que cette conclusion ne met pas en cause le large consensus qui existe dans la communauté internationale sur l'obligation et la nécessité pour les États contractants de protéger leurs frontières, qu'il s'agisse de leurs propres frontières ou des frontières extérieures de l'espace Schengen, selon les cas, d'une manière qui respecte les garanties de la Convention, et en particulier l'obligation de non-refoulement.

Conclusion : non-violation (unanimité).

La Cour conclut également, à l'unanimité, à la non-violation de l'article 13 combiné avec l'article 4 du Protocole n° 4, aux motifs que l'absence de procédure individualisée d'éloignement était la conséquence du propre comportement des requérants et que le grief tiré des risques qu'ils pouvaient courir dans le pays de destination a été écarté dès le début de la procédure.

(Voir *Hirsi Jamaa et autres c. Italie* [GC], 27765/09, 23 février 2012, Note d'information 149 ; *Sharifi et autres c. Italie et Grèce*, 16643/09, 21 octobre 2014, Note d'information 178 ; *Khlaifia et autres c. Italie* [GC], 16483/12, 15 décembre 2016, Note d'information 202 ; voir aussi *M.A. c. Chypre*, 41872/10, 23 juillet 2013, Note d'information 165 ; *Berisha et Haljiti c. l'ex-République yougoslave de Macédoine* (déc.), 18670/03, 16 juin 2005, Note d'information 76 ; et *Dritsas et autres c. Italie* (déc.), 2344/02, 1er février 2011)

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

Referrals/Renvois

Denis and/et Irvine – Belgium/Belgique, 62819/17 and/et 63921/17, Judgment/Arrêt 8.10.2019 [Section IV]

(See Article 5 § 1 (e) above/Voir l'article 5 § 1 e) ci-dessus, page 11)

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Conference on Women's Human Rights/ Conférence sur les droits humains des femmes

On 17 February 2020 the Court, in cooperation with the René Cassin Foundation and the Consulate General of Japan in Strasbourg, held a conference on "Women's Human Rights in the 21st Century: Developments and Challenges in International and European Law".

The programme and the videos of the conference are available on the Court's website.

Le 17 février 2020, la Cour, en coopération avec la Fondation René Cassin et le Consulat général du Japon à Strasbourg, a tenu une conférence sur le thème « Les droits humains des femmes

au XXIe siècle : développements et défis en droit international et européen ».

Le programme et les enregistrements vidéo de la conférence sont disponibles sur le site web de la Cour.

SCN: new member/SCN : nouveau membre

In February 2020 the Superior Courts Network welcomed a new member: the Belgian Court of Cassation, which brings the membership of the SCN to 87 courts from 39 States.

-ooOoo-

En février 2020, le Réseau des cours supérieures a accueilli un nouveau membre : la Cour de cassation de Belgique, faisant passer le nombre de membres actuels à 87 juridictions de 39 États.

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

New case-law guide/Nouveau guide sur la jurisprudence

As part of its series on the case-law relating to particular Convention Articles, the Court has recently published a Guide on Article 14 of the Convention (prohibition of discrimination). All Case-Law Guides can be downloaded from the Court's website.

-ooOoo-

Dans le cadre de sa série sur la jurisprudence par article de la Convention, la Cour vient de publier un nouveau Guide sur l'article 14 de la Convention (interdiction de la discrimination). Une traduction vers le français de celui-ci, disponible pour le moment uniquement en anglais, est en cours. Tous les guides sur la jurisprudence peuvent être téléchargés à partir du site web de la Cour.

The Court in facts and figures 2019/La Cour en faits et chiffres 2019

This document contains statistics on cases dealt with by the Court in 2019, particularly judgments delivered, the subject matter of the violations found and violations by Article and by State. It can be downloaded from the Court's website.

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Ce document contient des statistiques sur les affaires que la Cour a traitées en 2019, notamment sur les arrêts rendus, l'objet des violations constatées ainsi que les violations par article et par État. Il peut être téléchargé à partir du site web de la Cour.

Overview 1959-2019/Aperçu 1959-2019

This document, which gives an overview of the Court's activities since it was established, has been updated. It can be downloaded from the Court's website.

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Ce document, qui donne un aperçu des activités de la Cour depuis sa création, vient d'être mis à jour. Il peut être téléchargé à partir du site web de la Cour.

ECHR Commemorative Book/Livre de prestige de la CEDH

A Commemorative Book about the Court was recently published to mark the 70th anniversary of the European Convention on Human Rights. This work contains many hitherto unpublished photos and recounts the history of the Court in words and images.

The Commemorative Book can be ordered from Council of Europe Publishing (https://book.coe.int) for EUR 49.

Un livre de prestige sur la Cour a été publié à l'occasion du 70e anniversaire de la Convention européenne des droits de l'homme. L'ouvrage comporte de nombreuses photos inédites et retrace, notamment en images, l'histoire de la Cour.

Ce livre peut être commandé auprès des Éditions du Conseil de l'Europe (https://book.coe.int) au prix de 49 EUR.