248

February
2021
Février

INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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

Legal summaries published in the Case-Law Information Notes are also available in HUDOC, under "Legal Summaries" in the Document Collections box. The HUDOC database is available free-of-charge through the Court's Internet site (http://hudoc.echr.coe.int). It provides access to the case-law of the European Court of Human Rights (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note) and of the former European Commission of Human Rights (decisions and reports), and to the resolutions of the Council of Europe's Committee of Ministers.

-ooOoo-

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

Les résumés juridiques publiés dans la Note d'information sur la jurisprudence de la Cour sont également disponibles dans la base de données HUDOC, sous la catégorie de documents « Résumés juridiques ». La base de données HUDOC, disponible en libre accès à partir du site internet de la Cour (http://hudoc.echr.coe.int), permet d'accéder à la jurisprudence de la Cour européenne des droits de l'homme (arrêts et décisions de Grande Chambre, de chambre et de comité, affaires communiquées, avis consultatifs et résumés juridiques extraits de la Note d'information sur la jurisprudence), ainsi qu'à celle de l'ancienne Commission européenne des droits de l'homme (décisions et rapports) et aux résolutions du Comité des Ministres du Conseil de l'Europe.

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

For publication updates, please follow the Court's Twitter account at twitter.com/ECHR_CEDH

Photo: Council of Europe

Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)

Cour européenne des droits de l'homme
(Conseil de l'Europe)
67075 Strasbourg Cedex – France
Tél. : + 33 (0)3 88 41 20 18
Fax : + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
twitter.com/ECHR_CEDH
Fils RSS

Pour toute nouvelle information relative aux publications, veuillez consulter le compte Twitter de la Cour : twitter.com/ECHR_CEDH

Photo : Conseil de l'Europe

Couverture : vue intérieure du Palais des droits de l'homme (architectes : Richard Rogers Partnership et Atelier Claude Bucher)

TABLE OF CONTENTS / TABLE DES MATIÈRES

Impartial tribunal/Tribunal impartial

- Objective impartiality doubts as to judge presiding over applicant's case, who previously sat in separate proceedings which made extensive findings prejudging her guilt: *violation*
- Doutes quant à l'impartialité objective du juge ayant présidé le procès de la requérante et qui avait auparavant siégé dans une procédure distincte dans laquelle des conclusions détaillées préjugeant de la culpabilité de l'intéressée avaient été formulées : *violation*

- Refusal to discharge jury members who had read online articles concerning the trial and who had discussed the trial with a person not involved in examining the case: *violation*
- Refus de récuser des jurés ayant eu connaissance d'articles publiés sur internet au sujet du procès et ayant discuté avec une personne extérieure à la formation judiciaire : *violation*

Article 6 § 3 (d)

Examination of witnesses/Interrogation des témoins

- Applicants' conviction for minor offences based on decisive evidence of absent witnesses and lack of counterbalancing factors: *violation*
- Condamnation des requérants pour des infractions mineures fondée sur les dépositions décisives de témoins absents et absence de facteurs compensatoires : *violation*

ARTICLE 8

Respect for private and family life/Respect de la vie privée et familiale

- Refusal of the French authorities to allow the export of embryos for posthumous transfer in Spain despite the consent of the deceased husband: *communicated*
- Refus des autorités françaises d'autoriser l'exportation d'embryons pour transfert *post mortem* en Espagne malgré l'accord du mari décédé : *affaire communiquée*

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

- Failure to protect the personal integrity of a vulnerable child in the course of excessively long criminal proceedings relating to sexual abuse: *violation*
- Défaut de protection de l'intégrité personnelle d'une enfant vulnérable lors d'une procédure pénale d'une durée excessive relative à des abus sexuels : *violation*

Respect for private life/Respect de la vie privée

- Justified dismissal of judge and lifetime ban from re-entering justice system as result of individualised and serious findings of vetting process: *no violation*
- Caractère justifié de la révocation d'une juge et de l'interdiction à vie d'exercer des fonctions judiciaires prononcée contre elle en raison des faits personnels graves constatés au cours de la procédure d'évaluation : *non-violation*

- Dismissal of criminal complaint against judges for statements forming part of judgment's factual contextualisation and not attaining a threshold of seriousness: *Article 8 not applicable*; *inadmissible*
- Rejet d'une plainte pénale dirigée contre des juges concernant des déclarations qui faisaient partie de la contextualisation factuelle d'un arrêt et qui n'avaient pas atteint le seuil de gravité requis : *article 8 non applicable ; irrecevable*

- Contraindication for blood donation by men having recently engaged in homosexual intercourse; collection and retention of related personal data by handling authority: *communicated*
- Contre-indication au don de sang pour les hommes ayant eu une activité homosexuelle récente ; recueil et conservation de données personnelles y relatives par l'autorité gestionnaire : *affaire communiquée*

ARTICLE 10

Freedom of expression/Liberté d'expression

- Dismissal of doctor for lodging good faith but unfounded criminal complaint accusing colleague of active euthanasia, without verification to the extent permitted by circumstances: *no violation*
- Licenciement d'un médecin au motif que celui-ci avait porté plainte, de bonne foi mais de manière infondée, contre l'un de ses collègues qu'il accusait, sans avoir procédé aux vérifications que les circonstances lui auraient permis d'effectuer, d'avoir pratiqué l'euthanasie active sur certains patients : *non-violation*

Freedom to receive information/Liberté de recevoir des informations

- Unjustified limitations on a prisoner's ability to access Internet sites publishing legal information, on security grounds: *violation*
- Restrictions injustifiées apportées à la possibilité pour un détenu d'accéder à des sites Internet publiant des informations juridiques pour des raisons sécuritaires : *violation*

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

- Justified conviction for assaulting police officer during proportionate dispersal of protest: *inadmissible*
- Condamnation justifiée pour l'agression d'un policier lors de la dispersion proportionnée d'une manifestation : *irrecevable*

ARTICLE 14

Discrimination (Article 8)

- Failure of domestic courts to discharge positive obligation to afford redress to Jewish and Roma individuals for discriminatory public statements made by politician: *violation*
- Manquement par les tribunaux internes à leur obligation positive d'offrir un redressement à des personnes de souche juive ou rom pour des propos publics discriminatoires tenus par un politicien : *violation*

- Temporary refusal to allow men who recently engaged in homosexual intercourse to give blood: *communicated*
- Refus temporaire des dons de sang d'hommes ayant eu une activité homosexuelle récente : *affaire communiquée*

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

- Unjustified, direct sex discrimination by refusing employment-related benefit to pregnant woman who underwent *in vitro* fertilisation shortly before employment: *violation*
- Discrimination directe et injustifiée fondée sur le sexe, résultant du refus d'accorder un avantage social lié à l'emploi à une femme enceinte ayant eu recours à une fécondation *in vitro* peu avant son recrutement : *violation*

ARTICLE 18

Restriction for unauthorised purposes/Restrictions dans un but non prévu

- Pre-trial detention of opposition activists predominantly aiming to punish and silence them for active involvement in anti-government demonstrations: *violation*
- Placement d'opposants en détention provisoire dans le but principal de les punir d'avoir pris une part active dans des manifestations contre le gouvernement et de les réduire au silence : *violation*

ARTICLE 35

Article 35 § 1

Six-month period/Délai de six mois

- Out of time application in respect of continuing conflict-based interference with home/property, introduced six years after State's Convention ratification: *inadmissible*
- Introduction hors délai, six ans après la ratification de la Convention, d'une requête concernant une atteinte au respect du domicile/des biens : *irrecevable*

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

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

- Availability of adequate remedies to respond to an exchange-rate fluctuation between the euro and the currency of a loan, during a period of financial crisis: *inadmissible*
- Disponibilité des voies de recours adéquates pour faire face à la modification du taux de change entre l'euro et la devise du prêt, lors d'une période de crise financière : *irrecevable*

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

Right to free elections/Droit à des élections libres
Vote

- Disenfranchisement of persons divested of legal capacity affecting only a small group and subject to thorough parliamentary and judicial review: *no violation*
- Décision, touchant un groupe de personnes restreint et ayant été soumise à un examen parlementaire et judiciaire approfondi, de radier les personnes privées de la capacité juridique des listes électorales : *non-violation*

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

Interim measures/Mesures provisoires

- The Court grants an interim measure in favour of Aleksey Navalnyy and asks the Government of Russia to release him
- La Cour fait droit à la demande de mesure provisoire d'Aleksey Navalnyy et demande au gouvernement russe de le libérer

OTHER JURISDICTIONS/AUTRES JURIDICTIONS

RECENT PUBLICATIONS/PUBLICATIONS RÉCENTES

ARTICLE 1

Jurisdiction of States/Juridiction des États

Jurisdictional link engaging the obligation to investigate civilian deaths due to an air-strike occurring during active hostilities in extraterritorial armed conflict

Existence d'un lien juridictionnel de nature à déclencher l'obligation d'enquêter sur des décès de civils causés par une frappe aérienne ordonnée au cours d'une phase d'hostilités actives d'un conflit armé extraterritorial

Hanan – Germany/Allemagne, 4871/16, Judgment/Arrêt 16.2.2021 [GC]

(See Article 2 below/Voir l'article 2 ci-après)

ARTICLE 2

Effective investigation/Enquête effective

Effective investigation into deaths of civilians due to an airstrike in Afghanistan ordered by a German Colonel acting in a multinational military operation mandated by the United Nations Security Council: *no violation*

Enquête effective sur des décès de civils causés par une frappe aérienne ordonnée en Afghanistan par un colonel allemand agissant dans le cadre d'une opération militaire mandatée par le Conseil de sécurité des Nations unies : *non-violation*

Hanan – Germany/Allemagne, 4871/16, Judgment/Arrêt 16.2.2021 [GC]

Traduction française du résumé – Printable version

Facts – On 4 September 2009 a German Colonel K., acting in an International Security Assistance Force (ISAF) under a mandate given by the United Nations (UN) Security Council under Chapter VII of the UN Charter, ordered an airstrike against two fuel tankers which had been hijacked by Taliban insurgents in Afghanistan, killing and injuring both insurgents and civilians. A German prosecutor began and then discontinued an investigation based on a lack of grounds for the criminal liability of Colonel K. The applicant complained under Article 2 about a lack of an effective investigation into the airstrike that had killed his two sons and that he had not had an effective remedy to challenge the decision to discontinue the investigation.

Law

Article 1: Noting that the applicant had complained exclusively under the procedural limb of Article 2, the Grand Chamber examined the existence of a "jurisdictional link" for the purposes of Article 1 on the basis of the principles set out in its judgment *Güzelyurtlu and Others v. Cyprus and Turkey* [GC].

The principle that the institution of a domestic criminal investigation or proceedings concerning deaths which had occurred outside the jurisdiction *ratione loci* of that State, not within the exercise of its extraterritorial jurisdiction, was *in itself* sufficient to establish a jurisdictional link between that State and the victim's relatives who brought proceedings before the Court, did not apply to the present scenario. The deaths investigated by the German prosecution authorities had occurred in the context of an extraterritorial military operation within the framework of a mandate given by a resolution of the United Nations (UN) Security Council acting under Chapter VII of the UN Charter, outside the territory of the Contracting States to the Convention. Establishing a jurisdictional link merely on the basis of the institution of an investigation might have a chilling effect on instituting domestic investigations at the domestic level into deaths occurring in extraterritorial military operations and might result in an inconsistent application of the Convention in respect of Contracting States participating in the same operation. This would also excessively broaden the scope of application of the Convention.

However, in the *Güzelyurtlu and Others* case the Court had considered that "special features", which it had not been defined *in abstracto*, might establish a jurisdictional link bringing the procedural obligation imposed by Article 2 into effect, even in the absence of an investigation or proceedings having been instituted in a Contracting State in respect of a death which had occurred outside its jurisdiction. This also applied in respect of extraterritorial situations outside the legal space of the Convention as well as in respect of events occurring during the active hostilities phase of an armed conflict (*Georgia v. Russia (II)* [GC]).

In the present case, firstly, Germany had been obliged under customary international humanitarian law (IHL) to investigate the airstrike at issue, as it had concerned the individual criminal responsibility of members of the German armed forces for a potential war crime. This reflected the gravity of the alleged offence.

Secondly, the Afghan authorities had been, for legal reasons, prevented from instituting themselves a criminal investigation. By virtue of the International Security Assistance Force (ISAF) Status of Forces Agreement, the troop-contributing States had retained exclusive jurisdiction over the personnel they had contributed to ISAF in respect of any criminal or disciplinary offences on the territory of Afghanistan.

Thirdly, the German prosecution authorities had also been obliged under domestic law, related to Germany's ratification of the Rome Statute of the International Criminal Court, to investigate any liability of German nationals for, *inter alia*, war crimes or wrongful deaths inflicted abroad by members of their armed forces, as in the majority of Contracting States participating in military deployments overseas.

In sum, the fact that Germany had retained exclusive jurisdiction over its troops with respect to serious crimes which, moreover, it had been obliged to investigate under international and domestic law constituted "special features" which in their combination trigger the existence of a jurisdictional link in relation to the procedural obligation to investigate under Article 2.

Even if the Court did not have to examine whether there was also a jurisdictional link in relation to any substantive obligation under Article 2 because it had not been invoked by the applicant, the Court clarified that the mere establishment of a jurisdictional link in relation to the procedural obligation under Article 2 did not mean that the substantive act felt within the jurisdiction of the Contracting State or that the said act was attributable to that State.

Conclusion: within the jurisdiction of Germany.

Article 2 (procedural aspect): In the domestic proceedings the situation in which the airstrike occurred had been qualified as a non-international armed conflict for the purposes of IHL. There was no substantive normative conflict in respect of the requirements of an effective investigation between the rules of IHL applicable to the present case and those under the Convention. The Court could therefore confine itself to examining the facts based on its case-law under Article 2, without having to address whether in the present case the requirements allowing it to take account of the context and rules of IHL when interpreting and applying the Convention in the absence of a formal derogation under Article 15 of the Convention were met.

The challenges and constraints for the investigation authorities stemming from the fact that the deaths had occurred in active hostilities in an extraterritorial armed conflict had pertained to the investigation as a whole and had continued to influence the feasibility of the investigative measures that could be undertaken. Accordingly, the standards applied to the investigation conducted by the civilian prosecution authorities in Germany were to be guided by those established in respect of investigations into deaths in extraterritorial armed conflict, as set out in *Al-Skeini and Others v. the United Kingdom* [GC] and *Jaloud v. the Netherlands* [GC].

(a) *Adequacy of the investigation* – The cause of the death of the applicant's sons, and the person(s) responsible for it, had been known from the start of the criminal investigation.

The Federal Prosecutor General had determined that Colonel K. had not incurred criminal liability mainly because he had been convinced, at the time of ordering the airstrike, that no civilians had been present.

Having no legal powers to undertake investigative measures in Afghanistan, the Federal Prosecutor General had corroborated Colonel K.'s subjective assessment by among others objective circumstances and evidence which could not be tampered with, like audio recordings of the relevant radio traffic and thermal images from infrared cameras, which had been immediately secured.

Under normal circumstances the establishment of the precise number and status of the victims of the use of lethal force was an essential element of any proper investigation of incidents involving a high number of casualties. In the present case, the fact that the authorities had not established the precise number and status of the victims of the airstrike had not amounted to a deficiency capable of questioning compliance by the investigation with Convention standards.

In view of the foregoing, the facts surrounding the airstrike, including the decision-making and target verification process leading up to Colonel K's order, had been established in a thorough and reliable manner in order to determine the legality of the use of lethal force.

Moreover, given that the Federal Constitutional Court, which had expressly found that the Federal Prosecutor General's investigation had complied with the standards of Article 2, was able to set aside a decision to discontinue a criminal investigation, the applicant had at his disposal a remedy to challenge the effectiveness of the investigation.

(b) *Promptness, reasonable expedition and independence of the investigation* – The arrival of members of the German military contingent to perform the initial on-site reconnaissance occurred in the active hostilities phase of an extraterritorial armed conflict. Accordingly, they could not realistically have been expected to perform it more promptly. While it would have been preferable if the initial on-site assessment had not been conducted exclusively by German military under Colonel K.'s command, the investigation team from the German military police had not yet arrived at the time the initial assessment had been conducted. Ensuring the latter's participation would thus have resulted in a delay, albeit one of a minor nature, illustrating the interrelatedness of promptness and independence.

Considering that the procedural duty under Article 2 must be applied realistically and that the German civilian prosecution authorities had not had legal powers to undertake investigative measures in Afghanistan, the fact that the German military police had been under the overall command of the German military contingent had not affected their independence to the point of impairing the quality of their investigations.

By contrast, Colonel K. should not have been involved in investigative steps in Afghanistan given that the investigation had concerned his own responsibility in connection with ordering the airstrike. Nevertheless, this had not rendered the investigation ineffective. The Federal Prosecutor General's determination that Colonel K. had not incurred criminal liability had been primarily based on the finding in respect of Colonel K.'s *mens rea* at the time of ordering the airstrike, which had been corroborated by evidence which could not be tampered with and, which had been immediately secured.

In these circumstances, there had been, realistically, no risk that evidence decisive for the determination of Colonel K.'s criminal liability could become contaminated and unreliable. This marked a significant difference between the present case and those of *Jaloud* (where it had remained unclear who had fired the shots which had killed the applicant's son), and *Al-Skeini and Others* (where relevant circumstances of the deaths of the relatives of some of the first five applicants had remained uncertain).

Moreover, the competent German authorities had begun investigating into the airstrike, including with a view to establishing any criminal liability of those involved, promptly after the possibility of civilian deaths had become known.

The fact that the investigation had remained at the preliminary investigation stage for about six months until the opening of the formal criminal investigation, while regrettable, had not affected the effectiveness of the investigation.

(c) *Participation of the next of kin and public scrutiny* – The applicant had filed, on April 2010, a criminal complaint regarding the death of his two sons and had requested access to the investigation file. The Federal Prosecutor General had closed the investigation four days later, without having heard the applicant or granting his lawyer access to the file. This had not rendered the investigation deficient because the applicant and his counsel would not have been in a position to provide additional insights relevant to the determination of Colonel K.'s criminal liability.

Furthermore, the Federal Prosecutor General had reviewed the applicant's subsequent submissions and had rejected them as ill-founded. Had the applicant's statements contained new evidence or led to the existing evidence being viewed in a different light, this could have led to the reopening of the investigation. In such case, the applicant would have had the opportunity to influence the investigation, even though he had been not heard prior to the discontinuation decision.

There had been no undue restrictions or delay as regards the applicant's access to the investigation file. Initially, his representative had requested access to the file on behalf of many individuals, whose victim status had required a certain amount of time to verify. Once he had restricted the request to the applicant, access to the unclassified parts of the file had been granted two days later. The investigative material had contained sensitive information concerning a military operation in an ongoing armed conflict, and it could not be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next of kin be granted access to the ongoing investigation.

It had been reasonable that the discontinuation decision of April 2010 had not been published or served on injured parties right away, but had been redacted first, given that it had contained classified military information. The key aspects of the decision had been nonetheless published in a press release. Two days after the redacted version had been finalised, on October 2010, it had been served on the applicant's legal representative. Importantly, the one-month time-limit for filing a motion seeking to compel public charges had started to run from the date of service of the discontinuation decision. Thus, the delay in serving the redacted version of the discontinuation decision had not negatively affected the applicant's ability to challenge it.

Lastly, the investigation into the airstrike by the parliamentary commission of inquiry had ensured a high level of public scrutiny.

(d) *Conclusion* – In sum, having regard to the circumstances of the case, the investigation performed by the German authorities had been effective.

Conclusion: no violation (unanimously).

(See *Al-Skeini and Others v. the United Kingdom* [GC], 55721/07, 7 July 2011, Legal summary; *Jaloud v. the Netherlands* [GC], 47708/08, 28 November 2014, Legal summary; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 36925/07, 29 January 2019, Legal summary; and *Georgia v. Russia (II)* [GC], 38263/08, 21 January 2021, Legal summary; see also *Banković and Others v. Belgium and Others* (dec.) [GC], 52207/99, 12 December 2001, and *Behrami and Behrami v. France* and *Saramati v. France, Germany*

and Norway (dec.) [GC], 71412/01 and 78166/01, 2 May 2007, Legal summary)

Effective investigation/Enquête effective

Complaint of failure to effectively investigate alleged attempted murder of opposition politician through use of a chemical nerve agent: *communicated*

Grief tiré du manquement des autorités à mener une enquête effective sur une allégation de tentative de meurtre d'un politicien de l'opposition au moyen d'un agent chimique neurotoxique : *affaire communiquée*

Navalnyy – Russia/Russie, 36418/20, Communication [Section III]

Traduction française du résumé – Printable version

The applicant, a Russian opposition politician, experienced sudden, acute malaise and lost consciousness during a domestic flight. He was transferred for treatment in a hospital in Berlin, Germany, two days after the incident. The German Government subsequently published a press release stating that tests carried out on the applicant revealed the presence of a chemical nerve agent from the Novichok group, which constituted a severe violation of the Chemical Weapons Convention.

On the same day as the incident, an associate of the applicant, Mr G., filed a request with the Investigation Committee of the Russian Federation to open criminal proceedings, alleging that the applicant had been intentionally poisoned, in an attempted murder related to his political activity.

Between September and October 2020, the investigating authorities twice issued decisions dispensing with the criminal investigation on grounds that there had been no objective information received that any intentional criminal acts had been committed in respect of the applicant; on both occasions, the decision was quashed and the pre-investigation inquiry extended.

Mr G. unsuccessfully challenged the inaction of the investigating authorities on several occasions. A court also rejected the request to return the applicant's personal belongings seized for the inquiry.

The applicant complains that he had been poisoned with the chemical agent which only State services have access to and that the Russian authorities have failed to conduct an effective investigation into his attempted murder.

Communicated under Article 2 (procedural aspect) in conjunction with Article 13 of the Convention.

ARTICLE 3

Effective investigation/Enquête effective

Failure to use all reasonable investigative and international cooperation measures while examining sexual abuse in an orphanage alleged after children's adoption abroad: *violation*

Manquement à l'obligation d'employer toutes les mesures raisonnables en matière d'enquête et de coopération internationale dans le cadre de l'examen d'allégations d'abus sexuels dans un orphelinat formulées postérieurement à l'adoption des enfants concernés à l'étranger : *violation*

X and Others/et autres – Bulgaria/Bulgarie, 22457/16, Judgment/Arrêt 2.2.2021 [GC]

Traduction française du résumé – Printable version

Facts – The applicants, who were born in Bulgaria, are three siblings. In June 2012, aged 12, 10 and 9 respectively, they were adopted by an Italian couple. The applicants subsequently revealed to their adoptive parents accounts of sexual abuse during their placement in an orphanage in Bulgaria.

Both directly and through a helpline association, the parents lodged complaints about the abuse with the Italian authorities, notably through the Italian Commission for Intercountry Adoption ("the CAI"), and the Milan public prosecutor's office. Those authorities transmitted the complaints to the Bulgarian authorities. The applicant's parents also contacted an Italian investigative journalist, who published an article alleging large-scale sexual abuse of children in the orphanage, which received media attention in Bulgaria. Subsequent to those actions, three separate, preliminary investigations were opened in Bulgaria in respect of the reported allegations. All three were discontinued for lack of evidence that a criminal offence had been committed, a decision which was upheld by the superior domestic courts.

In a judgment of 17 January 2019 (see Legal Summary), a Chamber of the Court held, unanimously, that there had been no violation of Articles 3 (substantive and procedural limbs) and 8 of the Convention. The case was referred to the Grand Chamber at the applicants' request.

Law – Article 3: The Court considered the complaints in question more appropriate to examine under Article 3 alone.

(a) *Positive obligations to put in place appropriate legislative and regulatory framework (substantive limb)*

The existence in the respondent State of criminal legislation aimed at preventing and punishing child sexual abuse had not been called into question by the applicants, and the relevant provisions of the Bulgarian Criminal Code appeared apt to cover the acts complained of in the present case. States additionally had a heightened duty of protection towards children deprived of parental care and placed in the care of a public institution, and who were therefore in a particularly vulnerable situation. In that regard, the respondent State had maintained that a number of mechanisms to prevent and detect ill-treatment in children's facilities had been put in place. Although the applicants contested the actual existence and effectiveness of some of these measures and mechanisms, there had not been sufficient information to establish that. Nor had it been established that there had been a systemic issue related to sexual abuse of young children in residential facilities, such as to require more stringent measures on the part of the authorities.

(b) *Positive obligation to take preventive operational measures (substantive limb)*

The applicants had been in a particularly vulnerable situation and had been placed in the sole charge of the public authorities. In those circumstances, the obligation to take preventive operational measures where the authorities had, or ought to have, knowledge of a risk that a child might be subjected to ill-treatment, was heightened in the present case and required them to exercise particular vigilance.

The domestic investigations had not found it established that the staff members of the orphanage or any other authority had been aware of the alleged abuse. In those circumstances, and in the absence of evidence corroborating the assertion that the first applicant had reported abuse to the director of the orphanage, the Court did not have sufficient information to find that the Bulgarian authorities had known, or ought to have known, of a real and immediate risk to the applicants of being subjected to ill-treatment, such as to give rise to an obligation to take preventive operational measures to protect against such a risk.

Conclusion: no violation (unanimously).

(c) *Procedural obligation to carry out an effective investigation*

In cases potentially involving child sexual abuse, the procedural obligation under Article 3 to conduct an effective investigation had to be interpreted in the light of the obligations arising out of the other applicable international instruments, and more specifically the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse ("Lanzarote Convention"; see particularly Articles 12-14 and 30-38).

The authorities' obligation to conduct a sufficiently thorough investigation was triggered as soon as they received arguable allegations of sexual abuse. That obligation could not be limited to responding to any requests made by the victim or leaving it to the initiative of the victim to take responsibility of any investigatory procedures. As early as February 2013, the Bulgarian authorities had received more detailed information from the Milan public prosecutor's office concerning the applicants' allegations. That information had shown that the applicants' psychologists had deemed their allegations to be credible, and that a number of Italian bodies had considered them sufficiently serious to warrant an investigation. Accordingly, the Bulgarian authorities had been faced with arguable claims triggering the procedural duty under Article 3.

The Bulgarian authorities had taken a number of investigative steps. The Court therefore had to examine whether the investigations had been sufficiently effective. There was no reason to call into question the promptness and expedition with which the Bulgarian authorities had acted, nor the independence of the State Agency for Child Protection ("the SACP"), which had carried out a number of those steps.

Although the applicants' parents had not sought to be involved in the investigation, it was regrettable that the Bulgarian authorities had not attempted to contact them in order to provide them with the necessary information and support in good time. They had therefore been prevented them from taking an active part in the various proceedings, and they had been unable to lodge an appeal until long after the investigations had been concluded (see in this connection Article 31 § 1 (a), (c) and (d) of the Lanzarote Convention).

Regarding the thoroughness of the investigation: experts from relevant authorities and the police had carried out on-site checks, consulted files, including medical files of the applicants and other children who had lived at the orphanage during the period in question, and interviewed various staff, professionals, and individuals who might have been the alleged perpetrators. Interviews had also been conducted with children living in the orphanage, including some of the children mentioned by the applicants: although those had not always been adapted to the children's age and level of maturity, and they had not been video-recorded (see in this connection Article 35 §§ 1 and 2 of the Lanzarote Convention). One of the children had had to be interviewed a second time by the police.

Further, the authorities had apparently neglected to pursue some lines of inquiry which might have proved relevant, and to take certain investigative measures:

(i) *International cooperation* – If the Bulgarian authorities had had doubts as to the credibility of the applicants' allegations, they could have attempted to clarify the facts by requesting to interview the applicants and their parents. As professionals who had heard the children's statements, the various psychologists who had spoken with the applicants in Italy would also have been in a position to have provided relevant information. While it might not have been advisable for the Bulgarian authorities to interview the applicants – given the risk of exacerbating any trauma, and risks of inefficacy associated with the lapse of time and the tainting of evidence by overlapping memories or outside influences – the authorities should have assessed the need to request such interviews. Guided by the principles set out in international instruments, the authorities could have put measures in place to assist and support the applicants in their dual capacity as victims and witnesses, and could have travelled to Italy in the context of mutual legal assistance or requested the Italian authorities to interview the applicants again. As reflected in the Lanzarote Convention and the Court's case-law (see *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 36925/07, 29 January 2019, Legal Summary), in transnational cases, the procedural obligation to investigate might entail an obligation to seek the cooperation of other States for the purpose of investigation and prosecution. In the present case, although the Italian public prosecutor had declined jurisdiction on the grounds that there was an insufficient jurisdictional link with Italy in respect of the facts, it would have been possible for the applicants to be interviewed under the judicial cooperation mechanisms existing within the European Union in particular. Even if they had not sought to interview the applicants directly, the Bulgarian authorities could at least have requested from their Italian counterparts the video recordings of the applicant's accounts – which had been obtained by psychologists and through an interview with the Italian public prosecutor for minors – for the purpose of assessing their credibility.

Similarly, given the absence of medical certificates, the Bulgarian authorities could, again in the context of international judicial cooperation, have requested that they underwent a medical examination.

(ii) *Investigating abuse of and by other children* – The applicants' accounts and relevant evidence had also contained information concerning other children who had allegedly been victims of abuse, and children alleged to have committed abuse, some of which amounted to ill-treatment. The authorities had therefore had a duty to shed light on those alleged facts. However, the authorities had not attempted to interview the children named by the applicants who had left the orphanage in the meantime.

(iii) *Other investigative measures* – In view of the nature and seriousness of the alleged abuse, investigative measures of a more covert nature, such as surveillance of the orphanage perimeter, telephone tapping or the interception of telephone and electronic messages, as well as the use of undercover agents, should have been considered. Such measures were provided for in the Lanzarote Convention and widely used across Europe in such investigations. While the guarantees contained in Article 8 (respect for privacy) might legitimately place restraints on the scope of investigative action, such measures appeared appropriate and proportionate in the present case, given the applicants' allegations of involvement of an organised ring and the fact that identifiable individuals had been named. Measures of this kind could have been implemented progressively, beginning with those having least impact on individuals' private lives.

While noting that the Lanzarote Convention encouraged the use of dedicated helplines as a means of reporting abuse, the Court regretted the lack of response of the SACP, following the applicants' father's email and the report of the Nadja Centre (a Bulgarian foundation specialising in child protection) in November 2012. It had been open to them, within a framework guaranteeing anonymity to the potential victims, to request all necessary details from the Centre, which would have made it possible to identify the orphanage in question and carry out covert investigative measures even earlier.

Further, despite allegations that a photographer had produced images, the investigators had not considered searching his studio and seizing the media on which they might have been stored. More generally, the seizure of media used by other relevant individuals might have made it possible, if not to obtain proof of the applicants' alleged abuse, which had occurred several months previously, then at least to obtain evidence concerning similar abuse of children.

(iv) *Overall* – By conducting the investigations, the Bulgarian authorities had formally responded to the requests of the Italian authorities and, indirectly, to those of the applicants' parents. However, the investigating authorities – who, in particular, had not made use of the available investigation and international cooperation mechanisms – had not taken all reasonable measures to shed light on the facts and had not undertaken a full and careful analysis of the evidence before them. Instead, they

had confined their investigative efforts to questioning the people present in the orphanage or in the vicinity, and had closed the case on the sole basis of that investigative method. Indeed, the reasons given for the authorities' decisions to close the investigations appeared to show that, rather than clarifying all of the relevant facts, the investigating authorities had sought to establish that the applicants' allegations had been false.

The Court also noted and considered it unacceptable that the President of the SACP had delivered a televised statement, even before the findings of the authority's first inspection, in which he had accused the applicants' parents of slander, manipulation and inadequate parenting, and that a group of MPs visiting the orphanage had adopted a similar attitude. Such statements had inevitably undermined the objectivity – and hence credibility – of the enquiries conducted by the SACP and of the institution itself.

In sum, the omissions observed were sufficiently serious to consider that the investigation had not been effective for the purposes of Article 3, interpreted in the light of other applicable international instruments and in particular the Lanzarote Convention.

Conclusion: violation (nine votes to eight).

Article 41: EUR 12,000 each in respect of non-pecuniary damage.

(See also *O'Keeffe v. Ireland* [GC], 35810/09, 28 January 2014, Legal Summary)

Effective investigation/Enquête effective

Failure to protect the personal integrity of a vulnerable child in the course of excessively long criminal proceedings relating to sexual abuse: *violation*

Défaut de protection de l'intégrité personnelle d'une enfant vulnérable lors d'une procédure pénale d'une durée excessive relative à des abus sexuels : *violation*

N.Ç. – Turkey/Turquie, 40591/11, Judgment/Arrêt 9.2.2021 [Section II]

English translation of the summary – Version imprimable

En fait – La requérante a été contrainte à se prostituer par deux femmes alors qu'elle n'avait que douze ans. L'année d'après, elle porta plainte contre ces dernières, ainsi que les hommes avec lesquels elle avait eu des relations sexuelles.

La requérante se plaint d'une part de l'absence de protection de son intégrité personnelle dans le cadre de la procédure pénale relative aux abus sexuels subis par elle, et d'autre part, de l'effectivité l'enquête.

En droit – Articles 3 et 8 : Le seuil de gravité nécessaire pour l'applicabilité de l'article 3 de la Convention a été atteint à l'égard de la requérante. Au vu de son jeune âge au moment des faits, elle était dans une situation de vulnérabilité. Dans ce contexte, les abus sexuels sur elle, ainsi que les allégations de victimisation secondaire, c'est-à-dire les manquements dans la procédure pénale pour assurer la protection de la requérante sont suffisamment importants pour entrer dans le champ d'application de l'article 3. Aussi, au vu des répercussions des deux aspects des griefs de la requérante sur son intégrité physique et morale, les faits dénoncés par la requérante tombent également sous le coup de l'article 8 de la Convention.

a) *La protection de la requérante durant la procédure* – Une enquête fut déclenchée rapidement à la suite de la plainte de la requérante et la majorité des accusés furent punis de réclusions criminelles. Néanmoins, dans une affaire aussi grave concernant l'exploitation sexuelle d'une mineure de moins de quinze ans, la Cour ne peut se contenter de cette constatation générale afin de dire si l'État défendeur a rempli ou non ses obligations au titre des articles 3 et 8.

b) *L'absence d'assistance à la requérante durant la procédure* – Plusieurs instruments internationaux en matière de protection des victimes d'atteinte à l'intégrité physique ou mentale et de protection contre la victimisation secondaire réglementent l'assistance aux enfants victimes d'abus et d'exploitations sexuels. En l'espèce, durant dix-huit mois à partir de sa plainte, la requérante ne fut, à aucun moment, accompagnée par un assistant social, un psychologue ou un quelconque expert, ni devant la police, ni devant le procureur, ni durant les audiences devant la cour d'assises. Ce constat est suffisant pour conclure que la requérante n'a pas été prise en charge de manière adéquate durant la procédure en question.

c) *Le manquement à la protection de la requérante face aux accusés* – La situation de la requérante s'aggrava durant les audiences de la cour d'assises puisqu'aucune mesure ne fut prise pour séparer la requérante des accusés. Durant plusieurs audiences, elle se retrouva en face des accusés, et fut contrainte d'expliquer en détail les agressions, menaces et viols dont elle avait fait l'objet, ce qui a sans nul doute constitué un environnement extrêmement intimidant pour elle. Or le dossier ne contient aucun élément indiquant que la victime eût souhaité cette confrontation ou encore que cela avait été nécessaire pour un exercice adéquat et effectif des

droits de la défense, de sorte que la Cour ne peut conclure qu'une mise en balance adéquate avait été faite en la matière. Ainsi il y a eu manquement à protéger la requérante face aux accusés dans cette affaire grave de prostitution et d'abus sexuel sur un mineur de moins de quinze ans.

d) *La reconstitution inutile des viols* – La requérante dut reproduire, devant tous les accusés et leurs représentants, les positions dans lesquels les actes sexuels avaient eu lieu. La cour d'assises n'avait pris aucune mesure pour parer à l'humiliation que la requérante estime légitimement avoir subie de ce fait. Par ailleurs, aucun élément dans le dossier n'explique non plus pourquoi cette reconstitution avait été nécessaire pour l'établissement ou la qualification juridique des faits. Ainsi, pour la requérante, le caractère traumatisant de ces débats a dû atteindre un niveau extrême, et la seule décision de procéder aux audiences en y interdisant l'accès du public ne fut pas suffisante à la protéger des atteintes à sa dignité et à sa vie privée. Ces débats eurent un effet négatif sur son intégrité personnelle et entraînèrent une gêne très supérieure à celle inhérente au fait de témoigner en qualité de victime d'exploitation et d'abus sexuels. Ils ne pouvaient donc aucunement être justifiés par les exigences d'un procès équitable à l'égard des accusés.

e) *Les examens médicaux répétitifs* – La requérante fut examinée dix fois à la demande des autorités judiciaires, soit pour établir son âge exact, soit pour établir les séquelles liées aux viols dont elle avait fait l'objet. Il s'agit là d'un nombre excessif et inexpliqué d'examens médicaux, souvent extrêmement intrusifs, lesquels constituaient ainsi une atteinte inacceptable à l'intégrité physique et psychologique de la requérante.

f) *Le manque de sécurité* – À l'issue des audiences, la requérante dut aussi faire face à l'agressivité des proches des accusés, à tel point qu'un jour une escorte policière fut nécessaire pour lui faire quitter la ville. Aucune mesure préventive ne semble avoir été prise par les autorités à cet égard. Il n'y a aucune justification du refus de la cour d'assises de délocaliser le procès, pratique pourtant courante dans des affaires pénales sensibles qui aurait pu contribuer à la sérénité des audiences et la sécurité de la requérante.

g) *L'évaluation du consentement de la victime* – Pour autant que la requérante conteste la validité de son consentement en avançant son très jeune âge aux moments des faits, la Cour doit rechercher si oui ou non la législation et son application en l'espèce, associées aux insuffisances alléguées de l'enquête, ont été défaillantes au point d'emporter violation des obligations positives qui incombent à l'État défendeur en vertu des articles 3 et 8. La dignité humaine et l'intégrité psychologique nécessitent une attention particulière lorsqu'il s'agit d'un enfant victime d'abus sexuels et les obligations de l'État requièrent la mise en œuvre effective des droits de l'enfant. Ainsi l'intérêt supérieur de l'enfant doit prévaloir et les autorités nationales doivent répondre de manière adéquate aux besoins découlant de la vulnérabilité particulière de l'enfant. L'absence d'un effort substantiel de la part des autorités nationales en vue d'établir toutes les circonstances entourant les faits et de ne pas procéder à une évaluation contextuelle du consentement de la victime pourrait engendrer des problèmes vis-à-vis des dispositions en jeu.

Or, l'attribution au consentement d'un mineur de moins de quinze ans d'un poids équivalent à celui d'un adulte ne peut en aucun cas être admissible dans le cadre d'une affaire d'exploitation et d'abus sexuels. En effet, l'enquête et ses conclusions doivent porter avant tout sur la question de l'absence de consentement. De fait, la Cour note avec intérêt l'absence dans le libellé de l'article 414 du code pénal indiquant l'acte comme étant un « viol » du terme « consentement » ou « volonté » ou de tout synonyme et dans celui de l'article 416 du code pénal, réprimant la relation sexuelle consentie même avec un mineur de plus de quinze ans, qui appuie davantage la nécessité de ne pas prendre en considération le consentement lorsqu'il s'agit d'un mineur de moins de quinze ans.

Néanmoins, les juridictions nationales accordèrent un poids décisif au « consentement » de la requérante pour conclure à l'application de l'article 414 § 1, interprétée par les autorités judiciaires comme réprimant toute relation sexuelle, même consentie, avec un mineur de moins de quinze ans, sans toutefois indiquer pourquoi en l'espèce, tant les menaces et coups allégués que les paiements effectués n'étaient pas considérés comme correspondant aux critères désignés au second paragraphe de l'article 414 et interprétés par les autorités nationales comme des situations « d'absence de consentement » de la victime. Cette disposition prévoyait en effet une réclusion criminelle plus importante en faisant référence à « la contrainte, la violence, la menace » ou « un moyen frauduleux qui mettrait la victime dans un état qui ne lui permettrait pas de résister à l'acte », ce dernier critère ne décrivant aucune limite sur la nature physique, psychologique ou matériel du moyen frauduleux.

L'interprétation controversée des autorités judiciaires alla même à l'extrême s'agissant d'un des accusés qui avait menacé la requérante d'informer sa famille de ses activités afin d'obtenir à plusieurs reprises des relations sexuelles de sa part. Se référant à une jurisprudence de la Cour de cassation selon laquelle les éléments constitutifs de la menace ne

seraient pas réunis si la menace dérivait des activités de la personne concernée, la cour d'assises considéra que l'agissement de cet accusé ne pouvait pas être qualifié de menace, ce qui empêchait l'application du deuxième paragraphe de l'article 414. Aux yeux de la Cour, cette interprétation pourrait avoir éventuellement une logique dans un contexte approprié, par exemple, lorsqu'il s'agit de menacer un criminel de dénoncer son activité pour obtenir un bénéfice. Cependant, il est absolument inacceptable de faire une analogie pareille lorsqu'il s'agit de la menace dirigée contre la victime dans un contexte d'exploitation sexuelle et de viol d'un enfant.

Les autorités judiciaires avaient déployé d'énormes efforts pour éviter l'application de l'article 414 § 2 qui prévoyait une réclusion criminelle plus lourde et ne s'étaient à aucun moment préoccupé de la vulnérabilité de la requérante qui avait moins de quinze ans aux moments des faits. Cette interprétation restrictive qui ne prenait pas en considération l'âge de la victime ne correspondait aucunement à une évaluation objective du contexte sensible de cette affaire, ni à la protection d'un enfant victime d'exploitation et d'abus sexuels.

h) *L'effectivité de l'enquête* – La procédure pénale a duré environ onze ans, pour deux degrés de juridiction saisis à quatre reprises. Même si l'affaire était complexe tant par la difficulté d'établir les faits que par le nombre d'accusés, aucun délai ne semble attribuable au comportement de la requérante ou de ses avocats. La multiplicité inexpliquée des examens médicaux entraîna des retards considérables dans la procédure. Puis une période inexpliquée d'inactivité eut lieu durant quasiment cinq ans. Les délais d'attente du dossier devant la Cour de cassation durant deux fois un an sont aussi inexpliqués. Et l'accusation de séquestration et d'incitation à la prostitution fut rayée du rôle pour prescription pénale. Ainsi le comportement des autorités judiciaires ne cadrait aucunement avec l'exigence de célérité et de diligence nécessaire dans cette affaire qui méritait une attention particulière et une priorité absolue, en vue d'assurer la protection d'un enfant.

i) *Conclusion* – L'absence d'assistance à la requérante, le manquement à sa protection face aux accusés, la reconstitution inutile des viols, les examens médicaux répétitifs, le manque de sérénité et de sécurité durant les audiences, l'évaluation du consentement de la victime, la durée excessive de la procédure, et, enfin, la prescription pénale de deux chefs d'accusation ont constitué des cas graves de victimisation secondaire de la requérante.

Le comportement des autorités nationales ne fut pas conforme à l'obligation de protéger un enfant victime d'exploitation et d'abus sexuels. Il appartenait au premier chef aux juges de la cour d'assises de veiller à ce que le respect de l'intégrité personnelle de la requérante fût correctement protégé durant le procès. Compte tenu du caractère intime du sujet en cause et de l'âge de la requérante, l'affaire revêtait inexorablement une sensibilité particulière dont les autorités auraient dû tenir compte dans la conduite de la procédure pénale.

Quant aux améliorations introduites à partir de 2005 dans le système judiciaire turc, mis à part l'assistance d'une psychologue durant le recueil de la déposition de la requérante par commission rogatoire, ces amendements n'avaient pas été appliqués au cas de la requérante.

Au vu de ce qui précède, la conduite de la procédure n'a pas assuré l'application effective du droit pénal vis-à-vis de l'atteinte portée aux valeurs protégées par les articles 3 et 8 de la Convention.

Conclusion : violation (unanimité).

Article 41 : 25 000 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir aussi *Y. c. Slovénie*, 41107/10, 28 mai 2015, Résumé juridique, et *S.M. c. Croatie* [GC], 60561/14, 25 juin 2020, Résumé juridique)

ARTICLE 4

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

Domestic authorities' failure to take operational measures in line with international standards to protect minors prosecuted despite credible suspicion they were trafficking victims: *violation*

Manquement par les autorités internes à prendre des mesures concrètes conformes aux normes internationales pour protéger des mineurs dont on soupçonnait pourtant qu'ils étaient victimes de traite : *violation*

V.C.L. and/et A.N. – United Kingdom/Royaume-Uni, 77587/12 and/et 74603/12, Judgment/Arrêt 16.2.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants, Vietnamese nationals and minors at the relevant time, were discovered by police to be working in cannabis factories and charged with being concerned in the production of a controlled drug. At the time, several national reports had found that Vietnamese children were particularly vulnerable to being trafficked into and

within the United Kingdom and being exploited in such factories. The applicants were not referred immediately for assessment as potential victims of trafficking, but the Competent Authority later determined that both had been trafficked. The Crown Prosecution Service (CPS) disagreed with that assessment and pursued their prosecution. Both applicants pleaded guilty to the charges and were convicted. They later appealed unsuccessfully.

Law

Article 4 § 1

(a) *General principles for the prosecution of (potential) victims of trafficking* – The present case was the first occasion on which the Court had been called upon to consider if and when a case concerning the prosecution of a (potential) victim of trafficking might raise an issue under Article 4. No general prohibition on the prosecution of victims of trafficking could be construed from international anti-trafficking standards, nor could prosecuting child trafficking victims be precluded in all circumstances. Nevertheless, the prosecution of (potential) victims of trafficking might, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an individual had been trafficked.

For the prosecution of a (potential) victim to demonstrate respect for the freedoms guaranteed by Article 4, their early identification was of paramount importance. As soon as the authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence might have been trafficked or exploited, they should be assessed promptly by trained and qualified individuals, based on the criteria identified in international standards, having specific regard to the fact that threat of force and/or coercion was not required where the individual was a child.

Moreover, as an individual's status as a victim of trafficking might affect whether there was sufficient evidence to prosecute and whether it was in the public interest to do so, any decision on whether or not to prosecute a potential victim should, insofar as possible, only be taken once a trafficking assessment had been made by a qualified person. That was particularly important where children were concerned. The Court drew on its case-law from Articles 3 and 8 in respect of acts of violence to find that, as children were particularly vulnerable, the measures applied by the State to protect them against acts falling within the scope of Article 4 should be effective and include reasonable steps to prevent acts of which the authorities had, or ought to have had, knowledge, and effective deterrence. Once a trafficking assessment had been made by a qualified person, any subsequent prosecutorial decision had to take that assessment into account. While the prosecutor might not be bound by those findings, they would need clear reasons consistent with the definition of trafficking contained in the international standards for disagreeing with it.

(b) *Application of these principles* – It would have been open to the CPS, on the basis of clear reasons consistent with the definition of trafficking in international standards, to have disagreed with the conclusion of the Competent Authority that both applicants had been a child victim of trafficking. If accepted, it might also have been open to the CPS to prosecute them, if it considered that there had been no nexus between the offence and trafficking. However, neither of those two things had happened.

The first applicant had been discovered in circumstances which themselves had given rise to a credible suspicion that he had been a victim of trafficking. While the second applicant had been considered an adult when first discovered by the police, a credible suspicion had existed at the very latest nine days after, when the authorities had accepted that he was a minor. Nevertheless, both applicants had not been referred to the Competent Authority for a trafficking assessment, but they had been instead charged with criminal offences to which they had later pleaded guilty.

Secondly, even though the applicants had been subsequently recognised by the Competent Authority as victims of trafficking, the CPS, without providing adequate reasons for its decisions, had disagreed with that assessment and the Court of Appeal, relying on the same inadequate reasons, had found that the decisions to prosecute them had been justified. Both domestic jurisdictions had relied on factors which had not appeared to go to the core of the internationally accepted definition of trafficking.

In the light of the foregoing, the State had not fulfilled its duty under Article 4 to take operational measures to protect the applicants, either initially, as potential victims of trafficking, or subsequently, as persons recognised by the Competent Authority to be victims of trafficking.

Conclusion: violation (unanimously).

Article 6 § 1

(a) *Whether failure to investigate the applicants' victim-of-trafficking status before they were charged and convicted raises any issue under Article 6* – Both applicants had been legally represented from the outset, a factor generally considered to be an im-

portant safeguard against any unfairness in the proceedings. However, their representatives had dismissed out of hand the possibility that they had been victims of trafficking and had failed to act accordingly. Nevertheless, while criminal defence lawyers should undoubtedly be alert to indicators of trafficking, their failure to do so could not by itself absolve the State and its agents of their responsibility. In the context of Article 4, the State was under a positive obligation both to protect victims of trafficking and to investigate potential trafficking. That obligation was triggered by the existence of circumstances giving rise to a credible suspicion that an individual had been trafficked, not by a complaint made by or on behalf of the potential victim. A defendant, especially a minor, could not be required to self-identify as a victim of trafficking or be penalised for failing to do so. Accordingly, the lack of a timely assessment of whether the applicants had in fact been trafficked had prevented them from securing evidence which might have constituted a fundamental aspect of their defence.

(b) *Whether the applicants waived their rights under Article 6* – The applicants had provided "unequivocal" guilty pleas and, as they had been legally represented, they had almost certainly been made aware of the consequences. However, in the absence of any assessment as to whether they had been trafficked and, if so, whether that could have had any impact on their criminal liability, those pleas had not been made "in full awareness of the facts". Further, any waiver of rights would have run counter to the important public interest in combatting trafficking and protecting victims. It was true that the first applicant had not taken the opportunity given by the trial judge to apply to vacate his plea on the advice of his legal representative. Nevertheless, as a minor who had been arrested and prosecuted within a foreign criminal justice system, who had already pleaded guilty to an offence in circumstances which had not amounted to a waiver of his Article 6 rights, the applicant could not be said to have subsequently waived those rights by deciding not to pursue applications against the robust advice of his legal representative.

(c) *Whether the fairness of the proceedings as a whole was prejudiced* – Even though the applicants had pleaded guilty to the offences charged, the CPS had reviewed its decision to prosecute after the Competent Authority had recognised them as victims of trafficking. In addition, they had both subsequently been granted permission to appeal out of time and the first applicant's case had been referred back to the Court of Appeal for a further appeal.

However, the reasons given by the CPS for the disagreeing with the Competent Authority had been wholly inadequate, and inconsistent with the definition of trafficking in international law. Moreover, in dismissing the appeals on both occasions, the Court of Appeal had relied on the same reasons advanced by the CPS. Although the applicants had invoked Article 4, it had not considered their case through the prism of the State's positive obligations under that Article. On the contrary, it had restricted itself to a relatively narrow review, which would penalise victims of trafficking for not initially identifying themselves as such and allow the authorities to rely on their own failure to fulfil their duties under Article 4 to take operational measures to protect them. Consequently, the appeal proceedings had not cured the defects in the proceedings which had led to the applicants' charging and conviction.

Conclusion: violation (unanimously).

Article 41: EUR 25,000 each in respect of non-pecuniary damage.

(See also *S.M. v Croatia* [GC], 60561/14, 25 June 2020, Legal Summary)

ARTICLE 5

Article 5 § 3

Reasonableness of pre-trial detention/ Caractère raisonnable de la détention provisoire

Relevant but insufficient reasons in domestic court decisions for applicants' continued pre-trial detention: *violation*

Motivation pertinente mais insuffisante des décisions des juridictions internes prolongeant la détention provisoire des requérants : *violation*

Hasselbaink – Netherlands/Pays-Bas, 73329/16, Judgment/Arrêt
Maassen – Netherlands/Pays-Bas, 10982/15, Judgment/Arrêt
Zohlandt – Netherlands/Pays-Bas, 69491/16, Judgment/Arrêt
9.2.2021 [Section IV]

Traduction française du résumé dans les affaires *Hasselbaink*, *Maassen* et *Zohlandt* – Printable version in the *Hasselbaink*, *Maassen* and *Zohlandt* cases

Facts – The applicants had been arrested on suspicion of having committed various offences. They were placed in initial detention on remand, which was subsequently extended on several occasions by Regional Court orders. The applicants unsuccessfully made applications for their pre-trial detention to be lifted or suspended and/or appealed against the relevant decisions.

Law – Article 5 § 3: In *Maassen*, the applicant's initial pre-trial detention, which had lasted a little over nine months, had been based on several grounds: (i) suspicion of a crime attracting a prison sentence of twelve years or more, and which had caused serious upset to the legal order; (ii) the risk of reoffending; and (iii) the risk of influencing the witness and the co-suspects. The third ground had been dropped early on, when the Regional Court had first extended the applicant's pre-trial detention. As to the first ground, "legal order", contained in the domestic legislation, was synonymous with "public order" (see *Geisterfer v. the Netherlands*, 15911/08, 9 December 2014). A "serious upset" to that order, arising from the gravity of the crime, might justify detention (see *Kanzi v. the Netherlands* (dec), 28831/04, 5 July 2007) and the preservation of a threat to public order was commonly seen as a legitimate ground for detention. However, that ground could only be regarded as relevant and sufficient provided that it was based on facts capable of showing that the accused's release would actually upset the public order. In addition, detention would continue to be legitimate only if public order remained actually threatened. More generally, the need to continue the deprivation of liberty could not be assessed from a purely abstract point of view, taking into consideration only the seriousness of the offence. Moreover, the assessment of relevant and sufficient reasons for pre-trial detention could not be separated from the actual duration thereof. The longer the pre-trial detention lasted, the more substantiation was required for convincingly demonstrating that the alleged risk or risks in case of the suspect's release. In the Regional Court's first decision to extend the applicant's detention, it had not only relied on the gravity of the charge against the applicant, but also on the public reaction. It had referred to the young age of the victim and the great media attention. Taking into account the fact that the applicant's pre-trial detention had still been in its early stages, it could not be said that that decision had lacked relevant and sufficient reasons. The same could not be said for the subsequent domestic court decisions, however.

In *Zohlandt*, the applicant's pre-trial detention had initially been based on the risk of reoffending. When rejecting the applicant's original application for release, the Regional Court had limited itself to referring to the reasons which had led to the issuance of the original order for the applicant's placement in extended detention on remand, and, on appeal, the Court of Appeal had considered that the "serious objections and grounds" found by the Regional Court could indeed be derived from the case-file, which had fully justified the continuation of pre-trial detention.

In *Hasselbaink*, the Government had submitted that the continuation of the applicant's pre-trial detention had been found justified by the Regional Court because of: (i) the risk of his reoffending; (ii) the fact that the offence committed had constituted an affront to the legal order; and (iii) the risk that the applicant, if released, would take action to prejudice the administration of justice. However, the Court could not find support in the actual decisions of the domestic courts for the arguments put forward by the Government. The Court was called on to assess whether the judicial orders contained references to specific facts and individual circumstances justifying continued detention, and not the Government's posterior submissions in that regard. The wording of relevant decisions had merely referred back to the grounds and reasons (namely, the continued existence of suspicions, serious concerns and grounds which had led to the order for the applicant's initial detention on remand) which had been set out in an earlier decision, given before additional evidence had been taken by the investigating judge.

The relevant decisions of the domestic courts had fallen short of the requirements of the Court's established case-law. In all three cases, the decisions had not addressed the applicants' arguments, including those contesting the risk of reoffending (*Zohlandt*), or questioning whether, in the light of new evidence, the suspicion that the applicant had committed an offence had remained reasonable (*Hasselbaink*).

In that context, the Court reiterated that it was essentially on the basis of the reasons given by the national judicial authorities in their decisions on applications for release, and of the well-documented facts stated by the applicants in their appeals, that the Court was called upon to decide whether there had been a violation of Article 5 § 3 (*Buzadji v. the Republic of Moldova* [GC] 23755/07, 5 July 2016). The Court could not therefore accept the Government's contention that the depth of the courtroom discussions, reflected in the official records of the hearings concerned, had compensated for the lack of detail in the written decisions. Indeed, the discussion at the hearings reflected the arguments put forward by the parties, but did not indicate what had been the grounds justifying the pre-trial detention in the eyes of the judicial authority competent to order or extend a deprivation of liberty. Only a reasoned decision by those authorities could effectively demonstrate to the parties that they had been heard, and make appeals and public scrutiny of the administration of justice possible. Moreover, national law provisions stipulated that decisions on pre-trial detention should be duly reasoned.

By failing to address the specific facts and individual circumstances, the judicial authorities had extended the applicants' pre-trial detention on grounds which, although "relevant", could not be regarded as "sufficient" to justify their continued detention. That conclusion dispensed the Court from ascertaining whether the competent national authorities had displayed "special diligence" in the conduct of the proceedings.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 5 § 4 in *Hasselbaink*, as the period of twenty-two days which had elapsed before the Regional Court had examined the applicant's application to be released from pre-trial detention had fallen short of the requirement of a speedy judicial decision. The Court had taken into account the fact that the President of the relevant Regional Court had admitted, in her reply to the applicant's complaint, that the examination had not been scheduled with habitual diligence and had offered her apologies.

Article 41: EUR 1,300 in *Hasselbaink* and EUR 1,600 in *Maassen* in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed in both cases. No claims for just satisfaction made or awarded in *Zohlandt*.

(See also *Geisterfer v. the Netherlands*, 15911/08, 9 December 2014)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Legislative reform leading to premature termination of applicant's mandate as member of the National Council of the Judiciary: *relinquishment in favour of the Grand Chamber*

Réforme législative ayant conduit à la cessation prématurée du mandat d'un juge élu au Conseil national de la magistrature : *dessaisissement en faveur de la Grande Chambre*

Grzęda – Poland/Pologne, 43572/18 [Section I]

Traduction française du résumé – Printable version

In 2016, the applicant was elected a member of the National Council of the Judiciary (NCJ) for a four-year term. The NCJ is a constitutional organ charged with safeguarding the independence of courts and judges. It has adopted opinions critically assessing a number of the Government's proposed legislative reforms of the judicial system and pointing out the risks posed by them to the independence of the judiciary.

The following year, the Government announced plans for a large-scale judicial reform, including in relation to the NCJ. In January 2018, legislation entered into force, providing that the mandates of the judicial members of the NCJ, elected on the basis of the previous applicable legislation, would continue until the day preceding the beginning of the term of office of the new NCJ members. Less than two months later, new members of the NCJ were elected and the applicant's mandate was *ex lege* prematurely terminated. He did not receive any official notification regarding the termination.

In the Convention proceedings, the applicant complains that he was deprived of access to a tribunal and to any (other) procedure whereby he could contest the termination of his mandate as a member of the NCJ, in breach of Articles 6 § 1 and 13, respectively.

On 9 February 2021 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

Access to court/Accès à un tribunal

Adequate notification solely by electronic means of (draft) administrative decision potentially directly affecting third parties: *no violation*

Notification adéquate par la seule voie électronique d'une (d'un projet de) décision administrative susceptible de toucher directement des tiers : *non-violation*

Stichting Landgoed Steenbergen and Others/ et autres – Netherlands/Pays-Bas, 19732/17, Judgment/Arrêt 16.2.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants' premises and land are located in close proximity to a motocross track. The Provincial Executive published a notification of a draft decision and decision to extend the opening hours of the track on its website, which the applicants did not see in time. They subsequently lodged an appeal against the decision, after the fixed time-limit for doing so had expired, which was declared inadmissible.

Law – Article 6 § 1: Where an appeal lay against a decision by an administrative authority which might be to the detriment of directly affected third parties, a system needed to be in place enabling those parties to take cognisance of such a decision in a timely fashion. That required that the decision be made available in a pre-determined and

publicised manner that was easily accessible to all potentially directly affected third parties. Provided sufficient safeguards were in place to achieve such accessibility, it fell in principle within the State's margin of appreciation to opt for a system of publication solely by electronic means.

In the present case, the Provincial Executive's use of electronic means for publishing notifications had been sufficiently coherent and clear for the purpose of allowing third parties to become aware of decisions that could potentially directly affect them. At the relevant time, a statutory provision within an ordinance had provided for the possibility of notifying the Provincial Executive's (draft) decisions solely by electronic means. The notification of the adoption of the ordinance had been published in the Official Gazette and the text of the ordinance had been published in the Provincial Bulletin and website. Moreover, that provision had codified a practice which had been in place since 2011, and to which the attention of the public had been drawn by means of advertisements in local newspapers at the time.

The text of the ordinance had not explicitly indicated where notifications were to be published online; however, its explanatory notes had stated that notifications could be published on the Gelderland provincial website and notifications of the type at issue had been published on that website until 2016. The domestic court had found it sufficiently established that the impugned notifications had been published on that website. While that was disputed by the applicants, the Court could not question this assessment in the absence of clear evidence of arbitrariness.

Electronic communication between the administrative authorities and citizens might contribute to the aim of a more accessible and better functioning administration. Under Dutch law, notifications addressed to specific individuals might only be published solely by electronic means when the individuals concerned had indicated that they could be adequately reached in that manner. Given that decisions of administrative authorities might, in addition, potentially concern a large number of interested parties who it might not be possible to identify in advance, their electronic notification might enable a large proportion of the general public to become acquainted with those decisions. In that regard, Dutch law specified that restricting the publication of notifications, not addressed to specific individuals, exclusively by electronic means was only permitted when a statutory basis existed for it.

The impugned practice ran the risk of not reaching citizens who did not have access to the Internet or who were computer illiterate. However, it could not be overlooked that in 2013, the Internet penetration rate in the Netherlands had been high. Moreover, there was no indication that the applicants had been unable to find the (draft) decisions online due to, for example, a lack of access to a computer or the Internet or computer illiteracy. In those circumstances, publishing the notifications in a free local newspaper would not have provided better safeguards of reaching potentially affected parties. It had not been unrealistic to expect the applicants to consult the provincial website regularly for notifications of (draft) decisions that might affect them.

The system of electronic publication used by the Provincial Executive had therefore constituted a coherent system that had struck a fair balance between the interests of the community as a whole in having a more modern and efficient administration and the applicants. There was no indication that the applicants had not been afforded a clear, practical and effective opportunity to comment on the draft decision and to challenge the decision given by the Provincial Executive. In the light of all the circumstances and the safeguards identified, the national authorities had not exceeded the margin of appreciation afforded to the State and the applicants had not suffered a disproportionate restriction of their right to access of court.

Conclusion: no violation (unanimously).

(See also *Zavodnik v. Slovenia*, 53723/13, 21 May 2015, Legal Summary)

Fair hearing/Procès équitable

Lack of statutory limitation for asset evaluation not breaching principle of legal certainty, given its *sui generis* nature and context: *no violation*

L'absence de délai de prescription de la procédure de vérification de patrimoine n'enfreint pas le principe de sécurité juridique en raison du caractère *suis generis* de cette procédure et de son contexte : *non-violation*

Xhoxhaj – Albania/Albanie, 15227/19, Judgment/Arrêt 9.2.2021 [Section III]

(See Article 6 § 1 below/Voir l'article 6 § 1 ci-après, page 22)

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

Bodies set up to vet serving judges and prosecutors to combat corruption objectively

independent and impartial tribunals, established by law: *no violation*

Les instances instituées en vue d'évaluer les juges et procureurs en fonction à des fins de lutte contre la corruption sont des tribunaux objectivement indépendants et impartiaux établis par la loi : *non-violation*

Xhoxhaj – Albania/Albanie, 15227/19, Judgment/Arrêt 9.2.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, a former judge of the Constitutional Court of Albania, was dismissed from her post following a vetting process and she was banned for life from re-entering justice system.

The vetting process was part of a national reform effort, introduced in response to the widespread perception of corruption and a lack of public trust in the national judicial system. Under the Vetting Act, all serving judges and prosecutors were subject to vetting by an Independent Qualification Commission ("IQC") and a Special Appeal Chamber on appeal. Vetting consisted of the re-evaluation of three criteria: an evaluation of assets, an integrity background check to discover links to organised crime, and an evaluation of professional competence.

In the applicant's case, it was found, in relation to the evaluation of assets, that she had made a false declaration and concealed her and partner's acquisition of a flat. In relation to the evaluation of professional competence, the applicant had failed to disclose a conflict of interest and to recuse herself from examining a constitutional complaint.

Law – Article 6 § 1

(a) *Independence and impartiality of the vetting bodies*

The composition of the IQC and Appeal Chamber had been established in accordance with the law. They had been empowered to deal with all questions of fact and law, and then take a final and binding decision on the merits of the case. The domestic legislation also provided that the bodies would exercise their functions independently. As the IQC and Appeal Chamber had been set up and composed in a legitimate way, satisfying the requirements of a "tribunal established by law", the applicant had had access to a "court". Article 6 § 1 therefore applied under its civil head.

Regarding independence, once appointed, the vetting bodies had not been subject to any pressure by the executive during the examination of the applicant's case. That their members had not been drawn from the corps of serving professional judges had been consistent with the spirit and goal of the vetting process, specifically in an attempt to avoid any individual conflicts of interest and to ensure public confidence in the process. The fixed duration of their terms of office was understandable given the extraordinary nature of the vetting process. The domestic legislation had provided guarantees for their irremovability and for their proper functioning.

Regarding impartiality, there had been no confusion of roles for the IQC: the statutory obligation to open the investigation was not dependent on the IQC bringing any charges of misconduct against the applicant; its preliminary findings had been based on the available information without the benefit of the applicant's defence; and it had taken its final decision on the applicant's disciplinary liability on the basis of all the available submissions, including the evidence produced and the arguments made by the applicant at a public hearing. The mere fact that the IQC had made preliminary findings in the applicant's case was not sufficient to prompt objectively justified fears as to its impartiality. Regarding the Appeal Chamber, it had had full jurisdiction in examining the grounds of her appeal and had given a detailed decision in her case.

Conclusion: no violation (six votes to one).

(b) *Legal certainty*

The vetting bodies had been able to examine transactions that had taken place dating back as early as the 1990s. Placing strict temporal limits for the evaluation of assets would have greatly restricted and impinged on the authorities' ability to evaluate the lawfulness of the total assets acquired by the person being vetted over the course of their professional career. A greater degree of flexibility was granted to Albania for the application of statutory limitations, consistent with the objective of the Vetting Act, considering that prior verification of declarations of assets had not been particularly effective in the country. It could also be a matter of interpretation as to when exactly a specific offence might have occurred in that context, that was, whether at the time the asset had been initially acquired or at a later point in time when the asset had been disclosed in a periodic declaration of assets. Such flexibility could, however, not be unlimited, and the implications had to be considered on a case-by-case basis.

The adverse findings against the applicant had been based both on the disclosure made in her vetting declaration of assets and prior declarations filed by her and her partner. The applicant's difficulty in justifying the lawful nature of the financial sources, owing to the passage of time and the

potential absence of supporting documents, was partly due to her own failure to disclose the relevant asset at the time of its acquisition. Additionally, the Vetting Act provided attenuating circumstances if a person being vetted faced an objective impossibility to submit supporting documents. The applicant had not provided any supporting documents justifying the existence of an objective impossibility to demonstrate the lawful nature of her partner's income from 1992 to 2000. Further, the applicant's partner's savings, even if they had been accepted as claimed, would not have sufficed to buy the asset in question.

It was also not *per se* arbitrary, for the purposes of the civil limb of Article 6 § 1, that the burden of proof had shifted onto the applicant in the vetting proceedings after the IQC had made available the preliminary findings resulting from the conclusion of the investigation and had given access to the evidence in the case file.

Conclusion: no violation (five votes to two).

Article 8: There had been an interference with the applicant's right to respect for her private life as a result of her dismissal from office on the basis of the Vetting Act: firstly, as regards the evaluation of assets, because she had been found to have made a false declaration and concealed a flat; and secondly, regarding the evaluation of professional competence, because she had undermined public trust by failing to recuse herself from the examination of a constitutional complaint. While the second ground was formulated in rather broad terms, it was not uncommon to have such a provision in disciplinary law and rules of judicial discipline, and the ground had been supplemented by statutory provisions in force at the relevant time. The interference had therefore been "in accordance with the law". It had also pursued legitimate aims, as the Vetting Act in general, and the interference in the applicant's case in particular, had aimed to reduce the level of corruption and restore the public trust in the justice system, connecting to the interests of national security, public safety and the protection of the rights and freedoms of others.

The Vetting Act and related reforms had responded to the urgent need to combat alarming levels of corruption. In such circumstances, that reform of the justice system s had responded to a "pressing social need".

Regarding the evaluation of professional competence, the vetting bodies had not given adequate reasons to justify their finding that the applicant's failure to recuse herself from a set of constitutional proceedings had undermined public trust in the judicial system. Automatic disqualification of a judge who had blood ties with another judge who had heard another set of proceedings concerning one or all parties to the proceedings was not always called for, particularly for a country the size of Albania, and it had not been called for in the circumstances of that case. Regarding findings in relation to the evaluation of assets, however, there was nothing arbitrary or manifestly unreasonable in the domestic decisions. Moreover, according to international standards, judges had to meet particularly high standards of integrity in the conduct of their private matters out of court. Those findings, taken cumulatively, had been sufficiently serious under national law and could in themselves justify the applicant's dismissal from office.

Having regard to those individualised findings, the applicant's dismissal had been proportionate. The Vetting Act provided for two types of disciplinary sanctions: dismissal from office or suspension with the obligation to attend compulsory education. In light of the *sui generis* nature of the vetting proceedings and the exceptional circumstances which had preceded the adoption of the Vetting Act, it was consistent with the spirit of the vetting process to have a more limited scale of sanctions. Finally, the lifetime ban imposed on the applicant and other individuals removed from office on grounds of serious ethical violations was not inconsistent with or disproportionate to the integrity of judicial office and public trust in the justice system. That was especially so within the national context of ongoing consolidation of the rule of law.

Conclusion: no violation (five votes to two).

The Court also held, by five votes to two, that there had been no violation of Article 6 § 1 regarding the fairness of proceedings, as the applicant had had adequate information, time and facilities to prepare an adequate defence, and both vetting bodies had provided sufficient assessments and reasons for their decisions; and that there had been no violation Article 6 § 1 in respect of a public hearing, as the nature of proceedings on appeal had not required such.

(See also *Kamenos v. Cyprus*, 147/07, 31 October 2017, Legal Summary, and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 55391/13 et al., 6 November 2018, Legal Summary)

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Applicants' conviction for minor offences based on decisive evidence of absent witnesses and lack of counterbalancing factors: *Article 6 applicable; violation*

Condamnation des requérants pour des infractions mineures fondée sur les dépositions décisives de témoins absents et absence de facteurs compensatoires : *article 6 applicable ; violation*

Buliga – Romania/Roumanie, 22003/12, Judgment/Arrêt 16.2.2021
Negulescu – Romania/Roumanie, 11230/12, Judgment/Arrêt 16.2.2021 [Section IV]

(See Article 6 § 3 (d) below/Voir l'article 6 § 3 d) ci-dessous, page 27)

Fair hearing/Procès équitable

Failure to investigate applicants' status as potential trafficking victims affecting overall fairness of criminal proceedings: *violation*

Manquement à enquêter sur la situation des requérants en tant que victimes possibles de traite ayant une incidence sur l'équité globale du procès : *violation*

V.C.L. and/et A.N. – United Kingdom/Royaume-Uni, 77587/12 and/et 74603/12, Judgment/Arrêt 16.2.2021 [Section IV]

(See Article 4 above/Voir l'article 4 ci-dessus, page 16)

Fair hearing/Procès équitable

Signing of judgment by court's president on behalf of the judge, having in the meantime retired, who presided over the bench which deliberated on the case: *no violation*

Signature du jugement par la présidente de la juridiction au nom de la présidente de laformation collégiale ayant rendu le délibéré, partie à la retraite : *non-violation*

Iancu – Romania/Roumanie, 62915/17, Judgment/Arrêt 23.2.2021 [Section IV]

English translation of the summary – Version imprimable

En fait – La juge L.D.S., présidente de la formation collégiale de la Haute Cour de cassation et de justice (ci-après « la Haute Cour ») qui a rejeté l'appel de la requérante concernant sa condamnation pour complicité d'escroquerie, fut mise à la retraite juste après le délibéré. De ce fait, l'arrêt de la Haute Cour fut signé en son nom par la juge C.T., présidente de la Haute Cour, ainsi que par chacun des quatre juges de la formation ayant participé à la procédure. La requérante critique la signature par la juge C.T. externe à la procédure.

En droit – Article 6 § 1 : La Cour n'a décelé aucune atteinte au principe d'immédiateté lors des étapes du processus décisionnel qui a abouti à l'adoption de l'arrêt de la Haute Cour pour les raisons suivantes.

Le prononcé de l'arrêt a été fait par la même formation de jugement désignée pour statuer sur l'appel de la requérante, ayant examiné ses déclarations et participé à l'analyse directe des preuves.

La rédaction de l'arrêt a été réalisée par un magistrat assistant ayant participé aux audiences et aux délibérations et ayant exposé, au nom de la formation de jugement, les motifs sur lesquels reposait le verdict de condamnation conformément au droit national. Ainsi ni l'intervention de la juge L.D.S. ou son éventuel remplacement par un autre juge ne s'avéraient nécessaires au cours de cette étape. Et la juge C.T. n'est pas intervenue à ce stade.

La Haute Cour a jugé que les preuves versées au dossier justifiaient la condamnation de la requérante et a confirmé l'arrêt rendu par les juges du premier degré après avoir analysé le contenu de cet arrêt et procédé à sa propre appréciation des faits et des éléments de preuve. La motivation de l'arrêt a donc été entourée de garanties.

La juge L.D.S n'était plus en fonctions au moment du dépôt de la motivation l'arrêt et se trouvait donc dans l'impossibilité objective de le signer. La signature a ainsi été réalisée en son lieu et place par la juge C.T. conformément à la législation nationale et à la jurisprudence de la Haute Cour. Aussi, les justiciables disposent d'une voie de recours pour faire contrôler l'existence de cette impossibilité.

La règle de la signature des décisions par tous les membres des formations collégiales est appliquée en dehors de l'impossibilité de signer par la Haute-Cour. Mais ceci n'est pas un standard commun à tous les États membres du Conseil de l'Europe. Si dans certains États les décisions de justice sont signées par le président de la formation de jugement, seul ou avec le greffier, dans d'autres États le juge qui signe la décision de justice à la place du juge absent ne doit pas nécessairement être l'un des juges ayant pris part à la procédure.

En outre, la législation nationale a limité l'admissibilité de la signature par le président de la Haute Cour aux seuls cas où le juge titulaire se trouve dans l'impossibilité de signer la décision, c'est-à-dire à un stade ultérieur aux délibérations et à la rédaction de l'arrêt. La juge C.T. n'a participé ni aux audiences ni aux délibérations et sa non-participation à la rédaction de l'arrêt est confirmée par sa mention manuscrite apposée en regard de sa signature précisant qu'elle signait pour la juge L.D.S. et non en son nom propre. Ainsi, l'intervention de la juge C.T. n'a eu aucune conséquence concrète

sur l'issue de l'affaire. Et il n'y a pas eu de changement dans la composition de la formation d'appel de la Haute Cour.

Enfin, la requérante, assistée de l'avocat de son choix, avait déjà eu la possibilité de faire interroger les témoins dont elle souhaitait une nouvelle audition et les juges du premier degré avaient analysé la preuve en question. Dans ces circonstances, et compte tenu du fait qu'il n'y a pas eu renversement d'un verdict d'acquittement sur la base d'une réévaluation de la crédibilité des témoins (à comparer avec l'affaire *Dan c. République de Moldova*), les principes du procès équitable ne sauraient exiger une deuxième audition, en appel, de ces mêmes témoins.

Conclusion : non-violation (unanimité).

(Voir aussi *Dan c. République de Moldova*, 8999/07, 5 juillet 2011 ; *Cerovšek et Božičnik c. Slovénie*, 68939/12 et 68949/12, 7 mars 2017, Résumé juridique ; et *Svanidze c. Géorgie*, 37809/08, 25 juillet 2019, Résumé juridique)

Impartial tribunal/Tribunal impartial

Objective impartiality doubts as to judge presiding over applicant's case, who previously sat in separate proceedings which made extensive findings prejudging her guilt: *violation*

Doutes quant à l'impartialité objective du juge ayant présidé le procès de la requérante et qui avait auparavant siégé dans une procédure distincte dans laquelle des conclusions détaillées préjugeant de la culpabilité de l'intéressée avaient été formulées : *violation*

Meng – Germany/Allemagne, 1128/17, Judgment/Arrêt 16.2.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant was convicted of jointly murdering her husband with G.S., her partner at the time. The Regional Court in the applicant's case was presided by judge M., who had been judge rapporteur in the previous, separate criminal proceedings conducted against G.S. alone. The judgment against G.S. contained extensive findings of fact and law in respect of the applicant's participation in the offence. The applicant appealed unsuccessfully against her conviction, complaining that judge M. had not been impartial in her case.

Law – Article 6 § 1: There was nothing to indicate that judge M. had acted with personal prejudice in the proceedings against the applicant (subjective test). The Court therefore had to determine whether the participation of M. as judge rapporteur in the previous proceedings against G.S. had led to an objectively justified fear that judge M. had not been impartial (objective test).

The Court noted at the outset that M. was a professional judge, who had to be considered more trained, accustomed and prepared than a lay judge to disengage himself from the experience and findings of the previous trial against G.S. Furthermore, in the proceedings against the applicant, the Regional Court, presided by judge M., itself had taken witness and expert evidence, making fresh findings of fact and a legal analysis on that basis, and without any references to and reliance on the findings in the judgment against G.S. The facts established had differed in some details from those established in the judgment against G.S. While those were important elements in the examination of the question of whether the Regional Court had met the requirement of impartiality in the applicant's case, they did not exempt the Court from examining whether the judgment against G.S. had contained findings that had actually prejudged the question of the applicant's guilt.

The references to the applicant in the judgment against G.S. showed that the applicant had not formally been on trial in those proceedings; her procedural status as a third party (witness) had therefore been clear.

However, the applicant had not been mentioned only in passing in the impugned judgment: it had contained extensive findings of fact also concerning the applicant and had assessed evidence taken at the trial also in respect of the applicant. The Regional Court had presented its findings regarding the applicant as established facts and established legal qualifications thereof, and not as mere suspicions. The firm conviction that the applicant had been a co-perpetrator of the offence had been considered necessary by the Federal Court of Justice to establish the basis for G.S.'s conviction. The judgment against G.S. had contained a detailed assessment of the precise role played by the applicant in the death of her husband, going beyond a factual account of the circumstances of the crime. It had to be seen to establish the criteria necessary for the act to constitute a criminal offence also in respect of the applicant: it had described in detail not only the premeditated killing of the applicant's husband and the manner in which the joint plan with G.S. had been carried out, but also the base motives of the applicant herself for acting in that manner, namely, that she had wished to acquire her husband's assets in a reckless manner. The Regional Court could thereby be seen to have made a legal assessment of the act also in respect of the applicant, in that it had found in substance that not only G.S., but also the applicant had acted out of

greed and that the latter had thus participated in, and was equally guilty of, the murder. Those findings and the assessment in respect of the applicant had been made despite the fact that G.S. had been charged as a single perpetrator who had been found to have acted alone at the crime scene, and that the legal assessment of the applicant's acts appeared to go beyond what had been necessary to legally qualify G.S.'s offence. The applicant's doubts that the Regional Court, including judge M., might have already reached a preconceived view on the merits of her case in the judgment against G.S., prior to her own trial, had also been confirmed by the prosecution's assessment after that judgment.

The applicant therefore had had a legitimate fear that judge M., in the light of the wording of the judgment against G.S., had already reached a preconceived view on her guilt. The applicant's doubts as to the impartiality of the Regional Court in the present case had been objectively justified.

While a higher or the highest court might, in some circumstances, make reparation for defects that took place in the first-instance proceedings, the Federal Court of Justice, which had had the power to quash the Regional Court's judgment on grounds of lack of impartiality, had upheld the applicant's conviction and sentence. Consequently, the higher court had not remedied the defect in question.

Conclusion: violation (unanimously).

(See also *Rojas Morales v. Italy*, 39676/98, 16 November 2000, and *Miminoshvili v. Russia*, 20197/03, 28 June 2011)

Impartial tribunal/Tribunal impartial

Refusal to discharge jury members who had read online articles concerning the trial and who had discussed the trial with a person not involved in examining the case: *violation*

Refus de récuser des jurés ayant eu connaissance d'articles publiés sur internet au sujet du procès et ayant discuté avec une personne extérieure à la formation judiciaire : *violation*

Tikhonov and/et Khasis – Russia/Russie, 12074/12 and/et 16442/12, Judgment/Arrêt 16.2.2021 [Section III]

English translation of the summary – Version imprimable

En fait – L'affaire pénale des requérants, poursuivis entre autres pour meurtres, fut renvoyée en jugement devant un tribunal composé d'un jury.

Le 16 avril 2011, D., une jurée déportée, donna une interview à un journaliste qui la publia sur son blog. Il y déclara que certains jurés exerçaient une pression sur le jury : M. lisait chaque matin des articles parus sur internet ; et N. dit à un membre du greffe du tribunal qu'un verdict de culpabilité sera rendu.

À l'audience du 18 avril 2011, les requérants demandèrent au juge Z. de récuser les jurés M. et N. pour parti pris. Le juge invita M. et N. à se prononcer sur cette demande, puis il la rejeta.

Par un jugement du 6 mai 2011, le tribunal, se fondant sur le verdict de culpabilité du jury, condamna les requérants. Ces derniers interjetèrent appel de ce jugement pour manque d'impartialité des jurés M. et N. sans succès. Ils s'appuyaient sur l'interview de D. mais aussi sur celle du juré M. publiée par un site internet le 18 mai 2011 dans laquelle il confirmait avoir consulté différents médias sur internet pendant le procès, que quatre autres jurés avaient fait de même et que tous les jurés « partageaient des informations » issues des sources médiatiques en question.

Les requérants se plaignent de ne pas avoir été jugés par un tribunal impartial.

En droit – Article 6 § 1 : Le 18 avril 2011, les requérants ont demandé la récusation des jurés M. et N. en s'appuyant sur les déclarations de D. du 16 avril 2011. Les allégations litigieuses n'apparaissaient pas d'emblée manifestement dépourvues de sérieux au point que le juge président Z. ne fût pas tenu de prendre des mesures adéquates pour s'assurer que le tribunal répondait à l'exigence d'impartialité énoncée à l'article 6 § 1. En outre, selon le droit interne, les jurés doivent effectivement s'abstenir d'exprimer leur opinion sur l'affaire en dehors des délibérations, de discuter des circonstances de l'affaire avec des personnes ne faisant pas partie de la formation judiciaire et de rechercher des informations sur l'affaire en dehors de l'examen judiciaire. Or, selon les déclarations de D., M. et N. n'avaient pas respecté ces obligations.

Saisi de la demande de récusation dirigée contre M. et N., le juge Z. a recueilli, lors de l'audience du 18 avril 2011, les observations des parties et donné aux jurés concernés la possibilité de s'exprimer sur le fond de cette demande.

Toutefois le juge Z. n'a pas cherché à établir la véracité des allégations au sujet de la discussion de N. avec un membre du greffe du tribunal. Si N. n'était pas tenue de commenter la demande de récusation dont elle faisait l'objet, le juge pouvait auditionner les autres membres du jury pour vérifier la réalité du fait allégué étant donné que nul ne prétendait que la scène se fût déroulée pendant les délibérations du jury sur le verdict, protégées par le secret des délibérations en vertu de la loi.

En outre, M. a reconnu avoir consulté régulièrement différents médias sur internet pour se tenir informé sur le procès pénal, et avoir partagé avec les autres jurés les informations ainsi obtenues, et il a ainsi confirmé une partie des déclarations sur lesquelles reposait la demande de récusation. Or le juge Z. n'a pas tenté de déterminer si l'impartialité du jury avait été mise à mal par les informations transmises à ses membres, ni dans quelle mesure ce pouvait être le cas. En l'absence d'une telle vérification, les assurances données par M. quant à sa capacité à demeurer objectif et impartial n'étaient pas suffisantes pour exclure tout doute raisonnable à cet égard. Par ailleurs, le juge Z. n'a pas interrogé les autres jurés pour savoir s'ils étaient en mesure de rester impartiaux après avoir pris connaissance des informations que M. leur avait communiquées.

Pendant le procès, notamment après l'audition de M., le juge Z. n'a pas rappelé aux jurés l'importance de ne pas rechercher d'informations sur l'affaire dans les médias. Et s'il leur a rappelé à deux reprises qu'ils ne devaient pas tenir compte des informations publiées dans les médias, ces rappels ont eu lieu avant l'audience du 18 avril 2011 de M. Par ailleurs, même si, en l'absence de toute preuve du contraire, il est raisonnable de penser que le jury suivra les instructions du juge, dans les circonstances de l'espèce, un certain nombre d'éléments étaient propres à renverser cette présomption. En effet, les instructions données par le juge Z. avant l'audience du 18 avril 2011 n'étaient pas suffisantes pour exclure tout doute raisonnable quant à l'impartialité du jury. Le juge Z. aurait dû adresser au jury un complément d'instructions en des termes clairs et vigoureux pour s'assurer que le tribunal pouvait être estimé impartial, sinon congédier le jury. Par ailleurs, dans les instructions qu'il a données à la fin du procès, le juge n'a pas rappelé aux jurés qu'ils ne devaient pas tenir compte des informations parues dans les médias auxquelles ils avaient pu avoir accès pendant le procès.

Lorsqu'ils ont interjeté appel du jugement du 6 mai 2011, les requérants se sont à nouveau plaints d'un manque d'impartialité des jurés M. et N. et, de surcroît, ils ont produit devant la juridiction d'appel les déclarations que M. avait faites dans son interview du 18 mai 2011.

Cependant, la Cour suprême a noté qu'aucun élément ne venait démontrer leur thèse concernant « la collecte et la diffusion auprès des autres jurés, par [M.], de renseignements sur l'affaire pénale extérieurs au procès ». Cette appréciation ne tenait pas compte de ce que le juge Z. n'avait cherché ni à déterminer la teneur des informations dont M. avait fait part aux autres jurés ni à vérifier si ceux-ci étaient capables de demeurer objectifs et impartiaux après avoir pris connaissance de ces informations. La Cour suprême a refusé de tenir compte des publications jointes par les requérants à leurs mémoires d'appel, au motif que D. n'avait pas pris part aux délibérations du jury. Or, l'interview de M., postérieure au prononcé du jugement du 6 mai 2011, comportait des éléments nouveaux qui ne pouvaient pas avoir fait l'objet d'un examen par le juge Z. La Cour suprême a passé sous silence cet élément important sans indiquer pourquoi elle ne le prenait pas en considération. Cette juridiction a ainsi failli à prendre des mesures adéquates pour lever les doutes qui subsistaient quant à la réalité et à la nature des faits allégués, et pour ainsi dissiper tout doute quant à l'impartialité du jury.

Dès lors, les juridictions nationales ne se sont pas entourées de garanties suffisantes pour exclure tout doute légitime quant à l'impartialité du jury ayant rendu le verdict de culpabilité à l'égard des requérants et, partant, le droit de ces derniers à être jugés par un tribunal impartial n'a pas été respecté en l'espèce.

Conclusion : violation (six voix contre une).

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

(Voir aussi *Remli c. France*, 16839/90, 23 avril 1996 ; *Pullar c. Royaume-Uni*, 22399/93, 10 juin 1996 ; *Gregory c. Royaume-Uni*, 22299/93, 25 février 1997 ; et *Farhi c. France*, 17070/05, 16 janvier 2007, Résumé juridique)

Article 6 § 3 (d)

Examination of witnesses/Interrogation des témoins

Applicants' conviction for minor offences based on decisive evidence of absent witnesses and lack of counterbalancing factors: *violation*

Condamnation des requérants pour des infractions mineures fondée sur les dépositions décisives de témoins absents et absence de facteurs compensatoires : *violation*

Buliga – Romania/Roumanie, 22003/12, Judgment/Arrêt 16.2.2021
Negulescu – Romania/Roumanie, 11230/12, Judgment/Arrêt 16.2.2021 [Section IV]

Traduction française du résumé dans les affaires *Buliga* et *Negulescu* – Printable version in the *Buliga* and *Negulescu* cases

Facts – Criminal proceedings were brought against the applicants for minor offences but were discontinued. Although the prosecutor's office considered that the applicants were guilty, their

acts had not been serious enough to constitute a criminal offence. A fine was imposed. The applicants' challenges before the domestic courts were unsuccessful.

The applicants complained that the proceedings had been unfair, the courts having relied on the statements of witnesses whom they had not been able to question.

Law – Article 6 §§ 1 and 3 (d): Having established that the proceedings fell within the criminal limb of Article 6, the Court reiterated that the general requirements of fairness contained in that provision applied to all criminal proceedings, irrespective of the offence in issue. Consequently, they applied in these cases.

The Court then, applying the general principles set out in its Grand Chamber judgments of *Al-Khawaja and Tahery v. the United Kingdom* and *Schatschaschwili v. Germany*, found as follows:

Firstly, it emerged from the decisions in question that the domestic courts had made an assessment of the applicants' guilt referring to the statements of the witnesses who had not appeared before them.

Secondly, under the applicable domestic law, the courts had been bound to examine the criminal complaints against the applicants based on the evidence in the file and any other additional documents. They had not been allowed to hear witness testimony. This, however, did not constitute a good reason justifying the non-attendance of the relevant witnesses for the purposes of Article 6. Furthermore, there had been no indication that the witnesses had been unavailable or that it had been difficult to summon them to appear in court.

Thirdly, the domestic courts had reached their decisions by relying on the witnesses' statements. In *Negulescu*, the statement of the witness had also corroborated the medical evidence. It could therefore be inferred that the statements had been decisive for the courts' conclusions in the cases.

Finally, there had not been sufficient counterbalancing factors to compensate for the handicap created for the defence as a result of the admission of the decisive evidence of the absent witnesses. Although, an important safeguard would have been to have given the applicants or their defence counsel an opportunity to question the witnesses during the investigation stage, the defence had not been informed of the date of the witnesses' interviews or invited to participate. Nor had the applicants been present or represented during police questioning. In *Buliga*, there had been no response to the applicant's claims regarding witness intimidation by the police. Moreover, despite the applicants' challenges to the evidence and, in *Buliga*, a request for additional evidence, the domestic courts had based their decisions solely on the evidence in the case files. Further, they had not availed themselves of other means at their disposal to ensure, at least in theory, better protection of the defence's rights. More specifically, it had been open to them under domestic law to set aside the decisions taken by the prosecutor's office, refer the cases back to that office or examine them further in proper criminal proceedings, as a first instance court. Instead, the courts had upheld the decisions without hearing evidence, thus frustrating the applicants' opportunity to cross-examine the witnesses whose testimony had been of decisive importance.

In sum, the domestic courts had deprived the applicants of the possibility of having their case examined in compliance with Convention requirements.

Conclusion: violation (unanimously).

Article 41: Reopening of the domestic proceedings most appropriate form of redress given the nature of the applicants' complaints; EUR 1,000 in *Negulescu* and EUR 4,000 in *Buliga* in respect of non-pecuniary damage for the distress suffered by the applicants not compensated solely by reopening or the finding of a violation; no award in respect of pecuniary damage in both cases.

(See *Al-Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, 15 December 2011, Legal Summary, and *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Legal Summary; see also *Jalloh v. Germany* [GC], 54810/00, 11 July 2006, Legal Summary, and *Blokhin v. Russia* [GC], 47152/06, 23 March 2016, Legal Summary)

ARTICLE 8

Respect for private and family life/Respect de la vie privée et familiale

Refusal of the French authorities to allow the export of embryos for posthumous transfer in Spain despite the consent of the deceased husband: *communicated*

Refus des autorités françaises d'autoriser l'exportation d'embryons pour transfert *post mortem* en Espagne malgré l'accord du mari décédé : *affaire communiquée*

Caballero – France, 37138/20, Communication [Section V]

English translation of the summary – Version imprimable

À la suite de la mort de son mari en 2019 – qui avait donné son accord anticipé à l'utilisation *post mor-*

tem des embryons que le couple avait fait congeler –, la requérante prit contact avec un hôpital situé en Espagne et entama des démarches en vue d'une procréation par transfert d'embryon.

L'autorisation d'exporter les embryons lui fut refusée par les juridictions françaises, au motif que le couple n'avait pas de lien particulier avec l'Espagne, de sorte que cette demande visait simplement à contourner une interdiction légitimement posée par le législateur français. La requérante estime toutefois que sa situation est différente de l'affaire *Dalleau c. France* pendante devant la Cour car elle concerne des embryons – qui comportent son propre patrimoine génétique – et pas seulement les gamètes de son époux décédé.

Saisi pour avis d'un projet de réforme en 2019, le Conseil d'État avait estimé paradoxal de maintenir la condition d'être en vie au moment de la réalisation d'une telle opération, en ce que pareille condition aboutit à ce qu'une femme dont l'époux est décédé doive renoncer à tout projet d'assistance médicale à la procréation avec les gamètes de ce dernier ou les embryons du couple, alors qu'elle serait autorisée à faire l'objet d'une insémination artificielle seule, avec tiers donneur. Dans un souci de cohérence, le Conseil d'État préconisait donc d'autoriser les opérations *post mortem* d'insémination artificielle ou de transfert d'embryons sous deux conditions : le consentement du conjoint ou concubin décédé ; et un encadrement dans le temps – délai minimal et maximal à compter du décès – de la possibilité de recourir à cette forme d'aide à la procréation. Mais cette recommandation est restée sans suite.

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

(Voir *Dalleau c. France*, 57307/18, Résumé juridique)

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

Failure to protect the personal integrity of a vulnerable child in the course of excessively long criminal proceedings relating to sexual abuse: *violation*

Défaut de protection de l'intégrité personnelle d'une enfant vulnérable lors d'une procédure pénale d'une durée excessive relative à des abus sexuels : *violation*

N.Ç. – Turkey/Turquie, 40591/11, Judgment/Arrêt 9.2.2021 [Section II]

(See Article 3 above/Voir l'article 3 ci-dessus, page 14)

Respect for private life/Respect de la vie privée

Justified dismissal of judge and lifetime ban from re-entering justice system as result of individualised and serious findings of vetting process: *no violation*

Caractère justifié de la révocation d'une juge et de l'interdiction à vie d'exercer des fonctions judiciaires prononcée contre elle en raison des faits personnels graves constatés au cours de la procédure d'évaluation : *non-violation*

Xhoxhaj – Albania/Albanie, 15227/19, Judgment/Arrêt 9.2.2021 [Section III]

(See Article 6 § 1 above/Voir l'article 6 § 1 ci-dessus, page 22)

Respect for private life/Respect de la vie privée

Dismissal of criminal complaint against judges for statements forming part of judgment's factual contextualisation and not attaining a threshold of seriousness: *Article 8 not applicable; inadmissible*

Rejet d'une plainte pénale dirigée contre des juges concernant des déclarations qui faisaient partie de la contextualisation factuelle d'un arrêt et qui n'avaient pas atteint le seuil de gravité requis : *article 8 non applicable ; irrecevable*

De Carvalho Basso – Portugal, 73053/14 and/et 33075/17, Decision/Décision 4.2.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The mayor of a municipal council, L.M., made statements in a public meeting and to a local newspaper about the applicant's finances and the public subsidies that the applicant's local association was entitled to receive. Although L.M. was initially convicted for defamation, that judgment was later quashed by a Court of Appeal. The applicant unsuccessfully lodged a criminal complaint against the two judges who had sat on the Court of Appeal, claiming that the judgment had contained wording that amounted to a personal insult to him.

Law – Article 8: The applicant complained about the arguments made by the two judges in the Court of Appeal when ruling on L.M.'s appeal against his conviction for defamation. The complaint was examined as part of the applicant's right to protection of reputation under Article 8.

Firstly, the impugned statements had not concerned the particular judicial statements to which Article 8 had previously been applied: for example,

a suggestion that the domestic court suspected the applicant of sexually abusing a child (*Sanchez Cardenas v. Norway*, 12148/03, 4 October 2007); comments made in relation to a third party mentioned in the proceedings (*Vicent Del Campo v. Spain*, 25527/13, 6 November 2018); clearly discriminatory remarks (*Carvalho Pinto de Sousa Morais v. Portugal*, 17484/15, 25 July 2017); or disclosure of sensitive and personal medical or other private information (*L.L. v. France*, 7508/02, 10 October 2006). The impugned statements regarding the applicant's reputation had therefore not attained a certain level of seriousness in order for Article 8 to come into play.

Secondly, the statements had been part of the factual contextualisation of the judgment's motivation and had fallen within a wider analysis of the various aspects forming the background of the case. In particular, the statement had referred to L.M.'s comments on the potential distribution of public funds to the applicant's association, clarifying that it had been reasonable for the mayor to audit and comment on the adequate deployment and usage of those funds.

Lastly, the complaint raised the important issue of the protection of judicial independence, when judges were fulfilling their obligation to provide reasons, from losing parties who disagreed with the judgment delivered. Liability proceedings against judges should only take place in exceptional circumstances and criminal proceedings, in particular, had to be avoided when there was no proper evidence suggesting that any criminal liability existed on the part of the judge, such as in the instant case.

In the light of the foregoing, Article 8 was not applicable.

Conclusion: inadmissible (incompatible *ratione materiae*).

The Court also found, unanimously, that the applicant's complaint in relation to statements made by L.M. in a local newspaper was manifestly ill-founded, as the domestic courts had struck a fair balance between the applicant's right to respect for private life and L.M.'s freedom of expression.

Respect for private life/Respect de la vie privée

Contraindication for blood donation by men having recently engaged in homosexual intercourse; collection and retention of related personal data by handling authority: *communicated*

Contre-indication au don de sang pour les hommes ayant eu une activité homosexuelle récente ; recueil et conservation de données personnelles y relatives par l'autorité gestionnaire : *affaire communiquée*

Drelon – France, 3153/16 and/et 27758/18, Communication [Section V]

(See Article 14 below/Voir l'article 14 ci-dessous, page 36)

ARTICLE 10

Freedom of expression/Liberté d'expression

Dismissal of doctor for lodging good faith but unfounded criminal complaint accusing colleague of active euthanasia, without verification to the extent permitted by circumstances: *no violation*

Licenciement d'un médecin au motif que celui-ci avait porté plainte, de bonne foi mais de manière infondée, contre l'un de ses collègues qu'il accusait, sans avoir procédé aux vérifications que les circonstances lui auraient permis d'effectuer, d'avoir pratiqué l'euthanasie active sur certains patients : *non-violation*

Gawlik – Liechtenstein, 23922/19, Judgment/Arrêt 16.2.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant had been employed as deputy chief physician at the Liechtenstein National Hospital. After conducting some research in the hospital's electronic medical files, he concluded that his direct superior, Dr H, had illegally practised active euthanasia on some patients. The applicant lodged a criminal with the Public Prosecutors' Office in that regard. After two external medical experts concluded that there had been no active euthanasia, the criminal proceedings against Dr H. were discontinued and the applicant was dismissed from his post without notice. He appealed unsuccessfully against his dismissal.

Law – Article 10

(a) *An interference prescribed by law and pursuing a legitimate aim*

The applicant had been dismissed as a physician by the Liechtenstein National Hospital, a public law foundation; his employment relationship had been governed by private law. The dismissal had subsequently been endorsed, in particular, by the Liechtenstein Constitutional Court. In these circumstances, the impugned measure had constituted an interference by a State authority with the applicant's right to freedom of expression, which had

been prescribed by law and pursued a legitimate aim. It had served to protect both the business reputation and interests of the employing National Hospital, including its interest in a professional work relationship based on mutual trust, and the reputation of Dr H, the hospital's chief physician, who had been concerned by the applicant's allegations of euthanasia.

(b) *Necessity of the interference in a democratic society*

The Court had regard to the six criteria established in its case-law for examining the proportionality, and thus necessity, of an interference with an employee's right to freedom of expression. At the outset, it noted that the Constitutional Court, in its assessment of the applicant's complaint, had had regard to those criteria:

(i) *Public interest in the disclosed information* – The Court agreed with the Constitutional Court that there had been considerable public interest in medical treatment in a public hospital which was in accordance with the state of the art, and in the information disclosed by the applicant. That information had concerned suspicions of the commission of serious offences, namely the killing of several vulnerable and defenceless patients, in a public hospital, as well as a risk of repetition of such offences.

(ii) *Authenticity/veracity of the information disclosed* – However, the domestic courts had found, on the basis of reports by two external medical experts, that the applicant's reported suspicions had been clearly unfounded. The applicant had not consulted all patients' paper files, while both external experts had done so and concluded without any reservations that the patients in question had received necessary and justified palliative treatment – in basing its finding on those reports, the domestic courts had relied on an acceptable assessment of the relevant facts.

The Court stressed that information disclosed by whistle-blowers might also be covered by Article 10 under certain circumstances where the information in question was subsequently proved wrong or could not be proven correct. In particular, it could not reasonably be expected of a person having lodged a criminal complaint in good faith to anticipate whether the investigations would lead to an indictment or be discontinued (*Heinisch v Germany*). However, in those circumstances, the person concerned must have complied with the duty to verify, to the extent permitted by the circumstances, that the information was accurate and reliable. That approach was also reflected in relevant documents of the Council of Europe.

In the present case, the applicant had based his allegations of active euthanasia only on the information available in the electronic medical files which, as he had known as a doctor practising in the hospital, had not contained complete information on the patients' state of health. The applicant had not consulted the paper medical files, which had contained comprehensive information in that regard. The domestic courts had determined that, had he done so, he would have recognised immediately that his suspicions had been clearly unfounded and he had therefore acted irresponsibly. By reason of the duties and responsibilities inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to whistleblowers was subject to the proviso that they acted in order to disclose information that was accurate and reliable and in accordance with professional ethics. That applied, in particular, if the person concerned, like the applicant as deputy chief physician and thus a high-ranking and highly qualified employee, owed a duty of loyalty and discretion to their employer. The Court did not lose sight of the fact that the applicant, in light of the interpretation he had made of the information in the electronic files, must have concluded that it was very urgent to act in order to stop the suspected practice. However, since, as a deputy chief physician, he could have consulted the paper files at any moment, that verification would not have been very time-consuming. Having regard to the gravity of an allegation of active euthanasia, the Court agreed with the domestic courts' findings that the applicant had been obliged, but failed, to proceed to such a verification. He had not, therefore, carefully verified, to the extent permitted by the circumstances, that the disclosed information had been accurate and reliable.

(iii) *Detriment to the employer* – The allegation of active euthanasia having been practised at a State-run hospital had certainly been prejudicial to the employing hospital's business reputation and interests and to the public confidence in the provision of state-of-the-art medical treatment in the only public hospital in Liechtenstein. It had further been prejudicial to the personal and professional reputation of another hospital staff member, namely Dr H. While the applicant initially had not voiced his allegations in public, but disclosed them by lodging a criminal complaint, following the ensuing investigations, the allegations had become known to a larger public and had been repeatedly discussed in national media which had risked increasing their prejudicial effect. In the present case, in which the well-foundedness of that suspicion had not been sufficiently verified prior to disclosure, the public interest in receiving such information could not

outweigh the employer's and Dr H's interest in the protection of their reputation.

(iv) *Existence of alternative channels for making the disclosure* – The applicant could not have been expected to first raise his suspicion with his superior, Dr H, who had been directly concerned by them. As for the internal reporting channel, it had not been shown that anonymous reports of irregularities via that system were no longer handled by Dr H. alone. The applicant therefore could legitimately proceed on the assumption that redress could not be obtained in that way either. The Court left open the question of whether the applicant had been obliged to raise his suspicions either with a member of the hospital's foundation board or with the hospital's director, prior to lodging a criminal complaint. While those appeared to be effective alternative channels for disclosure, with the potential to remedy any irregularities rapidly, the offences of which the applicant suspected his direct superior had been serious and there had been a possibility that he might himself be held liable in case of a failure to report such offences.

(v) *Applicant's motives for the disclosure* – The domestic courts had not found that the applicant had acted out of personal motives. The Court had no reason to doubt that the applicant had acted in the belief that the information had been true and that it had been in the public interest to disclose it.

(vi) *Severity of the sanction* – The applicant's dismissal without notice had constituted the heaviest sanction possible under labour law. It had had negative repercussions on his professional career and led to the applicant and his family having to leave Liechtenstein, due to the loss of his residence permit as a foreign national without employment. Having regard also to the media coverage, the sanction must have therefore had a certain chilling effect on other employees in the hospital and the health sector in general – at least regarding direct disclosure to external bodies of suspicions and irregularities.

Overall, and as determined by the domestic courts, the interference with the applicant's right to freedom of expression, in particular his right to impart information, had been proportionate to the legitimate aim pursued and thus necessary in a democratic society.

Conclusion: no violation (unanimously).

(See also *Guja v. Moldova* [GC], 14277/04, 12 February 2008, Legal Summary; *Heinisch v. Germany*, 28274/08, 21 July 2011, Legal Summary; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], 17224/11, 27 June 2017, Legal Summary)

Freedom to receive information/Liberté de recevoir des informations

Unjustified limitations on a prisoner's ability to access Internet sites publishing legal information, on security grounds: *violation*

Restrictions injustifiées apportées à la possibilité pour un détenu d'accéder à des sites Internet publiant des informations juridiques pour des raisons sécuritaires : *violation*

Ramazan Demir – Turkey/Turquie, 68550/17, Judgment/Arrêt 9.2.2021 [Section II]

English translation of the summary – Version imprimable

En fait – Le requérant, avocat détenu pour les chefs d'appartenance à une organisation terroriste et de propagande en faveur d'une organisation terroriste, a demandé aux autorités pénitentiaires de l'autoriser à accéder aux sites Internet de la Cour, de la Cour constitutionnelle et du Journal officiel afin de pouvoir préparer sa propre défense et de suivre les affaires de ses clients. Cependant, cette demande a été rejetée par les autorités.

En droit – Article 10 : L'accès des détenus à certains sites Internet dans des buts de formation et de réinsertion étant prévu en droit turc, la restriction de l'accès du requérant aux sites Internet de la Cour, de la Cour constitutionnelle et du Journal officiel, qui ne contiennent que des informations juridiques de nature à servir le développement et la réhabilitation de l'intéressé dans le cadre de sa profession et de ses centres d'intérêt, constitue une ingérence dans l'exercice du droit du requérant à recevoir des informations. Cette ingérence était prévue par la loi et poursuivait les buts légitimes de la défense de l'ordre et de la prévention du crime.

Les décisions des juridictions nationales semblent se fonder essentiellement sur les dispositions du droit turc pour restreindre l'accès du requérant aux sites Internet en question. Cependant, les juridictions nationales n'apportent pas d'explications suffisantes sur les questions de savoir pourquoi l'accès du requérant à ces sites Internet ne pouvait pas être considéré comme relevant de la formation et de la réinsertion de l'intéressé, dans quel cas l'accès à Internet des détenus est autorisé par le droit national, et de savoir si et pourquoi le requérant devait être considéré comme un détenu présentant une certaine dangerosité ou appartenant à une organisation illégale à l'égard duquel l'accès à Internet pouvait être restreint en vertu des mêmes dispositions.

Aucune explication n'est donnée à savoir pourquoi la mesure litigieuse était nécessaire eu égard aux buts légitimes du maintien de l'ordre et de la sécu-

rité de l'établissement pénitentiaire et de la prévention du crime. Les dispositions nécessaires à l'utilisation d'Internet par les détenus sous le contrôle des autorités pénitentiaires avaient en tout état de cause été prises dans le cadre de programmes de formation et de réinsertion. Même si les considérations sécuritaires invoquées par les autorités nationales devaient être considérées comme pertinentes, les juridictions nationales n'ont pas procédé à une analyse détaillée des risques de sécurité qui auraient résulté de l'accès du requérant aux trois sites Internet, d'autant plus qu'il s'agissait de sites Internet d'autorités étatiques et d'une organisation internationale, et que le requérant y aurait accédé seulement sous contrôle des autorités et dans les conditions que ces dernières auraient déterminées.

Ainsi, les motifs invoqués par les autorités nationales pour justifier la mesure incriminée n'étaient ni pertinents ni suffisants et la mesure litigieuse n'était pas nécessaire dans une société démocratique.

Conclusion : violation (unanimité).

Article 41 : 1 500 EUR pour préjudice moral.

(Voir aussi *Kalda c. Estonie*, 17429/10, 19 janvier 2016, Résumé juridique)

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

Justified conviction for assaulting police officer during proportionate dispersal of protest: *inadmissible*

Condamnation justifiée pour l'agression d'un policier lors de la dispersion proportionnée d'une manifestation : *irrecevable*

Knežević – Montenegro/Monténégro, 54228/18, Decision/Décision 2.2.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant was an opposition leader at the relevant time and his political party a part of an opposition coalition. The opposition coalition organised a protest rally from the boulevard in front of the national Parliament for a period of twenty days, during which time a number of temporary objects (including tents and a stage) were installed. The purpose of the gathering was to publicly protest and express dissatisfaction with citizens' living standards and to request the formation of a transitional government. The protest was subsequently dispersed by the police and the objects were removed. The applicant, who had been participating in the protest, was arrested and convicted for assaulting a police officer during the dispersal. He complained that his Article 11 right to freedom of peaceful assembly had been violated.

Law – Article 11

(a) *Applicability* – There was nothing to suggest that the protests had not been intended to be peaceful or that the organisers, including the applicant, had had violent intentions; nor that the applicant had had violent intentions when he had joined the demonstration. While the applicant had been convicted for assaulting a police officer, that had concerned an incident during the tense moments when the police had moved to disperse the protestors, and was not indicative of any initial violent intention on his part. Accordingly, he had enjoyed the protection of Article 11.

(b) *Removal of the tents and stage* – The organisers of the protest had been authorised to set up a number of temporary objects, including a stage, in the park opposite the Parliament building for a certain period of time. Against that authorisation, as well as relevant legislation in force at the time, the organisers had set up the stage not in the park but in the traffic lanes in front of Parliament. They had also set up about 300 tents on the road without any authorisation. The organisers, including the applicant, had thereby intentionally failed to abide by their own request, the rules, and the terms of the authorisation issued by the authorities. They had also caused disruption to ordinary life and other activities to a degree exceeding that which was inevitable. The boulevard in question had been the busiest road in the city and blocking it had completely obstructed the normal activities of other people and services for twenty days. Such conduct, although less serious than recourse to physical violence, could be described as "reprehensible" (see, *mutatis mutandis*, *Kudrevičius and Others v. Lithuania* [GC] and *Barraco v. France*).

A municipal police inspector had issued a decision ordering that the objects be removed, which had in no way interfered with the holding of the protest rally itself. However, the organisers had refused to sign the delivery slip accompanying that decision, had failed to comply with it, and had not allowed two municipal police inspectors to enforce it.

(c) *Dispersal of the gathering* – The authorities had tolerated the disturbance and obstruction for twenty days in total: although they had been authorised in law to do so, they had not imposed any fines on the organisers and/or protestors; they had prohibited traffic in the boulevard in question in order to facilitate the gathering; and the objects had been removed only at the end of that period. During those twenty days, the organisers, includ-

ing the applicant, had been able to freely manifest their views. It had not been unreasonable *per se* that the authorities had viewed that period to be sufficient, and that the major disruption could no longer be allowed to continue.

The participants, including the applicant, had refused to comply with the police's request to step away so that the stage and tents could be removed. They had formed a human shield and put up resistance, including by breaking the police cordon and driving into the boulevard. It was only after such resistance that the police officer in command had ordered that the gathering be dispersed. In such circumstances, the intervention by the police had not overstepped the margin of appreciation of the national authorities.

(d) *Arrest and conviction of the applicant* – The applicant had not been prosecuted and convicted for organising a protest, but notably for assaulting an official performing his duties. By his own submission, the applicant had repeatedly pushed the police officer, removed the officer's hat and taken it away. The officer had remained calm and applied no force whatsoever in respect of the applicant.

When individuals were involved in acts of violence, State authorities enjoyed a wider margin of appreciation when examining the need for an interference, and the imposition of a sanction for such reprehensible acts might be considered compatible with the guarantees of Article 11. The Court was very attentive when assessing the proportionality as regards the chilling effect of criminal sanctions. However, the sanction in the present case had not been for the applicant's organising and/or participating in the protests. Assaulting an official was a criminal offence; the applicant's sentence of four months had been below the statutory minimum; and he had served less than three months. In the present case, that sentence, although not insignificant, had not been contrary to Article 11. The applicant's prosecution and conviction had been in accordance with the law, had pursued legitimate aims, notably prevention of disorder or crime and protection of the rights and freedoms of others, and had been necessary in a democratic society.

Conclusion: inadmissible (manifestly ill-founded).

The Court also held, by a majority, that the applicant's complaint under Article 6 § 1 as to the alleged unfairness of his criminal proceedings was inadmissible, as it was manifestly ill-founded in the light of all the material in the Court's possession.

(See *Barraco v. France*, 31684/05, 5 March 2009, Legal Summary, and *Kudrevičius and Others v. Lithuania* [GC], 37553/05, 15 October 2015, Legal Summary; see also *Primov and Others v. Russia*, 17391/06, 12 June 2014, Legal Summary, and *Gülcü v. Turkey*, 17526/10, 19 January 2016, Legal Summary)

ARTICLE 14

Discrimination (Article 8)

Failure of domestic courts to discharge positive obligation to afford redress to Jewish and Roma individuals for discriminatory public statements made by politician: *violation*

Manquement par les tribunaux internes à leur obligation positive d'offrir un redressement à des personnes de souche juive ou rom pour des propos publics discriminatoires tenus par un politicien : *violation*

Behar and/et Gutman – Bulgaria/Bulgarie, 29335/13, Judgment/Arrêt 16.2.2021
Budinova and/et Chaprazov – Bulgaria/Bulgarie, 12567/13, Judgment/Arrêt 16.2.2021 [Section IV]

Traduction française du résumé dans les affaires *Behar et Gutman* et *Budinova et Chaprazov*

Printable version in the *Behar and Gutman* and *Budinova and Chaprazov* cases

Facts – The applicants, ethnic Jews and Roma, alleged that the leader of a political party (the politician) had made public statements which constituted harassment of and incitement to discrimination against Jew through passages in two books (in *Behar and Gutman*) and Roma in Bulgaria in a series of statements made in his television programme, interviews, speeches and a book (in *Budinova and Chapzarov*). They argued, *inter alia*, that each of them, as a member of a minority, had been personally affected by those statements. The applicants' complaints were dismissed by the domestic courts, and they appealed unsuccessfully.

Law – Article 14 in conjunction with Article 8

(a) *Applicability*

The question in the present cases was whether negative public statements about a social group could be seen as affecting the "private life" of individual members of that group to the point of triggering the application of Article 8. The general proposition in that domain had been laid down in the *Aksu v. Turkey* case: to be seen as capable of impacting on the sense of identity of an ethnic or social group and on the feelings of self-worth and self-confidence of that group's members to the point of triggering Article 8 applicability, the negative stereotyping of the group had to reach a certain

level. That point could only be decided on the basis of the entirety of the circumstances of the specific case. However, the kinds of considerations which might bear on the assessment could be distilled from the Court's case-law on that point, and in the general approach to the applicability of Article 8 in the case of *Denisov v. Ukraine* [GC], subsequently applied to other issues, in which the negative effect of a statement or an act on someone's "private life" had to rise above a "threshold of severity".

In cases such as the present ones, the relevant factors for deciding whether Article 8 was applicable included, but were not necessarily limited to:

(i) the characteristics of the group (for instance its size, its degree of homogeneity, its particular vulnerability or history of stigmatisation and its position *vis-à-vis* society as a whole);

(ii) the precise content of the negative statements regarding the group (in particular, the degree to which they could convey a negative stereotype about the group as a whole, and the specific content of that stereotype);

(iii) the form and context in which the statements had been made, their reach (which might depend on where and how they had been made), the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity.

It was the interplay of all of these factors which was important. The overall context of each case, in particular the social and political climate prevalent at the time when the statements had been made, might also be an important consideration.

Jews (in *Behar and Gutman*) and Roma in Bulgaria (in *Budinova and Chaprazov*), both groups targeted by the content of the politician's statements, could be seen as being in a vulnerable position.

In the former case, the statements had been virulently anti-Semitic. Although some of them had referred to specific facts, they all had rehearsed timeworn anti-Semitic narratives. In particular, regarding the statements denying the reality of the Holocaust and casting it as a story contrived as a means for financial extortion, this Court and former Commission had invariably seen such statements as attacks on the Jewish community and as incitement to racial hatred, anti-Semitism and xenophobia. Regarding the latter case, the statements appeared to have been deliberately couched in inflammatory terms, visibly seeking to portray Roma in Bulgaria as exceptionally prone to crime and depravity. They had been systematic and characterised by their extreme virulence. In both cases, the statements had amounted to extreme negative stereotyping meant to vilify those groups and to stir up prejudice and hatred towards them.

While the most virulent of the politician's statements in *Behar and Gutman* had been made in two books which had not been in massive circulation, his later becoming the chairman of an ascendant political party and winning second place in a presidential election a few years later must have added considerably the notoriety of his statements about Jews. In *Budinova and Chaprazov*, the politician had frequently repeated his core message on many channels of communication, and it could be accepted that they had reached a wide audience. When making most of those statements, he had been a well-known figure in Bulgarian society and, moreover, his vehement anti-Roma stance appeared to have constituted a core component of his party's political message. The applicants in both cases had lodged their claims against the politician at precisely the time when his political career had been on the rise and when his utterances had thus been gaining more notoriety.

In view of all those factors, which pointed in the same direction and reinforced each other, the impugned statements had been capable of having a sufficient impact on the sense of identity of Jews and Roma in Bulgaria, and on their feelings of self-worth and self-confidence, to have reached the "certain level" or "threshold of severity" required. It had thus affected the applicants' "private life". Article 8 and, therefore, Article 14 were applicable.

(b) *Whether the authorities discharged their positive obligation*

The Bulgarian authorities had not assessed the tenor of the politician's statements in an adequate manner. Although they had acknowledged their vehemence, they had downplayed their capacity to stigmatise both groups and arouse hatred and prejudice against them, and apparently had seen the statements as no more than part of a legitimate debate on matters of public concern. However, it could readily be seen, in *Behar and Gutman*, that the impugned statements in his two books had meant to vilify Jews and stir up prejudice and hatred towards them. Viewed in the light of those earlier statements and of the anti-Semitic discourse in which his political party had been engaging, the politician's statements at the pre-election rally and in Parliament could be seen as directed against, *inter alia*, Jews. In *Budinova and Chaprazov*, his statements had gone beyond being a legitimate part of a public debate about ethnic relations and crime in Bulgaria, amounting as they did to extreme negative stereotyping meant to vilify Roma in that country and stir up prejudice and hatred towards them.

The Court had consistently held that sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups deserved no or very limited protection under Article 10, read in the light of Article 17. That was fully in line with the requirement, stemming from Article 14, to combat racial discrimination. The fact that the author of those statements was a politician or had spoken in their capacity as a member of parliament did not alter that. By in effect ascribing considerable weight to the politician's freedom of expression in relation to the impugned statements, and by playing down their effect on the applicants' right to respect for private life as respectively ethnic Jews and ethnic Roma living in Bulgaria, the domestic courts had failed to carry out the requisite balancing exercise in line with the Court's case-law. By refusing to grant the applicants redress in respect of the politician's discriminatory statements, they had failed to comply with their positive obligation to respond adequately to discrimination on account of the applicants' ethnic origin and to secure respect for their "private life".

Conclusion: violation (unanimously).

Article 41: Finding of violation sufficient in respect of non-pecuniary damage.

(See also *Aksu v. Turkey* [GC], 4149/04 and 41029/04, 15 March 2012, Legal Summary; *Denisov v. Ukraine* [GC], 76639/11, 25 September 2018, Legal Summary; and *Beizaras and Levickas v. Lithuania*, 41288/15, 14 January 2020, Legal Summary)

Discrimination (Article 8)

Temporary refusal to allow men who recently engaged in homosexual intercourse to give blood: *communicated*

Refus temporaire des dons de sang d'hommes ayant eu une activité homosexuelle récente : *affaire communiquée*

Drelon – France, 3153/16 and/et 27758/18, Communication [Section V]

English translation of the summary – Version imprimable

Le droit interne français prévoit une contre-indication au don de sang pour les hommes ayant eu un rapport sexuel avec un autre homme dans une période récente (douze mois selon un arrêté ministériel de 2016, quatre mois selon un nouvel arrêté pris en 2019).

Le requérant dénonce une discrimination selon l'orientation sexuelle, ainsi que le recueil et la conservation par l'Établissement français du sang (EFS) de données personnelles s'y rapportant. Selon lui, ce régime est disproportionné et insuffisamment prévisible.

Affaire communiquée sous l'angle des articles 8 et 14 de la Convention.

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

Unjustified, direct sex discrimination by refusing employment-related benefit to pregnant woman who underwent *in vitro* fertilisation shortly before employment: *violation*

Discrimination directe et injustifiée fondée sur le sexe, résultant du refus d'accorder un avantage social lié à l'emploi à une femme enceinte ayant eu recours à une fécondation *in vitro* peu avant son recrutement : *violation*

Jurčić – Croatia/Croatie, 54711/15, Judgment/Arrêt 4.2.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant entered into an employment contract ten days after she had undergone *in vitro* fertilisation (IVF). When she subsequently went on sick leave, on account of pregnancy-related complications, the relevant domestic authority re-examined her health insurance status. It concluded that, by signing the contract shortly after IVF, the applicant had only sought to obtain pecuniary advantages related to employment status and that her employment was therefore fictitious. Her application to be registered as an insured employee, along with her request for salary compensation due to sick leave, was accordingly rejected. She appealed unsuccessfully.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1

(a) *Whether there was a difference in treatment* – The applicant had been refused the status of an insured employee and an employment-related benefit, on grounds of employment which had been declared fictitious due to her pregnancy. Such a decision could only be adopted in respect of women. It therefore had constituted a difference in treatment on grounds of sex.

(b) *Whether the difference in treatment was justified* – The Government had argued that the decision to revoke the applicant's insurance status had pursued the legitimate aim of protecting public resources from fraudulent use, and the overall stability of the healthcare system. The Court stressed that a woman's pregnancy as such could not be considered fraudulent behaviour, and that the financial obligations imposed on the State during a

woman's pregnancy by themselves could not constitute sufficiently weighty reasons to justify difference in treatment on the basis of sex.

Even assuming that the Court had been generally prepared to accept the aim of the protection of public funds as legitimate, it had to be established whether the impugned measure had been necessary to achieve it, taking into account the narrow margin of appreciation afforded to States in cases where difference in treatment was based on sex.

Precisely because of the fact that the applicant had entered into new employment such a short time before seeking the employment-related benefit in question, the relevant administrative authority had initiated review of the applicant's health insurance status, under suspicion that her employment agreement had been concluded only for her to be able to claim that benefit. Under the applicable legislation, the relevant authorities had been entitled to verify whether the facts on which an individual had based their health insurance status were still valid. However, such review in practice had frequently targeted pregnant women, and women who had concluded an employment contract at an advanced stage of their pregnancies or with close family members had automatically been put in the "suspicious" category of employees whose employment merited verification. Such an approach was generally problematic.

In the present case, the authorities had concluded that the applicant had been unfit to work on the date of concluding her contract because her doctor had recommended her rest, following her IVF ten days before. In particular, they had relied on the fact that the applicant had been expected to work at the employer's headquarters, located far from her place of residence, and that travel in her condition might reduce her chances of a favourable outcome of the fertilisation. As a matter of principle, even where the availability of an employee was a precondition for the proper performance of an employment contract, the protection afforded to women during pregnancy could not be dependent on whether her presence at work during maternity was essential for the proper functioning of her employer, or by the fact that she was temporarily prevented from performing the work for which she had been hired. Moreover, introducing maternity protection measures was essential to uphold the principle of equal treatment of men and women in employment.

By concluding that, due to the IVF, the applicant had been medically unfit to take up the employment in question, the domestic authorities had implied that she had to refrain from doing so until her pregnancy had been confirmed. That conclusion had been in direct contravention to both domestic and international law. It had also been tantamount to discouraging the applicant from seeking employment due to her possible pregnancy.

The foregoing was sufficient to conclude that the applicant had been discriminated against on the basis of her sex. However, the Court found it necessary to point out some additional factors, which had made the difference in treatment even more striking:

– The applicant had regularly paid contributions to the compulsory health insurance scheme during her fourteen years of prior work experience. It could not thus be argued that she had failed to contribute to the insurance fund.

– When entering into her employment, the applicant had had no way of knowing whether the IVF procedure had been successful or whether it would result in her becoming pregnant. Moreover, she could not have known that her future pregnancy, if any, would have resulted in complications which would have required her to be issued sick leave for a prolonged period of time.

– When reviewing the applicant's case, the authorities had failed to provide any explanation of how she could have consciously concluded a fraudulent employment contract, without even knowing whether she would actually become pregnant, particularly bearing in mind that she had not been under any legal obligation to report the fact that she had undergone the IVF procedure or that she might be pregnant while concluding the contract. Domestic law prohibited the employer from requesting any information concerning a woman's pregnancy. Indeed, asking a woman information about her possible pregnancy or planning thereof, or obliging her to report such a fact at the moment of recruitment, would also have amounted to direct discrimination based on sex.

– The authorities had reached their conclusion in the applicant's case without assessing whether she had ever actually taken up her duties and started performing her work assignments for the employer; nor had they sought to establish whether the IVF procedure she had undergone had necessitated her absence from work due to health reasons. There was also nothing to show that women who had undergone the IVF procedure would generally be unable to work during their fertility treatment or pregnancy.

– Finally, the Court expressed concern about the overtones of the domestic authorities' conclusion, which had implied that women should not work or seek employment during pregnancy or possibility thereof. Gender stereotyping of that sort presented

a serious obstacle to the achievement of real substantive gender equality, which was one of the major goals of the member States of the Council of Europe. Such considerations had not only been found to breach domestic law, but had also been at odds with international gender equality standards.

(c) *Overall* – A refusal to employ or recognise an employment-related benefit to a pregnant woman based on her pregnancy amounted to direct discrimination on grounds of sex, which could not be justified by the financial interests of the State. The Court also noted a similar approach in the case-law of the Court of Justice of the European Union and in other relevant international standards. Accordingly, the difference in treatment to which the applicant, as a woman who had become pregnant through IVF, had been subjected, had not been objectively justified or necessary.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 in respect of non-pecuniary damage.

(See also *Napotnik v. Romania*, 33139/13, 20 October 2020, Legal Summary)

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Pre-trial detention of opposition activists predominantly aiming to punish and silence them for active involvement in anti-government demonstrations: v*iolation*

Placement d'opposants en détention provisoire dans le but principal de les punir d'avoir pris une part active dans des manifestations contre le gouvernement et de les réduire au silence : *violation*

Azizov and/et Novruzlu – Azerbaijan/Azerbaïdjan, 65583/13 et al, Judgment/Arrêt 18.2.2021 [Section V]

Traduction française du résumé – Printable version

Facts – Both applicants, members of NIDA, a non-governmental youth organisation, participated in peaceful anti-government demonstrations concerning the deaths of soldiers in the army in non-combat situations. They were arrested and remanded in custody on charges of illegal possession of narcotic substances and Molotov cocktails (second applicant), following searches of their flats and a day before another demonstration was planned. Their pre-trial detention was extended pursuant to a number of domestic court decisions, and their requests for alternative house arrest were dismissed. Additional criminal charges ensued.

Law – Article 5 § 3: The domestic courts had failed to give "relevant" and "sufficient" reasons to justify the need for extending the applicants' pre-trial detention: they had used a standard template merely listing the detention grounds without addressing case-specific facts; they had cited irrelevant grounds and had disregarded the fact that the second applicant was a minor.

Conclusion: violation (unanimously).

Article 18 taken together with Article 5 § 3: The complaint under this Article constituted a fundamental and distinct aspect of the case which merited separate examination.

The applicants in the present case and those in the case of *Rashad Hasanov and Others* had been prosecuted and convicted within the framework of the same criminal proceedings. However, unlike the case of *Rashad Hasanov and Others*, in the present case the Court was not called upon to examine whether the applicants had been deprived of their liberty in the absence of a "reasonable suspicion" of their having committed a criminal offence, as the applicants had not exhausted domestic remedies in this regard. The present case had therefore to be distinguished from cases in which an applicant's right or freedom had been restricted solely for a purpose that was not prescribed by the Convention (compare, for example, *Rashad Hasanov and Others v. Azerbaijan*, *Aliyev v. Azerbaijan* and *Navalnyy v. Russia*), notably the Court had to address the issue of a potential plurality of purposes. In doing so, the Court found as follows:

First, there were sufficient elements to find that the applicants' pre-trial detention had pursued an ulterior motive; namely, punishing and silencing NIDA members for their active involvement in the anti-government demonstrations. In particular, the prosecuting authorities: (i) as found in *Rashad Hasanov and Others*, had clearly targeted NIDA and its members; (ii) had tried from the very beginning of the criminal proceedings to link the applicants' alleged possession of narcotic substances and Molotov cocktails to their NIDA membership; (iii) had used the institution of the criminal proceedings (bearing in mind their timing – on the eve of another demonstration) and the applicants' subsequent pre-trial detention to prevent the organisation of further demonstrations; and (iv) had tried to portray leaflets found in the second applicant's flat and worded "democracy urgently needed, tel: +994, address: Azerbaijan" as illegal material in an attempt to establish intention for incitement to violence

and civil unrest at the demonstration planned the next day.

Secondly, this ulterior motive had been the predominant purpose of the restriction of their liberty. In reaching this conclusion, the Court took into account: (i) the backdrop and pattern of arbitrary arrest and detention of government critics, human-rights defenders and civil society activists, including NIDA members, through retaliatory prosecutions and misuse of the criminal law (as identified in the case of *Aliyev* and reaffirmed in subsequent judgments); (ii) the particular targeting of NIDA as an organisation and its administration with a view to paralysing its activities (*Rashad Hasanov and Others*) and the attempt to prevent further protests via the institution of criminal proceedings against the applicants and their pre-trial detention; and lastly, (iii) the failures of the domestic courts when examining the applicants' pre-trial detention as found under Article 5 § 3.

Conclusion: violation (unanimously).

Article 41: EUR 20,000 to each applicant in respect of non-pecuniary damage. Second applicant's claim for pecuniary damage dismissed.

(See *Rashad Hasanov and Others v. Azerbaijan*, 48653/13 et al., 7 June 2018; *Aliyev v. Azerbaijan*, 68762/14 and 71200/14, 20 September 2018, Legal Summary; and *Navalnyy v. Russia* [GC], 29580/12 et al., 15 November 2018, Legal Summary; see also *Buzadji v. the Republic of Moldova* [GC], 23755/07, 5 July 2016, Legal Summary; *Merabishvili v. Georgia* [GC], 72508/13, 28 November 2017, Legal Summary; and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], 14305/17, 22 December 2020, Legal Summary)

ARTICLE 35

Article 35 § 1

Six-month period/Délai de six mois

Out of time application in respect of continuing conflict-based interference with home/property, introduced six years after State's Convention ratification: *inadmissible*

Introduction hors délai, six ans après la ratification de la Convention, d'une requête concernant une atteinte au respect du domicile/des biens : *irrecevable*

Samadov – Armenia/Arménie, 36606/08, Decision/Décision 26.1.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant was forced to flee from his home and property in Kalbajar (a district surrounding Nagorno-Karabakh) when, in 1993, it was invaded and captured by ethnic Armenian forces. Due to the occupation of Kalbajar, the applicant had not been able to return to his home and property, living instead with his family in housing assigned to them as internally displaced persons.

Law – Article 35 § 1: The present case concerned a continuing situation in a complex post-conflict context affecting large groups of persons. In the context of their accession to the Council of Europe, Armenia and Azerbaijan had given a joint undertaking to seek a peaceful settlement of the Nagorno-Karabakh conflict. That undertaking and the States' ratification of the Convention had led to a phase of intensified contacts and negotiations. Thus, the applicant, like hundreds of thousands of refugees and internally displaced persons, could for some time thereafter have reasonably expected that a solution to the conflict would eventually be achieved, containing a basis for the settlement of property issues and for the question of the return of displaced persons as one aspect. However, several years later the hope of a political solution must have been considered to have turned very weak. In particular, the negotiations conducted by the Organization for Security and Co-operation in Europe (OSCE) Minsk Group had not led to any agreement between the parties to the conflict in the years that followed. Thus, several years after Armenia's ratification of the Convention, potential applications should have become aware that there was no longer any realistic hope of regaining access to their property and home in the foreseeable future.

The present application had been introduced in 2008 more than six years after Armenia's ratification of the Convention and its entry into force in 2002 and, at the time of introduction, more than fifteen years since the applicant's forced displacement from his alleged property and home. His inability to return to his former domicile or to have any other access to or compensation for his property and home had thus remained unchanged for a considerable period of time, during which there had been no domestic petitions made or proceedings conducted and no political solution in sight. There had been no property claims mechanisms or other procedures in either Armenia or Azerbaijan whose conclusion the applicant and other potential claimants had to wait for before applying to the court (see in contrast *Demopoulos and Others v. Greece*). Moreover, there had been no other indication that the applicant had been unable to introduce his application with a shorter delay: more than a thousand similar applications had been lodged with the Court in the years 2004-07. Even

with due regard had to the applicant's personal status as a displaced person, the period of six years had to be considered excessive. Consequently, by introducing his application only at that time, he had failed to act with due diligence.

Conclusion: inadmissible (out of time).

(See *Demopoulos and Others v. Turkey* (dec.) [GC], 46113/99 et al., 1 March 2010, Legal Summary, and *Chiragov and Others v. Armenia* [GC], 13216/05, 16 June 2015, Legal Summary)

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

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

Availability of adequate remedies to respond to an exchange-rate fluctuation between the euro and the currency of a loan, during a period of financial crisis: *inadmissible*

Disponibilité des voies de recours adéquates pour faire face à la modification du taux de change entre l'euro et la devise du prêt, lors d'une période de crise financière : *irrecevable*

Antonopoulou – Greece/Grèce, 46505/19, Decision/ Décision 11.2.2021 [Section I]

English translation of the summary – Version imprimable

En fait – La requérante avait contracté un prêt immobilier en francs suisses afin de bénéficier d'un taux de change favorable et stable. Une clause du contrat prévoyait que tout remboursement du prêt devait se faire sur la base du taux de change au moment du remboursement et pas au moment où le prêt avait été contracté. Ayant dû cesser son activité professionnelle pour des raisons de santé, la requérante demanda à rembourser le prêt. Ce qu'elle fut dans l'incapacité de faire, car le renforcement du franc suisse par rapport à l'euro avait augmenté le montant du prêt d'environ 60%. Devant les juridictions nationales, la requérante a soutenu que la clause en question devait s'analyser en une clause abusive. Elle fut déboutée de ses actions.

En droit – Article 1 du Protocole n° 1 : La modification du taux de change entre l'euro et le franc suisse est intervenue à une période de crise financière qui a touché toute l'Europe, et particulièrement la Grèce, et qui n'a cessé de s'aggraver pendant une longue période. Un tel changement des circonstances était sans doute imprévisible tant pour les banques que pour les emprunteurs et pour ces derniers a atteint un degré tel qui dépassait le risque assumé par un emprunteur lorsque celui-ci, à l'occasion d'un prêt immobilier dans des circonstances normales, fait un choix entre un prêt à taux fixe ou à taux variable. Face à une crise financière d'une telle envergure, l'État se doit de prendre des mesures afin d'éviter que des milliers de personnes ayant contracté des prêts immobiliers aient à subir, sans qu'ils en soient responsables, une charge disproportionnée au risque de perdre leurs biens.

Toutefois, la requérante n'a pas été dans l'ignorance quant aux risques liés à la conclusion d'un contrat de prêt en francs suisses et à la fluctuation vers le haut de cette devise aussi forte pendant la durée du remboursement du prêt qui s'élevait à 25 ans.

Ainsi la requérante, assurée pendant trois ans contre le risque d'une augmentation des mensualités de ses remboursements due à une éventuelle hausse du taux de change, n'a pas opté pour le prolongement de cette assurance. En outre, elle n'a pas non plus opté pour la possibilité de demander à tout moment la conversion de la devise du prêt en euros, prévue par le contrat de prêt. Enfin, entre décembre 2010 et janvier 2015, elle conclut avec sa banque quatre conventions de modification du contrat initial prévoyant la réduction du montant des versements, des extensions des délais de paiement, voire la suspension provisoire du paiement de certaines mensualités.

De 2007 à 2015, la requérante a payé ses mensualités sans invoquer l'impossibilité de s'acquitter de ses obligations en raison de la fluctuation du taux de change. Or, si ses capacités de remboursement étaient diminuées en raison d'un fait imprévu indépendant d'elle ou de la banque, telle la modification brutale sur le plan international de la parité euro/ franc suisse, le droit interne offrait à la requérante des voies de recours adéquates pour faire valoir ses droits relatifs au respect des biens : le recours en annulation devant les juridictions civiles de la clause du contrat de prêt qu'elle estimait abusive, voie qu'elle a utilisée ; la possibilité de demander en justice la renégociation ou même la résiliation du contrat. À cela s'ajoutent les possibilités offertes par le contrat lui-même, d'une part, de demander à tout moment à la banque la conversion de la devise du prêt en euros et de s'assurer contre le risque de l'augmentation des mensualités des remboursements. Quant à l'effectivité de la voie de droit pour laquelle elle a opté, la requérante a eu l'opportunité de développer tous ses arguments devant les juridictions compétentes et d'obtenir un arrêt motivé de manière détaillée et rendu par la formation plénière de la Cour de cassation.

Enfin, la Cour de cassation, sans se référer explicitement à la jurisprudence de la Cour de justice de l'Union européenne, a interprété le droit interne de

manière conforme à celle-ci : une clause contractuelle qui n'est pas négociée individuellement mais qui reflète une règle qui, selon le droit interne, s'applique aux parties contractantes ne peut pas être soumise à un examen quant à son caractère abusif. En effet, la législation nationale a déjà établi un équilibre entre les droits et obligations des parties dans ce type de contrats.

Ainsi, le cadre légal mis en place par l'État offrait à la requérante un mécanisme lui permettant de faire respecter les droits que lui garantissait l'article 1 du Protocole n° 1. Dès lors, l'État défendeur a satisfait aux obligations positives découlant pour lui de cette disposition, et ceci à supposer même que cette dernière s'appliquait en l'espèce.

Conclusion : irrecevable (défaut manifeste de fondement).

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

Right to free elections/Droit à des élections libres
Vote

Disenfranchisement of persons divested of legal capacity affecting only a small group and subject to thorough parliamentary and judicial review: *no violation*

Décision, touchant un groupe de personnes restreint et ayant été soumise à un examen parlementaire et judiciaire approfondi, de radier les personnes privées de la capacité juridique des listes électorales : *non-violation*

Strøbye and/et Rosenlind – Denmark/Danemark, 25802/18 and/et 27338/18, Judgment/Arrêt 2.2.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants were deprived of their legal capacity. As a result, they were disenfranchised and prevented from voting in general elections, including the 2015 parliamentary elections. The applicants unsuccessfully brought proceedings before the Danish courts claiming that they had wrongfully been denied the right to vote in the latter elections.

Law – Article 1 of Protocol No. 3: The restriction had been lawful and pursued the legitimate aim of ensuring that voters in the general elections had the required level of mental skills.

In assessing the proportionality of the said measure, the Court had regard to various of factors.

Firstly, the mentally disabled had not been in general subject to disenfranchisement under Danish law. Nor had persons under guardianship. At the time of the 2015 parliamentary elections, only those persons who had been subject to guardianship under section 5 and who, after an individualised judicial evaluation, had also been found legally incompetent by a court under section 6 of the Guardianship Act, had been excluded from voting in general elections. Under the Act, the principle of proportionality had applied to the imposition, content and lifting of a legal incapacitation order.

Secondly, the disenfranchisement in question had only affected a small group of persons, as the number of persons declared legally incompetent had been rather low.

Thirdly, both the parliamentary review of the necessity of the general measure and the judicial review of the applicants' disenfranchisement had been thorough. In connection to the latter, the Court found that the Supreme Court had thoroughly examined the proportionality and justification of the limitation of the applicants' voting rights and had performed a balancing of interests, in the light of the Court's case-law. The quality of the judicial review of the disputed general measure and its application in the present case therefore militated in favour of a wide margin of appreciation. While that margin was substantially narrower when a restriction of fundamental rights applied to a particularly vulnerable group in society, such as the mentally disabled, the legislation at issue in the present case significantly differed from that examined in *Alajos Kiss v. Hungary*, where all persons, whether under full or partial guardianship, had been subject to an automatic blanket restriction in respect of suffrage.

In addition, a further factor of relevance to the scope of the margin of appreciation was the existence or not of common ground between the national laws of the Contracting States. The Supreme Court had observed that other European countries also had legislation restricting the right to vote in respect of persons who had been deprived of their legal capacity. Indeed, the Court observed that it could not be concluded that there was common ground between the national laws of the Contracting States to uncouple disenfranchisement from deprivation of legal capacity. Nor did the Court discern any common ground at the international and European level in this respect. In the Court's view therefore, the Supreme Court had not overstepped the margin of appreciation afforded to it.

The Court also noted the following:

– It was true that, apart from the individualised judicial evaluation of the applicants' legal capacity, domestic law had not required a separate individu-

alised assessment of their voting capacity. However, under Article 3 of Protocol No. 1 it was not a requirement for depriving a person of his or her right to vote that a specific and individualised assessment of their voting capacity be carried out. In this connection, the lack of European consensus, including as to whether to detach disenfranchisement from deprivation of legal capacity was also relevant. Further, in certain situations a general measure might be found to be a more feasible means of achieving a legitimate aim than a provision requiring a case-by-case examination, a choice, that in principle was left to the legislature in the Member States, subject to European Supervision.

– In cases arising from individual petitions, the Court's task was not to review the relevant legislation or an impugned practice in the abstract but to confine itself as far as possible, without losing sight of the general context, to examining the issues raised in the case before it. In the present case, it had had regard to the historical and political context; the Danish legislator had constantly sought to limit restrictions on the right to vote while also aiming to protect the small group of persons who had been in need of guardianship combined with a deprivation of their legal capacity. The restrictions on the right to vote had therefore been gradually reduced from 1996 onwards. In 2016, persons deprived of their legal capacity had been granted the right to vote in European Parliament, local and regional elections and in 2019, legislation had provided for the possibility of depriving a person "only" partially of his or her legal capacity, with the intended consequence that such a person would retain the right to vote in general elections. The applicants were thus now eligible to vote in general elections. The fact that the change in the legislation had been gradual, requiring thorough legal reflection and time, could not in the Court's view be held against the Government to negate the justification and proportionality of the restriction at issue. In this regard, the changing perspective of society also had to be taken into account.

Accordingly, the present case had significantly differed from the situation in *Alajos Kiss v. Hungary*, in which the Court had found no evidence that the legislature had ever sought to weigh the competing interests or to assess the proportionality of the restriction in question.

In conclusion, the restriction on the applicants' voting rights had been proportionate to the aim sought to be achieved.

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there had been no violation of Article 14 taken in conjunction with Article 3 of Protocol No. 1 as, referring to its reasoning in its examination of the latter provision, it was satisfied that the difference in the treatment of the applicants had pursued a legitimate aim and that there had been a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(See also *Alajos Kiss v. Hungary*, 38832/06, 20 May 2010, Legal Summary; *Ždanoka v. Latvia* [GC], 58278/00, 16 March 2006, Legal Summary; and *Hirst v. the United Kingdom (no. 2)* [GC], 74025/01, 6 October 2005, Legal Summary)

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

Interim measures/Mesures provisoires

The Court grants an interim measure in favour of Aleksey Navalnyy and asks the Government of Russia to release him

La Cour fait droit à la demande de mesure provisoire d'Aleksey Navalnyy et demande au gouvernement russe de le libérer

Navalnyy – Russia/Russie, Interim measure/Mesure provisoire

Press release – Communiqué de presse

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

In order to promote animal welfare in the context of ritual slaughter, member States may, without infringing the fundamental rights enshrined in the Charter, require a reversible stunning procedure which cannot result in the animal's death

Afin de promouvoir le bien-être animal dans le cadre de l'abattage rituel, les États membres peuvent, sans méconnaître les droits fondamentaux consacrés par la Charte, imposer un procédé d'étourdissement réversible et insusceptible d'entraîner la mort de l'animal

Case/Affaire C-336/19, Judgment/Arrêt 17.12.2020

Press release – Communiqué de presse

-oOo-

Before issuing a return decision in respect of an unaccompanied minor, a member State must verify that adequate reception facilities are available for the minor in the State of return

Avant de prendre une décision de retour à l'égard d'un mineur non accompagné, un État membre doit vérifier qu'un accueil adéquat est disponible pour le mineur dans l'État de retour

Case/Affaire C-441/19, Judgment/Arrêt 14.1.2021

Press release – Communiqué de presse

-oOo-

The practice adopted by an employer and consisting in the payment of an allowance only to workers with disabilities who have submitted disability certificates after a date chosen by that employer may constitute direct or indirect discrimination on the grounds of disability

La pratique d'un employeur consistant à verser un complément de salaire aux seuls travailleurs handicapés ayant remis une attestation de reconnaissance de handicap après une date qu'il a lui-même fixée est susceptible de constituer une discrimination directe ou indirecte fondée sur le handicap

Case/Affaire C-16/19, Judgment/Arrêt 26.1.2021

Press release – Communiqué de presse

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

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

The Court has recently published a translation into Romanian of the latest edition of the Admissibility Guide, a translation into Russian of the Guide on Mass Protests, a translation into Serbian of the background paper on "The Authority of the Judiciary" for the Opening of the Judicial Year 2018, and a translation into Macedonian of the Guide on Article 10.

In addition, translations into Romanian of a further eleven Case-Law Guides and five Research Reports have also been published.

All Case-Law Guides and Research Reports can be downloaded from the Court's website.

Водич за Член 10 од Европската конвенција за човекови права Слобода на изразување (MKD)

Ghid practic cu privire la condițiile de admisibilitate (RON)

Массовые протесты (RUS)

Pravosudni seminar 2018: Autoritet sudstva (SRP)

La Cour vient de publier une traduction en roumain de l'édition la plus récente du Guide sur la recevabilité, une traduction en russe du Guide sur les manifestations de masse, une traduction en serbe du document de travail pour le séminaire pour l'ouverture de l'année judiciaire 2018 et une traduction en macédonien du Guide sur l'article 10.

En outre, des traductions vers le roumain de onze guides sur la jurisprudence et de cinq rapports de recherche viennent également d'être publiées.

Tous les guides et rapports de recherche peuvent être téléchargés à partir du site web de la Cour.