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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

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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 lawyers under the authority of the Jurisconsult and are not binding on the Court. They are normally drafted in the language of the case concerned. The translation of the legal summaries into the other official language can be accessed directly through hyperlinks in the Note. These hyperlinks lead to the HUDOC database, which is regularly updated with new translations. The electronic version of the Note may be downloaded at www.echr.coe.int/NoteInformation/en.

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

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

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

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

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Cour européenne des droits de l'homme
(Conseil de l'Europe)
67075 Strasbourg Cedex – France
Tél. : + 33 (0)3 88 41 20 18
Fax : + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
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Positive obligations (substantive aspect)/ Obligations positives (volet matériel) Effective investigation/Enquête effective

Failure to prevent gender-based violence by a police officer and to investigate the law-enforcement authorities' passive response: *violations*

Manquement à l'obligation d'empêcher des violences fondées sur le sexe commises par un policier et d'enquêter sur la passivité des forces de l'ordre : *violations*

A and/et B – Georgia/Géorgie, 73975/16, Judgment/ Arrêt 10.2.2022 [Section V]

Traduction française du résumé – Printable version

Facts – The applicants are the mother and son of C, who was murdered by her partner (D), a police officer at the relevant time. Over the course of several years, C and her family reported numerous incidents of domestic abuse carried out by D. D was convicted of the murder. The first applicant, acting on behalf of herself and the second applicant, complained to relevant law-enforcement authorities of the failures of relevant police officers and public prosecutors to protect C's life and to give proper consideration to the repeated reports of domestic violence. In civil proceedings, the applicants were awarded approximately EUR 7,000 in compensation for non-pecuniary damage.

Law – Article 2 taken in conjunction with Article 14

(a) *Procedural aspect* – The competent authority had not made an attempt to establish responsibility on the part of the officers for their failure to respond properly to the multiple incidents of gender-based violence occurring prior to C's murder. Nor had they deemed it necessary to grant the applicants victim status. No disciplinary inquiry into the police's alleged inaction had even been opened, and no steps had been taken to train the police officers in question on how to respond properly to allegations of domestic violence in the future. The applicants had received no response whatsoever as regards their complaint calling into question the inaction of the public prosecutor.

In the light of the relevant circumstances of the case, in particular the existence of indices pointing to possible gender-based discrimination as at least partly informing the response of law enforcement to the complainant and the complaints, and the fact that they had permitted the alleged perpetrator to participate in the questioning of the complainant and victim of the alleged domestic abuse, there had been a pressing need to conduct a meaningful investigation into the response of law enforcement. The fact that the alleged perpetrator had been a member of law enforcement himself, and that the threats he had used against the victim and her family had referred to that fact and what he considered to be his impunity, had rendered the need for a proper investigation all the more pressing.

The above considerations were sufficient to conclude that there had been a breach of the State's procedural obligations. However, the Court also noted the insufficiency of the redress offered by the two other sets of domestic proceedings. The criminal prosecution of the perpetrator had not involved any examination of the possible role of gender-based discrimination in the commission of the crime. As regards the civil proceedings brought by the applicants against the law-enforcement authorities, the domestic courts had not expanded their scrutiny to the question of whether the official tolerance of incidents of domestic violence might have been conditioned by the same gender bias. Nor had they addressed the question of whether there had been indications of the relevant law-enforcement officers' acquiescence or connivance in the gender-motivated abuses perpetrated by their colleague. Those gaps did not sit well with the respondent State's heightened duty to tackle prejudice-motivated crimes.

In the particular circumstances of the case, and having regard to the nature and quantum of the pecuniary award, the applicants had maintained their victim status and there had been a breach by the respondent State of its procedural obligations.

Conclusion: violation (unanimously).

(b) *Substantive aspect* – There had been a lasting situation of domestic violence, which meant that there could be no doubt about the immediacy of the danger to the victim, and that the police had known or ought to have known of the nature of that situation. However, the police had failed to display the requisite special diligence and had committed major failings in their work such as inaccurate, incomplete or even misleading evidence gathering and not attempting to conduct a proper analysis of what the potential trigger factors for the violence could be.

Further, while the domestic legislative framework provided for various temporary restrictive measures in respect of alleged abusers, the relevant domestic authorities had not resorted to them at all.

The inactivity of the domestic law-enforcement authorities was even more concerning when assessed

against the fact that the abuser had himself been a police officer. What is more, the law-enforcement authorities had been aware that he had been using various attributes of his official position to commit the abuse. They had not only failed to put an end to such, but had allowed him to participate in the questioning of the victim and had soon after promoted him to a higher police rank. Member States were expected to be all the more stringent when investigating and, where appropriate, punishing their own law-enforcement officers for the commission of serious crimes. This was because what was at stake was not only individual criminal-law liability of the perpetrators, but also the State's duty to combat any sense of impunity felt by the offenders by virtue of their office, and to maintain public confidence in and respect for the law-enforcement system.

Overall, the case could be seen as yet another vivid example of how general and discriminatory passivity of the law-enforcement authorities in the face of allegations of domestic violence could create a climate conducive to a further proliferation of violence committed against victims, merely because they were women. Despite the various protective measures available, the authorities had not prevented gender-based violence against the applicants' next of kin, which had culminated in her death, and they had compounded that failure with an attitude of passivity, even accommodation, as regards the alleged perpetrator, later convicted of the victim's murder.

Conclusion: violation (unanimously).

Article 41: EUR 35,000 jointly in respect of non-pecuniary damage.

(See also *Tkhelidze v. Georgia*, 33056/17, 8 July 2021, Legal Summary)

Effective investigation/Enquête effective

Thorough and sufficient scope of legacy inquest into fatal shooting by soldiers in Northern Ireland, despite certain identified weaknesses: *inadmissible*

Enquête sur des coups de feu mortels tirés par des soldats en Irlande du Nord suffisamment approfondie et étendue malgré quelques lacunes relevées : *irrecevable*

Gribben – United Kingdom/Royaume-Uni, 28864/18, Decision/Décision 25.1.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – In 1990, the applicant's brother (Mr McCaughey) and another were shot and killed by soldiers from a specialist unit of the British Army in Northern Ireland. An inquest was opened in 2012 and ended the same year with a unanimous verdict of "lawful killing".

In *McCaughey and Others v. the United Kingdom*, the Court found a violation of Article 2 (procedural limb) for the excessive delays in the investigative process into the circumstances of the deaths. In the present application, the applicant complains under the procedural limb of Article 2 in relation to the conduct of the inquest.

Law – Article 2

(a) *Preliminary observations* – The Court had not intended for the specific requirements of the duty to investigate to be considered in a piecemeal and incremental fashion. As the separate requirements were not ends in themselves, compliance with the essential parameters had to be considered jointly and not separately. Furthermore, it had envisaged a global assessment of all relevant investigatory steps taken by the authorities. However, in the cases concerning conflict-related deaths in Northern Ireland, the focus had been primarily on the inquests. In the United Kingdom, inquests played an important role in discharging the State's investigatory duty under Article 2, although an inquest, in and of itself, was neither necessary nor necessarily sufficient to discharge that duty.

There were good reasons why such emphasis had been placed on the inquest procedure in Northern Ireland and in the present case the main thrust of the applicant's complaints had concerned the conduct of the inquest. However, the inquest procedure was currently unable to cope due to the large number of ongoing and pending legacy inquests and that the coronial system was beset by systemic delay. That being so, it would neither be desirable nor appropriate for the Court to act as a court of further appeal addressing each and every challenge to the inquest procedure if and when it arose. Not only would the Court effectively become a "court of fourth instance", but the problem of delay at domestic level would be further exacerbated.

Once an application was lodged, it would usually fall to the Court, at the point at which it examined the complaints, to carry out a global assessment of the investigation which had taken place to date by reference to the essential parameters identified in its case-law. Nonetheless, in *McCaughey and Others*, the Court had only dealt with the complaint concerning the promptness of the investigation and had informed the applicants that, if dissatisfied in the future with the progress or outcome of ongoing domestic procedures, it would be open to them to reintroduce their complaints. On the particular facts of the case at hand, the Court accepted that

the present application concerned new aspects which it had not covered in its previous judgment.

(b) *Assessment of the inquest* – The Court confined its assessment to the specific complaints made by the applicant about the conduct of the inquest. She made five complaints in that regard:

(i) *The disclosure of material to the next of kin* – The applicant complained that the Coroner had refused to provide her with disclosure of the involvement of the soldiers in other lethal force incidents and had prevented the next of kin from questioning the soldiers and other witnesses about such matters; and that references to such incidents in the soldiers' statements had not been put before the jury, thereby creating a false impression that the soldiers had not been involved in such incidents.

While the Court agreed that the material ought to have been disclosed to the next of kin when it had first been sought, it was not persuaded that as a consequence of the non-disclosure the applicant had been excluded from the investigative process to such a degree as would infringe the minimum standard under Article 2. Furthermore, in view of the Court of Appeal's conclusion that this material was either not relevant or not material, the Court was similarly not persuaded that the decision to prevent the next of kin from questioning the soldiers and other witnesses about those other lethal force incidents and to remove references to such incidents in the statements put before the jury had prevented examination of those aspects which had fallen within the scope of the inquest.

(ii) *The recall of one of the soldiers* – The domestic courts had considered it desirable for one of the soldiers ("soldier A") to have returned to give further evidence to the inquest. However, the Coroner's decision to conclude the inquest without that further evidence could not be impugned. The difficulties connected with the recall of soldier A, now a private citizen living abroad, were an inevitable consequence of the delay in conducting the inquest; his availability and whereabouts were not known; and in the circumstances, the Coroner had considered that the value in completing the inquest efficiently and while the evidence had still been fresh in the mind of the jury had outweighed the value in speculatively trying to seek A's attendance. Soldier A's statement, together with other evidence and findings, had been read to the jury and they had been informed of the situation concerning Soldier A. Moreover, the participants had been permitted to make their own submissions to the jury on the relevant matters.

(iii) *The conduct of the inquest with a jury* – The applicant had not challenged the engagement of a jury *per se* before or during the inquest. Had she done so, the Coroner and possibly the domestic courts would have been able to consider the risk of bias and, if such a risk had been found to exist, direct that the inquest be conducted by the Coroner sitting alone. Instead, the applicant had only brought her challenge after the jury had delivered its verdict, when the only remedy would have been to quash the verdict and order a fresh inquest. That would have caused significant further delay which in turn would have further compromised the adequacy and effectiveness of the investigation. As such, the domestic courts could not be criticised for refusing leave to apply for judicial review on that ground.

(iv) *The decision not to discharge a specific juror* – It had been open to the Coroner to have investigated, of his own motion, allegations as to one of the juror's inappropriate or hostile behaviour towards the next of kin. Indeed, in view of the highly sensitive nature of the inquest, it might have been preferable for him to have done so. However, given Coroner's clear findings in relation to the relevant juror, which had been twice upheld on appeal, and the jury's clear and unanimous verdict, that matter did not in and of itself seriously prejudice the investigation as a whole.

(v) *The Coroner's questions, directions and summations to the jury* – Unlike other previous legacy inquests considered by the Court, in the present case the jury had been tasked with providing not just a short-form verdict but also a longer, narrative verdict on the issues central to the inquest. While the Coroner's questions, directions and summations to the jury had helped to shape the narrative verdict, the latter had provided an important check on the role of the Coroner as it had allowed the jury to elucidate the reasoning behind its verdict, and had made it possible to determine the impact on the jury of any deficiencies in the Coroner's directions.

The Court did not consider that the Coroner's direction to the jury had fallen significantly short of ensuring that the soldiers' recourse to lethal force had been assessed by reference to the Convention standard of "absolute necessity", or that the fact-finding role of the inquest had in any way been undermined. When the narrative verdict was considered together with the Coroner's questions and summation to the jury, it was clear that the jury had considered that each of the soldiers had honestly and reasonably believed that their lives had been in danger both when they had opened fire and as they had continued to fire; that the force used throughout had been reasonable in the circumstances; and that once the soldiers had felt compromised the use of force had been absolutely necessary, there having been no other reasonable course of action available to them.

Overall, the inquest had been thorough, with a scope which had extended beyond matters directly causative of the deaths and which had encompassed broader questions relating to the planning and scope of the operation. While the Court had identified certain weaknesses in the inquest, it did not consider that those, either individually or cumulatively, had undermined the ability of the inquest to fulfil that essential purpose.

Conclusion: inadmissible (manifestly ill-founded).

(See *McCaughey and Others v. the United Kingdom*, 43098/09, 16 July 2013, Legal Summary)

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations/Droits et obligations de caractère civil
Fair hearing/Procès équitable

Non-renewal of a foreign judge's secondment to the judicial services of the respondent State, complaint concerning inadequacy of procedural guarantees: *communicated*

Non-renouvellement du détachement d'un magistrat étranger auprès des services judiciaires de l'État défendeur, grief d'insuffisance des garanties procédurales : *affaire communiquée*

Levrault – Monaco, 47070/20, Communication [Section V]

English translation of the summary – Version imprimable

Magistrat français, le requérant fut détaché auprès de la Principauté de Monaco pour exercer les fonctions de juge chargé de l'instruction pendant une durée de trois ans, expirant en août 2019.

Fin 2018, le requérant demanda le renouvellement de son détachement pour trois nouvelles années. Les autorités monégasques puis françaises émirent un avis favorable. Cependant, en juin 2019, les autorités monégasques firent savoir qu'elles renonçaient finalement à solliciter sa reconduction.

Interrogé sur les motifs de ce revirement, le directeur des services judiciaires de la Principauté répondit que les décisions prises à ce titre constituent des actes de gouvernement et de souveraineté, qui n'ont pas à être motivés et échappent au contrôle juridictionnel.

Il précisa accessoirement que le changement de position de la Principauté tenait à la mise en œuvre d'une nouvelle politique pénale, ainsi qu'aux relations du requérant avec certains acteurs de la chaîne pénale.

Une ordonnance souveraine mit fin aux fonctions du requérant. Ses recours furent vains.

Le requérant voit dans cette non-reconduction une atteinte à son indépendance en tant que juge. Il estime par ailleurs que le rejet de son recours en annulation est insuffisamment motivé, et dénonce un manque d'indépendance et d'impartialité du Tribunal suprême.

Affaire communiquée sous l'angle de l'article 6 § 1 de la Convention (avec des questions sur l'applicabilité de son volet civil, et sur le processus de sélection des membres du Tribunal suprême).

Access to court/Accès à un tribunal

Cancellation without judicial review of the suspensive effect of fathers' appeals, thereby enabling their children to leave the country with their mothers and removing the jurisdiction of the domestic courts: *violations*

Retrait, sans contrôle judiciaire, de l'effet suspensif des recours des pères, ayant permis le départ à l'étranger des enfants avec leurs mères et ainsi entraîné l'incompétence des tribunaux internes : *violations*

Plazzi – Switzerland/Suisse, 44101/18, Judgment/Arrêt 8.2.2022 [Section III]
Roth – Switzerland/Suisse, 69444/17, Judgment/Arrêt 8.2.2022 [Section III]

English translation of the summary in the *Plazzi* and *Roth* cases – Version imprimable dans les affaires *Plazzi* et *Roth*

En fait – Dans les affaires *Plazzi* et *Roth*, l'Autorité de protection de l'enfant et de l'adulte (APEA) a autorisé le transfert du domicile des enfants des requérants, les pères, à l'étranger et a décidé de l'absence d'effet suspensif d'un éventuel recours.

La décision de l'APEA étant immédiatement exécutoire, dans l'affaire *Plazzi*, l'enfant du requérant V.R. a déménagé avec sa mère D.R. à la Principauté de Monaco le jour même de la notification de la décision et dans l'affaire *Roth*, l'enfant du requérant L.L. a déménagé avec sa mère F.L. en Allemagne dans les jours qui suivirent cette décision.

Les requérants se plaignent de ne pas avoir pu s'opposer, devant un tribunal national, à la décision de l'APEA. À la suite du déménagement des mères et des enfants, les juridictions suisses se sont déclarées incompétentes pour traiter du recours des requérants au fond et décider du rétablissement de l'effet suspensif, car les transferts du domicile des

enfants à l'étranger ont entraîné le transfert de la compétence internationale à ces États.

En droit – Article 6 § 1

a) *Définition de l'objet du litige pendant* – Le changement de lieu de résidence des enfants a entraîné le transfert de la compétence internationale à ces États et donc l'incompétence des juridictions suisses pour connaître des recours des requérants en application de l'article 5 de la Convention de La Haye de 1996. Par conséquent, suite au recours des requérants contre les décisions de l'APEA, le Tribunal d'appel (affaire *Plazzi*) et la Cour suprême cantonale de Berne (ci-après « la Cour suprême bernoise ») (affaire *Roth*) ont constaté qu'ils n'étaient plus compétents pour se prononcer sur les recours, traiter des demandes de rétablissement de l'effet suspensif et du fond de l'affaire. Le Tribunal fédéral confirma ces décisions dans les deux affaires.

b) *Limitation du droit d'accès à un tribunal* – Les requérants ont subi une limitation de leur droit d'accès à un tribunal qui a été causée par le retrait par l'APEA de l'effet suspensif à un éventuel recours et qui a été matérialisée par la déclaration d'incompétence des tribunaux nationaux.

c) *Justification de la limitation* – Les juridictions nationales, s'étant déclarées incompétentes, n'ont pas pu réaliser un examen effectif et complet en fait et en droit, lors d'un examen contradictoire des affaires au cours d'un procès équitable respectant les garanties de l'article 6 § 1.

Les arrêts de ces juridictions se fondent sur la Convention de La Haye de 1996 qui ne s'applique qu'aux situations dans lesquelles il y a eu un déplacement du lieu de résidence habituelle d'un enfant au sens de son article 5. Ces arrêts n'étaient pas arbitraires et peuvent être justifiés si l'on considère seulement l'aspect du changement accompli de la résidence habituelle.

Cependant, le retrait de l'effet suspensif à un éventuel recours a été décidé par l'APEA, qui est une autorité administrative, sans que le Tribunal d'appel ou la Cour suprême bernoise puis le Tribunal fédéral n'aient pu remédier à cette situation. Le contrôle effectif ultérieur d'un organe judiciaire de pleine juridiction national a été exclu par l'APEA.

Il existe des situations exceptionnelles, dûment justifiées par l'intérêt supérieur de l'enfant, dans lesquelles l'urgence particulière commande que le parent concerné puisse changer le domicile de l'enfant sans devoir attendre le jugement définitif au fond. Dans de tels cas, il est suffisant mais nécessaire qu'une procédure effective de recours avec des mesures provisionnelles soit à disposition. Il n'est dès lors pas exclu que les autorités administratives retirent exceptionnellement l'effet suspensif à un éventuel recours. Toutefois, dans de telles circonstances, il faut qu'il soit assuré que le parent concerné ait la possibilité de s'adresser à un juge avant que le retrait de l'effet suspensif n'entre en vigueur et qu'il soit rendu attentif à la procédure à suivre.

L'APEA et le Gouvernement ont justifié l'urgence qui commandait le retrait de l'effet suspensif d'un éventuel recours à savoir l'intérêt supérieur des enfants pour lesquels l'APEA souhaitait éviter l'impact négatif d'un éventuel recours. Or les raisons de l'urgence invoquées dans les présentes espèces n'étaient pas assez graves pour justifier l'impossibilité pour les requérants de s'adresser à un juge avant l'entrée en vigueur du retrait de l'effet suspensif. Cela d'autant plus s'agissant d'une procédure relevant du droit de la famille, susceptible d'avoir des conséquences très graves et délicates pour les requérants dans la mesure où des questions du futur rapport avec leurs enfants ainsi que leurs droits vis-à-vis de ces derniers étaient directement en jeu.

Pour le Gouvernement, les requérants auraient pu demander la restitution de l'effet suspensif au Tribunal d'appel ou la Cour suprême bernoise, le jour même de la notification de la décision de l'APEA. Si ces juridictions avaient accédé aux demandes des requérants, la compétence internationale de la Suisse pour le fond de l'affaire aurait été maintenue. En tout état de cause, ce moyen leur aurait permis de faire examiner par une autorité judiciaire le risque d'un transfert de la compétence internationale vers l'étranger.

Dans l'affaire *Plazzi*, le requérant n'a pas tardé à introduire son recours auprès du Tribunal d'appel le mardi 29 août 2017 au regard de la date de la notification de la décision le vendredi 25 août 2017. Le requérant ne s'est pas abstenu d'utiliser les voies de recours existantes au moins en théorie. En outre, D.R. est partie avec V.R. pour la Principauté de Monaco le jour même de la notification de la décision de l'APEA et dès lors le requérant n'avait aucune chance de s'adresser au Tribunal d'appel pour restituer l'effet suspensif de son recours afin de maintenir la juridiction de la Suisse et avoir accès à un tribunal au fond.

Dans l'affaire *Roth*, la Cour peut se poser la question du temps que le requérant a pris pour réaliser son recours devant la Cour suprême bernoise, soit presque un mois, au regard de la date de la notification de la décision et de sa connaissance de la date de début du nouveau travail de F.L. en Allemagne. Le requérant n'a donc *a priori* pas utilisé une voie de recours existante en théorie dans un délai raisonnable. Il incombait au requérant après qu'il eut pris

connaissance de la décision litigieuse de s'enquérir lui-même, en s'entourant au besoin de conseils éclairés, des recours disponibles. Cependant, la recherche des recours disponibles contre la décision de l'APEA, après avoir eu connaissance de celle-ci le jour de sa notification le mercredi 27 janvier 2016, en présence d'une situation juridique complexe, a pu demander un certain temps au requérant et à son avocat. Tout en admettant que ce ne soit pas un argument valable en soi, la Cour reconnaît qu'il ne leur restait donc que trop peu de temps pour introduire la demande de saisine à titre superprovisionnel et *a fortiori* obtenir une décision juridictionnelle, préalablement au départ de L.L. avec F.L. en Allemagne qui s'est probablement réalisé l'après-midi du vendredi 29 janvier 2016 sachant que F.L. commençait son nouveau travail en Allemagne le lundi 1er février 2016.

Aussi, dans les deux affaires, le Gouvernement n'a pas apporté la preuve de la mise en œuvre et de l'efficacité pratique des recours qu'il suggère dans les circonstances particulières de la cause, avec des exemples de jurisprudence pertinente des tribunaux nationaux dans une affaire analogue.

Ainsi un tel recours devant le Tribunal d'appel ou la Cour suprême bernoise n'aurait pas présenté des perspectives raisonnables de succès relativement au grief formulé par les requérants sur le terrain de l'article 6 § 1.

Par conséquent les requérants n'ont pas pu avoir accès à un tribunal national, avant le départ à l'étranger des enfants avec leurs mères, pour contester la décision de l'autorité administrative « APEA » au fond et demander le rétablissement de l'effet suspensif.

Le droit d'accès à un tribunal était atteint dans sa substance même par les décisions de l'APEA de retirer l'effet suspensif du recours des requérants, suivi du départ à l'étranger des enfants avec leurs mères, qui a entraîné l'incompétence des tribunaux suisses à travers le transfert de la compétence internationale vers les pays de destination respectifs. Cette limitation était disproportionnée au but poursuivi, à savoir la protection des droits et libertés de la mère et de l'enfant du requérant, au regard de l'importance pour les requérants des questions soulevées par la procédure litigieuse.

Conclusion : violation (unanimité).

Article 41 : 12 000 EUR à chacun des requérants pour préjudice moral.

Fair hearing/Procès équitable

Fair balance between parties in, and adversarial nature of, civil proceedings not upset by participation of a prosecutor, independent officer with no special powers under domestic law: *no violation*

Juste équilibre entre les parties et caractère contradictoire d'une procédure civile, qui n'ont pas été compromis par la participation d'un procureur, fonctionnaire indépendant ne disposant pas de pouvoirs spéciaux en droit interne : *non-violation*

Kramareva – Russia/Russie, 4418/18, Judgment/Arrêt 1.2.2022 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant brought proceedings against a company, as her previous employer, after the termination of her employment contract. She asked the court to declare the termination unlawful and to reinstate her; to award her compensation for lost earnings and non-pecuniary damage; and for the company to provide her with copies of some work-related documents. A prosecutor was present at the hearing. At the end of the hearing, he gave an opinion that the applicant's claims should be allowed in part and the remainder dismissed. The District Court allowed the applicant's claims relating to the provision of document copies and award of compensation for non-pecuniary damage, but found that the termination of the applicant's employment contract had been lawful and dismissed the remainder of the claims. The applicant appealed unsuccessfully; during the appeal hearing, the prosecutor supported the judgment of the District Court.

Law – Article 6 § 1: The crux of the applicant's complaints was the fact of the prosecutor's participation in the proceedings.

The Court noted the existence of various approaches to the examination of that issue in the case-law, as well as the variety of models of prosecutorial participation in civil proceedings across Europe. The existing approaches were neither irreconcilable, nor did they call for any general pronouncement of the compatibility of any model of prosecutorial intervention in civil cases with the requirements of Article 6.

The Russian civil procedural law afforded the parties an opportunity to submit their written or oral comments after the prosecutor's intervention in the proceedings. Under Russian domestic law, the prosecutor was an independent officer with legal expertise and his or her participation in certain categories of civil cases was provided for by law, if the protection of the civil rights and lawful interests of society or the State so required. The prosecutor's opinion could not predetermine the position of a

court in a case and his or her participation as such did not prevent the parties from fully exercising their rights; nor did it upset the balance between the parties or infringe the principle of adversarial procedure. They enjoyed no special powers in civil proceedings, did not attend courts' deliberations and their opinions were public and open for comments.

It was most appropriate in the present case to follow the approach flowing from the general principles common to the Court's case-law on participation of independent legal officers in civil proceedings, in the light of specific considerations previously identified in Russian cases. Accordingly, the Court had to ascertain whether, in view of the prosecutor's participation, the principles of equality of arms and of adversarial proceedings had been adequately safeguarded in the case at hand and, therefore, whether the "fair balance" that ought to prevail between the parties had been respected.

In the instant case, the prosecutor had given an opinion that the applicant's reinstatement claim should be dismissed as lacking basis in domestic law. Nothing proved that in doing so the prosecutor had acted as the applicant's adversary in the proceedings or acted *ultra vires* in securing the public interest. The applicant's argument that the prosecutor's opinion had unduly influenced the courts, had special significance over and above submissions of the parties, and that the courts had been bound by that opinion, had been pure speculation and not supported by any specific and tangible proof. Those arguments had not been supported by any reference to relevant legal provisions either. There were therefore no grounds to infer any divergence from the principle of equality of arms in the present case. Moreover, in line with the principle of adversarial proceedings, the prosecutor's opinion had been made public and been put on record, the parties had known of its contents and, in law and in practice, had had an effective opportunity to make submissions in reply to it.

In the absence of further arguments by the applicant, there were no grounds to conclude that the opinion had unduly influenced the courts, prevented the applicant from bringing an effective defence or otherwise upset the fair balance between the parties.

Conclusion: no violation (six votes to one).

(See also *Menchinskaya v. Russia*, 42454/02, 15 January 2009; *Batsanina v. Russia*, 3932/02, 26 May 2009, Legal Summary; and *Gruba and Others v. Russia*, 66180/09 et al., 6 July 2021, Legal Summary)

Fair hearing/Procès équitable

No sufficiently compelling reason justifying a retrospective law determining the substance of pensions disputes in pending proceedings: *violation*

Aucune raison assez impérieuse pour justifier une loi rétroactive réglant au fond des litiges en matière de pensions faisant l'objet de procédures pendantes : *violation*

D'Amico – Italy/Italie, 46586/14, Judgment/Arrêt 17.2.2022 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant successfully brought domestic proceedings in relation to the amount she received from her survivor's pension after the death of her husband. The relevant authority appealed. While those proceedings were pending, new domestic legislation, providing an authentic interpretation of the law at issue, entered into force. Consequently, the appeal was allowed, the first-instance judgment was reversed and the applicant's claim was dismissed.

Law – Article 6 § 1: The new law had settled once and for all the terms of the disputes before the ordinary courts retrospectively. The enactment of the law while the proceedings had been pending had determined the substance of the disputes, and its application by the various courts had made it pointless for an entire group of individuals in the applicant's position to carry on with the litigation. It thus had had the effect of definitively altering the outcome of the pending litigation to which the State was a party, endorsing the State's position to the applicant's detriment.

Only compelling general-interest reasons could be capable of justifying such interference by the legislature:

The Government had repeatedly argued that there had been a minority strand of case-law that had been unfavourable to individuals in the same position as the applicant. However, the Court could not discern why the conflicting court decisions, especially after a judgment had upheld the approach in favour of the applicant, would have required legislative intervention while proceedings had been pending. Such divergences were an inherent consequence of any judicial system based on a network of courts with authority of area of their territorial jurisdiction, and the role of a supreme court was precisely to resolve conflicts between decisions of the courts below.

The Government had also argued that the law had been necessary to tackle the heavy financial im-

balance of the pension system. However, financial considerations could not by themselves warrant the legislature substituting itself for the courts in order to settle disputes.

They had further argued that the law had been necessary to achieve a homogenous pension system, in particular by abolishing a system which had favoured pensioners of the public sector over others. While this was a reason of some general interest, it was not compelling enough to overcome the dangers inherent in the use of retrospective legislation, which had had the effect of influencing the judicial determination of a pending dispute.

The present case was different from that of other Court cases cited by the Government (see the references below), where the applicants had attempted to take advantage of the deficiencies in the law at issue and the action by the State to remedy the situation had been foreseeable. In the present case, however, there had been no major flaws in the law. Against that background, even assuming that the law had sought to reintroduce the legislature's original intention, the aim of harmonising the pensions system had not been sufficiently compelling. Indeed, even accepting that the State had been attempting to adjust a situation it had not originally intended to create, it could have done so without resorting to a retrospective application of the law.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 in respect of non-pecuniary damage and EUR 9,700 in respect of pecuniary damage.

(See also *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 21319/93 et al., 23 October 1997, Legal Summary; and *OGIS-Institut Stanislas, OGEC Saint-Pie X and Blanche de Castille and Others v. France*, 42219/98 and 54563/00, 27 May 2004, Legal Summary)

Reasonable time/Délai raisonnable

Unreasonable length of proceedings, lasting six years and ongoing, for grandparent requesting foster care of grandchildren without parental care, not justified by Covid-19 related measures: *violation*

Durée excessive, non justifiée par des mesures liées à la Covid-19, d'une procédure – qui dure depuis six ans – engagée par des grands-parents pour obtenir la garde de leurs petits-enfants privés de protection parentale : *violation*

Q and/et R – Slovenia/Slovénie, 19938/20, Judgment/Arrêt 8.2.2022 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants are grandparents of two children who were left without parental care. The applicants' daughter was killed by her husband and the applicants' grandchildren (then 3 and 5 years of age) came to stay with the applicant grandparents. After a few months, social services placed them in a foster family in another region. The first applicant requested a foster care permission with respect to her grandchildren.

Law

Article 6 § 1: The first applicant complained of the length of the foster care permission proceedings, which had so far lasted almost six years and were currently pending at first instance following the remittal of the case by the Constitutional Court.

Regarding the complexity of the case, while the domestic courts had had to resort to expert opinions in order to determine the applicant's ability to act as a foster carer of her grandchildren and to identify the best interests of the latter in the sensitive circumstances of the case, that fact alone could neither explain nor justify that, after almost six years, the proceedings were still pending before the first-instance court.

Apart from certain periods of inactivity, the main reasons for the length of the proceedings related to the preparation of the expert reports, the remittal of the case following the first applicant's constitutional complaint and the measures related to the Covid-19 pandemic:

Regarding the first two issues, it was for Contracting States to organise their judicial system in such a way that their courts were able to guarantee everyone the right to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time. That applied to both the failure of the first instance court to appoint a special guardian and examine an expert, which had resulted in a remittal of the case, as well as the difficulties which had arisen due to the inadequate provision of experts or their excessive workload, which had resulted in significant delays. The Court furthermore noted that the appointed experts had been acting in the context of judicial proceedings supervised by the judge; the latter had remained responsible for the preparation of the case and for the speedy conduct of the trial.

On the other hand, the restrictions necessitated by the Covid-19 crisis could have understandably had an adverse effect on the processing of cases before the domestic courts. However, in the present case that could not absolve the State from its responsibility for the lengthy proceedings. In particular, the case would have been dealt with during the

periods of Covid-19 related restrictions had it been classified as urgent. In view of the limited nature of contact between the first applicant and her grandchildren, the importance of what had been at stake for the first applicant (namely, her wish to look after her grandchildren following her daughter's death) had called for special diligence on the part of the authorities, especially taking into account the first applicant's argument concerning the effect of the passage of time on her relationship with the grandchildren.

The Court considered that the first applicant's own conduct had not delayed the proceedings to any significant degree. Moreover, given the main reasons behind the delays and the dismissal of the first applicant's acceleratory remedies, the Court was not convinced that, by availing herself of those remedies at an earlier stage of the proceedings, she could have influenced their course in any significant way.

Overall, the present case, even assuming that it had been of a certain complexity, had not been heard within a reasonable time.

Conclusion: violation (unanimously).

Article 8: The applicants also complained, on the one hand, about the domestic courts' refusal to examine one of the experts, and, on the other hand, of the courts' failure to hear the views of the grandchildren and appoint a special guardian to represent their interests.

As regards the first complaint, the first-instance court had read the relevant expert's opinion, but had refused to examine him at the hearing because of, *inter alia*, his limited field of expertise. Two experts had been appointed when the contact between the applicants and their grandchildren had initially been determined and a new expert report had been prepared by the appointed child psychiatrist following the applicants' request for extended contact. The applicants had been able to respond to her opinion in writing and orally at the hearing at which she had been examined. The first and second instance courts had explained why the relevant expert had not been examined and their reasons had been found to be adequate by the Constitutional Court. Having regard to the foregoing, and the fact that the first applicant had later objected to the relevant expert's report, the Court did not find the domestic courts' refusal to examine the expert unreasonable.

As regards the second complaint, the grandchildren had not been heard by the domestic court because the court-appointed child psychiatrist had considered that, at that time, they had not been capable of forming their view on the matter (at the time they had been eight and five years old respectively). The domestic court, in reaching its decision on contact, had relied largely on the report prepared by the aforementioned expert, who had examined the children. There was no reason to call into question the domestic court's decision not to hear the children directly. In so far as the applicants had complained about the fact that the children's interests had been represented by the Social Work Centre and not by a special guardian, the grandchildren were not applicants in the present case. Further, no arguments had been put forward demonstrating that the alleged flaw of representation could have affected the applicants' position in those proceedings.

Conclusion: no violation (unanimously).

Article 41: EUR 3,000 to the first applicant in respect of non-pecuniary damage.

Tribunal established by law/Tribunal établi par la loi

Manifest breaches, following legislative reform, in appointment to Supreme Court's Civil Chamber of judges who examined applicant company's civil appeal: *violation*

Violations manifestes, à la suite d'une réforme législative, dans la nomination à la chambre civile de la Cour suprême des juges qui ont examiné le recours en matière civile formé par la société requérante : *violation*

Advance Pharma sp. z o.o – Poland/Pologne, 1469/20, Judgment/Arrêt 3.2.2022 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant company's cassation appeal, in civil compensation proceedings it had brought, was examined by a panel of three judges of the Civil Chamber of the Supreme Court. The judges had been newly appointed through the procedure involving the new National Council of the Judiciary (NCJ) as established by the 2017 Amending Act on the NCJ as part of the large-scale legislative reform of the Polish judicial system initiated by the government in 2017. The NCJ's judicial members were now elected by Sejm. Pursuant to the relevant domestic provisions read as a whole, judges were appointed to all levels and types of courts, including the Supreme Court, by the President of Poland following a recommendation of the NCJ which the latter issued after a competitive selection procedure in which it evaluated and nominated the candidates.

The applicant company complained that the Civil Chamber's judges who had examined its case, had

been appointed by the President of Poland upon the NCJ's recommendation in manifest breach of the domestic law and the principles of the rule of law, separation of powers and the independence of the judiciary.

Law – Article 6 § 1: The Court's task in the present case, as in previous similar cases, was to assess the circumstances relevant for the process of appointment of judges to the Civil Chamber of the Supreme Court in the procedure involving the NCJ established under the 2017 Amending Act and not to consider the legitimacy of the reorganisation of the Polish judiciary as a whole. The Court examined whether the hearing of the applicant's case by the Civil Chamber of the Supreme Court – sitting in a formation of judges who had all been appointed in the impugned procedure – gave rise to a violation of its right to a "tribunal established by law" in the light of the criteria laid down in *Guðmundur Andri Ástráðsson v. Iceland* [GC] and as applied in *Xero Flor w Polsce sp. z o.o. v. Poland* and *Reczkowicz v. Poland*. In reaching its conclusions, the Court took into account in particular the rulings of the Polish Supreme Court and the Court of Justice of the European Union, as well as multiple reports and assessments by European and international institutions.

(a) *Whether there was a manifest breach of the domestic law* – The alleged breach was twofold:

(i) *The alleged lack of independence of the NCJ from executive and legislative powers* – The Court followed the reasoning and methodology applied in *Reczkowicz*, the alleged violation originating in the same fundamental breach of the domestic law. Given that the new judges of the Civil Chamber had been appointed through an identical procedure, all the Court's considerations and findings in the above case as to the characteristics of the NCJ and the existence of a breach of the domestic law caused by the participation of the NCJ in the appointment procedure were equally valid in the present case. Since the NCJ, as established under the 2017 Amending Act, did not provide sufficient guarantees of independence from the legislative or executive powers, there had been a manifest breach of domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to that Chamber. The Court also noted that the Constitutional Court's recent ruling of 24 November 2021 holding Article 6 § 1 of the Convention and the right to a fair trial enshrined therein to be incompatible with various provisions of the Polish Constitution, had been given in an apparent attempt to prevent the execution of the Court's judgment in *Xero Flor w Polsce sp. z.o.o* under Article 46 of the Convention and to restrict the Court's jurisdiction under Articles 19 and 32 of the Convention in respect of Poland.

(ii) The *lack of effective judicial review of NCJ resolution no. 330/2018 and the President of Poland's appointment of judges to the Civil Chamber despite the stay of the implementation of that resolution* – On 27 September 2018 the Supreme Administrative Court, had issued an interim order staying the implementation of NCJ resolution no. 330/2018 of 28 August 2018 – which had recommended candidates for seven posts of judges in the Civil Chamber of the Supreme Court, including those who had dealt with the applicant company's case – pending its examination of a number of appeals by a number of non-recommended candidates contesting the legality of the resolution. Notwithstanding the stay and the fact that the appeals were pending, the President of Poland had proceeded with the appointment of the candidates. Further, whilst the judicial review of the above resolution was still ongoing, by virtue of new amendments introduced by the 26 April 2019 Act, the hitherto existing right to appeal against NCJ resolutions concerning appointment to the Supreme Court in individual cases was extinguished and any pending appeals against such resolutions had to be discontinued by operation of law.

The executive power by proceeding with the above appointments despite the pending judicial review of resolution no. 330/2018, and the legislature, by intervening in pending judicial proceedings in order to extinguish any legal or practical effects of judicial review, had acted in manifest disregard for the rule of law and in flagrant breach of the requirements of a fair hearing within the meaning of Article 6 § 1. They had demonstrated an attitude which could only be described as one of utter disregard for the authority, independence and role of the judiciary. Assessing all the circumstances as a whole, the Court concluded that their actions had amounted to a manifest breach of the domestic law. Deliberate disregard of a binding judicial decision and interference with the course of justice, in order to vitiate and render meaningless a pending judicial review of the appointment of judges, could only be characterised as blatant defiance of the rule of law.

(b) *Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges* – The manifest breach of domestic law had adversely affected the fundamental rules of procedure for the appointment of judges to the Supreme Court's Civil Chamber. That was because the recommendation for the appointments – a condition *sine qua non* for appointment by the President of Poland – had been entrusted to the NCJ, which, as established under the 2017 Amending Act, lacked sufficient guarantees of independence from the legislature and the executive. That

breach had been compounded and, in effect, perpetuated by the legislature's and the President of Poland's actions taken in blatant defiance of the rule of law in order to render meaningless the judicial review of the NCJ's resolution recommending the candidates.

By virtue of the 2017 Amending Act, which deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers, had achieved a decisive influence on the composition of the NCJ. The Act had practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard enabling the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities had taken advantage – as shown, for instance, by the circumstances surrounding the endorsement of judicial candidates for the NCJ. This situation had been further aggravated by the subsequent appointment of judges to the Civil Chamber by the President of Poland, carried out in flagrant disregard for the fact that the implementation of NCJ resolution no. 330/2018 recommending their candidatures had been stayed.

A procedure for appointing judges which, as in the present case, disclosed undue influence of the legislative and executive powers on the appointment of judges was *per se* incompatible with Article 6 § 1 and, as such, amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of the judges so appointed.

Thus, the breaches in the procedure for the appointment of seven judges to the Civil Chamber, including three judges who had dealt with the applicant company's case, were of such gravity that they impaired the very essence of the applicant company's right to a "tribunal established by law".

(c) *Whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts* – NCJ resolution no. 330/2018 had been subject to judicial review by the Supreme Administrative Court which, on 6 May 2021, had given judgment quashing that resolution. However, the Polish authorities' actions, taken in manifest breach of the domestic law, had rendered that judicial review meaningless and devoid of any purpose. Further, having regard to its decision to reject the Government's non-exhaustion objection as in the particular circumstances a constitutional complaint contesting the rules governing the procedure of appointment lacked sufficiently realistic prospects of success, the Court found that no remedies were provided to the applicant company.

(d) *Overall* – The formation of the Civil Chamber of the Supreme Court, which examined the applicant company's case, was not a "tribunal established by law".

Conclusion: violation (unanimously).

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

Article 46: The Court refrained from giving any specific indications as to the type of individual and/or general measures that might be taken in order to remedy the situation and limited its considerations to general guidance. Its conclusions regarding the incompatibility of the judicial appointment procedure involving the NCJ with the requirements of an "independent and impartial tribunal established by law" under Article 6 § 1 would have consequences for its assessment of similar complaints in other pending or future cases. The deficiencies of that procedure as identified in the present case in respect of the newly appointed judges of the Supreme Court's Civil Chamber, and in *Reczkowicz* in respect of the Disciplinary Chamber of that court, and in *Dolińska-Ficek and Ozimek v. Poland* of the Chamber of Extraordinary Review and Public Affairs, had already adversely affected existing appointments and were capable of systematically affecting the future appointments of judges, not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts.

The violation of the applicant company's rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State was required.

In that context, various options were open to the respondent State; however, it was an inescapable conclusion that the continued operation of the NCJ as constituted by the 2017 Amending Act and its involvement in the judicial appointments procedure perpetuated the systemic dysfunction as established by the Court and might in the future result in potentially multiple violations of the right to

an "independent and impartial tribunal established by law", thus leading to further aggravation of the rule of law crisis in Poland. As regards the legal and practical consequences for final judgments already delivered by formations of judges appointed upon the NCJ's recommendation and the effects of such judgments in the Polish legal order, the Court at this stage noted that one of the possibilities to be contemplated by the respondent State was to incorporate into the necessary general measures the Supreme Court's conclusions regarding the application of its interpretative resolution of 23 January 2020 in respect of the Supreme Court and other courts and the judgments given by the respective court formations.

That being said it fell upon the respondent State to draw the necessary conclusions from the judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

(See *Guðmundur Andri Ástráðsson v. Iceland* [GC], 26374/18, 1 December 2020, Legal summary; *Xero Flor w Polsce sp. z o.o. v. Poland*, 4907/18, 7 May 2021, Legal Summary; *Reczkowicz v. Poland*, 43447/19, 22 July 2021, Legal Summary; and *Dolińska-Ficek and Ozimek v. Poland*, 49868/19 and 57511/19, 8 November 2021, Legal Summary)

ARTICLE 8

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

Transgender person unable to obtain a full birth certificate without gender reassignment reference, while its short extract and new ID documents indicate only reassigned gender: *no violation*

Refus de délivrer à une personne transgenre un acte de naissance complet sans mention de sa conversion sexuelle, alors que l'extrait de l'acte et les nouveaux documents d'identité n'indiquent que le nouveau sexe : *non-violation*

Y – Poland/Pologne, 74131/14, Judgment/Arrêt 17.2.2022 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant is a transgender person, who has undergone gender reassignment and has been legally recognised as male. The short extract of his birth certificate indicates only his new name and reassigned gender. However, his full birth certificate includes a marginal annotation about the gender reassignment. The applicant was issued with new identity documents. He was later lawfully married and continues to live in society as a male person. The applicant brought unsuccessful proceedings to remove the annotation and subsequently, to be issued with a new birth certificate as done in the event of adoption of a child.

Law – Article 8: The question to be determined in the present case was whether respect for the applicant's private life and/or family life entailed a positive obligation on the respondent State to provide an effective and accessible procedure allowing the applicant to obtain a birth certificate without any reference to the gender assigned at birth.

In nearly all everyday situations, the applicant was able to establish his identity by means of identification documents or the short extract of the birth certificate which indicated only his new name and reassigned gender. The Court acknowledged the applicant's feelings that the marginal annotation was demeaning and caused him mental suffering. However, it did not appear that in his daily life he was required to reveal these intimate details of his private life and that the inconveniences complained of were sufficiently serious. Furthermore, full birth records were not publicly accessible; only a limited number of persons and entities could access the register of births and obtain full copies of birth certificates. In addition, the applicant himself would seldom be required to provide a full copy of the birth certificate. In this connection, the Court was mindful of the historical nature of the birth record system and that, in view of the public interest, reference to the gender assigned at birth, might, in certain situations, be necessary to prove certain facts predating the sex reassignment, even though this could cause the person concerned to experience some distress.

Notwithstanding all the above considerations, the applicant had not demonstrated that he had suffered any sufficiently serious negative consequences or difficulties resulting from the fact that the sex assigned at birth was still visible in the form of an annotation on his full birth certificate. He had failed to provide any details that he had been affected by that situation and to what extent. Any potential risk of adverse consequences was not capable of rendering the current Polish system deficient from the point of view of the State's positive obligation.

In conclusion, given the particular circumstances of the present case, the Court accepted that the Polish authorities had struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them.

Conclusion: no violation (unanimously).

The Court also found, unanimously, that there had been no violation of Article 14 taken in conjunction with Article 8 as the applicant could not claim to be in the same situation with adopted children, who were issued a new birth certificate in the event of full adoption.

(See *Christine Goodwin v. the United Kingdom* [GC], 28957/95, 11 July 2002, Legal Summary, and *Hämäläinen v. Finland* [GC], 37359/09, 16 July 2014, Legal Summary)

Respect for family life/Respect de la vie familiale

Court's refusal to hear young children without parental care represented by social services, and not by special guardian, in foster care proceedings brought by applicant grandparents: *no violation*

Refus du tribunal d'entendre de jeunes enfants privés de protection parentale, représentés par les services sociaux et non par un tuteur *ad litem*, dans une procédure de placement engagée par les grands-parents requérants : *non-violation*

Q and/et R – Slovenia/Slovénie, 19938/20, Judgment/Arrêt 8.2.2022 [Section II]

(See Article 6 § 1 above/Voir l'article 6 § 1 ci-dessus, page 13)

ARTICLE 10

Freedom of expression/Liberté d'expression

14 EUR fine on counter-demonstrator for displaying, amid the crowd of his opponents, provocative banner distorting the event's message and likely to cause unrest: *no violation*

Amende de 14 EUR infligée à un contre-manifestant pour avoir déployé, au milieu des manifestants, une banderole provocatrice dénaturant le message de la manifestation et susceptible de provoquer des troubles : *non-violation*

Manannikov – Russia/Russie, 9157/08, Judgment/Arrêt 1.2.2022 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, a human rights activist, along with another person, attended an officially approved event in support of President Putin, in the run up to the legislative elections of December 2007 and the presidential election of March 2008. They moved into the crowd and raised a banner reading "Putin is better than Hitler". When tensions appeared, the police ordered them to remove the banner; they did not and continued to display it for the entire event. No violence ensued. The applicant was convicted of "a breach of the established rules for the conduct of public events", an administrative offence, and was fined 500 Russian roubles (equivalent to 14 euros). His appeal was unsuccessful.

Law – Article 10: The police order to remove the banner and the applicant's conviction had amounted to an "interference" with his right to freedom of expression which had been "prescribed by law" and had pursued the legitimate aims of "prevention of disorder" and "the protection of the rights and freedoms of others". The Court then found that, in the specific circumstances of the case, it had not gone beyond what had been "necessary in a democratic society" for the following reasons.

The impugned police order had been based on the considerations that the banner had not corresponded to the programme of the event, had been provocative and could have resulted in unrest. Given that the domestic courts were better placed to assess what was likely to be considered provocative and offensive by the society, and that the text on the banner had been ambiguous, the Court gave credence to the domestic courts' finding that the banner could have in fact been perceived as offensive by some of the participants. Indeed, comparing Mr Putin with Adolf Hitler could be seen as something other than support for the President's policies. The Court therefore accepted that the display of the banner could have resulted in a conflict between the applicant and the participants in the public event.

That by itself could not however justify an interference with the fundamental right provided for by Article 10. A demonstration might annoy or give offence to persons opposed to the ideas or claims that it was seeking to promote. Moreover, the Court has consistently underlined the importance of the right to counter-demonstration, which could be held at the same time and venue with a demonstration. The right to counter-demonstration, however, was not absolute, as in a democracy it could not extend to inhibiting the exercise of the right to demonstrate. Further, the Contracting States had a duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. These principles, which had been formulated in cases concerning freedom of assembly, were fully pertinent to the present case, given that the applicant had expressed his opinion during a public event. Bearing them in mind, and as the domestic courts had found, the police order had been triggered by the applicant's conduct which had been considered provocative by some of the participants

to the event and by their negative reaction and not by the banner's content as such.

Indeed, the applicant's location among the demonstrators had been a key factor; he had chosen to raise the banner in the middle of a crowd of his opponents, although nothing had prevented him from taking a place in an adjacent area. The banner had distorted and undermined the message of support to Mr Putin that other participants and the overall demonstration had wanted to convey. It had also made it difficult for the police, who had been best positioned to evaluate the security risks and those of disturbance as well as the appropriate measures dictated by the risk assumption, to ensure the peaceful conduct of the event. Their order to remove the banner therefore did not appear to have been unreasonable or excessive and could thus be considered proportionate to the legitimate aims pursued.

Lastly, bearing in mind that the applicant had not been removed from the event, his conviction and the fine, which was the minimum amount provided by domestic law, did not appear to be excessive.

Conclusion: no violation (five votes to two).

(See also *The United Macedonian Organisation Ilinden and Ivanov v. Bulgaria*, 44079/98, 20 October 2005; *Fáber v. Hungary*, 40721/08, 24 July 2012, Legal Summary; and *Berkman v. Russia*, 46712/15, 1 December 2020, Legal Summary)

Freedom to impart information/Liberté de communiquer des informations

Denial of access, on national security grounds, to classified records relating to a sensitive part of country's recent history, accompanied by adequate procedural safeguards and proportionate: *no violation*

Refus d'accès, pour des motifs de sécurité nationale, à des documents secrets relatifs à une partie sensible de l'histoire récente du pays, assorti de garanties procédurales adéquates et proportionné : *non-violation*

Šeks – Croatia/Croatie, 39325/20, Judgment/Arrêt 3.2.2022 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant, a retired politician, requested access to classified presidential records from the State Archive, in order to write a book on the founding of the Republic of Croatia. After obtaining the opinion of the Office of the National Security Council, the President of the Republic declassified thirty-one of the requested documents but declined to declassify the remaining twenty-five documents stating that such disclosure might cause irreparable damage to the independence, integrity and national security of the Republic of Croatia as well as its foreign relations. The State Archive thus refused the applicant's request in so far as it concerned the latter documents, giving him access only to the documents that had been declassified. The applicant's appeals were unsuccessful.

Law – Article 10

(a) *Applicability* – Applying the criteria for right of access to State-held information laid down in *Magyar Helsinki Bizottság v. Hungary* [GC], the Court was satisfied that the applicant, as a former politician intending to publish a historical monograph, had exercised the right to impart information on a matter of public interest and sought access to that end to information which had been ready and available. Article 10 was thus applicable.

(b) *Merits* – Denying the applicant access to the requested documents had amounted to an "interference" with his right to freedom of expression which had been "prescribed by law" and had pursued the legitimate aims of protecting the independence, integrity and security of the country and its foreign relations.

As to whether the interference had been necessary in a democratic society, the Court first observed that unlike a number of previous cases concerning access to personal information, the present case concerned classified information relating to a sensitive part of Croatia's rather recent history, which still formed part of considerable public debate. National security being an evolving and context-dependent concept, the States had to be afforded a wide margin of appreciation in assessing what posed a national security risk in their countries at a particular time. At the same time, the concepts of "national security" and "public safety" had to be applied with restraint, interpreted restrictively and brought into play only where it had been shown to be necessary to suppress the release of the information for the purposes of protecting national security and public safety. Although the Court was not well equipped to challenge the national authorities' judgment concerning the existence of national security, when this was at stake, and as in the present case, resulted in decisions restricting human rights, the Court would scrutinise the national decision-making procedure to ensure that it incorporated adequate safeguards to protect the interests of the person concerned. In particular, the concepts of lawfulness and the rule of law in a democratic society required that measures affecting fundamental human rights had to be subject to some form of adversarial proceedings before

an independent body competent to review the reasons for the decision. If there was no possibility of challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention.

For the most part, the applicant's request to access the documents in question had been granted. The President's decision had been based on the opinion of a specialised advisory body on national security issues and had been ultimately reviewed and upheld by the Information Commissioner - an independent body in charge of protecting, monitoring and promoting the right of access to information-, the High Administrative Court and the Constitutional Court. The applicant's request had been carefully assessed by all the above authorities and the requested documents, which had been assigned the highest level of classification under domestic law for a period of thirty years, had been directly inspected by at least two of them. Further, the Information Commissioner had agreed with the President's conclusion, found no abuse of discretion by the executive and noted the applicant's failure to explain in his appeal why his interest in accessing that information would have outweighed such crucial public interests. In such circumstances, it could not be said that the manner in which the domestic authorities had assessed the applicant's request had been fundamentally flawed, devoid of appropriate procedural safeguards or that they had failed to perform a proportionality analysis as required under the domestic law.

Lastly, taking into consideration the extent of procedural safeguards provided to the applicant, the Court was satisfied that the reasons adduced by the national authorities for refusing him access to the documents in question had not only been relevant but also, in the circumstances, sufficient. In this connection, it noted that in the national security context, the competent authorities might not be expected to give the same amount of details in their reasoning as, for instance, in ordinary civil or administrative cases, since providing detailed reasons for refusing declassification of top-secret documents might easily run counter to the very purpose for which that information had been classified in the first place.

Accordingly, the interference with the applicant's freedom of access to information had been necessary and proportionate to the important aims of national security relied on and the subsequent independent domestic review of his request in the circumstances had not been outside the State's wide margin appreciation in this area.

Conclusion: no violation (unanimously).

(See *Magyar Helsinki Bizottság v. Hungary* [GC], 18030/11, 8 November 2016, Legal Summary)

ARTICLE 14

Discrimination (Article 2)

Failure to prevent gender-based violence by a police officer and to investigate the law-enforcement authorities' passive response: *violations*

Manquement à l'obligation d'empêcher des violences fondées sur le sexe commises par un policier et d'enquêter sur la passivité des forces de l'ordre : *violations*

A and/et B – Georgia/Géorgie, 73975/16, Judgment/Arrêt 10.2.2022 [Section V]

(See Article 2 above/Voir l'article 2 ci-dessus, page 6)

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

Deprivation of property/Privation de propriété

Refusal to award compensation in respect of the financial burdens arising from the disability of a child, born disabled as a result of a fault during the prenatal diagnosis, through retrospective application of the law: *violation*

Absence d'indemnisation des charges résultant du handicap d'un enfant né comme tel en raison d'une faute lors du diagnostic prénatal, par application rétroactive de la loi : *violation*

N.M. and Others/et autres – France, 66328/14, Judgment/Arrêt 3.2.2022 [Section V]

English translation of the summary – Version imprimable

En fait – Les parents d'un enfant né handicapé en 2001 ont engagé en 2006, en leur nom propre et pour le compte de leur enfant, une action en responsabilité pour faute du centre hospitalier, étant donné qu'en raison d'une erreur médicale le diagnostic prénatal n'avait détecté aucune anomalie. Ils demandèrent réparation entre autres des dépenses liées au handicap.

De nouvelles dispositions législatives (codifiées à l'article L. 114-5 du code de l'action sociale et des familles (CASF)), qui interdisent d'inclure de telles charges dans le préjudice indemnisable, sont en-

trées en vigueur le 7 mars 2002, soit après la naissance de l'enfant des requérants (en 2001) mais avant l'introduction de leur demande de réparation du préjudice subi (en 2006). Les dispositions transitoires de cette loi prévoyaient son application rétroactive. Toutefois, en 2010, le Conseil constitutionnel les abrogea, par une décision sur la question prioritaire de constitutionnalité (QPC).

Cette décision donna lieu à deux interprétations différentes du Conseil d'État et de la Cour de cassation quant à l'applicabilité de l'article L. 114-5 du CASF à des actions en justice relatives à des faits générateurs antérieurs à l'entrée en vigueur de la loi en cause mais engagées postérieurement à celle-ci. Le Conseil d'État jugea que les nouvelles dispositions étaient applicables à pareille situation au contraire de la Cour de cassation qui considéra que devaient s'appliquer les conditions de droit commun selon lesquelles s'applique la loi en vigueur à la date de survenance du dommage.

Dans la présente affaire, en 2014, le Conseil d'État jugea que faute d'avoir, pour les requérants, engagé une instance avant l'entrée en vigueur de la loi en cause (le 7 mars 2002), l'article L. 114-5 du CASF était applicable au litige et en déduisit que cela faisait obstacle à l'indemnisation des frais de prise en charge de l'enfant handicapé tout au long de sa vie à laquelle donnait droit une jurisprudence constante jusqu'à l'intervention de cette loi.

En droit – Article 1 du Protocole n° 1 : Compte tenu des principes de droit commun français et de la jurisprudence constante en matière de responsabilité selon lesquels la créance en réparation prend naissance dès la survenance du dommage qui en constitue le fait générateur, les requérants pouvaient légitimement espérer pouvoir obtenir réparation de leur préjudice correspondant aux frais de prise en charge de leur enfant handicapé dès la survenance du dommage, à savoir la naissance de cet enfant, antérieur à l'intervention de la loi litigieuse. Ils étaient donc titulaires d'un « bien » au sens de la première phrase de l'article 1 du Protocole n° 1, lequel s'applique dès lors en l'espèce.

L'application au litige porté par les requérants des dispositions de l'article L. 114-5 du CASF qui ont exclu par principe l'indemnisation des frais liés à la prise en charge du handicap de leur fils constitue une ingérence s'analysant en une privation de propriété.

En premier lieu, selon les termes de la décision QPC du Conseil constitutionnel, l'ensemble du dispositif transitoire ayant prévu l'application rétroactive de l'article L. 114-5 du CASF est abrogé. Ceci laisse immédiatement place à l'application des règles de droit commun relatives à l'application de la loi dans le temps. L'article L. 114-5 du CASF ne saurait donc être appliqué à des faits nés antérieurement à l'entrée en vigueur de la loi, quelle que soit la date d'introduction de l'instance.

En second lieu, il existe une divergence entre l'interprétation retenue, de manière prétorienne, par le Conseil d'État de la volonté du législateur et de la portée de l'abrogation prononcée par le Conseil constitutionnel et celle retenue par la Cour de cassation. Dans ces conditions, la légalité de l'ingérence en l'espèce résultant de l'application, par la décision du Conseil d'État, de l'article L. 114-5 du CASF, ne pouvait pas trouver un fondement dans une jurisprudence constante et stabilisée des juridictions internes. Ainsi, l'atteinte rétroactive portée aux biens des requérants ne saurait être regardée comme ayant été « prévue par la loi » au sens de l'article 1 du Protocole n° 1.

Conclusion : violation (unanimité).

Article 41 : satisfaction équitable réservée.

(Voir aussi *Maurice c. France* [GC], 11810/03, 6 octobre 2005, Résumé juridique)

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

Free expression of the opinion of the people/Libre expression de l'opinion du peuple
Vote

Disproportionate automatic disenfranchisement of applicant due to partial guardianship order based on his mental disability with no individualised judicial review of voting capacity: *violation*

Privation du droit de vote disproportionnée car automatique du fait du placement sous tutelle partielle du requérant atteint de troubles mentaux, sans examen judiciaire individualisé de son aptitude au vote : *violation*

Anatoliy Marinov – Bulgaria/Bulgarie, 26081/17, Judgment/Arrêt 15.2.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant was diagnosed with psychiatric disorders and was placed under partial guardianship. As a result, he automatically lost the right to vote. He unsuccessfully brought proceedings for the restoration of his legal capacity and thus was unable to vote in the 2017 parliamentary elections. Subsequently, in the context of fresh proceedings, his legal capacity was restored and the guardianship lifted.

Law – Article 1 of Protocol No. 3: The restriction had been lawful and pursued the legitimate aim of ensuring that only persons capable of making informed and meaningful decisions could participate in the choice of legislature in the country. The restriction, however, did not distinguish between persons under total guardianship and those under partial guardianship but concerned citizens "placed under guardianship" in general. The restriction was removed only once guardianship was lifted. The Court did not consider it necessary to take a position on the relevance of the data submitted by the parties regarding the proportion of Bulgaria's voting-age population that had been disenfranchised on account of being under guardianship as a whole, as, in any event, the impugned restriction appeared to be disproportionate to the legitimate aim pursued by the State in this case.

In particular, the Court had already accepted that this was an area in which, generally, a wide margin of appreciation should be granted to the national legislature to decide on the procedure for assessing the fitness to vote of mentally disabled persons. However, there was no evidence that the Bulgarian legislature had ever sought to weigh the competing interests or to assess the proportionality of the restriction and thus, open the way for the courts to conduct a particular analysis of the capacity of the applicant to exercise the right to vote, independently of a decision to place a person under a guardianship. The Government had failed to prove that domestic judicial practice allowed for the possibility of lifting the restriction on a person's right to vote in cases where that person remained deprived of his or her legal capacity. It also appeared that such possibility would not be in line with the domestic legal framework.

The applicant had lost his right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship (with no option for an individualised judicial evaluation of his fitness to vote); this had placed him in a situation similar to that of the applicant in the case of *Alajos Kiss v. Hungary* (38832/06, 20 May 2010, Legal Summary). The applicant might therefore claim to be a victim of a measure incompatible with the relevant established principles.

It was questionable to treat people with intellectual or mental disabilities as a single class and the curtailment of their rights had to be subject to strict scrutiny. Accordingly, the indiscriminate removal of voting rights without an individualised judicial evaluation, solely on the grounds of mental disability necessitating partial guardianship, could not be considered to be proportionate to the legitimate aim for restricting the right to vote.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 in respect of non-pecuniary damage.

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

Interim measures/Mesures provisoires

Interim measures in the case of Polish Supreme Court judge's immunity

Mesures provisoires dans une affaire concernant l'immunité d'un juge de la Cour suprême polonaise

Wróbel – Poland/Pologne, 6904/22

Press release – Communiqué de presse

Interim measures following the military attack of February 2022/Mesures provisoires à la suite de l'agression militaire de février 2022

The Court grants urgent interim measures in an *inter-State application* concerning Russian military operations on Ukrainian territory

La Cour indique des mesures provisoires urgentes dans une *requête interétatique* concernant les opérations militaires russes sur le territoire ukrainien

Ukraine – Russia/Russie (X), 11055/22

Press release – Communiqué de presse

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Decision of the Court on requests for interim measures in *individual applications* concerning Russian military operations on Ukrainian territory

Décision de la Cour sur les demandes de mesures temporaires formées dans le cadre de *requêtes individuelles* relatives aux opérations militaires russes sur le territoire ukrainien

Press release – Communiqué de presse

-oOo-

Measures applied in respect of cases in which Ukraine is a respondent or an applicant Government following the military attack of February 2022

Mesures à appliquer, à la suite de l'agression militaire de février 2022, aux affaires dans lesquelles l'Ukraine est un gouvernement défendeur ou requérant

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

EU law precludes a national supreme court, following an appeal in the interests of the law brought by the Prosecutor General, from declaring a request for a preliminary ruling submitted by a lower court unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings

Le droit de l'Union s'oppose à ce que, à la suite d'un pourvoi dans l'intérêt de la loi formé par le procureur général, une juridiction suprême nationale constate l'illégalité d'une demande de décision préjudicielle introduite par une juridiction inférieure, au motif que les questions posées ne sont pas pertinentes ni nécessaires pour la solution du litige au principal

Case/Affaire C-564/19, Judgment/Arrêt 23.11.2021

Press release – Communiqué de presse

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