247

January
2021
Janvier

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

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

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

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

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ARTICLE 1

Jurisdiction of States/Juridiction des États

Jurisdiction of Russia over Abkhazia and South Ossetia during the active phase of hostilities and after their cessation

Juridiction de la Russie concernant l'Abkhazie et l'Ossétie du Sud pendant la phase active des hostilités et après leur cessation

Georgia/Géorgie – Russia/Russie (II), 38263/08, Judgment/Arrêt (merits/fond) 21.1.2021 [GC]

Traduction française du résumé – Printable version

Facts – As in the case of *Georgia v. Russia (I)*, the application was lodged in the context of the armed conflict between Georgia and the Russian Federation in August 2008 following an extended period of ever-mounting tensions, provocations and incidents that opposed the two countries.

The applicant Government submitted that, in the course of indiscriminate and disproportionate attacks by Russian forces and/or by the separatist forces under their control, hundreds of civilians were injured, killed, detained or went missing, thousands of civilians had their property and homes destroyed, and over 300,000 people were forced to leave Abkhazia and South Ossetia. In their submission, these consequences and the subsequent lack of any investigation engaged Russia's responsibility under Articles 2, 3, 5, 8 and 13 of the Convention, Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

Law

1. Preliminary questions

(a) *Jurisdiction*

Article 1: The Court made a distinction between the military operations carried out during the active phase of hostilities and the other events which require examining in the context of the present international armed conflict, including those that occurred during the "occupation" phase after the active phase of hostilities had ceased, and the detention and treatment of civilians and prisoners of war, freedom of movement of displaced persons, the right to education and the obligation to investigate.

(i) *Active phase of hostilities during the five-day war (from 8 to 12 August 2008)*

The present case marked the first time since the Grand Chamber decision in *Banković and Others v. Belgium and Others* (concerning the NATO bombing of the RadioTelevision Serbia headquarters in Belgrade) that the Court had been required to examine the question of jurisdiction in relation to military operations (armed attacks, bombing, shelling) in the context of an international armed conflict. However, the Court's case-law on the concept of extraterritorial jurisdiction had evolved since that decision, in that the Court had, *inter alia*, established a number of criteria for the exercise of extraterritorial jurisdiction by a State, which had to remain exceptional, the two main criteria being that of "effective control" by the State over an area (spatial concept of jurisdiction) and that of "State agent authority and control" over individuals (personal concept of jurisdiction). Subsequently, in *Medvedyev and Others v. France* [GC], the Court had explicitly reiterated, with reference to the *Banković and Others* decision, that a State's responsibility could not be engaged in respect of "an instantaneous extraterritorial act, as the provisions of Article 1 did not admit a 'cause and effect' notion of 'jurisdiction'" (see also *M.N. and Others v. Belgium* (dec.) [GC]).

In that connection it could be considered from the outset that, in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict, one could not generally speak of "effective control" over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos meant that there was no control over an area. It also excluded any form of "State agent authority and control" over individuals. This was also true in the present case, given that the majority of the fighting had taken place in areas that had previously been under Georgian control. This conclusion was confirmed by the practice of the High Contracting Parties in not derogating under Article 15 of the Convention in situations where they had engaged in an international armed conflict outside their own territory. In the Court's view, this might be interpreted as the High Contracting Parties considering that, in such situations, they did not exercise jurisdiction within the meaning of Article 1.

However, having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations were predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court was not in a position to develop its case-law beyond the understanding of the notion of "jurisdiction" as established to date. If, as in the present case, the Court was to be entrusted with the task of assessing acts of war and active hostilities in the

context of an international armed conflict outside the territory of a respondent State, it had to be for the Contracting Parties to provide the necessary legal basis for such a task. This did not mean that States could act outside any legal framework; they were obliged to comply with the very detailed rules of international humanitarian law in such a context.

Conclusion: The events that had occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1; inadmissible (eleven votes to six).

(ii) *Occupation phase after the cessation of hostilities (ceasefire agreement of 12 August 2008)*

In their observations the respondent Government had acknowledged a substantial Russian military presence after hostilities had ceased, and provided numerous indications showing the extent of the economic and financial support that the Russian Federation had provided and continued to provide to South Ossetia and to Abkhazia. The EU's Fact-Finding Mission had also pointed to the relationship of dependency not only in economic and financial terms, but also in military and political ones; the information provided by it was also revealing as to the pre-existing relationship of subordination between the separatist entities and the Russian Federation, which had lasted throughout the active phase of the hostilities and after their cessation. In its report, the EU Fact-Finding Mission had referred to "creeping annexation" of South Ossetia and Abkhazia by the Russian Federation.

The Russian Federation had therefore exercised "effective control", within the meaning of the Court's case-law, over South Ossetia, Abkhazia and the "buffer zone" from 12 August to 10 October 2008, the date of the official withdrawal of the Russian troops. Even after that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation, on whom their survival depended, as was shown particularly by the cooperation and assistance agreements signed with the latter, indicated that there had been continued "effective control" over South Ossetia and Abkhazia.

Conclusion: The events that had occurred after the cessation of hostilities fell within the jurisdiction of the Russian Federation for the purposes of Article 1 (sixteen votes to one).

(b) *Interrelation between the provisions of the Convention and the rules of international humanitarian law (IHL)*

The Court examined the interrelation between the two legal regimes with regard to each aspect of the case and each Convention Article alleged to have been breached. In doing so, it ascertained each time whether there was a conflict between the two legal regimes.

(c) *Definition of the concept of "administrative practice"*

While the criteria set out in *Georgia v. Russia (I)* [GC] defined a general framework, they did not indicate the number of incidents required to establish the existence of an administrative practice: that was a question left for the Court to assess having regard to the particular circumstances of each case.

2. Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1

Generally speaking, IHL applied in a situation of "occupation". In the Court's view, the concept of "occupation" for the purposes of IHL included a requirement of "effective control". If there was "occupation" for the purposes of IHL there would also be "effective control" within the meaning of the Court's case-law, although the term "effective control" was broader and covered situations that did not necessarily amount to a situation of "occupation" for the purposes of IHL. Having regard to the complaints raised in the present case, there was no conflict between Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1 and the rules of IHL applicable in a situation of occupation.

From the time when the Russian Federation had exercised "effective control" over the territories of South Ossetia and the "buffer zone" after the active conduct of hostilities had ceased, it was also responsible for the actions of the South Ossetian forces, including an array of irregular militias, in those territories, without it being necessary to provide proof of "detailed control" of each of those actions. The Court had sufficient evidence in its possession to enable it to conclude beyond reasonable doubt that there had been an administrative practice contrary to Articles 2 and 8 of the Convention and Article 1 of Protocol No. 1 as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the "buffer zone". Having regard to the seriousness of the abuses committed, which could be classified as "inhuman and degrading treatment" owing to the feelings of anguish and distress suffered by the victims, who, furthermore, had been targeted as an ethnic group, this administrative practice was also contrary to Article 3.

Conclusion: violation (sixteen votes to one).

3. Articles 3 and 5 –*Treatment of civilian detainees and lawfulness of their detention*

There was no conflict between Article 3 and the provisions of IHL, which provided in a general way

that detainees were to be treated humanely and detained in decent conditions. As for Article 5, there might be such a conflict (see *Hassan v. the United Kingdom* [GC]); however, there was none in the present case since the justification for detaining civilians put forward by the respondent Government was not permitted under either set of rules.

Some 160 Georgian civilians detained by the South Ossetian forces in the basement of the "Ministry of Internal Affairs of South Ossetia" in Tskhinvali between approximately 10 and 27 August 2008 fell within the jurisdiction of the Russian Federation for the purposes of Article 1. There had been an administrative practice contrary to Article 3 as regards their conditions of detention and the humiliating acts to which they had been exposed, which had to be regarded as inhuman and degrading treatment. There had also been an administrative practice contrary to Article 5 as regards their arbitrary detention.

Conclusion: violation (unanimously).

4. Article 3 – *Treatment of prisoners of war*

There was no conflict between Article 3 and the provisions of IHL, which provided that prisoners of war had to be treated humanely and held in decent conditions.

The Georgian prisoners of war who had been detained in Tskhinvali between 8 and 17 August 2008 by the South Ossetian forces fell within the jurisdiction of the Russian Federation for the purposes of Article 1. There had been an administrative practice contrary to Article 3 as regards the acts of torture of which they had been victims.

Conclusion: violation (sixteen votes to one).

5. Article 2 of Protocol No. 4 – *Freedom of movement of displaced persons*

There was no conflict between Article 2 of Protocol No. 4 and the relevant provisions of IHL concerning a situation of occupation.

A large number of Georgian nationals who had fled the conflict no longer resided in South Ossetia, but in undisputed Georgian territory. However, in the Court's view, the fact that their respective homes, to which they had been prevented from returning, were situated in areas under the "effective control" of the Russian Federation, and the fact that the Russian Federation exercised "effective control" over the administrative borders, were sufficient to establish a jurisdictional link for the purposes of Article 1 between the Russian Federation and the Georgian nationals in question. There had been an administrative practice contrary to Article 2 of Protocol No. 4 as regards the inability of Georgian nationals to return to their respective homes.

Conclusion: violation (sixteen votes to one).

6. Article 2 of Protocol No. 1 – *Alleged looting and destruction of public schools and libraries and intimidation of ethnic Georgian pupils and teachers*

There was no conflict between Article 2 of Protocol No. 1 and the relevant provisions of IHL concerning a situation of occupation.

The Court did not have sufficient evidence in its possession to conclude beyond reasonable doubt that there had been incidents contrary to Article 2 of Protocol No. 1.

Conclusion: violation (unanimously).

7. Article 2 –*Obligation to investigate*

In general, the obligation to carry out an effective investigation under Article 2 was broader than the corresponding obligation in IHL. Otherwise, there was no conflict between the applicable standards in this regard under Article 2 and the relevant provisions of IHL.

In the present case, in view of the allegations that it had committed war crimes during the active phase of the hostilities, the Russian Federation had an obligation to investigate the events in issue, in accordance with the relevant rules of IHL and domestic law. Indeed, the prosecuting authorities of the Russian Federation had taken steps to investigate those allegations. Furthermore, although the events that had occurred during the active phase of the hostilities did not fall within the jurisdiction of the Russian Federation, it had established "effective control" over the territories in question shortly afterwards. Lastly, given that all the potential suspects among the Russian service personnel were located either in the Russian Federation or in territories under the control of the Russian Federation, Georgia had been prevented from carrying out an adequate and effective investigation into the allegations. Accordingly, having regard to the "special features" of the case, the Russian Federation's jurisdiction within the meaning of Article 1 was established in respect of this complaint (see, *mutatis mutandis*, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC]).

The Russian Federation had therefore a procedural obligation under Article 2 to carry out an adequate and effective investigation not only into the events that occurred after the cessation of hostilities but also into the events that occurred during the active phase of the hostilities. Having regard to the seriousness of the crimes allegedly committed during the active phase of the hostilities, and the scale and nature of the violations found during the period of occupation, the investigations carried out by the Russian authorities had been neither prompt nor

effective nor independent, and accordingly had not satisfied the requirements of Article 2.

Conclusion: violation (sixteen votes to one).

8. Article 38

The respondent Government had refused to submit the "combat reports", on the grounds that the documents in question constituted a "State secret", despite the practical arrangements proposed by the Court to submit non-confidential extracts. Nor had they submitted any practical proposals of their own to the Court that would have allowed them to satisfy their obligation to cooperate while preserving the secret nature of certain items of information.

Conclusion: violation (sixteen votes to one).

The Court also held, unanimously, that there was no need to examine separately the applicant Government's complaint under Article 13 in conjunction with Articles 3, 5 and 8 and with Articles 1 and 2 of Protocol No. 1 and Article 2 of Protocol No. 4.

Article 41: reserved.

(See also *Georgia v. Russia (I)* [GC], 13255/07, 3 July 2014, Legal summary; *Hassan v. the United Kingdom* [GC], 29750/09, 16 September 2014, Legal summary; *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], 36925/07, 29 January 2019, Legal summary; *Medvedyev and Others v. France* [GC], 3394/03, 29 March 2010, Legal summary; *Banković and Others v. Belgium and Others* (dec) [GC], 52207/99, 12 December 2001; and *M.N. and Others v. Belgium* (dec.) [GC], 3599/18, 5 May 2020, Legal summary)

Jurisdiction of States/Juridiction des États

Jurisdiction of Russia over Crimea

Juridiction de la Russie concernant la Crimée

*Ukraine– Russia/Russie (*re *Crimea)*, 20958/14, Decision/Décision 14.1.2021 [GC]

Traduction française du résumé – Printable version

Facts – The Ukrainian Government maintains that the Russian Federation has from 27 February 2014 exercised effective control over the Autonomous Republic of Crimea and the city of Sevastopol, integral parts of Ukraine, and that it had adopted an administrative practice in or in respect of Crimea which resulted in numerous Convention violations between 27 February 2014 and 26 August 2015, in connection with the purported integration of Crimea into the Russian Federation.

Law

Scope of the case – The questions of the legality *per se* under international law of the "annexation of Crimea" and, accordingly, of its consequent legal status thereafter had not been referred to the Court. Accordingly, they were outside the scope of the case and were not directly considered by the Court.

Alleged lack of a genuine application – The political nature of any motives that might have inspired an applicant Government to lodge an inter-State application before it, or the political implications that the Court's ruling might have, were of no relevance in the establishment of its jurisdiction to adjudicate the legal issues submitted before it on the basis of the competence expressly conferred on the Court by Article 19 of the Convention. The respondent Government's preliminary objection under this head was dismissed.

Approach to the evidence – The Court adhered to its usual approach to the burden of proof for the purposes of assessing evidence in the present case. It also identified the standards of proof applicable to the respective issues of the respondent State's "jurisdiction" in Crimea and the alleged existence of an "administrative practice" (see below).

1. Article 1 – *The respondent State's "jurisdiction" over Crimea*

The issue of the respondent State's "jurisdiction" had to be examined to the "beyond reasonable doubt" standard of proof, it being understood that such proof might follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. The Court's decision on this preliminary issue at this stage of the proceedings was without prejudice to the issues of attribution and responsibility of the respondent State under the Convention for the acts complained of, which fell to be examined at the merits phase of the proceedings.

The Court examined separately two periods – respectively, before and after 18 March 2014, date on which the Russian Federation, the "Republic of Crimea" and the City of Sevastopol signed a treaty whereby Crimea and the city of Sevastopol were, as a matter of Russian law, admitted as constituent entities of the Russian Federation.

(a) *As to the period from 27 February to 18 March 2014*

It had to be established whether it had been shown to the appropriate standard of proof that there were exceptional circumstances capable of giving rise to the exercise of extraterritorial jurisdiction by the respondent State on a part of the territory of the applicant State during that time.

(i) *Strength of the Russian military presence in Crimea*

The framework for the presence and operations of the Russian military forces (Black Sea Fleet) in

Crimea was provided for by a series of bilateral agreements between Ukraine and the Russian Federation of 1997 and 2010. The number of Russian troops on the peninsula had nearly doubled within a short space of time, namely between late January and mid-March 2014. The respondent Government had not produced any evidence that the presence of Russian troops in Crimea had ever reached the same level as in the present case at any time since the entry into force of the Agreements. Ukraine had not consented to such an increase of the Russian military presence on its territory. The fact that troop numbers had not exceeded the general limits set in the Agreements could not be decisive for the Court's assessment. The Court's concern was rather the actual size and strength of the respondent State's military presence considered in the relevant context. According to the Ukrainian Government, the Russian military forces stationed in Crimea had been "elite troops" "equipped for effective and prompt seizure and retention of a territory". The respondent Government had not contested the allegations suggesting technical, tactical, military and qualitative superiority of the Russian military forces. The purported grounds submitted by the respondent Government to justify the increase of the Russian military presence in Crimea had not been corroborated by any convincing evidence. In particular, it had not been shown that there had been any, let alone any real, threat to the Russian military forces stationed in Crimea at the time. Moreover, in accordance with the relevant Agreement, any protective measures were to be applied "in cooperation with the competent Ukrainian authorities". Regarding the purported aims to "assist the Crimean people in resisting attack by the Ukrainian armed forces", to "ensure that Crimean population could make a democratic choice safely without fear of reprisal", there was nothing in the Agreements that could be interpreted as allowing the Russian military units to carry out any policing or public-order functions in Crimea.

(ii) *Conduct of the Russian military forces in Crimea*

The respondent Government had not provided any evidence or convincing arguments that could call into question the credibility of the applicant Government's version of events and the evidence submitted in support of it, in particular the allegations that Russian servicemen had been actively involved in the events of 27 February 2014 in the administrative buildings of the Supreme Council and the Council of Ministers of Crimea, resulting in the transfer of power to the new local authorities, which had subsequently organised the "referendum", declared the independence of Crimea and taken active steps towards its integration into the Russian Federation.

In the first place and importantly, the Court had particular regard to the uncontested statement by President Putin made in a meeting with heads of security agencies during the night of 22 to 23 February 2014, namely that he had taken the decision to "start working on the return of Crimea to the Russian Federation". Secondly, the respondent Government had confirmed that "between 1 and 17 March 2014 [the Russian troops in Crimea] stood ready to assist the Crimean people in resisting attack by the Ukrainian armed forces". Thirdly, Resolution No. 48-SF adopted on 1 March 2014 by the Federation Council of the Federal Assembly of the Russian Federation had authorised the President of the Russian Federation to use armed forces on the territory of Ukraine "until the social and political situation in the country becomes normal". Fourthly, the Defence Minister of the Russian Federation, Mr Sergey Shoigu, had asserted that the Russian Special Forces had seized the building of the Supreme Council in Simferopol on 27 February 2014. Finally, the Court gave particular weight to President Putin's interview statements explicitly acknowledging that the Russian Federation had "disarm[ed] the military units of the Ukrainian army and law enforcement agencies" and that "the Russian servicemen did back the Crimean self-defence forces".

Conclusion: There was sufficient evidence that during the relevant period the respondent State had exercised effective control over Crimea. The respondent Government's objection *ratione loci* was dismissed.

(b) *As to the period after 18 March 2014*

It was common ground between the parties that the respondent State had exercised jurisdiction over Crimea after 18 March 2014. However, their positions differed as to the legal basis of that jurisdiction. Unlike the applicant Government, who had asserted that that jurisdiction was based on the "effective control" ground, the respondent Government had invited the Court not to enter into the determination of the nature of its jurisdiction after 18 March 2014.

However, it was necessary to consider the nature or legal basis of the respondent State's jurisdiction over Crimea in relation to three specific complaints advanced by the applicant Government. First, in so far as the Ukrainian Government had alleged a violation of the requirement for a "tribunal established by law" under Article 6 § 1, it would be impossible for the Court to examine that complaint without first determining whether the relevant "domestic law" was that of Ukraine or that of the Russian Federation. The other two complaints brought under Article 2 of Protocol No. 4 and under Article 14,

taken in conjunction with Article 2 of Protocol No. 4, concerned the alleged restrictions of freedom of movement between Crimea and mainland Ukraine resulting from the *de facto* transformation by the respondent State of the administrative border line into a State border (between the Russian Federation and Ukraine). If the jurisdiction exercised by the Russian Federation over Crimea at the relevant time took the form of territorial jurisdiction rather than that of "effective control over an area", Article 2 § 1 of Protocol No. 4 would not be applicable.

As the respondent Government had asserted and the Court accepted, it was not for the Court to determine whether and to what extent the Accession Treaty of 18 March 2014 had, consistently with public international law, changed the sovereign territory of either the respondent or the applicant State. The Court had regard to the following factors. In the first place, both Contracting States had ratified the Convention in respect of their respective territories within the internationally recognised borders as at that time; secondly, no change to the sovereign territories of both countries had been accepted or notified by either State; thirdly, a number of States and international bodies had refused to accept any change to the territorial integrity of Ukraine in respect of Crimea within the meaning of international law. The respondent Government had not, in fact, advanced a positive case that the sovereign territory of either party to the proceedings had been changed.

Conclusion: For the purposes of this admissibility decision, the Court proceeded on the basis of the assumption that the jurisdiction of the respondent State over Crimea was in the form or nature of "effective control over an area" rather than in the form or nature of territorial jurisdiction.

2. Article 35 § 1 – *Exhaustion of domestic remedies) and standard of proof applicable to the alleged existence of an "administrative practice*

The applicant Government had limited the scope of the case to the alleged existence of an administrative practice of violations of the Convention. They had clearly and unequivocally stated that their aim "was not to seek individual findings of violations". Accordingly, the exhaustion rule did not apply in the circumstances of the present case.

In the Court's view, the close interplay between the two admissibility issues, namely the exhaustion rule and the substantive admissibility of the complaint of an "administrative practice" said to amount to an "alleged breach" (in the French version "*manquement ... qu'elle croira pouvoir être imputé*") under Article 33 of the Convention, required the application of a uniform standard in order for the complaint of an administrative practice to be admissible on both formal and substantive grounds. It had been consistently held that the prima facie evidentiary threshold, as the appropriate standard of proof required at the admissibility stage regarding allegations of an administrative practice, needed to be satisfied so as to render the exhaustion requirement inapplicable to this category of cases. This standard was to apply to each of the two component elements of the alleged "administrative practice", namely the "repetition of acts" and the necessary "official tolerance". Only if both component elements of the alleged "administrative practice" were sufficiently substantiated by prima facie evidence did the exhaustion rule not apply. In the absence of such evidence, it would not be necessary for the Court to go on to consider whether there were other grounds, such as the ineffectiveness of domestic remedies, which exempted the applicant Government from the exhaustion requirement. In that event, the complaint of an administrative practice could not on substantive grounds be viewed as admissible and warranting the Court's examination on the merits.

The only question, therefore, that needed to be addressed in the present case was whether there was sufficient prima facie evidence to establish that there had been an administrative practice (that is, both the "repetition of acts" and "official tolerance") in relation to each of the complaints made by the applicant Government.

Any conclusion by the Court as to the admissibility of the complaint of an administrative practice was without prejudice to the question whether the existence of an administrative practice was at a later stage established on the merits "beyond reasonable doubt", and if so, whether in this respect any responsibility under the Convention could be attributed to the respondent State. Those were questions that could only be determined after an examination of the merits.

Conclusion: the respondent Government's objection of non-exhaustion of domestic remedies dismissed.

3. *Admissibility of the complaints of an administrative practice*

General remarks as to the evidence – The Court rejected the respondent Government's argument that, in order to be regarded as admissible, an allegation of administrative practice had to be supported by direct evidence emanating from the alleged victims. Direct evidence might be difficult to come by, and witnesses and alleged victims might reasonably have feared possible persecution by the post-February 2014 authorities in Crimea. Moreover, the Court did not consider that evidence obtained from Ukrainian officials or from media re-

porting was *per se* inadmissible, even though it had to be treated with a degree of caution.

Furthermore, the reliability of the relevant international reports, as well as the relative probative value of all available evidence, was considered not only on the basis of whether they corroborated each other, but also in the light of the refusal by the respondent State to grant human rights monitoring bodies unhindered access to Crimea, notably through the imposition of visa requirements, involving prior authorisation of individual members of the monitoring bodies by the receiving State. The Court drew a parallel between a situation where a State restricted the access of independent human rights monitoring bodies to an area in which it exercised "jurisdiction" within the meaning of Article 1 and a situation where there was non-disclosure by a Government of crucial documents in their exclusive possession that prevented or hindered the Court establishing the facts. After all, in both situations the events in issue lied wholly, or in large part, within the exclusive knowledge of the authorities of the respondent State.

Any findings by the Court that an allegation of an administrative practice was inadmissible by reason of the absence of sufficient prima facie evidence were without prejudice to the right of individuals to bring individual applications under Article 34.

Conclusion: The Court declared *admissible*, without prejudging the merits, the applicant Government's complaints concerning

(a) the alleged existence of an administrative practice of enforced disappearances and of a lack of an effective investigation into the alleged existence of such an administrative practice, in violation of Article 2 of the Convention;

(b) the alleged existence of an administrative practice of ill-treatment, in violation of Article 3 of the Convention;

(c) the alleged existence of an administrative practice of unlawful detention, in violation of Article 5 of the Convention;

(d) the alleged existence of an administrative practice of extending the Russian Federation's laws to Crimea and the resulting effect that as from 27 February 2014 the courts in Crimea could not be considered to have been "established by law" within the meaning of Article 6 of the Convention;

(e) the alleged existence of an administrative practice of unlawful automatic imposition of Russian citizenship (regarding the system of opting out of Russian citizenship), in violation of Article 8 of the Convention;

(f) the alleged existence of an administrative practice of arbitrary raids of private dwellings, in violation of Article 8 of the Convention;

(g) the alleged existence of an administrative practice during the period under consideration on account of the harassment and intimidation of religious leaders not conforming to the Russian Orthodox faith, arbitrary raids of places of worship and confiscation of religious property, in violation of Article 9 of the Convention;

(h) the alleged existence of an administrative practice of suppression of non-Russian media, in violation of Article 10 of the Convention;

(i) the alleged existence of an administrative practice of prohibiting public gatherings and manifestations of support, as well as intimidation and arbitrary detention of organisers of demonstrations, in violation of Article 11 of the Convention;

(j) the alleged existence of an administrative practice of expropriation without compensation of property from civilians and private enterprises, in violation of Article 1 of Protocol No. 1 to the Convention;

(k) the alleged existence of an administrative practice of suppression of the Ukrainian language in schools and harassment of Ukrainian-speaking children at school, in violation of Article 2 of Protocol No. 1 to the Convention;

(l) the alleged existence of an administrative practice of restricting the freedom of movement between Crimea and mainland Ukraine, resulting from the de facto transformation (by the respondent State) of the administrative border line into a State border (between the Russian Federation and Ukraine), in violation of Article 2 of Protocol No. 4 to the Convention;

(m) the alleged existence of an administrative practice targeting Crimean Tatars, in violation of Article 14 of the Convention, taken in conjunction with Articles 8, 9, 10 and 11 of the Convention;

(n) the alleged existence of an administrative practice targeting Crimean Tatars, in violation of Article 14 of the Convention, taken in conjunction with Article 2 of Protocol No. 4 to the Convention.

The Court declared *inadmissible* the following applicant Government's complaints concerning

(a) the alleged existence of an administrative practice of killing and shooting and a lack of an effective investigation into the alleged existence of such an administrative practice, in violation of Article 2 of the Convention;

(b) the alleged existence of an administrative practice of apprehension and intimidation of, and sei-

zure of material from, international journalists, in violation of Article 10 of the Convention;

(c) the alleged existence of an administrative practice of nationalisation of the property of Ukrainian soldiers, in violation of Article 1 of Protocol No. 1 to the Convention.

The Court further decided to *communicate* to the respondent Government the complaint about the alleged transfers of "convicts" to the territory of the Russian Federation, in violation of Article 8 of the Convention; to join application no. 38334/18 to the present case, and to examine, exceptionally, the admissibility and merits of the complaints raised therein together with the above-mentioned transfer of "convicts" complaint at the same time at the merits stage of the proceedings and to invite the respondent Government to submit their observations on the admissibility and merits of this part of the case.

The Court also decided to *lift* the interim measure indicated to the parties on 13 March 2014 in relation to Crimea under Rule 9 of the Rules of Court.

ARTICLE 2

Effective investigation/Enquête effective

Russia's failure to comply with procedural obligation to investigate effectively the events that occurred both during the active phase of the hostilities and after their cessation: *violation*

Manquement de la Russie à l'obligation procédurale de mener une enquête effective sur les événements s'étant déroulés au cours de la phase active des hostilités et après leur cessation : *violation*

Georgia/Géorgie – Russia/Russie (II), 38263/08, Judgment/Arrêt (merits/fond) 21.1.2021 [GC]

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

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Ill-treatment of Maidan protestors by police and non-State agents hired by it, and lack of effective investigation: *violation*

Mauvais traitements infligés à des manifestants de Maïdan par la police et des acteurs non étatiques engagés par celle-ci, et absence d'enquête effective : *violation*

Lutsenko and/et Verbytskyy – Ukraine, 12482/14 and/et 39800/14, Judgment/Arrêt 21.1.2021
Shmorgunov and Others/et autres – Ukraine, 15367/14 et al, Judgment/Arrêt 21.1.2021 [Section V]

(See Article 11 below/Voir l'article 11 ci-dessous, page 32)

Degrading treatment/Traitement dégradant

Insufficient justification for prolonged systematic handcuffing of life prisoners without regular and individualised review of specific security concerns: *violation*

Justification insuffisante d'une pratique consistant à menotter les détenus à vie de manière systématique, sans examen régulier et au cas par cas des questions de sécurité : *violation*

Shlykov and Others/et autres– Russia/Russie, 78638/11 et al, Judgment/Arrêt 19.1.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The four applicants, all serving sentences of life imprisonment at various prison facilities, were systematically subjected to handcuffing every time they left their cells on the grounds that they had a life sentence, had disciplinary records or had been placed under surveillance as dangerous prisoners by a prison commission.

Law – Article 3: The applicants had been handcuffed for long periods of time every time they left their cells. Even though their handcuffing had not been exposed to the public, any such measure that diminished self-esteem or self-image in the eyes of others, especially when lasting for extended periods of time, had to be considered as potentially "degrading".

The routine handcuffing of persons sentenced to life imprisonment did not seem to be based on domestic legislation. The relevant domestic provisions did not require that inmates sentenced to life imprisonment be handcuffed systematically when leaving their cells but presupposed discretion. It also transpired from domestic practice that this measure had not been applied automatically in all detention facilities housing such inmates. Nonetheless, when handcuffing had been applied routinely, the prisoners concerned found it very difficult to obtain a change in their situations. Furthermore, although the applicable domestic regulations provided that the use of restraint measures had to be regularly reviewed, there was no evidence that this

had been systematically done during the applicants' detention. Nor had any evidence been submitted of conduct that would have justified the use of the routine measure upon the applicants for extended periods of time. In the absence of evidence of any risk assessment by the authorities in charge of the applicants, it was unclear to the Court how the prison administration and domestic courts had reached and maintained their conclusions that the measure applied had been prompted by such a risk.

Although the Court was mindful of the difficulties States might encounter in maintaining order and discipline in penal institutions and that disobedience of detainees might quickly degenerate into violence, a life sentence could not justify routine and prolonged handcuffing that was not based on specific security concerns and the inmate's personal circumstances and not be subject to regular review. Furthermore, restraint measures against life-sentenced prisoners could only be taken as a proportionate response to a specific risk for the time strictly necessary to counter that risk.

The applicants in the present case had been handcuffed for prolonged periods every time they left their cells, without a proper evaluation of their individual situation and any regular assessment of whether the application of the measure in question was appropriate or pursued a specific aim. In view of this, their systematic handcuffing in a secure environment had been a measure which lacked sufficient justification and could thus be regarded as degrading treatment.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 3 on account of the conditions of the prison regime in which one of the applicants had been held, and of Article 6 § 1 on account of some of the applicants having been deprived of the opportunity to attend hearings in the proceedings they had instituted to challenge the practice of systematic handcuffing.

Article 41: the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by one of the applicants; EUR 3,000 to another applicant and EUR 1,950 for each of the remaining two applicants in respect of non-pecuniary damage.

Article 46: respondent State invited to implement measures of a general character with regard to a violation of Article 3 (the practice of prolonged handcuffing of life prisoners).

(See also *Goriunov v. the Republic of Moldova*, 14466/12, 29 May 2018, and *Yevdokimov and Others v. Russia*, 27236/05 et al., 16 February 2016, Legal Summary)

ARTICLE 6

Article 6 § 1 (civil)

Fair hearing/Procès équitable

Pre-trial judge proceedings not weakening applicants' positions so as to render subsequent proceedings for civil claims unfair *ab initio*: *no violation*

La procédure devant le juge de la mise en état n'a pas affaibli les positions des requérants au point de rendre inéquitable la procédure ultérieure relative à leur contestation civile : *non-violation*

Victor Laurenţiu Marin – Romania/Roumanie, 75614/14, Judgment/Arrêt 12.1.2021 [Section IV]
Mihail Mihăilescu – Romania/Roumanie, 3795/15, Judgment/Arrêt 12.1.2021 [Section IV]

Traduction française des résumés dans les affaires *Marin* et *Mihăilescu*

Printable version in the *Marin* and *Mihăilescu* cases

Facts – The applicant's father in *Victor Laurenţiu Marin* died in a car accident which was the subject of a criminal investigation. The applicant in *Mihail Mihăilescu* made a criminal complaint against his former mother-in-law for perjury, in the wake of his divorce proceedings. Both applicants joined the respective criminal proceedings as civil parties and in respect of civil claims. These cases were subsequently the subject of proceedings before a pre-trial judge, who upheld the prosecutor's office's decision to discontinue them. The applicants appealed unsuccessfully. The relevant domestic provisions for pre-trial judge proceedings have since been amended, following a Constitutional Court finding that they were unconstitutional.

Law – Article 6 § 1: Both cases concerned the applicants' civil claims, the applicants having complained of the unfairness of the criminal proceedings comprising these civil claims.

It was not for the Court to seek to impose any particular model on the Contracting Parties concerning the procedures, competences and role of investigating or pre-trial judges. These issues might involve important and sensitive questions about fairness and how to strike an appropriate balance between the parties to the proceedings, and the solutions to be adopted were linked with complex procedural matters specific to each constitutional order. Rather, the Court's task was to conduct a review of the specific circumstances of the case, on the basis of the complaints brought before it.

In the instant cases, the proceedings before a pre-trial judge had concerned the preliminary stage of

criminal proceedings, taken alone or jointly with claims by a civil party. Their main purpose had been to decide whether to commence a criminal trial in a case or to end a criminal-law dispute. Amongst other things, the pre-trial judge had been called upon to examine the lawfulness of an act of indictment or a decision not to indict, or decisions by the prosecutor's office to discontinue or close the criminal proceedings in a case. The judge's activities had not concerned the merits of the case, and their decisions had neither aimed at determining the essential elements of the alleged criminal offence, namely the act in question, the person who had committed it, and that person's guilt, nor any civil claim lodged by a civil party within criminal proceedings. These points could have been determined by the criminal court only at the trial stage of the proceedings.

Nevertheless, Article 6 § 1 under its civil head was applicable from the moment that the victim, or their next of kin, joined the criminal proceedings as a civil party, even during the preliminary criminal investigation stage taken on its own. This preliminary investigation stage or pre-trial stage of criminal proceedings might be of importance for civil proceedings, both because of the decisive impact the outcome of the criminal proceedings might have, in certain circumstances, on civil proceedings, and because the evidence collected by the authorities could be used by the applicant in the civil proceedings and could prove essential for the determination of the claim. Given that under the national legal framework the applicants could have had the merits of their civil rights and obligations determined either within the context of a criminal trial, or within the context of separate civil proceedings, the Court had regard to all the proceedings open to them, including the handling of the case by the pre-trial judge, when determining whether their rights had been prejudiced.

In line with the relevant legal framework in place at the time, the proceedings before the pre-trial judge had been conducted in chambers and in the absence of the parties. The parties could only make written submissions before the pre-trial judge concerning the admissibility and merits of the complaint against the prosecutor's office's decision not to prosecute, could not rely on any legal provision expressly giving them the opportunity to ask for a public and oral hearing to be held by the pre-trial judge, and could not ask the pre-trial judge to administer again the available evidence or add new evidence to the case file, nor had the decisions been amenable to appeal. In *Mihail Mihăilescu*, the other participants had not been notified of all the submissions made by one of the participants to the proceedings.

Admittedly, depending on the circumstances, such decisions by the pre-trial judge could have had a more or less extensive effect on the examination of the civil limb of proceedings. However, the decisions affected rather the manner in which a criminal trial court that had been called upon to determine the merits of both criminal and civil limbs of proceedings following an indictment could examine a case and review evidence which had been deemed lawful or unlawful by the pre-trial judge. It did not seem that such decisions similarly affected the manner in which the civil court could examine a case and the necessary evidence, where it was called upon to determine civil proceedings separately, especially where the criminal proceedings had been discontinued at the pre-trial judge stage of the proceedings.

In *Mihail Mihăilescu*, the applicant had brought separate civil proceedings; however, there was no evidence as to the outcome of those proceedings. In *Victor Laurențiu Marin*, the applicant had not brought separate civil proceedings. In both cases, the Court could not speculate as to what the precise outcome of those proceedings might have been. However, a final judgment of a criminal court was *res judicata* for civil courts, which had been called upon to examine a civil action, only with regard to the existence or lack of an act and the existence of evidence that a person had committed it. Those conditions did not seem to have been met with respect to the pre-trial judge's decision in both cases. Even assuming that the decisions could be viewed as the final judgment of a criminal court, at no stage of the proceedings brought by the applicants had the investigations been discontinued or closed on the substantive grounds that the alleged perpetrators' acts had not taken place or that they had not been the persons who had committed the acts. In both cases, the Court was not convinced that a separate civil action had been rendered obviously futile by any *res judicata* effect of the pre-trial judge's decision. Nor had the applicants presented any other argument suggesting that a separate civil action against the alleged perpetrators would have been unfair *ab initio*, or would not have been compliant with the Article 6 § 1 guarantees.

The Court's power to review compliance with domestic law was limited and it was in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporated" the rules of that law. It was therefore incumbent on aggrieved individuals to test the extent of the protection to fundamental rights offered by any legal system and to allow the domestic courts to apply those rights and, where appropriate, develop them in their power of interpretation.

In *Victor Laurenţiu Marin*, the applicant had also argued that he had been unable to have his case, including his civil claims, reviewed by an independent and impartial tribunal established by law because the pre-trial judge had lacked the competences and functions of a proper court. The guarantees set out in Article 6 under its criminal limb had not been applicable in the circumstances; moreover, the applicant could have brought separate civil proceedings against the alleged perpetrator which, in turn could have led to the merits of his civil action being determined in circumstances that complied with the guarantees set out under the civil limb of Article 6. Even assuming that the concept of a "tribunal" covered a pre-trial judge, the proceedings had not breached the requirements of lawfulness, independence and impartiality merely because the judge had been called upon to perform certain tasks without having the same powers as a court called upon to examine the merits of the case. The general competences and role of the pre-trial judge had been prescribed by the national legal framework in place at the relevant time. None of the available information suggested that the relevant judge had not complied with the requirements of independence and impartiality. In that connection, the pre-trial judge was a professional judge who had had to follow the same training programme and appointment procedure and observe the same rules concerning independence and impartiality as any other judge in the country.

Overall, the measures and decisions taken during the pre-trial judge proceedings in the circumstances of the applicants' cases had not weakened their positions to such an extent that subsequent proceedings aimed at determining the merits of their civil claims would have been rendered unfair from the outset. These findings were without prejudice to the domestic authorities' actions to set up a domestic legal framework in order to ensure a heightened level of protection compared with the Convention, as regards proceedings before a pre-trial judge.

Conclusion: no violation (unanimously).

In *Victor Laurenţiu Marin*, the Court also held, unanimously, that there had been no violation of Article 2 (procedural) in relation to the effectiveness of the investigation, and no violation of Article 13 (in conjunction with Articles 2 and 6), in respect of effective remedies.

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

Fair hearing/Procès équitable

Failure to grant applicant free legal aid to obtain the assistance of a lawyer during a procedure to place him under administrative surveillance for eight years: *violation*

Absence d'octroi d'une aide judiciaire gratuite au requérant sans argent pour obtenir l'assistance d'un avocat lors d'une procédure de placement sous surveillance administrative pour huit ans : *violation*

Timofeyev and/et Postupkin – Russia/Russie, 45431/14 and/et 22769/15, Judgment/Arrêt 19.1.2021 [Section III]

(See Article 7 below/Voir l'article 7 ci-dessous, page 20)

Impartial tribunal/Tribunal impartial

Public meeting and agreement on procedural matters with Ministry of Defence, a future defendant in army salary dispute, not affecting objective impartiality of Supreme Court: *no violation*

La tenue d'une réunion publique et la signature d'un accord sur des questions d'ordre procédural avec le ministère de la Défense, futur défendeur dans un contentieux sur les traitements de militaires, n'ont pas nui à l'impartialité objective de la Cour suprême : *non-violation*

Svilengaćanin and Others/et autres – Serbia/Serbie, 50104/10 et al., Judgment/Arrêt 12.1.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants are active, former or retired army officers who disputed the Minister of Defence's calculation of their salaries at the domestic level. The applicants brought successful civil claims before municipal courts against the respondent State for malfeasance on the part of the Ministry and the payment of salary arrears by way of redress.

On an unspecified date before March 2004, a meeting was held between the President of the Supreme Court and the Civil Division President, a President of a first-instance court and a representative of the Ministry. During the meeting, the courts were given background information on the complex way in which military salaries were determined, but the conversation turned principally to procedural matters. In particular, according to the Ministry, it was agreed in principle that the lower court would adopt a partial decision as to the legal basis of the civil claim and that the Supreme Court would then give a final ruling on the admissibility and merits of the case. If the court accepted the civil claims, the Ministry intended to propose out-of-court settlements of all pending cases to avoid further litiga-

tion costs. In the meantime, several first-instance courts applied to the Supreme Court to seek an opinion and guidance, in light of the large number of cases being brought, on the issue of jurisdiction, in order to harmonise inconsistent domestic case-law on the issue. In May 2005 the Supreme Court adopted a legal opinion, finding that the administrative route should be pursued to challenge the legality of an administrative decision establishing rights or the amount of salary or pension to be paid, while the civil courts were competent to adjudicate cases involving claims for damages caused by malfeasance on the part of State bodies.

At various points, the appellate courts ruled either in favour of or against the applicants in respect of the request for pecuniary damage.

In the eighth applicant's case, the Ministry appealed as a defendant to the Supreme Court and, in December 2008, sent a formal letter asking the Supreme Court to take a decision in the case as a priority and on two other appeals on points of law, as well as to serve its final judgment on the Ministry directly and not via the lower courts as required by law, in order to prevent execution of the lower judgments and thus irreparable damage to the military budget. Shortly afterwards, the Supreme Court ordered a retrial at second instance.

Ultimately, all of the applicants' cases in respect of pecuniary damage were unsuccessful on appeal to the Supreme Court, which reaffirmed its reasoning in the legal opinion; namely, that disputes as to salary calculation should have been regarded as a public-law matter and brought before the administrative authorities and courts. The Ministry of Defence brought an action for unjust enrichment against the eighth applicant, requesting reimbursement of the amount paid to him in accordance with the lower judgments in his favour.

The applicants lodged unsuccessful appeals with the Constitutional court, arguing that the civil proceedings had been unfair, in particular, because the Supreme Court had lacked impartiality and adopted a judgment which had been the result of an agreement reached with the Ministry.

Law – Article 6 § 1: The central question raised was whether, in the circumstances of the present case, the holding of the meeting with the representative of the Ministry of Defence, which had later become a party to the proceedings, had been capable of casting doubt on the Supreme Court's impartiality sufficiently to compromise the impartiality of the chambers, which had determined the appeals on points of law lodged in the applicants' cases at a later stage. The Court had to determine whether the Supreme Court itself and its chambers had offered sufficient guarantees to exclude any legitimate doubt in respect of their partiality. While the standpoint of the applicants was important, the decisive factor was whether there were ascertainable facts which might raise doubts as to the court's impartiality from the point of view of the external observer.

The cases before the domestic courts had involved a large number of litigants, including the applicants, against an executive authority (the Ministry of Defence), concerning a complex factual and legal issue, which could also have significantly affected the military budget. Against such a background, it was legitimate for the Supreme Court to seek methods to effectively deal with a large influx of cases at domestic level, particularly if they raised preliminary jurisdictional issues that fell within its competence, or if, for example, the outcome might lead to out-of-court settlements. In that regard, the courts may enter into institutional relations to the extent that it is consistent with the impartiality required of judges. In particular, they should strike an appropriate balance between the need to maintain the impartiality and appearance of impartiality on the one hand, and the courts' interest in obtaining information relevant to adjudication or effectively dealing with an influx of cases on the other. Meetings with any interested party, even more so with a State body, on issues which are the subject of pending or foreseeable litigation, should be held in a way which does not undermine the decision-making process and the public confidence that the courts must inspire.

The meeting had not been a private communication on a pending case, but a public meeting which had occurred outside the framework of any proceedings before the Supreme Court itself. Had the cases been pending before the Supreme Court, the holding of the meeting with only one party to discuss matters, in these particular circumstances, could have possible raised an issue. However, at the time, neither the applicants' cases nor the other cases of the same kind had been pending before the Supreme Court; most of the applicants' claims had not even been lodged with a first-instance court.

Furthermore, the complaints concerned the court of last resort in ordinary judicial proceedings in Serbia, which was composed exclusively of professional judges with guaranteed tenure. There was no real reason to doubt the ability of the judges to ignore extraneous considerations, if any, in the present case. They were in principle expected and trusted to abide by the law until there were ascertainable facts which might raise doubts as to their impartiality from the point of view of an external observer. Extracting one case to be the lead for all the others did not in any way compromise the im-

partial decision-making process, as it was a regular procedural step when required, which might lead to a reduction in the number of pending cases by means of out-of-court settlements or their disposal by lower courts.

As to the influence on adjudication by the lower courts, they had made use of their statutory entitlement to seek a legal opinion from the highest court in view of apparently divergent practice on the impugned matter. The Supreme Court had provided a comprehensive interpretation of the relevant legislation causing ambiguities in this area and had given guidance to the lower courts on the subject matter, and had been confined to its proper judicial role of determining who was vested with which authority. There was also no indication that the Supreme Court had changed its interpretation of the law as a result of the meeting. Moreover, the Constitutional Court had subsequently upheld their legal interpretation.

Consequently, while emphasising the importance of "appearances" in this context, in light of all the circumstances of the case and the foregoing considerations, the holding of the meeting had not been such as to cast doubt on the objective impartiality of the Supreme Court in ruling on the applicants' appeals on points of law against the lower courts' decisions. There remained the issue that the applicants might not have seen the Supreme Court as having been totally free from bias after the meeting. However, the existence of such sentiments and fears on their part was not sufficient to establish that they had been objectively justified within the meaning of the Court's case-law.

Conclusion: no violation (six votes to one).

(See also *Procola v. Luxembourg*, 14570/89, 28 September 1995, Legal Summary)

Article 6 § 3 (d)

Examination of witnesses/Interrogation des témoins

Refusal to call prosecution witnesses of decisive weight for trial's outcome due to defence's failure to substantiate request for their cross-examination, and lack of counterbalancing factors: *violation*

Refus d'appeler des témoins clés de l'accusation au motif que la défense n'a pas justifié sa demande de contre-interrogatoire, et absence de facteurs compensateurs : *violation*

Keskin – Netherlands/Pays-Bas, 2205/16, Judgment/Arrêt 19.1.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant was convicted *in absentia*, on the basis, *inter alia*, of seven witness statements, of having been in *de facto* control of fraud committed by a company on two other companies. He appealed unsuccessfully and, in the context of these proceedings, his requests to summon these witnesses for cross-examination were rejected by the Court of Appeal. His ensuing appeal in cassation was declared inadmissible.

Law – Article 6 §§ 1 and 3 (d): In order to assess whether the overall fairness of the applicant's trial had been impaired by the use of statements made by the absent witnesses, the Court applied the three-tier test laid down in its Grand Chamber case of *Al-Khawaja and Tahery v. the United Kingdom*, as further clarified by its Grand Chamber judgment in *Schatschaschwili v. Germany*.

(a) *Whether there was good reason for the non-attendance of the witnesses at the trial* – The Court of Appeal's dismissal of the applicant's requests had not been on grounds of death or fear, the witnesses' state of health or unreachability, or related to the special features of the criminal proceedings, but solely on the ground that the defence had failed to substantiate its interest in the examination of the witnesses. In particular, the defence had not indicated on what points the witness statements had been incorrect, and the applicant had availed himself of his right to remain silent when interviewed by the police. The right of an accused to cross-examine witnesses against him or her could not, however, be made dependent on his or her renunciation of the right to remain silent. Moreover, the Court of Appeal had not taken into account the relevancy of the testimony when dismissing the applicant's requests, and it had not been argued before the Court that it had been manifestly irrelevant or redundant.

Further, the domestic ruling in this case as well as the Supreme Court's leading judgments required the substantiation of requests to summon and examine witnesses regardless of whether they concerned witnesses for the prosecution or for the defence. In that respect, the European Court's judgments referred to by the Supreme Court in two of its leading judgments on the matter and by the Government in their submissions pre-dated and thus had all been superseded by the Grand Chamber's judgment in *Al-Khawaja and Tahery*. The latter judgment had consolidated and clarified the Court's case-law as regards the examination of witnesses.

Furthermore, the Court's judgments referred to by the Supreme Court concerned the examination of

defence witnesses, as opposed to the prosecution witnesses in issue in the present case. The Court therefore took the opportunity to reaffirm that paragraph 3 (d) of Article 6 comprised two distinct rights: a right relating to the examination of witnesses against the accused and a right to obtain the attendance and examination of witnesses on behalf of the accused. The Court had developed general principles which related exclusively to the right to examine, or have examined, prosecution witnesses, as well as general principles specifically concerning the right to obtain the attendance and examination of defence witnesses. In particular, contrary to the situation with defence witnesses, the accused was not required to demonstrate the importance of a prosecution witness. In principle, if the prosecution decided that a particular person was a relevant source of information and relied on his or her testimony at the trial, and if the testimony of that witness was used by the court to support a guilty verdict, it had to be presumed that his or her personal appearance and questioning were necessary (see *Khodorkovskiy and Lebedev v. Russia (no. 2)*). In other words, the interest of the defence in being able to have the prosecution witness concerned examined in his or her presence had to be presumed and, as such, constituted all the reason required to accede to a request by the defence to summon the witness.

Accordingly, it could not be said in the present case that the Court of Appeal had established good factual or legal grounds for not securing the attendance of the prosecution witnesses.

(b) *Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction* – The Court of Appeal had not based the applicant's conviction only on the statements of the seven witnesses. Furthermore, it appeared that none of those statements had been sufficient in themselves to establish that the applicant had committed the offence, and the Court of Appeal had not explicitly indicated its position on the weight it had given to them. Having regard to the Court of Appeal's findings on the evidence, the Court was of the view that the evidence of the absent witnesses had been of such significance or importance as was likely to have been determinative of the outcome of the case.

(c) *Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured* – The Court of Appeal, in its judgment, had given neither any indication that it had been aware of the reduced evidentiary value of the untested witness statements nor reasoning as to why it had considered this evidence to be reliable. Further, no corroborative evidence supporting this untested evidence of the kind as described in the *Schatschaschwili* judgment had been available or other such evidence that could have provided the same safeguard. The applicant had been able to give his own version of the events in question and it had been open to him to challenge the accuracy of the witnesses' statements. However, the Court considered that an opportunity to challenge and rebut absent witness statements was of limited use in a situation where a defendant had been denied the possibility to cross-examine witnesses and such an opportunity, on the basis of its well-established case-law, could not be regarded as a sufficient counterbalancing factor to compensate for the handicap for the defence created by the witnesses' absence.

Consequently, regard being had to the above considerations, the Court held that the applicant's inability to cross-examine the prosecution witnesses had rendered the trial as a whole unfair.

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

(see also *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015, Legal Summary, *Al-Khawaja and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, ECHR 2011, Legal Summary, and *Khodorkovskiy and Lebedev v. Russia (no. 2)*, 51111/07 and 42757/05, 14 January 2020)

ARTICLE 7

Retroactivity/Rétroactivité

Administrative surveillance for preventive purposes, after convicted persons have served their sentences, not constituting a penalty and not subject to the principle of retroactivity: *inadmissible*

Surveillance administrative aux fins préventifs, après l'exécution de la peine par les condamnés, non constitutive d'une peine et non soumise au principe de rétroactivité : *irrecevable*

Timofeyev and/et Postupkin – Russia/Russie, 45431/14 and/et 22769/15, Judgment/Arrêt 19.1.2021 [Section III]

English translation of the summary – Version imprimable

En fait – Le premier et le second requérants avaient été condamnés, respectivement en 2003 et 2007, pour une infraction commise en récidive dangereuse.

Puis ils ont été placés sous surveillance administrative par des décisions judiciaires de 2013 fondées

sur la loi n° 64FZ du 6 avril 2011 qui stipule que toute personne libérée d'un établissement pénitentiaire qui se trouvait en état de condamné en raison d'une condamnation pour une infraction commise en récidive dangereuse ou particulièrement dangereuse se voyait appliquer automatiquement la surveillance administrative.

Des restrictions ont été imposées aux requérants dont, entres autres, l'obligation de se présenter d'une à trois fois par mois à l'autorité chargée de la surveillance administrative, de signaler le changement du lieu de domicile dans un délai de trois jours ouvrés, et l'interdiction de quitter le domicile entre 22 heures et 6 heures.

En droit

Article 7 : Le placement sous surveillance administrative du premier requérant, fondé sur une décision judiciaire, a eu lieu plusieurs années après sa condamnation pénale, mais il était néanmoins lié à celle-ci et lui faisait suite.

S'agissant de la qualification de la surveillance administrative en droit interne, elle ne doit pas automatiquement aboutir à la conclusion de l'inapplicabilité de l'article 7.

En l'occurrence, les mesures ont pour but préventif d'empêcher la récidive et ne peuvent être regardées comme ayant un caractère répressif et comme constituant une sanction.

Quant à la ressemblance des mesures imposées dans le cadre de la surveillance administrative à celles constituant une peine restrictive de liberté, la mise en place de la surveillance administrative ne dépend pas du degré de culpabilité de la personne concernée et se fonde sur la « dangerosité » de la personne condamnée en état de récidive. Ainsi cette mesure ne revêt pas un caractère répressif.

S'agissant de la procédure associée à l'adoption et à la mise en œuvre de la surveillance administrative, elle était de nature civile et elle est maintenant de nature administrative, ne relevant pas de la justice pénale.

Les sanctions en cause ne pourront être infligées que dans le cadre d'une procédure judiciaire distincte au cours de laquelle le juge compétent pourra apprécier le caractère fautif ou non du manquement.

Enfin, s'agissant de la sévérité des mesures litigieuses, certaines étaient contraignantes, d'autres substantielles. Cependant, la gravité des mesures n'est pas décisive en soi, puisque de nombreuses mesures non pénales de nature préventive peuvent, de même que des mesures devant être qualifiées de peines, avoir un impact substantiel sur la personne concernée.

Ainsi, les obligations et restrictions imposées au premier requérant dans le cadre de la surveillance administrative ne constituaient pas une « peine » au sens de l'article 7 § 1 et elles doivent être analysées comme des mesures préventives auxquelles le principe de non-rétroactivité énoncé dans cette disposition n'a pas vocation à s'appliquer.

Conclusion : irrecevable (incompatibilité *ratione materiae*).

Article 4 du Protocole n° 7 : Eu égard à ses conclusions selon lesquelles les mesures de surveillance administrative ne constituaient pas une peine au sens de l'article 7 de la Convention, la Cour estime que l'imposition desdites mesures au second requérant ne revenait pas à le « punir pénalement » au sens de l'article 4 du Protocole n° 7.

Conclusion : irrecevable (incompatibilité *ratione materiae*).

Article 6 § 1 : La Convention n'oblige pas à accorder l'aide judiciaire dans toutes les contestations en matière civile.

Aucune disposition du droit interne en vigueur au moment des faits ne prévoyait la possibilité d'octroi d'une aide judiciaire gratuite dans le cadre d'une procédure de placement sous surveillance administrative. Toutefois, l'instauration d'un système d'aide judiciaire ne constitue qu'un moyen parmi d'autres propre à garantir l'équité de la procédure.

Le premier requérant était défendeur dans une procédure engagée par les autorités internes, soit l'établissement pénitentiaire.

La gravité de l'enjeu pour le premier requérant dans cette procédure était indéniablement importante : les restrictions imposées à l'intéressé avaient de sérieuses répercussions sur sa vie privée et sur l'exercice de ses droits, notamment de son droit à la liberté de circulation.

L'examen de la demande tendant à la mise en place de la surveillance administrative portait sur des questions juridiques qui demandaient une certaine connaissance du droit et de la jurisprudence. Or, le premier requérant n'était pas une personne expérimentée ou spécialiste dans le domaine du droit. Et le juge ne l'a pas assisté, ayant rejeté toutes ses demandes procédurales faites en ce sens. Or si le premier requérant avait été représenté par un avocat, il aurait pu préparer sa défense afin de remettre en cause les éléments versés par son adversaire. Aussi il était d'autant plus important d'assurer au premier requérant la défense de sa cause que, pour imposer les restrictions administratives audit requérant, le juge de première instance a pris en compte la « personnalité » de l'intéressé et « l'avis négatif » de l'administration de l'établissement pénitentiaire. En

outre, l'adversaire du premier requérant, à savoir le représentant de la colonie pénitentiaire, a bénéficié de l'assistance du procureur tout au long de la procédure.

Les juridictions internes ont prononcé plusieurs ajournements afin de permettre au premier requérant de trouver un représentant. Or, les demandes de l'intéressé étaient motivées par l'absence de moyens financiers pour rémunérer un avocat, et non pas par le manque de temps pour en trouver. Les ajournements prononcés n'auraient donc pas pu remédier à la situation du premier requérant.

Enfin, tenant compte de la situation du premier requérant qui, jusqu'à une semaine avant l'audience en appel, était un détenu purgeant une peine d'emprisonnement, et de ses difficultés pour préparer sa défense, l'intéressé a dû être bien plus éprouvé du point de vue physique et émotionnel par la procédure qu'un avocat expérimenté ne l'aurait été.

Eu égard à ce qui précède, l'impossibilité pour ledit requérant de bénéficier d'une aide judiciaire gratuite en vue d'obtenir l'assistance d'un avocat a dû placer l'intéressé dans une situation de net désavantage par rapport à son adversaire.

Conclusion : violation (unanimité).

Article 2 du Protocole n° 4 : Les obligations et restrictions imposées au second requérant lors de sa surveillance administrative étaient constituées de plusieurs mesures qui examinées séparément ou cumulativement, constituaient une ingérence dans son droit à la liberté de circulation. Elles avaient une base légale accessible dans le droit interne. En revanche, l'intéressé conteste le caractère prévisible de ladite loi au motif que celle-ci a été appliquée rétroactivement aux personnes condamnées avant son entrée en vigueur.

Eu égard à sa conclusion selon laquelle les mesures litigieuses ne constituaient pas une peine au sens de l'article 7 de la Convention, la Cour estime que l'imposition par la loi à l'égard des personnes condamnées à des peines privatives de liberté de mesures de prévention en prenant en compte leur comportement antérieur à l'entrée en vigueur de cette loi n'est pas problématique.

La loi était suffisamment prévisible quant à la catégorie des personnes susceptibles d'être concernées par son application, en ne laissant pas place à une appréciation discrétionnaire des juridictions nationales, et à sa portée temporelle car la durée de la surveillance administrative ne pouvait dépasser celle de l'existence de l'état de condamné.

Le second requérant relevait de la catégorie des personnes visées par la loi, c'estàdire celles qui, au moment de l'entrée en vigueur de la loi, se trouvaient en état de condamné pour une infraction commise en récidive dangereuse et devaient faire l'objet d'une surveillance administrative automatiquement, indépendamment de leur conduite au cours de l'exécution de la peine.

Le second requérant n'a pas contesté la prévisibilité de la loi en question quant à la portée des restrictions et obligations prévues. Dans ces circonstances, il n'est pas nécessaire d'examiner la question de savoir si leur portée était suffisamment prévisible.

S'agissant des buts des mesures litigieuses, les juridictions internes ont motivé le placement du second requérant sous surveillance administrative par le besoin de prévenir la récidive. Les mesures restrictives à la liberté de circulation de l'intéressé poursuivaient donc le but de la « prévention des infractions pénales ».

S'agissant de la proportionnalité d'une mesure restreignant la liberté de circulation, en droit interne, la durée de la surveillance administrative est fixée par la loi pour toute la durée de l'existence de l'état de condamné, qui est de huit ans (selon la version actuelle de la disposition pertinente du code pénal russe) et ne dépend pas de l'appréciation du juge.

Cependant, la loi prévoit la possibilité de contrôles juridictionnels périodiques de la nécessité du maintien des restrictions dont l'imposition n'est pas obligatoire, notamment l'interdiction de sortir du domicile entre 22 heures et 6 heures. Étant donné qu'il ne ressort pas des éléments du dossier soumis à la Cour que le second requérant a présenté une demande en ce sens, il n'y a pas lieu pour elle d'examiner si l'étendue du contrôle juridictionnel était suffisante en pratique.

S'agissant des mesures dont l'imposition est obligatoire en application de la loi, notamment l'obligation de se présenter une fois par mois à l'autorité chargée de la surveillance administrative, imposée au second requérant, la fréquence de contrôles périodiques de la nécessité de leur maintien est régie par la loi. En effet, la personne placée sous surveillance administrative peut demander l'arrêt anticipé de ce régime en tant que tel après l'écoulement de la moitié de la durée pour laquelle celui-ci a été appliqué et, en cas de rejet de la demande, une nouvelle demande d'arrêt anticipé de la surveillance administrative ne peut être introduite que six mois après ledit rejet.

Le second requérant avait été condamné pour une infraction grave et les juridictions ont estimé que le délai d'effacement de l'état de condamné était pour lui de six ans suivant l'exécution de sa peine (conformément à la version de la disposition pertinente du code pénal en vigueur à l'époque des

faits). Il s'ensuit que le contrôle de la nécessité de maintenir celui-ci sous surveillance administrative, et par conséquent de l'obliger à se présenter à l'autorité compétente une fois par mois, ne pouvait être effectué, à l'initiative de l'intéressé, qu'après l'écoulement d'une période initiale de trois ans. Cependant, eu égard à la nature de la restriction en cause et en particulier à la fréquence peu élevée de présentation personnelle imposée à l'intéressé, cette circonstance ne peut passer pour incompatible avec l'exigence de contrôle périodique. En outre, après cette période initiale, la nécessité de maintenir la mesure litigieuse pouvait faire l'objet d'un contrôle juridictionnel à des intervalles de six mois entre chaque rejet d'une éventuelle demande d'arrêt anticipé de la mesure faite par l'intéressé.

Les mesures de surveillance administrative appliquées au second requérant ont donc été proportionnées aux buts poursuivis.

Conclusion : non-violation (six voix contre une).

Article 41 : 4 000 EUR pour préjudice moral.

(Voir aussi, pour l'article 6, *Steel et Morris c. Royaume-Uni*, 68416/01, 15 février 2005, Résumé juridique, et, pour l'article 2 du Protocole n° 4, *De Tommaso c. Italie* [GC], 43395/09, 23 février 2017, Résumé juridique)

ARTICLE 8

Respect for private life/Respect de la vie privée

Justified publication of applicant's identifying data, including home address, on tax authority website portal, for failing to fulfil his tax obligations: *no violation*

Publication, justifiée, sur le portail internet des autorités fiscales, de renseignements propres à permettre l'identification du requérant, dont l'adresse de son domicile, au motif que celui-ci ne s'était pas acquitté de ses obligations fiscales : *non-violation*

L.B. – Hungary/Hongrie, 36345/16, Judgment/Arrêt 12.1.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant's personal data had been published on the website of the National Tax and Customs Authority for his failure to fulfil his tax obligations. It named him as a tax defaulter, and subsequently a major tax evader, and detailed his name, the amount of his tax arrears and debts, his tax identification and home address.

Law – Article 8

(a) *Applicability* – The Tax Authority had published personal data in connection with the applicant's failure to contribute to public revenue, which could arguably be considered conduct that may be recorded or reported in a public manner. Nonetheless, as such data provided information on the applicant's economic situation, the data published by the Tax Authority related to the applicant's private life. In this context, it was of no relevance whether the published data concerned unpaid tax on activities of a professional nature. Furthermore, the measure involved the publication of the applicant's home address. Article 8 was therefore applicable.

(b) *Whether there was an interference prescribed by law and following a legitimate aim* – As the information in question had become available to third parties, the publication on the Tax Authority's website of the data constituted an interference with his private life, which was in accordance with the law.

The Court was ready to accept that the impugned measures aimed to improve discipline regarding tax payment and thereby followed the legitimate aim of protecting the economic well-being of the country. Further, the aim of disclosure of the applicant's data under a list of "major tax evaders" had been to protect the particular interests of third parties, in relation to persons who owe tax, by providing them with an insight in those persons' financial situation. The State could therefore also invoke the rights and freedoms of others as a legitimate aim.

(c) *Whether the interference was necessary in a democratic society* – The Court had to consider whether a fair balance had been struck between the applicant's interest in protecting his right to privacy, and the interest of the community as a whole and third parties, with due regard to the specific context in which the information at issue had been made public.

(i) *The regime of publishing the identity of persons who fail to respect their tax obligations* – The impugned measure had been implemented in the framework of the State' general tax policy. Taxes had an instrumental role in financing State apparatus, but also in implementing the economic and social policy of the State in a broader sense. While there were difficulties in establishing whether the publication of tax defaulters' data actually tackled tax evasion and revenue losses, it was not unreasonable for the State to consider it necessary to protect its general economic interest in collecting public revenue by means of public scrutiny aimed at deterring persons form defaulting on their tax obligations. In addition, any person wishing to establish economic relations with others had a specific interest in obtaining information relating to

another person's compliance with their tax obligations, and ultimately their suitability to do business with, particularly when tax avoidance had persisted for an extended period of time. Since access to such information also had an impact on fair trading and the functioning of the economy, the disclosure of the list of persons who owed a large amount of tax also had an information value for the public on a matter of general interest.

Based on the foregoing, and bearing in mind the margin of appreciation allowed to States as regards general measures of economic and social strategy, the legislature's choice to make public the identity of persons who failed to respect their tax obligations was not manifestly without reasonable foundation.

(ii) *Scope and manner of publication of personal data (impact)* – The question remained as to whether the impact of the publication in the present case had outweighed the justifications for the general measure, having regard to the essential role played by personal data protection in safeguarding the right to respect for private life.

The relevant domestic law provided for the publication of personal details only of major tax defaulters and major tax evaders (those whose tax arrears and tax debts exceeded HUF 10 million – approximately EUR 30,000 – which, given the economic realities of contemporary Hungary, was not an insignificant amount). Publication was subject to the condition that the affected persons had failed to fulfil their tax obligations over an extended period of time (namely, 180 days). The legislation thus drew a distinction between taxpayers, based on relevant criteria. The measure had accordingly been circumscribed to address the risk of distortion of the tax system and the negative effect of such publication had been limited to those whose conduct was most detrimental to revenue. Moreover, the personal data of such a person was removed from the website and no longer made available to the general public once their due taxes had been paid – identification was therefore possible for no longer than was necessary.

While the data in question could not be considered intimate details linked to the applicant's identity, they had still provided quite comprehensive information about him. Despite the fact that the applicant's home address might have been publicly available in any event, his interest in the protection of his right to respect for private life had still been engaged by its disclosure alongside other information. Further, the publication of personal data, including a home address, could have significant effects or even serious repercussions on a person's private life. In the circumstances of the present case, however, the list of tax defaulters and tax evaders would have been pointless if it had not allowed for the identification of the taxpayers in question. Communication of a taxpayer's first name and surname only would not have made it possible to distinguish them from other individuals, would have been likely to have provided inaccurate information, and entailed ramifications for persons bearing the same name. In the circumstances, therefore, a combination of identifiers had been necessary to ensure the accuracy and efficacy of the scheme. Besides, the publication of any identifying data other than those at issue would not have been manifestly less onerous, or constituted a less intrusive interference with Article 8.

Uploading the applicant's personal data to the Tax Authority's website had made that data accessible to anyone who connected to the Internet, including people in another country. While recognising the importance of the rights of a person who has been the subject of content available on the Internet, those rights had to also be balanced against the public's right to be informed. In the present case, the purpose and principal effect of publication had been to inform the public, and the main reason for making such data available on the Internet had been to make the information easily available and accessible to those concerned, irrespective of their place of residence. The fact alone that access to the list had not been restricted did not necessarily mean that the list had drawn wide public attention: among other things, an individual seeking the information had to take the initial step of going to the website, proceeding to the tax defaulters' or tax evaders' list, and then looking up the desired information. Further, it was doubtful that the list, appearing in Hungarian on the website of the Tax Authority, would have attracted public attention – worldwide – from persons other than those concerned. On the contrary, publication by means of a portal designed for tax matters had ensured that such information had been distributed in a manner reasonably calculated to reach those with a particular interest in it, while avoiding disclosure to those who had no such interest. In addition, the website had not provided the public with a means of shaming the applicant, for example, by way of posting comments underneath the lists in question.

Finally, although the applicant had referred to the general public-shaming effect of appearing on the list, there had been no evidence or reference indicating that the publication of his personal data on the list had led to any concrete repercussions in his private life.

In the circumstances of the present case, making the information in question public could not be

considered a serious intrusion into the applicant's personal sphere. Making his personal data public had not placed a substantially greater burden on his private life than had been necessary to further the State's legitimate interest.

Conclusion: no violation (five votes to two).

Respect for private life/Respect de la vie privée

Fine imposed on a poor and vulnerable Roma woman for harmless begging, and subsequent imprisonment for five days for non-payment: *violation*

Amende infligée à une personne rom démunie et vulnérable pour avoir mendié inoffensivement puis emprisonnement pendant cinq jours pour son non-paiement : *violation*

Lacatus – Switzerland/Suisse, 14065/15, Judgment/Arrêt 19.1.2021 [Section III]

English translation of the summary – Version imprimable

En fait – La requérante, appartenant à la communauté rom, a été déclarée coupable de mendicité et condamnée à une amende de 500 francs suisses, assortie d'une peine privative de liberté de cinq jours en cas de nonpaiement. Incapable de payer cette somme, elle a exécuté cette peine de prison.

En droit – Article 8

a) *Applicabilité* – La Cour n'a jamais été amenée à trancher la question de savoir si une personne qui se voit infliger une sanction pour avoir mendié peut se prévaloir de l'article 8.

La dignité humaine, une notion sous-jacente à l'esprit de la Convention, est sérieusement compromise si la personne concernée ne dispose pas de moyens de subsistance suffisants. En mendiant, l'intéressé adopte un mode de vie particulier afin de surmonter une situation inhumaine et précaire. Il convient donc de prendre en compte les spécificités du cas concret, et notamment les réalités économiques et sociales de la personne concernée.

La requérante est extrêmement démunie, analphabète et sans emploi. Elle ne bénéficie pas d'aide sociale et n'est pas soutenue par une tierce personne. La mendicité lui permettait d'acquérir un revenu et d'atténuer sa situation de pauvreté. En interdisant la mendicité de manière générale et en infligeant à la requérante une amende, assortie d'une peine d'emprisonnement pour non-exécution de la peine prononcée, les autorités suisses l'ont empêchée de prendre contact avec d'autres personnes afin d'obtenir une aide qui constitue, pour elle, l'une des possibilités de subvenir à ses besoins élémentaires. Et le droit de s'adresser à autrui pour en obtenir de l'aide, relève de l'essence même des droits protégés par l'article 8.

Conclusion : article 8 applicable.

b) *Fond* – Il y a eu une ingérence dans l'exercice par la requérante de sa vie privée, prévue par la loi.

La Cour n'exclut pas au regard de l'arrêt du Tribunal fédéral que certaines formes de mendicité, en particulier ses formes agressives, puissent déranger les passants, les résidents et les propriétaires des commerces. Elle considère également comme valable l'argument tiré de la lutte contre le phénomène de l'exploitation des personnes, en particulier des enfants. L'ingérence visait ainsi *a priori* les buts légitimes de la défense de l'ordre et la protection des droits d'autrui.

La loi applicable ne permet pas une véritable mise en balance des intérêts en jeu et sanctionne la mendicité de manière générale, indépendamment de l'auteur de l'activité poursuivie et de sa vulnérabilité éventuelle, de la nature de la mendicité ou de sa forme agressive ou inoffensive, du lieu où elle est pratiquée ou de l'appartenance ou non de l'accusé à un réseau criminel. Or, la Cour estime pouvoir laisser ouverte la question de savoir si, en dépit de la rigidité de la loi applicable, un juste équilibre aurait en l'espèce néanmoins pu être ménagé entre les intérêts publics de l'État, d'une part, et les intérêts de la requérante, d'autre part. En tout état de cause, l'État défendeur a outrepassé la marge d'appréciation dont il jouissait en l'espèce, et ce pour les raisons qui suivent.

Il n'existe pas de consensus au sein du Conseil de l'Europe par rapport à l'interdiction ou à la restriction de la mendicité. Il y a néanmoins une certaine tendance à la limitation de l'interdiction et une volonté des États de se contenter de protéger efficacement l'ordre public par des mesures administratives. En revanche, une interdiction générale prévue par une disposition pénale, comme celle qui fait l'objet de la présente requête, semble être l'exception. Cet élément constitue un deuxième indice, outre celui tiré de la nature fondamentale de la question en jeu pour l'existence de la requérante, de la marge d'appréciation limitée dont jouissait l'État défendeur en l'espèce.

Quant à l'intérêt privé de la requérante à se livrer aux activités incriminées, la mendicité constituait l'un de ses moyens de survivre. Se trouvant dans une situation de vulnérabilité manifeste, elle avait le droit, inhérent à la dignité humaine, de pouvoir exprimer sa détresse et à essayer de remédier à ses besoins par la mendicité.

Quant à la nature et à la sévérité de la sanction infligée, la peine privative de liberté est une sanction grave. Eu égard à la situation précaire et vulnérable

de la requérante, l'imposition d'une peine privative de liberté, qui peut alourdir encore davantage la détresse et la vulnérabilité d'un individu, était pour elle presque automatique et quasiment inévitable.

Une telle mesure doit être justifiée par de solides motifs d'intérêt public, qui n'étaient pas réunis.

Tout en reconnaissant l'importance de lutter contre la traite des êtres humains et l'exploitation des enfants, et l'obligation des États parties à la Convention de protéger les victimes, la Cour doute que la pénalisation des victimes de ces réseaux soit une mesure efficace. À cet égard, dans son rapport concernant la Suisse publié en 2019, le groupe d'experts sur la lutte contre la traite des êtres humains (GRETA) a estimé que l'incrimination de la mendicité met les victimes de mendicité forcée dans une situation de grande vulnérabilité. Il a en outre « exhorté les autorités suisses à se conformer à l'article 26 de la Convention sur la lutte contre la traite des êtres humains en adoptant une disposition qui prévoit la possibilité de ne pas sanctionner les victimes de la traite pour avoir pris part à des activités illicites lorsqu'elles y ont été contraintes (...) ». Par ailleurs, le Gouvernement ne fait pas valoir que la requérante appartiendrait à un tel réseau criminel ou qu'elle serait autrement victime des activités criminelles d'autrui, et aucun élément du dossier ne le laisse penser.

Quant à l'intérêt public des autorités à imposer la mesure litigieuse pour la protection des droits des passants, résidents ou propriétaires des commerces, il ne semble pas que les autorités aient reproché à la requérante de s'être livrée à des formes de mendicité agressives ou intrusives, ou que des plaintes aient été déposées contre l'intéressée auprès de la police par des tierces personnes. En tout état de cause, pour la Rapporteuse spéciale des Nations unies sur l'extrême pauvreté et les droits de l'homme, la motivation de rendre la pauvreté moins visible dans une ville et d'attirer des investissements n'est pas légitime au regard des droits de l'homme, contrairement à ce que semble alléguer le Gouvernement.

Enfin, la Cour n'est pas en mesure de souscrire à l'argument du Tribunal fédéral selon lequel des mesures moins restrictives n'auraient pas permis d'atteindre le même résultat ou un résultat comparable. La majorité des États membres du Conseil de l'Europe prévoit des restrictions plus nuancées que l'interdiction générale. De plus, même si l'État dispose d'une certaine marge d'appréciation en la matière, le respect de l'article 8 aurait exigé que les tribunaux internes se livrent à un examen approfondi de la situation concrète de l'espèce.

Compte tenu de ce qui précède, la sanction infligée à la requérante ne constituait une mesure proportionnée ni au but de la lutte contre la criminalité organisée, ni à celui visant la protection des droits des passants, résidents et propriétaires des commerces. La mesure par laquelle la requérante, qui est une personne extrêmement vulnérable, a été punie pour ses actes dans une situation où elle n'avait très vraisemblablement pas d'autres moyens de subsistance et, dès lors, pas d'autres choix que la mendicité pour survivre, a atteint sa dignité humaine et l'essence même des droits protégés par l'article 8. Dès lors, l'État défendeur a outrepassé la marge d'appréciation dont il jouissait en l'espèce.

Partant, l'ingérence n'était pas « nécessaire dans une société démocratique ».

Conclusion : violation (unanimité).

Article 41 : 922 EUR pour préjudice moral.

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

Refusal of national authorities to recognise male identity of transgender persons in the absence of gender reassignment surgery: *violation*

Refus des autorités nationales de reconnaître l'identité masculine de personnes transgenres faute d'une intervention chirurgicale de conversion sexuelle : *violation*

X and/et Y – Romania/Roumanie, 2145/16 and/et 20607/16, Judgment/Arrêt 19.1.2021 [Section IV]

English translation of the summary – Version imprimable

En fait – Les requérants, personnes transgenres, ont vu leurs demandes tendant à la rectification sur leurs documents d'identité des mentions concernant leur sexe, leur prénom et leur code numérique personnel rejetées par les autorités administratives et judiciaires au motif que, pour justifier d'une telle demande, le demandeur doit établir avoir subi une intervention chirurgicale de conversion sexuelle.

En droit – Article 8

a) *Applicabilité* – Le droit au respect de la vie privée englobe l'identification sexuelle comme un aspect de l'identité personnelle. Cela concerne tous les individus, y compris les personnes transgenres, comme les requérants, qu'elles souhaitent ou non commencer un traitement de conversion sexuelle agréé par les autorités. L'article 8 se trouve donc applicable dans la présente affaire sous son volet relatif à « la vie privée » concernant les demandes faites par les requérants auprès des juridictions nationales afin de faire modifier les registres d'état civil en raison de leur réassignation sexuelle.

Conclusion : Article 8 applicable.

b) *Fond* – La question principale est celle de savoir si le dispositif réglementaire en place et les décisions prises à l'égard des requérants permettent de constater que l'État s'est acquitté de son obligation positive de respecter leur vie privée.

i. *Sur l'existence d'un cadre légal approprié pour la reconnaissance juridique de la réassignation de genre*

La loi roumaine ne consacre pas de procédure spécifique aux demandes de reconnaissance juridique de la réassignation sexuelle, comme tel est le cas en Italie. Cependant, le droit existant a permis à des personnes transgenres d'obtenir, par la voie judiciaire, la reconnaissance de leur réassignation sexuelle et la modification de leur état civil. Ainsi, il y avait en droit roumain une base légale qui permettait d'introduire des actions en justice afin de faire examiner en substance des demandes relatives à la réassignation sexuelle.

Toutefois des difficultés sont rencontrées par les tribunaux nationaux appelés à trancher des questions sensibles et en évolution continue. Des exemples de décisions montrent des hésitations quant à la procédure à suivre pour la reconnaissance de la réassignation sexuelle, ainsi qu'au tribunal compétent ou à la partie défenderesse contre laquelle l'action doit être dirigée. De plus, pour ce qui est des conditions à remplir pour obtenir la reconnaissance juridique de la réassignation sexuelle et la modification de l'état civil, une jurisprudence divergente s'est développée quant à l'exigence d'une intervention chirurgicale de conversion sexuelle préalable, à tout le moins à l'époque des actions des requérants. Ainsi, il apparaît que certains tribunaux ont considéré que les dispositions législatives exigeaient impérativement une décision préalable autorisant une intervention chirurgicale sur les organes génitaux, et d'autres non.

Ainsi le cadre légal roumain en matière de reconnaissance juridique du genre n'était pas clair et, dès lors, prévisible.

ii. *Sur l'exigence d'une intervention chirurgicale de conversion sexuelle avant la modification de l'état civil*

Les tribunaux internes ont constaté que les requérants étaient transgenres sur la base d'informations détaillées relatives à leur état psychologique et médical ainsi qu'à leur mode de vie sociale. Ils ont notamment constaté que les requérants avaient subi un traitement hormonal et qu'avant ou au cours des procédures, ils avaient subi des mastectomies. Ils ont toutefois refusé de reconnaître la réassignation sexuelle ou d'autoriser la modification de la mention du sexe et d'autres données sur les registres civils au motif que les intéressés n'avaient pas effectué d'interventions chirurgicales de conversion sexuelle sur leurs organes génitaux. Les tribunaux ont ainsi considéré que le principe de l'autodétermination n'était pas suffisant pour faire droit aux demandes de conversion sexuelle dont ils avaient été saisis.

Or les requérants ne souhaitaient pas subir de telles interventions avant la reconnaissance juridique de leur réassignation sexuelle, et dans ce seul but, et invoquaient en substance leur droit à l'autodétermination. En cela, la présente affaire diffère de la situation des requérants dans les affaires récentes *S.V. c. Italie* et *Y.T. c. Bulgarie*, dans lesquelles les requérants souhaitaient subir de telles interventions chirurgicales pour, selon eux, achever le processus de conversion sexuelle. En revanche, elle se rapproche de la situation des requérants dans l'affaire *A.P., Garçon et Nicot*, dans laquelle la reconnaissance de la réassignation sexuelle était assujettie à la réalisation d'une opération ou d'un traitement stérilisant que les intéressés ne souhaitaient pas subir. Dans cette dernière affaire, la Cour était partie du principe qu'à l'époque des faits, c'était le droit positif français qui imposait cette condition.

Contrairement à l'affaire *A.P., Garçon et Nicot*, les requérants de la présente affaire n'insistent pas particulièrement sur l'aspect stérilisant de l'intervention exigée, bien qu'ils reconnaissent qu'elle peut aboutir à un tel résultat. Mais tout comme l'opération ou le traitement stérilisant, l'intervention chirurgicale de conversion sexuelle sur les organes génitaux que les tribunaux roumains exigeaient des requérants, qui ne souhaitaient pas la subir, touche manifestement à l'intégrité physique des intéressés. Or, dans le contexte français, la Cour a déjà jugé que toute ambiguïté dans les procédures de reconnaissance juridique du genre est problématique dès lors que l'intégrité physique de la personne est en jeu sur le terrain de l'article 8.

À cet égard, une jurisprudence divergente s'est développée quant à l'exigence d'une intervention chirurgicale de conversion sexuelle préalable, à tout le moins à l'époque des actions des requérants. En outre, le droit interne ne prévoyait pas l'exigence de subir une opération de conversion sexuelle pour obtenir la reconnaissance juridique du genre, exigence qui a néanmoins justifié le rejet de leurs demandes.

Ensuite, dans le cadre des procédures engagées par les requérants, les tribunaux n'ont aucunement étayé leur raisonnement quant à la nature exacte de l'intérêt général exigeant de ne pas permettre le changement juridique du sexe, et n'ont pas réalisé, dans le respect de la marge d'appréciation accordée, aussi étroite soit-elle, un exercice de mise en balance de cet intérêt avec le droit des requérants à la reconnaissance de leur identité sexuelle. Dans

ces conditions, la Cour ne peut déceler quelles sont les raisons d'intérêt général ayant conduit au refus de mettre en adéquation l'identité sexuelle des requérants et la mention correspondant à celle-ci sur les registres civils. Et les raisons d'intérêt général évoquées par le Gouvernement ne l'ont été que pour justifier la nécessité d'une décision de justice et donc le caractère judiciaire de la procédure, et non pour justifier l'exigence d'une opération de conversion sexuelle. Dès lors, ces motifs ne sauraient pallier l'omission des tribunaux nationaux.

La Cour voit là une rigidité de raisonnement sur la reconnaissance de l'identité sexuelle des requérants qui a placé ces derniers, pendant une période déraisonnable et continue, dans une situation troublante leur inspirant des sentiments de vulnérabilité, d'humiliation et d'anxiété. En effet, tout comme dans l'affaire *A.P., Garçon et Nicot*, les tribunaux nationaux ont mis les requérants, qui ne souhaitaient pas une intervention chirurgicale de conversion sexuelle, devant un dilemme insoluble : soit subir malgré eux cette intervention, et renoncer au plein exercice de leur droit au respect de leur intégrité physique, qui relève notamment du droit au respect de la vie privée, mais aussi de l'article 3 de la Convention ; soit renoncer à la reconnaissance de leur identité sexuelle qui relève également du droit au respect de la vie privée. Elle voit là une rupture du juste équilibre que les États parties sont tenus de maintenir entre l'intérêt général et les intérêts des personnes concernées.

En outre, le nombre d'États membres du Conseil de l'Europe qui exigent une intervention chirurgicale de conversion sexuelle comme condition préalable à la reconnaissance juridique de l'identité de genre ne cesse de diminuer. En 2020, vingt-six États ne l'exigent plus.

Ainsi, le refus des autorités internes de reconnaître juridiquement la réassignation sexuelle des requérants faute d'une intervention chirurgicale de conversion sexuelle a porté une atteinte injustifiée au droit des requérants au respect de leur vie privée.

iii. *Conclusion* – Partant, il y a eu une absence d'une procédure claire et prévisible de reconnaissance juridique de l'identité de genre permettant le changement de sexe, et donc de nom ou de code numérique personnel, dans les documents officiels, de manière rapide, transparente et accessible. De plus, le refus des autorités nationales de reconnaître l'identité masculine des requérants faute d'une intervention chirurgicale de conversion sexuelle a conduit en l'occurrence à une rupture du juste équilibre que l'État est tenu de maintenir entre l'intérêt général et les intérêts des requérants.

Conclusion : violation (unanimité).

Article 41 : 1 153 EUR pour dommage matériel au deuxième requérant ; 7 500 EUR pour préjudice moral à chacun des deux requérants.

(Voir aussi *A.P., Garçon et Nicot c. France*, 79885/12 et al., 6 avril 2017, Résumé juridique, *S.V. c. Italie*, 55216/08, 11 octobre 2018, Résumé juridique, et *Y.T. c. Bulgarie*, 41701/16, 9 juillet 2020, Résumé juridique)

Respect for family life/Respect de la vie familiale

Taking into care of the Roma granddaughter of the applicant, who had had custody of her since birth, and failure to implement visiting rights: *violation*

Placement en institut de la petite-fille rom de la requérante disposant de sa garde depuis sa naissance, et non-exécution du droit de visite : *violation*

Terna – Italy/Italie, 21052/18, Judgment/Arrêt 14.1.2021 [Section I]

English translation of the summary – Version imprimable

En fait – La requérante, ressortissante italienne, avait été condamnée pénalement pour différents crimes. Elle disposait de la garde de sa petite-fille appartenant à l'ethnie rom depuis sa naissance en 2010.

À partir de 2016, au moment où l'enfant a été placée dans un institut, la requérante n'a cessé de demander au tribunal l'organisation de rencontres, mais elle n'a pas pu exercer son droit de visite nonobstant les décisions rendues par cette juridiction. Par la suite, l'enfant a été déclarée adoptable et le droit de visite de la requérante a été suspendu.

En droit

Article 8 : Les parents de l'enfant ont été déchus de leur autorité parentale, et même en l'absence d'une procédure officielle de prise en charge de l'enfant par la requérante, sa grand-mère, cette dernière s'est occupée d'elle depuis sa naissance, un lien interpersonnel étroit s'était développé et la requérante s'est comportée à tous égards comme sa mère. Par conséquent, les relations entre la requérante et sa petite-fille sont en principe de même nature que les autres relations familiales protégées par l'article 8.

La requérante n'a cessé de tenter de reprendre des contacts avec l'enfant depuis le placement de cette dernière en institut et malgré les différentes déci-

sions du tribunal, elle n'a pas pu exercer son droit de visite.

Certes, les autorités étaient confrontées en l'espèce à une situation très difficile qui découlait notamment du risque d'enlèvement allégué, en particulier par la tutrice, et de ses implications pour les modalités de déroulement des rencontres. Toutefois, à deux reprises, le tribunal a demandé aux services sociaux d'organiser les rencontres selon des modalités visant à garantir l'anonymat du lieu de placement de l'enfant, mais que les services sociaux n'ont jamais donné suite à ses injonctions.

Les autorités n'ont pas fait preuve de la diligence qui s'imposait en l'espèce et elles sont restées en deçà de ce que l'on pouvait raisonnablement attendre d'elles. En particulier, les services sociaux n'ont pas pris les mesures appropriées pour créer les conditions nécessaires à la pleine réalisation du droit de visite de la requérante.

Les juridictions internes n'ont pas pris rapidement des mesures concrètes et utiles visant à l'instauration de contacts effectifs entre la requérante et l'enfant et elles ont ensuite « toléré », pendant un certain temps, que l'intéressée ne puisse pas voir la mineure. En particulier le tribunal a décidé de suspendre le droit de visite de la requérante dans l'attente du dépôt du rapport d'expertise alors qu'aucune visite n'avait jamais été organisée.

Or, bien que l'arsenal juridique prévu par le droit italien semble suffisant, aux yeux de la Cour, pour permettre à l'État défendeur d'assurer le respect des obligations positives qui découlent pour lui de l'article 8, force est de constater que les autorités ont laissé se consolider, pendant un certain temps, une situation de fait mise en place au mépris des décisions judiciaires, sans prendre en compte les effets à long terme susceptibles d'être engendrés par une séparation permanente entre l'enfant concerné et la personne chargée de s'en occuper, en l'occurrence la requérante.

Eu égard à ce qui précède et nonobstant la marge d'appréciation de l'État défendeur en la matière, les autorités nationales n'ont pas déployé les efforts adéquats et suffisants pour faire respecter le droit de visite de la requérante en méconnaissant le droit de l'intéressée au respect de sa vie familiale.

Conclusion : violation (unanimité).

Article 14 combiné avec l'article 8 : Les juridictions internes ont procédé au placement de la petite-fille de la requérante en se basant sur les expertises qui avaient constaté l'incapacité de cette dernière à exercer son rôle parental et les difficultés de l'enfant qui grandissait dans un environnement criminel et présentait des troubles de l'attachement. À la suite du placement de la mineure en institut, le tribunal a ordonné à deux reprises le maintien des contacts entre la requérante et l'enfant.

En outre, la tutrice de l'enfant avait demandé au juge des tutelles la suspension des contacts en raison d'un risque d'enlèvement de l'enfant par la communauté rom, sa communauté d'appartenance. Si dans un premier temps le juge des tutelles, agissant à titre provisoire, a fait droit à la demande de la tutrice en ordonnant la suspension des rencontres et en prévoyant des mesures provisoires de nature à prévenir un enlèvement de la mineure, le tribunal, dans l'examen du fond de l'affaire, a modifié sa décision et a ordonné aux autorités compétentes de s'assurer que les rencontres avec l'enfant pussent se dérouler en veillant à la préservation de l'anonymat du lieu de placement de cette dernière.

Quant au fait que les contacts, même si ordonnés par le tribunal, n'ont pas eu lieu, il s'agit d'un défaut d'organisation des visites par les services sociaux ayant conduit la Cour à conclure à la violation de l'article 8 à raison de l'absence d'efforts adéquats et suffisants déployés par les autorités nationales pour faire respecter le droit de visite de la requérante. Ces retards, ainsi qu'il ressort de la jurisprudence de la Cour, montrent l'existence d'un problème systémique en Italie.

La tierce partie s'est référée à une enquête de 2011 qui montrerait un nombre élevé d'enfants roms placés en Italie. Cependant aucune motivation liée à l'origine ethnique de l'enfant et de sa famille n'a été invoquée par les juridictions internes pour justifier son placement. Celui-ci a été motivé en raison de l'intérêt supérieur de la fillette d'être éloignée d'un milieu où elle était fortement pénalisée sous différents points de vue et également en raison de l'incapacité de la requérante à exercer un rôle parental.

Quant au rôle de la tutrice, si ses considérations sont le reflet de préjugés et ne peuvent passer pour une formulation malheureuse appelant des critiques sérieuses, elles sont en soi une base insuffisante pour conclure que les décisions de juridictions étaient motivées par l'origine ethnique de l'enfant et de sa famille. Et même si le juge des tutelles a fait provisoirement droit à la demande de la tutrice en ordonnant la suspension des rencontres et en prévoyant des mesures provisoires de nature à prévenir un enlèvement de la mineure, cette décision a été par la suite modifiée par le tribunal.

Conclusion : non-violation (unanimité).

Article 41 : 4 000 EUR pour préjudice moral.

(Voir aussi *Jansen c. Norvège*, 2822/16, 6 septembre 2018, Résumé juridique)

ARTICLE 10

Freedom of expression/Liberté d'expression

Award of damages against a blogger journalist for defamation of another journalist, without relevant and sufficient reasons: *violation*

Condamnation civile d'un journaliste blogueur pour diffamation d'un confrère, sans motifs pertinents et suffisants : *violation*

Gheorghe-Florin Popescu – Romania/Roumanie, 79671/13, Judgment/Arrêt 12.1.2021 [Section IV]

English translation of the summary – Version imprimable

En fait – Journaliste de profession, le requérant fut condamné à verser environ 1 100 EUR à titre de réparation du préjudice moral causé à L.B., rédacteur en chef d'un journal et réalisateur d'émissions pour une chaîne de télévision locale, par plusieurs articles qu'il avait publiés sur son blog.

Dans leurs motifs, les tribunaux retinrent que le requérant avait accusé L.B. d'être moralement responsable d'un meurtre-suicide sans avancer aucune preuve, se bornant à affirmer à l'appui de ses accusations que L.B. avait refusé de couvrir, dans son journal, l'événement en question. Et qu'il avait utilisé des expressions vulgaires et diffamatoires.

En droit – Article 10 : Les tribunaux nationaux ont centré leur analyse principalement sur les conséquences négatives que les propos litigieux avaient eues sur l'honneur, la réputation et la dignité de L.B., ainsi que sur le fait que le requérant ne soit pas parvenu à prouver ses allégations. La Cour note cependant que les tribunaux ont omis :

i. de distinguer entre les affirmations de fait et les jugements de valeur ;

ii. d'analyser certains éléments essentiels, à savoir que le requérant était journaliste et que la liberté de la presse joue un rôle fondamental dans le bon fonctionnement d'une société démocratique ;

iii. de constater que le litige portait sur un conflit entre le droit à la liberté d'expression et le droit à la protection de la réputation, appelant mise en balance ;

iv. de rechercher si les propos du requérant relevaient d'un domaine d'intérêt public et contribuaient à un débat d'intérêt général ;

v. de tenir compte de la notoriété et du comportement antérieur du plaignant : il n'a pas été établi avec exactitude si L.B. était une « figure publique » agissant dans un contexte public, au sens de la jurisprudence de la Cour, du fait d'un éventuel engagement politique ou de son travail en tant que rédacteur en chef et réalisateur d'émissions de télévision dans un groupe de médias ;

vi. en ce qui concerne le contenu des articles litigieux, de chercher à savoir quel était leur objet : le raisonnement des tribunaux témoigne d'une acceptation tacite du fait que le respect du droit à la vie privée prévalait en l'espèce sur le respect du droit à la liberté d'expression ;

vii. en ce qui concerne le style des articles litigieux, de rechercher avec une attention particulière – puisque le caractère satirique des articles constituait l'argument principal de la défense du requérant – s'il s'agissait ou non d'une forme d'exagération ou de déformation de la réalité visant naturellement à provoquer, à agiter et qu'il n'y avait pas lieu de prendre au sérieux ;

viii. d'analyser l'ampleur de la diffusion des articles litigieux, leur accessibilité, ou encore la question de savoir si le requérant bénéficiait, en tant que blogueur ou utilisateur de médias sociaux, d'une certaine popularité, de nature à augmenter l'impact de ses propos.

En ce qui concerne la lourdeur de l'indemnité à payer, le requérant indique que son montant était sept fois supérieur au salaire minimum mensuel en Roumanie, sans toutefois indiquer quelle était sa situation financière à l'époque des faits, ni s'il a eu des difficultés à payer ce montant. Les tribunaux se sont bornés à énumérer certains critères devant être appliqués aux fins de l'établissement de la sanction, sans toutefois les appliquer, ni tenir compte des conséquences de cette sanction sur la situation économique du requérant. Dans ces conditions, et en l'absence d'informations quant à l'exécution de la décision interne, la Cour ne saurait spéculer sur l'impact de la sanction sur la situation du requérant.

En toute hypothèse, eu égard à ce qui précède – et notamment au fait que les tribunaux internes n'ont pas dûment mis en balance les intérêts en jeu conformément aux critères établis dans sa jurisprudence –, la Cour considère que l'ingérence dans le droit du requérant à la liberté d'expression n'a pas été justifiée par des motifs pertinents et suffisants.

Conclusion : violation (unanimité).

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

Freedom of expression/Liberté d'expression

Order to remove from a website illegally recorded extracts of the private conversations of a vulnerable public figure was justified,

notwithstanding the fact that they had been reproduced by other media: *no violation*

Injonction justifiée de retirer sur un site les enregistrements illicites de conversations privées d'une personne publique vulnérable, malgré la reprise de leur contenu par d'autres médias : *non-violation*

Société éditrice de Mediapart and Others/et autres – France, 281/15 and/et 34445/15, Judgment/Arrêt 14.1.2021 [Section V]

English translation of the summary – Version imprimable

En fait – Les requérants sont un site d'information d'actualités en ligne Mediapart, son directeur et un journaliste. Dans le courant de l'année 2009, un conflit opposa M^me^ Bettencourt (décédée en 2017), principale actionnaire du groupe l'Oréal, à sa fille, à l'occasion de donations importantes au profit de tiers. Des enregistrements secrets avaient été effectués entre mai 2009 et mai 2010 par le majordome de M^me^ Bettencourt de conversations de celle-ci avec ses proches, dont P.D.M., chargé de la gestion de sa fortune. Avertis de ce que la fille de M^me^ Bettencourt les avait remis à la brigade financière de la police nationale, en juin 2010, les requérants décidèrent de publier en ligne des extraits. Cependant, les tribunaux nationaux leur firent l'injonction de les retirer et de ne plus les publier.

En droit – Article 10 : L'injonction de retrait des enregistrements illicites et l'interdiction de ne plus les publier s'analysent en une ingérence des autorités publiques dans l'exercice du droit à la liberté d'expression des requérants. L'ingérence était prévue par la loi et poursuivait le but légitime de la protection de la réputation ou des droits d'autrui. L'interception clandestine, indépendamment des éléments constitutifs de sa répression par la loi française en tant que délit, constituait une intrusion suffisamment grave pour faire entrer en jeu le droit au respect de la vie privée de M^me^ Bettencourt et de P.D.M. au titre de l'article 8 de la Convention.

Les requérants ne sauraient se fonder sur la décision de relaxe rendue à leur encontre par les juridictions pénales pour justifier du caractère disproportionné de l'ingérence qu'ils dénoncent devant la Cour. Les procédures civile et pénale diligentées visaient en effet des objectifs différents.

En l'espèce, la cour d'appel de renvoi et la Cour de cassation ont abordé la question du conflit de droits au regard du mode d'obtention des enregistrements publiés sur le site. L'injonction a, de ce fait, été considérée comme une restriction à la liberté d'informer des requérants, nécessaire au respect de la vie privée de M^me^ Bettencourt et de P.D.M. Cette mise en balance des droits aboutit à faire primer le respect de la vie privée sur la liberté d'expression alors même que les publications se rapportent à un débat d'intérêt général, en raison non seulement de l'origine illicite des publications mais aussi de l'ampleur de leur impact et donc de la gravité de l'atteinte à la vie privée des intéressés. La Cour n'entend pas revenir sur la contribution des publications à un débat d'intérêt général dès lors que cette dernière n'a pas été sérieusement contestée. Elle se concentrera donc sur les éléments pris en considération par le juge des référés pour caractériser le trouble illicite et décider de le faire cesser.

La divulgation des extraits des enregistrements, dont les requérants n'ignoraient pas qu'elle constitue un délit, devait les conduire à faire preuve de prudence et de précaution, indépendamment du fait qu'ils auraient agi en vue, entre autres, de dénoncer l'abus de faiblesse dont était victime M^me^ Bettencourt. Si les requérants indiquent avoir procédé à un tri des propos pour ne garder que ceux portant sur des questions d'intérêt général, la Cour de cassation a jugé que cet élément n'était pas suffisant au regard de leurs devoirs et responsabilités de journalistes. Elle a estimé que l'information du public sur ces questions aurait pu se faire autrement qu'en divulguant les enregistrements illicites. Les journalistes auteurs d'une infraction ne peuvent se prévaloir d'une immunité pénale exclusive, dont ne bénéficient pas les autres personnes qui exercent leur droit à la liberté d'expression, du seul fait que l'infraction a été commise dans l'exercice de leur fonction journalistique.

Eu égard à la portée des publications sur le site de Mediapart, à la divulgation des propos par extraits en ligne, avec un accès direct audio à certains d'entre eux, malgré le travail de vérification opéré par les requérants, les juridictions internes pouvaient légitimement conclure dans les circonstances de l'espèce que l'intérêt public devait s'effacer devant le droit de M^me^ Bettencourt et de P.D.M. au respect de leur vie privée. Même si l'accès au site n'est pas gratuit, les propos retranscrits étaient visibles d'un grand nombre de personnes et sont demeurés en ligne sur une période de temps importante. Les juridictions internes pouvaient raisonnablement estimer que l'information était susceptible d'être établie par un travail d'investigation et d'analyse mené sous le bénéfice du droit au secret des sources.

Quant au caractère dissuasif des mesures ordonnées aux requérants, pour justifier l'injonction en question, la cour d'appel a estimé que l'accès aux enregistrements *via* le site du journal constituait un trouble persistant à l'intimité de la vie privée des intéressés. La Cour de cassation a considéré que cette sanction était proportionnée à l'infraction commise même si le contenu des enregistrements

révélé initialement par les requérants avait été repris ultérieurement par d'autres organes de presse.

Les juridictions nationales ont pu légitimement estimer que le passage du temps n'avait pas fait disparaître l'atteinte à la vie privée de P.D.M. et de M^me^ Bettencourt compte tenu de l'ampleur de l'impact des publications qu'elles ont apprécié au regard de la manière dont les propos retranscrits avaient été enregistrés, de la vulnérabilité de la seconde, et, plus généralement, de l'importance de leurs conséquences dommageables pour les intéressés. La sensibilité des informations attentatoires à la vie privée et le caractère continu du dommage causé par l'accès aux retranscriptions écrites et audio sur le site du journal appelaient une mesure susceptible de faire cesser le trouble constaté ce que ne permettait pas la possibilité d'obtenir des dommages et intérêts. Une autre mesure que celle ordonnée aurait été insuffisante pour protéger efficacement la vie privée des intéressés.

La Cour de cassation a estimé que le fait que les informations litigieuses aient été reprises sur d'autres sites ou dans la presse écrite ne devait pas être pris en considération. La Cour a certes déjà souligné à plusieurs occasions qu'il n'est pas admissible au regard de l'article 10 d'empêcher la divulgation d'une information déjà rendue publique ou dépouillée de son caractère confidentiel. Cela étant, les juridictions nationales ont sanctionné les requérants pour faire cesser le trouble causé à une femme qui, bien qu'étant un personnage public, n'avait jamais consenti à la divulgation des propos publiés, était vulnérable et avait une espérance légitime de voir disparaître du site du journal les publications illicites dont elle n'avait jamais pu débattre, contrairement à ce qu'elle a pu faire lors du procès pénal. Dans ces conditions, la Cour admet également que l'injonction entendait réparer l'ingérence initiale dans la vie privée de M^me^ Bettencourt et de P.D.M. Si le contenu des enregistrements était largement diffusé au moment du prononcé de l'injonction, leur publication littérale était dès l'origine illicite et restait prohibée pour l'ensemble des organes de presse. En outre, la Cour relève que les requérants, qui ont été relaxés dans le cadre de la procédure pénale, n'ont pas été privés de la possibilité d'exercer leur mission d'information en ce qui concerne le volet public de l'affaire Bettencourt. Dans ces conditions, les requérants n'ont pas démontré que le retrait et l'interdiction de publier le contenu des enregistrements a effectivement pu avoir un effet dissuasif sur la manière dont ils ont exercé et exercent encore leur droit à la liberté d'expression.

Les motifs invoqués par les juridictions internes étaient pertinents et suffisants pour démontrer que l'ingérence litigieuse était « nécessaire dans une société démocratique », et que l'injonction prononcée n'allait pas au-delà de ce qui était nécessaire pour protéger M^me^ Bettencourt et P.D.M. de l'atteinte à leur droit au respect de leur vie privée.

Conclusion : non-violation (unanimité).

(Voir aussi *Radio Twist a.s. c. Slovaquie*, 62202/00, 19 décembre 2006, Résumé juridique)

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

Deliberate strategy to stop initially peaceful Maidan protest through excessive force resulting in escalation of violence and multiple abuses by non-State agents hired by police: *violation*

Stratégie délibérée impliquant un usage excessif de la force pour stopper une manifestation initialement pacifique organisée sur la place Maïdan, avec pour conséquences une escalade de violence et des abus de la part d'acteurs non étatiques engagés par la police : *violation*

Lutsenko and/et Verbytskyy – Ukraine, 12482/14 and/et 39800/14, Judgment/Arrêt 21.1.2021
Shmorgunov and Others/et autres – Ukraine, 15367/14 et al, Judgment/Arrêt 21.1.2021
[Section V]

Traduction française des résumés dans les affaires *Lutsenko et Verbytskyy* et *Shmorgunov et autres*

Printable version in the *Lutsenko and Verbytskyy* and *Shmorgunov and Others* cases

Facts – The cases concerned mass protests, which took place in Ukraine between November 2013 and February 2014 (the so-called "Euromaidan" or "Maidan" protests) in response to the suspension of the Ukraine-European Union Association Agreement. The Automaidan movement organised car rallies to support the Maidan protesters in various parts of Ukraine, including by protesting in front of the homes of high-ranking officials and bringing supplies to protesters. The protests led to the ousting of the President of Ukraine and a series of political and constitutional changes. Initially the protesters numbered up to 100,000 people, rising to up to 800,000 people. Special police forces were mobilised to disperse the protests which led to clashes. The authorities also used non-State agents aligned with the police (*titushky* – private individuals, including those with a criminal background), who are alleged to have carried out numerous assaults, kidnappings and murders of protesters. Reportedly there were over 100 deaths (including 70

by gunfire) and thousands injured between both the protestors and the police.

Law

General remarks – These judgments pointed to a deliberate strategy on the part of the authorities, or parts thereof, to hinder and put an end to a protest, the conduct of which had initially been peaceful, with rapid recourse to excessive force which had resulted in, if not contributed to, an escalation of violence. Some of the abuse had been committed by non-State agents who had acted with the acquiescence if not the approval of the authorities.

In *Shmorgunov and Others*, the Court found multiple violations of Articles 3, 5 § 1 and 11 of the Convention as a result of the manner in which the law-enforcement authorities had engaged in the public order operations undertaken to deal with the Maidan protests in 2013 and 2014, the excessive force and, in certain cases, deliberate ill-treatment used in relation to some protesters, amounting, in relation to two applicants, to torture, and, in one case, failure to provide adequate medical assistance during detention.

In *Lutsenko and Verbytskyy*, the Court found violations of Articles 2, 3, 5 § 1 and 11 of the Convention on account, in particular, of the abductions, ill-treatment and persecution of the first applicant and the torture and death of the second applicant's brother, Mr Y. Verbytskyy, as a result of their implication in the Maidan protests.

In both cases, the Court found that to date no independent and effective official investigation had been conducted into crimes committed by lawenforcement officers and non-State agents, who had been allowed to act with the acquiescence, if not the approval of the latter.

Article 3 – Use of excessive force by police during dispersal of demonstrations (*Shmorgunov and Others*)

(a) *Substantive limb*

There was no evidence or information indicating that the police's recourse to physical force against the applicants in relation to dispersals had been made strictly necessary by their conduct, nor that the force had been used in compliance with domestic law. The applicants had been subjected to beatings, including with rubber and/or plastic batons, which had been done publicly and accompanied by verbal abuse in some cases, which had amounted to ill-treatment. In addition, two applicants had been subjected to torture.

(b) *Procedural limb*

There had been significant shortcomings in the investigations into the events of the respective dates and evidence had not been collected in a timely fashion. On the whole, the investigations into the events and the related court proceedings had not so far resulted in the circumstances pertaining to the applicants' alleged ill-treatment being established. Nor had they led to the identification of all those who had actually used force against the applicants. There had been no substantial progress in court proceedings concerning suspects whose cases had eventually been referred for trial, some of which had been ongoing at first instance since 2015. Domestic and international reports suggested that the trials had been protracted and that not all necessary measures had been taken to ensure the appearance of victims, witnesses and defendants at court hearings. As a result of delays and omissions, by the time investigations had intensified, some suspects and possible offenders appeared to have fled Ukraine and were consequently out of the authorities' reach. Moreover, there had been reported instances of the Ministry of the Interior refusing to cooperate with the investigations.

Those serious shortcomings, and the fact that after more than six years the circumstances pertaining to the applicants' alleged ill-treatment had not been established and those who had allegedly used excessive force against them had still not been identified, was sufficient to find that, so far, no effective investigation had been conducted into the applicants' complaints of ill-treatment by the police.

Conclusion: violations (unanimously).

Articles 2 and 3 – Abduction and ill-treatment by private individuals (*Lutsenko and Verbytskyy*)

(a) *Substantive limb*

Both individuals had clearly been subjected to ill-treatment. That was done in order to obtain information relating to their involvement in the Maidan protests and/or to intimidate and/or punish them in that connection. There was no dispute between the parties that those suspected of being responsible had been under the control of the authorities or had acted on the authorities' instructions. That version of events also had considerable basis in the available domestic and international material, notably regarding the involvement of *titushky*. The Court therefore found these circumstances to be sufficiently established.

Having been subjected to torture, Mr Y. Verbytskyy had been left in a remote location by the suspects who had been hired by law-enforcement officials, in weather conditions which had been particularly harsh, where he had been unlikely to survive for long if left unattended. The responsibility for his death therefore rested with the respondent State.

(b) *Procedural limb*

No effective investigation had been conducted into the applicants' abduction and ill-treatment, nor into Mr Y. Verbytskyy's murder. Only one of the suspects had stood trial, and two more suspects had been committed for trial but there was no information that they had been concluded. Although the authorities had tried, unsuccessfully, to extradite one of the suspects found in Russia, it remained unclear whether any further steps had been taken to establish the whereabouts of all of the other suspects who had absconded and to ensure their availability for the investigations. Although the investigating authorities had acknowledged suspicion that the suspects had been hired by law-enforcement officials and that the crimes had been part of the authorities' attempt to suppress the Maidan protests, there was no information that any meaningful efforts had been made to identify the law-enforcement officials concerned. There was no information that any other substantial progress had been made in the investigations in order to shed light on all the circumstances of the applicants' abduction and ill-treatment or to verify whether there had been a discriminatory motive based, on Mr Y. Verbytskyy's Western Ukraine origin, behind his ill-treatment and murder.

Conclusion: violations (unanimously).

Article 11 (both cases)

There were ample indications that the rapid recourse by the authorities to excessive and at times brutal force against the protesters on 30 November 2013, in particular, and instances of unjustified detention appeared to have disrupted the initially peaceful conduct of the protest and resulted in, if not contributed to, an escalation of violence. After that dispersal, the number of people involved had risen considerably and the scale of the protests had become larger.

(a) *Whether the applicants enjoyed protection under Article 11*

Most of the protestors, including the ten applicants (in *Shmorgunov and Others*), had appeared to offer little or no resistance to the police during the dispersal on 30 November 2013. Two further applicants had taken part in protests in the early hours of 11 December. Although by that time the protestors had erected barricades, set up tents and platforms and occupied several administrative buildings, there was no information indicating that the protestors' original goal of being obstructive but peaceful had changed at that point. In the course of the dispersal on that date, some of the protestors had appeared to offer resistance to the police, however, the applicants had offered no such resistance. Two further applicants had taken part in protests between January and February 2014, which had involved substantially more violent clashes between the police and the protestors, leading to numerous persons being wounded and several police dying. However, there was no evidence demonstrating that the specific applicants had intended to commit or engaged in acts of violence or offered any resistance to the police. Similarly, in *Lutsenko and Verbytskyy*, there had been no evidence that the first applicant and second applicant's brother had intended to commit or had engaged in any acts of violence during their participation in the protests. Consequently, each of the foregoing had enjoyed the protection of Article 11.

(b) *Whether there was a justified interference*

In *Shmorgunov and Others*, the authorities had detained several of the applicants concerned and also used force against many of them in connection with their participation in the protests. Those measures had led to the termination of their participation in the protests on those dates, amounting to interferences with their freedom of peaceful assembly. The Court proceeded on the assumption that the interferences had pursued a legitimate aim and had a basis in domestic law, while reiterating the problems concerning the quality of the applicable domestic legislation which it had identified in previous Ukrainian cases in relation to Article 11. The Court emphasised, however, that there was no legal basis in domestic law for the authorities to engage the services of *titushky* in any law-enforcement operations for the purposes of dispersing, apprehending and dealing with protesters.

The Court had already found that the relevant applicants' treatment had violated Articles 3 and/or 5. Those findings might be sufficient to conclude that there was a disproportionate interference under Article 11, on account of the unjustified use of force against them by the police, which had entailed termination of their participation in the protests.

However, the Court also noted that, in relation to the complaints under Article 3 and/or 5 of the applicants concerned, there had been indications that the actions of the authorities in relation to the protestors had generally appeared to have formed part of a deliberate strategy to put an end to and further hinder the Maidan protests. Viewing the relevant applications and complaints raised thereunder as a whole, the Court could not but conclude that the increasingly violent dispersal of the series of protests at issue and the adoption of the repressive measures, examined in that and other Maidan cases, had clearly had the serious potential, if not as regards some parts of law enforcement, the aim, to deter the protestors and the public at large from

taking part in the protests and more generally form participating in open political debate.

In light of the foregoing, the interferences of all concerned applicants had been disproportionate to any legitimate aims which they might have pursued and thus had not been necessary in a democratic society.

In *Lutsenko and Verbytskyy*, there were cogent and substantial elements demonstrating that the abuses suffered by the first applicant and second applicant's brother had been aimed at punishing or intimidating them on account of their involvement in the protests and/or preventing their further participation therein. There was nothing in the case file capable of demonstrating that the interference at issue, which had consisted of treatment in violation of Articles 2 and 3, had been prescribed by law, or pursued a legitimate aim. Nor was there any ground to suggest it had been necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 3,000 to Mr Lutsenko in respect of pecuniary damage; sums ranging between EUR 15,000 and 30,000 in respect of non-pecuniary damage.

(See also *Kadura and Smaliy v. Ukraine*, 42753/14 and 43860/14; *Dubovtsev and Others v. Ukraine*, 21429/14 et al.; and *Vorontsov and Others v. Ukraine*, 58925/14 et al., 21 January 2021)

ARTICLE 14

Discrimination (Article 3)

Conviction for minor offence and EUR 40 fine for violent homophobic attack, without investigating hate motives, and subsequent discontinuation of criminal proceedings on *ne bis in idem* grounds: *violation*

Condamnation de l'auteur d'une violente agression homophobe à une amende de 40 EUR pour infraction mineure, sans enquête sur les motivations haineuses de l'acte, puis abandon des poursuites pénales en vertu du principe *ne bis in idem*: *violation*

Sabalić – Croatia/Croatie, 50231/13, Judgment/Arrêt 14.1.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant was physically attacked by a private individual (M.M.) after revealing her sexual orientation to him. She sustained minor physical injuries from the incident. The police subsequently brought successful minor offences proceedings against M.M. for breach of public peace and order. He was fined approximately EUR 40. After realising that the police had failed to institute a criminal investigation against M.M., the applicant lodged a criminal complaint with the State Attorney's Office. It was rejected, on the ground that M.M. had already been prosecuted for minor offences proceedings and that his criminal prosecution would contravene the *ne bis in idem* principle.

Law – Article 14 in conjunction with Article 3

(a) *Scope*

The Court found that the most appropriate way to proceed with the applicant's allegations – that the violence against her had had homophobic overtones which had not been properly addressed by the authorities – was to subject them to a simultaneous examination under Article 3 taken in conjunction with Article 14.

(b) *The response of the domestic authorities*

The domestic legal system had provided for criminal law mechanisms protecting individuals from hate-motivated violence. However, the Court did not need to examine that framework further, since the applicant's complaint was rather of a procedural nature.

The police had immediately responded at the scene and made initial findings, which presented prima facie indications of violence motivated or at least influenced by the applicant's sexual orientation. These findings had never been put into doubt during the proceedings at the domestic level. According to the Court's case-law, this had mandated for an effective application of domestic criminal-law mechanisms capable of elucidating the possible hate motive with homophobic overtones behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible. According to the domestic procedures, the police had been required to lodge a criminal complaint with the State Attorney's Office, which had been competent to conduct further official investigations into the indications of violent hate crime even in cases of only minor bodily injuries. Attempted grave bodily injury and violent behaviour and acts of discriminatory breach of human rights had required an *ex-officio* investigation and prosecution even without a hate crime element. On the basis of these provisions, the State Attorney's Office had instituted an official investigation before an investigating judge. There was therefore no doubt that, even in terms of the domestic law, the police had been under a duty to report the matter to the State Attorney's Office, which, however, they had failed to do.

Instead, the police had instituted minor offences proceedings indicting M.M. on charges of breach of public peace and order. That had not in any manner addressed the hate crime element to the physical attack, nor had M.M. been indicted or convicted of any charges related to violence motivated by discrimination. Moreover, he had been sentenced to a derisory fine of approximately EUR 40. The Court could not overlook the fact that the sentence had been manifestly disproportionate to the gravity of ill-treatment suffered by the applicant. That conclusion was confirmed by comparing it with the prescribed sanctions for the offences as subsequently classified by the State Attorney's Office – which had been punishable by imprisonment.

Overall, the response of the domestic authorities through the minor offences proceedings had not been capable of demonstrating the State's Convention commitment to ensuring that homophobic ill-treatment did not remain ignored by the relevant authorities and to providing effective protection against acts of ill-treatment motivated by the applicant's sexual orientation. The sole recourse to those proceedings could be considered rather as a response that fostered a sense of impunity for the acts of violent hate crime than as a procedural mechanism showing that such acts could in no way be tolerated.

(c) *The ne bis in idem principle (Article 4 § 2 of Protocol No. 7)* – The State Attorney's Office and the criminal courts had found, on the basis of their interpretation of the *Sergey Zolotukhin* and *Maresti* case-law, that M.M.'s final conviction in the minor offences proceedings had created a formal impediment to his criminal prosecution for the violent hate crime on the grounds of the *ne bis in idem* principle. The Government had submitted that, given that it had been necessary to secure compliance with the principle, the domestic authorities had had a justified reason for not implementing the effective criminal-law mechanism.

However, the domestic authorities had themselves brought about the situation in which they, by unnecessarily instituting the ineffective minor offences proceedings, had undermined the possibility to put properly into practice the relevant provisions and requirements of the domestic criminal law.

Both the failure to investigate hate motives behind a violent attack and failure to take into consideration such motives in determining the punishment for violent hate crimes had amounted to "fundamental defects" in the proceedings under Article 4 § 2 of Protocol No. 7. The domestic authorities had failed to remedy the impugned situation, although it could not be said that there had been *de jure* obstacles to do so. In particular, they had failed to offer the defendant the appropriate redress, for instance, by terminating or annulling the unwarranted set of proceedings and effacing its effects, and to re-examine the case.

(d) *Overall* – By instituting the ineffective minor offences proceedings and, as a result, erroneously discontinuing the criminal proceedings on formal grounds, the domestic authorities had failed to discharge adequately and effectively their procedural obligation under the Convention concerning the violent attack against the applicant motivated by her sexual orientation. Such conduct of the authorities was contrary to their duty to combat impunity for hate crimes which are particularly destructive of fundamental rights.

Conclusion: violation (unanimously).

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

(See also *Sergey Zolotukhin v. Russia* [GC], 14939/03, 10 February 2009, Legal Summary, and *Maresti v. Croatia*, 55759/07, 25 June 2009)

Discrimination (Article 8)

Ethnic origin not the reason for the removal and placement in care of the Roma granddaughter of the applicant, who had had custody of her since birth: *no violation*

Absence de justification par l'origine ethnique de l'éloignement et la prise en charge par les services sociaux de la petite-fille rom de la requérante disposant de sa garde depuis sa naissance : *non-violation*

Terna – Italy/Italie, 21052/18, Judgment/Arrêt 14.1.2021 [Section I]

(See Article 8 above/Voir l'article 8 ci-dessus, page 28)

ARTICLE 33

Inter-State application/Requête interétatique

Jurisdiction of Russia over Abkhazia and South Ossetia during the active phase of hostilities and after their cessation

Juridiction de la Russie concernant l'Abkhazie et l'Ossétie du Sud pendant la phase active des hostilités et après leur cessation

Georgia/Géorgie – Russia/Russie (II), 38263/08, Judgment/Arrêt (merits/fond) 21.1.2021 [GC]

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

Inter-State application/Requête interétatique

Alleged existence of an administrative practice by Russian authorities in Crimea resulting in multiple Convention violations: *admissible*

Existence alléguée d'une pratique administrative des autorités russes en Crimée emportant de multiples violations des droits conventionnels : *recevable*

Ukraine– Russia/Russie (re Crimea), 20958/14, Decision/Décision 14.1.2021 [GC]

(See Article 1 above/Voir l'article 1 ci-dessus, page 10)

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

Article 2 § 1

Freedom of movement/Droit de circulation

Administrative practice as regards the inability of Georgian nationals to return to their respective homes in Abkhazia and South Ossetia: *violation*

Pratique administrative quant à l'impossibilité pour les ressortissants géorgiens de retourner dans leurs foyers respectifs en Ossétie du Sud et en Abkhazie : *violation*

Georgia/Géorgie – Russia/Russie (II), 38263/08, Judgment/Arrêt (merits/fond) 21.1.2021 [GC]

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

Freedom of movement/Droit de circulation

Proportionality of administrative surveillance measures imposed for six years after the sentence had been served, subject to periodical review of their necessity: *no violation*

Caractère proportionné des mesures de surveillance administrative, imposées pour six ans après l'exécution de la peine et soumises aux contrôles périodiques de leur nécessité : *non-violation*

Timofeyev and/et Postupkin – Russia/Russie, 45431/14 and/et 22769/15, Judgment/Arrêt 19.1.2021 [Section III]

(See Article 7 above/Voir l'article 7 ci-dessus, page 20)

ARTICLE 4 OF PROTOCOL No. 7/ DU PROTOCOLE N° 7

Right not to be tried or punished twice/ Droit à ne pas être jugé ou puni deux fois

Administrative surveillance of a convicted person in order to prevent recidivism after having served his sentence, not amounting to a second "criminal penalty": *inadmissible*

Surveillance administrative d'une personne condamnée pour éviter sa récidive après l'exécution de la peine, ne revenant pas à la « punir pénalement » une seconde fois : *irrecevable*

Timofeyev and/et Postupkin – Russia/Russie, 45431/14 and/et 22769/15, Judgment/Arrêt 19.1.2021 [Section III]

(See Article 7 above/Voir l'article 7 ci-dessus, page 20)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

Hungary has failed to fulfil its obligations under EU law in the area of procedures for granting international protection and returning illegally staying third-country nationals

La Hongrie a manqué à ses obligations découlant du droit de l'Union en matière de procédures relatives à l'octroi de la protection internationale et de retour des ressortissants de pays tiers en séjour irrégulier

Case/Affaire C-808/18, Judgment/Arrêt 17.12.2020

Press release – Communiqué de presse

The existence of evidence of systemic or generalised deficiencies concerning judicial independence in Poland or of an increase in those deficiencies does not in itself justify the judicial authorities of the other Member States refusing to execute any European arrest warrant issued by a Polish judicial authority

L'existence d'éléments témoignant de défaillances systémiques ou généralisées concernant l'indé-

pendance de la justice en Pologne ou de l'aggravation de celles-ci ne justifie pas, à elle seule, que les autorités judiciaires des autres États membres refusent d'exécuter tout mandat d'arrêt européen émis par une autorité judiciaire polonaise

Joined Cases/Affaires jointes C-354/20 PPU and/et C-412/20 PPU, Judgment/Arrêt 17.12.2020

Press release – Communiqué de presse

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

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

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

Macedonian/Macédonien

Водич за Член 10 од Конвенцијата - Слобода на изразување

Russian/Russe

Практическое руководство по критериям приемлемости

Руководство по статье 4 Протокола № 4 к Конвенции о защите прав человека

Spanish/Espagnol

Manual de Derecho europeo sobre asilo, fronteras e inmigración – Edición 2020