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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

The Court's monthly round-up of case-law, news and publications

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

European Court of Human Rights

Cour européenne des droits de l'homme

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

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

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An annual index provides an overview of the cases that have been summarised in the monthly Information Notes. The index for 2019 is cumulative and is regularly updated.

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

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Un index annuel récapitule les affaires résumées dans les Notes d'information. L'index pour 2019 est cumulatif ; il est régulièrement édité.

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Romeo Castaño – Belgium/Belgique, 8351/17, Judgment/Arrêt 9.7.2019 [Section II]

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Kurt – Austria/Autriche, 62903/15, Judgment/Arrêt 4.7.2019 [Section V]

Traduction française du résumé – Printable version

Facts – In 2010 the applicant's husband was convicted of causing bodily harm to her and making dangerous threats towards his relatives. A barring order, with which he complied, obliged him to stay away from their apartment, as well as from the applicant's parents' apartment and the surrounding areas for fourteen days. In the following two years the applicant did not report any incidents to the police. In 2012 the applicant filed for divorce and reported her husband to the police for rape, domestic violence and for making dangerous threats on a daily basis in the preceding two months. When interviewed, their minor son and daughter stated that their father had beaten their mother, as well as them. On the same day, criminal proceedings were opened and a new barring order was issued against the applicant's husband, prohibiting him from returning to their marital home, the applicant's parents' apartment and the surrounding areas. His keys were seized. Three days later, he shot their son dead at school and committed suicide by shooting himself. The applicant unsuccessfully brought official liability proceedings, claiming that her husband should have been held in pre-trial detention.

Law – Article 2 (*substantive aspect*)

(i) *The positive obligation to take preventive operational measures* – The question to be answered was whether, on the basis of the information available at the time, the authorities could or should have known that the applicant's husband had posed a real and immediate risk to his son's life outside the places in respect of which the barring order had been issued, which could only have been averted by taking him into detention.

After the murder, the domestic authorities had conducted a comprehensive investigation. The domestic courts' assessment of the facts had been comprehensive, relevant, persuasive and in line with the Court's case-law. The courts had balanced the applicant's rights under Articles 2 and 3 of the Convention on the one hand and her husband's rights under Article 5 on the other and found that it would have been disproportionate to remand him in custody.

The authorities had known that the applicant's husband had been convicted once for bodily harm against the applicant and for dangerous threatening behaviour and there was strong evidence that he had committed the very same offences again. However, before reporting the alleged rape, the applicant had spent three more days in the apartment she had shared with him. His violent outbreaks had previously been limited to the vicinity of the home, which a barring order had been capable of preventing, especially since he had fully complied with such a measure in 2010 and the authorities had not been made aware of any further violent acts until 2012. Even though there were indications of a certain escalation of violence because of the pending divorce proceedings, this did not lead to the conclusion that there had been a danger to the children's lives in a public place. While the applicant's husband had started threatening her and their children two months before the murder of his son, those threats had been partly inconsistent (for example, on the one hand he had threatened to kill his children in front of the applicant, on the other he had threatened to take them to Turkey, but he had also threatened to commit suicide) and had been issued on a daily basis over a period of two months without being acted upon. Therefore, those threats had not indicated an immediate risk for the children's lives outside the residential premises. Their father had never acted aggressively in public before. When confronted by police officers, he had remained calm and cooperative and had not given the appearance of posing an immediate

threat to anyone. Moreover, there were no indications that he had had a gun or any other weapon, or that he had tried to get one.

In those circumstances, the real and immediate risk of a planned murder by the applicant's husband obtaining a gun and shooting his son at school had not been detectable. On the basis of the above factors, when looked at cumulatively, the domestic authorities had been entitled to conclude that the barring order combined with a seizure of the keys would be sufficient for the protection of the applicant's life, as well as those of her children, and that a more serious measure such as pre-trial detention had not been warranted.

(ii) *The positive obligation to put in place a regulatory framework* – In the aftermath of her husband's violent outbreak, the applicant had not lodged a request for a temporary restraining order from the competent district court, which could have banned him from public places beyond the residential premises. That fact showed that she herself had not seen an imminent need for such a measure. Moreover, she had remained in the marital home for three days after that incident before going to the authorities, and there were no indications that she had been unable to seek police protection earlier. Also, after the barring order had been issued, the applicant had told her children that they could see their father whenever they wanted to. Those considerations did not imply any criticism towards the applicant, but showed that, although a legal framework for the applicant's and her children's protection existed, full use of it had not been made because, tragically, a real and immediate risk for her son's life at school had not been discernible at that time. While certain improvements had been made to the relevant law after those events, that fact could not be interpreted as recognition of a previous deficiency.

In those circumstances, the competent authorities had not failed to comply with their positive obligations to the life of the applicant's son.

Conclusion: no violation (unanimously).

(See also *Osman v. the United Kingdom*, 23452/94, 28 October 1998; *Kontrová v. Slovakia*, 7510/04, 31 May 2007, Information Note 97; *Opuz v. Turkey*, 33401/02, 9 June 2009, Information Note 120; *Talpis v. Italy*, 41237/14, 2 March 2017, Information Note 205; and the Factsheet on Protection of minors)

Effective investigation/Enquête effective

Refusal to execute a European arrest warrant, thus impeding a murder investigation in Spain, on the grounds of an insufficiently substantiated risk of poor conditions of detention: *violation*

Refus d'exécuter un mandat d'arrêt européen, empêchant une enquête sur un meurtre en Espagne, au motif insuffisamment étayé du risque de mauvaises conditions de détention : *violation*

Romeo Castaño – Belgium/Belgique, 8351/17, Judgment/Arrêt 9.7.2019 [Section II]

English translation of the summary – Version imprimable

En fait – En 1981, le père des requérants fut assassiné par un commando appartenant à l'organisation terroriste ETA. En 2007, tous les membres du commando furent condamnés par la justice espagnole, hormis N.J.E., qui s'est réfugiée en Belgique.

Des mandats d'arrêt européens (ci-après « MAE ») ont été décernés par un juge d'instruction espagnol en 2004, 2005 et 2015 à l'encontre de N.J.E. aux fins de poursuites pénales. Mais en 2013 et 2016, la chambre des mises en accusation belge refusa toutefois l'exécution des MAE estimant qu'il y avait de sérieux motifs de croire que l'exécution du MAE porterait atteinte aux droits fondamentaux de N.J.E. Le parquet fédéral belge se pourvut en cassation contre ces arrêts. Mais la Cour de cassation rejeta les pourvois en 2013 et 2016.

Les requérants se plaignent que l'Espagne ait été empêchée de poursuivre N.J.E. par le refus des autorités belges d'exécuter les MAE, système mis en place au sein de l'Union européenne (UE).

En droit

Article 1 (*compétence* ratione loci) : Le grief que les requérants tirent de l'article 2 de la Convention à l'égard de la Belgique concerne le manquement allégué des autorités belges à coopérer avec les autorités espagnoles en prenant les mesures nécessaires pour permettre que l'auteure présumée de l'assassinat de leur père, réfugiée en Belgique, soit jugée en Espagne. Il ne repose donc pas sur l'affirmation d'un manquement de la Belgique à une éventuelle obligation procédurale d'enquêter elle-même sur cet assassinat.

Dans le cadre de l'existence d'engagements de coopération en matière pénale liant les deux États concernés par le biais du MAE, les autorités belges ont été informées de l'intention des autorités espagnoles de poursuivre N.J.E., et sollicitées de procéder à son arrestation et à sa remise.

Ces circonstances suffisent à considérer qu'un lien juridictionnel existe entre les requérants et la Belgique au sens de l'article 1 concernant le grief soulevé par les requérants sous l'angle du volet procédural de l'article 2.

Conclusion : exception préliminaire rejetée (unanimité).

Article 2 (*volet procédural*) : Dans le cadre de l'exécution d'un MAE par un État membre de l'UE, il convient de ne pas appliquer le mécanisme de reconnaissance mutuelle de manière automatique et mécanique, au détriment des droits fondamentaux. Compte tenu de la présomption de respect par l'État d'émission des droits fondamentaux qui prévaut dans la logique de la confiance mutuelle entre États membres de l'UE, le refus de remise doit être justifié par des éléments circonstanciés indiquant un danger manifeste pour les droits fondamentaux de l'intéressé de nature à renverser ladite présomption. En l'espèce, les juridictions belges ont justifié leur décision de refus d'exécuter les MAE émis par le juge d'instruction espagnol en raison du risque, en cas de remise à l'Espagne, que N.J.E. y subisse une détention dans des conditions contraires à l'article 3 de la Convention. Cette justification peut constituer un motif légitime pour refuser l'exécution du MAE, et donc pour refuser la coopération avec l'Espagne. Encore faut-il, vu la présence de droits de tiers, que le constat d'un tel risque repose sur des bases factuelles suffisantes.

La chambre des mises en accusation s'est fondée essentiellement sur des rapports internationaux en date de 2011 à 2014 ainsi que sur le contexte de « l'histoire politique contemporaine de l'Espagne ». Elle n'a pas procédé à un examen actualisé et circonstancié de la situation qui prévalait en 2016 et n'a pas cherché à identifier un risque réel et individualisable de violation des droits de la Convention dans le cas de N.J.E. ni des défaillances structurelles quant aux conditions de détention en Espagne.

De nombreux MAE ont été émis et exécutés précédemment à l'égard de membres présumés de l'ETA sans que les pays d'exécution des MAE, dont la Belgique, y aient vu des risques de violation des droits fondamentaux des personnes faisant l'objet de la remise.

Les circonstances de l'espèce et les intérêts en cause auraient dû amener les autorités belges, en faisant usage de la possibilité que la loi nationale leur donnait, à demander des informations complémentaires quant à l'application du régime de détention dans le cas de N.J.E., plus particulièrement quant à l'endroit et aux conditions de détention, afin de vérifier l'existence d'un risque concret et réel de violation de la Convention en cas de remise.

Ainsi, l'examen effectué par les juridictions belges lors des procédures de remise n'a pas été assez complet pour considérer le motif invoqué par elles pour refuser la remise de N.J.E. au détriment des droits des requérants comme reposant sur une base factuelle suffisante. La Belgique a donc manqué à l'obligation de coopérer qui découlait pour elle du volet procédural de l'article 2 et il y a eu violation de cette disposition.

Ce constat n'implique pas nécessairement que la Belgique ait l'obligation de remettre N.J.E. aux autorités espagnoles. C'est l'insuffisance de la base factuelle du motif pour refuser la remise qui a conduit la Cour à constater une violation de l'article 2. Cela n'enlève rien à l'obligation des autorités belges de s'assurer qu'en cas de remise aux autorités espagnoles N.J.E. ne courra pas de risque de traitement contraire à l'article 3. Plus généralement, le présent arrêt ne saurait être interprété comme réduisant l'obligation des États de ne pas extrader une personne vers un pays qui demande son extradition lorsqu'il y a des motifs sérieux de croire que l'intéressé, si on l'extrade vers ce pays, y courra un risque réel d'être soumis à un traitement contraire à l'article 3, et donc de s'assurer qu'un tel risque n'existe pas.

Conclusion : violation (unanimité).

Article 41 : 5 000 EUR à chacun des requérants pour préjudice moral.

(Voir aussi *Soering c. Royaume-Uni*, 14038/88, 7 juillet 1989 ; *Mamatkoulov et Askarov c. Turquie* [GC], 46827/99 et 46951/99, 4 février 2005, Note d'information 72 ; *Rantsev c. Chypre et Russie*, 25965/04, 7 janvier 2010, Note d'information 126 ; *Trabelsi c. Belgique*, 140/10, 4 septembre 2014, Note d'information 177 ; *Avotiņš c. Lettonie* [GC], 17502/07, 23 mai 2016, Note d'information 196 ; *Pirozzi c. Belgique*, 21055/11, 17 avril 2018 ; et *Güzelyurtlu et autres c. Chypre et Turquie* [GC], 36925/07, 29 janvier 2019, Note d'information 225 ; ainsi que la fiche thématique Jurisprudence relative à l'Union européenne)

Effective investigation/Enquête effective

Manifest disproportion between seriousness of act committed by State agents and punishment imposed: *violation*

Disproportion manifeste entre la gravité de l'acte commis par des agents de l'État et la sanction infligée : *violation*

Vazagashvili and/et Shanava – Georgia/Géorgie, 50375/07, Judgment/Arrêt 18.7.2019 [Section V]

Traduction française du résumé – Printable version

Facts – On 2 May 2006 the applicants' son was shot dead by the police. The initial investigation into his death was discontinued. The investigation was subsequently reopened and in 2015 five high-ranking officers were convicted of either double aggravated murder or malfeasance or perverting the course of justice. It was established that the whole police operation in issue had been mounted on the basis of the documents fabricated by a senior of-

ficer with the sole aim of assassinating the passengers of the applicants' son's car and thus taking a personal revenge against one of them.

Law – Article 2 (*procedural aspect*): The very first investigative measures had been undertaken, in the immediate aftermath of the police operation, by the same officers who had participated in that operation. The evidence collected by those officers had later been relied on by the prosecution authority during the first stage of the investigation into the proportionality of the use of force by the police. As such, the primary and most decisive investigative steps taken by the relevant authorities had manifestly fallen afoul of the requisite requirements of independence and impartiality, and such a procedural deficiency could not but taint the subsequent developments in the investigation.

The prosecutor's office had been unwilling to involve the applicants by allowing them to benefit uninhibitedly from the requisite victim status. Without the latter procedural standing, the applicants had been unable to appeal to a court against the prosecutorial decision terminating the investigation. The prosecution authority had failed to give due consideration to the statements of two independent witnesses who had confirmed that the passengers in the applicants' son's car had never put up any armed resistance to the police. A proper assessment of the latter fact had, however, been indispensable for the purposes of reaching objective conclusions regarding the proportionality of the use of force by the police. Those considerations were sufficient to conclude that that part of the original investigation had manifestly lacked the requisite thoroughness, objectivity and, as had subsequently been revealed by the results of the reopened investigation, integrity.

After the criminal investigation into the police operation had been reopened in 2012, five high-ranking officers of the Ministry of the Interior had been convicted in relation to that incident of double aggravated murder, malfeasance or perverting the course of justice. However, the Court was not convinced that the outcome of the reopened criminal proceedings had constituted sufficient redress for the applicants. The belated acknowledgement of the fact of the aggravated murder of the applicants' son, more than nine years after the killing had taken place, coupled with the significant periods of total inactivity on the part of the investigation authorities, had clearly amounted to procrastinated justice.

After the reopening of the investigation, it was the first applicant who, even in the absence of the relevant victim status, had borne the burden of the investigation, by interviewing the various key witnesses and collecting other evidence, for a considerable period of time. Despite the fact that there had already existed substantial evidence implicating the relevant police officers in the unlawful use of the lethal force against the applicants' son, it still had taken the relevant domestic authorities almost three years to terminate the investigation and transfer the case for trial. It was partly on the basis of the evidence collected by the first applicant himself that the conviction for his son's murder had been later secured.

The Court could not fail to note that the first applicant's assassination – in a bomb blast caused by a device planted at his son's grave – had been prompted by his incessant public activities aimed at shining a light on the activities of the police officers responsible for the killing of his son. By taking over the investigative role, which should normally have been the responsibility of the relevant authorities, the first applicant had put himself at almost certain risk of retaliation. The Court underlined that the tragic development in the present case could be seen as yet another vivid example of how tangibly deleterious the consequences of a lack of due diligence on the part of the authorities investigating life-endangering crimes could be, particularly where police corruption was involved.

The second applicant had not been granted victim status in the reopened investigation. Her inability to take part in the trial after her husband's death (he had been assassinated in a bomb blast at his son's grave) had impaired the possibility of seeking and obtaining adequate compensation for the damage which she and her already late husband had sustained as a result of the killing of their son by the police.

Although substantial deference had to be granted to the national courts in the choice of appropriate sanctions for ill-treatment and homicide, the Court had to intervene in cases of manifest disproportion between the seriousness of the act committed by State agents and the punishment imposed. That was essential for maintaining public confidence, ensuring adherence to the rule of law and preventing any appearance of tolerance of or collusion in unlawful acts committed by State agents.

In the applicants' case, although domestic law permitted the trial court to impose a higher sentence – either twenty years in prison or life imprisonment –, it had initially handed down sixteen-year prison sentences for the two authors of the aggravated murder of the applicants' son. When handing down those sentences, the trial court had known that the sentences were subject to a further reduction, by a quarter, pursuant to automatic provisions of the Amnesty Act. It was a matter of regret that the do-

mestic legislator, when enacting the Amnesty Act, had not given due consideration to the need to punish serious police misconduct with unbending stringency. When an agent of the State, in particular a law-enforcement officer, had been convicted of a crime that violated Article 2, the granting of an amnesty or pardon should not be permissible. States were expected to be all the more stringent when punishing their own law-enforcement officers for the commission of such serious life endangering crimes than they were with ordinary offenders, because what was at stake was not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat the sense of impunity the offenders might consider they enjoy by virtue of their very office, and to maintain public confidence in and respect for the law-enforcement system.

The two police officers who had been found guilty of aggravated murder had not been banned from public service by the domestic courts. They could have potentially re-joined the law-enforcement system after they had served their prison sentences. As a matter of principle, it would be wholly inappropriate and would send the wrong signal to the public if the perpetrators of the very serious crime in question were able to maintain eligibility for holding public office in the future. The sentences imposed upon the two police officers who had murdered the applicants' son and his friend in the egregious circumstances – with malice aforethought, employing the law-enforcement machinery for that unique purpose – had not constituted fully adequate punishment for the crime committed.

In the light of the foregoing, despite the eventual conviction of the five police officers, the criminal-law system had proved to be far from rigorous and could not be said to have had sufficiently dissuasive effect for prevention of similar criminal acts in the future.

Conclusion: violation (unanimously).

Article 41: EUR 50,000 in respect of non-pecuniary damage.

The Court also held, unanimously, there had been a violation of the substantive aspect of Article 2. The domestic courts had made it crystal clear that the killing of the applicants' son had been attributable to the respondent State.

(See also *Hasan Köse v. Turkey*, 15014/11, 18 December 2018, Information Note 224; *Kolevi v. Bulgaria*, 1108/02, 5 November 2009, Information Note 124; *Šilih v. Slovenia* [GC], 71463/01, 9 April 2009, Information Note 118; *Enukidze and Girgvliani v. Georgia*, 25091/07, 26 April 2011; *Armani Da Silva v. the United Kingdom* [GC], 5878/08, 30 March 2016, Information Note 194; and compare *Bektaş and Özalp v. Turkey*, 10036/03, 20 April 2010; and *Nikolova and Velichkova v. Bulgaria*, 7888/03, 20 December 2007, Information Note 103)

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Forcible catheterisation to obtain evidence of traffic offence: *violation*

Sonde urinaire posée de force aux fins de l'obtention de preuves d'une infraction routière : *violation*

R.S. – Hungary/Hongrie, 65290/14, Judgment/Arrêt 2.7.2019 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant was forcibly catheterised at a police station in order to obtain a urine sample.

Law – Article 3 (*substantive aspect*): Article 3 did not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain evidence. However, any recourse to a forcible medical intervention had to be convincingly justified on the facts of a particular case. That was especially true where the procedure was intended to retrieve from inside the individual's body real evidence of the very crime of which he was suspected.

The particularly intrusive nature of such an act required strict scrutiny of all the surrounding circumstances. In that connection, due regard had to be had to the seriousness of the offence in issue. The authorities had also to demonstrate that they had taken into consideration alternative methods of recovering the evidence. Furthermore, the procedure could not entail any risk of lasting detriment to a suspect's health. The following factors were of particular importance when assessing an interference with a person's physical integrity carried out with the aim of obtaining evidence: the extent to which a forcible medical intervention had been necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure had been carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health.

There was no well-established domestic practice or regulations concerning the use and method of catheterisation to obtain evidence of a person's involvement in an offence. Neither did the domestic law provide guarantees against the arbitrary or improper taking of urine samples through cath-

eterisation. In particular, there was no consistent approach to the necessary form of consent in such situations. When assessing the issue of consent, the domestic authorities had been confronted with two conflicting versions of events. The investigating authorities had interviewed the applicant, police officers and other witnesses and had assembled the relevant evidence. Thus, it could not be said that the authorities had not made a genuine attempt to eliminate the discrepancies between the applicant's specific statements and the police officers' statements, but rather that, following the examination, they had decided to give preference to the police officers' account of the events.

However, they had paid no heed to the surrounding circumstances, in particular to the fact that the applicant's alleged consent had been given while he had been under the influence of alcohol and under the control of the police officers. In any event, bearing in mind the applicant's right to withdraw his initial consent at any time, as guaranteed under domestic law, the applicant had clearly resisted the intervention, as evidenced by the fact that the police officers had had to pin him down in order for the procedure to be completed. From a medical point of view, there had been the possibility to interrupt the catheterisation once it had started. Taking into account all the above-mentioned facts, the Court could not conclude that there had been free and informed consent by the applicant throughout the intervention.

An order had been given for the urine sample to be taken in order to determine whether the applicant had been involved in a traffic-related offence. Thus, it had been intended to retrieve real evidence from inside the applicant's body, and had not been carried out in response to a potential medical necessity. Given the intrusive nature of the act, the applicant's case was to be distinguished from situations where an intervention was considered to be of minor importance. Furthermore, although the procedure had been carried out by a doctor in a medical emergency service, the police officers had restrained the applicant and kept him handcuffed throughout the medical intervention to which he had been forcibly subjected.

The Court accepted that the police officers had deemed it necessary to determine the blood alcohol level of the applicant and to find out whether he had been under the influence of drugs, as he was a road user. However, the recourse to a catheterisation was unnecessary in the light of the fact that the police officers had also proceeded with the taking of a blood sample for the same purposes. Moreover, catheterisation was not a generally accepted and applied measure in the context of domestic practice and, in comparison to blood tests, there was no clear stance as to the utility of the measure in obtaining evidence of drug-related offences. Domestic medical practice disagreed as to whether the intervention should be considered to be of an invasive nature. Having regard to the divergent domestic approach, it could not be established with certainty that the intervention had entailed no possible risk to the applicant's health.

The authorities had subjected the applicant to a serious interference with his physical and mental integrity, against his will. The manner in which the impugned measure had been carried out had been liable to arouse in the applicant feelings of insecurity, anguish and stress that were capable of humiliating and debasing him. Furthermore, there was no material that would allow the Court to conclude that the officers had paid any consideration to the risk the procedure could have entailed for the applicant. Although it could not be established that that had been the intention, the measure had been implemented in a way which had caused the applicant both physical pain and mental suffering.

Conclusion: violation (unanimously).

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

(See also *Jalloh v. Germany* [GC], 54810/00, 11 July 2006, Information Note 88)

Inhuman or degrading treatment/ Traitement inhumain ou dégradant
Positive obligations (procedural aspect)/ Obligations positives (volet procédural)

Failure of authorities to take adequate measures to protect victim of domestic violence: *violation*

Manquement des autorités à leur obligation de prendre des mesures adéquates pour protéger une victime de violences domestiques : *violation*

Volodina – Russia/Russie, 41261/17, Judgment/ Arrêt 9.7.2019 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant alleged that the Russian authorities had failed in their duty to prevent, investigate and prosecute acts of domestic violence which she had suffered at the hands of her former partner and that they had failed to put in place a legal framework to combat gender-based discrimination against women.

Law

Article 3: The violence suffered by the applicant at the hands of her former partner had reached the required level of severity under Article 3. The feel-

ings of fear, anxiety and powerlessness that the applicant must have experienced in connection with his controlling and coercive behaviour were sufficiently serious as to amount to inhuman treatment within the meaning of this provision.The Court therefore had to examine whether the State authorities had discharged their interlinked positive obligations to ensure that individuals within their jurisdiction were protected against all forms of ill-treatment, including where such treatment had been administered by private individuals.

(a) *The obligation to establish and apply a legal framework* – Russia had not enacted specific legislation to address violence occurring within the family context. Neither a law on domestic violence nor any other similar laws had ever been adopted. The concept of "domestic violence" or any equivalent thereof was not defined or mentioned in any form in the Russian legislation. Domestic violence was not a separate offence under either the Criminal Code or the Code of Administrative Offences. Nor had it been criminalised as an aggravating form of any other offence. The Russian Criminal Code made no distinction between domestic violence and other forms of violence against the person, dealing with it through provisions on causing harm to a person's health or other related provisions, such as murder, death threats or rape.

The existing criminal-law provisions were not capable of adequately capturing the offence of domestic violence. Following a series of legislative amendments, assault on family members was now considered a criminal offence only if committed for a second time within twelve months or if it had resulted in at least "minor bodily harm". The Court had previously found that requiring injuries to be of a certain degree of severity as a condition precedent for initiating a criminal investigation undermined the efficiency of the protective measures in question, because domestic violence could take many forms, some of which did not result in physical injury – such as psychological or economic abuse or controlling or coercive behaviour. Moreover, the provisions on "repeat battery" would not have afforded the applicant any protection in the situation where attacks on her in 2016 had been followed by a new wave of threats and assaults more than twelve months later, in 2018. The Court reiterated that domestic violence could occur even as a result of one single incident.

Furthermore, Russian law left the prosecution of charges of "minor harm to health" and "repeat battery" to the private initiative of the victim. The effective protection of the Convention right to physical integrity did not require public prosecution in all cases of attacks by private individuals. Within the context of domestic violence, however, the possibility of bringing private prosecution proceedings was not sufficient, as such proceedings obviously required time and did not serve to prevent the recurrence of similar incidents. A private prosecution put an excessive burden on the victim of domestic violence, shifting onto her the responsibility for collecting evidence capable of establishing the abuser's guilt to the criminal standard of proof. The collection of evidence presented inherent challenges in cases where abuse had occurred in a private setting without any witnesses present, and sometimes left no tangible marks. That was not an easy task even for trained law-enforcement officials, but the challenge became insurmountable for a victim who was expected to collect evidence on her own while continuing to live under the same roof, being financially dependent on, and fearing reprisals from the perpetrator. Moreover, even if a trial resulted in a guilty verdict, a victim could not be provided with the necessary protection, such as protective or restraining orders, owing to the absence of such measures under Russian legislation.

Russian law made no exception to the rule that the initiation and pursuance of proceedings in respect of such offences were entirely dependent on the victim's initiative and determination. The prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of a victim's withdrawal of complaints. The Russian authorities had not given heed to the Council of Europe's Recommendation Rec(2002)5, which required member States to make provision to ensure that criminal proceedings could be instituted by a public prosecutor and that the victims should be given effective protection during such proceedings against threats and possible acts of revenge. The authorities' failure to provide for the public prosecution of domestic-violence charges had been consistently criticised by the CEDAW Committee.

The Russian legal framework – which did not define domestic violence, whether as a separate offence or an aggravating element of other offences, and established a minimum threshold of gravity of injuries required for launching public prosecution – fell short of the requirements inherent in the State's positive obligation to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims.

(b) *The obligation to prevent the known risk of ill-treatment* – The risk of a real and immediate threat had to be assessed, taking due account of the particular context of domestic violence. In such a situation, it was not only a question of an obligation to afford general protection to society, but above all to take account of the recurrence of successive episodes of violence within a family.

The applicant had informed the authorities of her former partner's violence on numerous occasions. She had informed the authorities of the threats of violence made, and actual violence perpetrated, and supplied medical evidence corroborating her allegations. Therefore, officials had been aware, or ought to have been aware, of the violence to which the applicant had been subjected and of the real and immediate risk that violence might recur. Given those circumstances, the authorities had had an obligation to take all reasonable measures for her protection.

In a large majority of Council of Europe member States, victims of domestic violence were able to apply for immediate measures of protection. Such measures were variously known as "restraining orders", "protection orders" or "safety orders", and they aimed to forestall the recurrence of domestic violence and to safeguard the victim of such violence by typically requiring the offender to leave the shared residence and to abstain from approaching or contacting the victim. Russia remained among only a few member States whose national legislation did not provide victims of domestic violence with any comparable measures of protection.

It could not be said that the Russian authorities had made any genuine attempts to prevent the recurrence of violent attacks against the applicant. Her repeated reports of physical attacks, kidnapping and assault had not led to any measures being taken. Despite the gravity of the acts, the authorities had merely obtained explanations from her former partner and concluded that it had been a private matter between him and the applicant. A criminal case had been opened for the first time more than two years after the first reported assault. It had not related to any violent act but to the much lesser offence of interference with the applicant's private life. Even though the institution of criminal proceedings had allowed the applicant to lodge an application for State protection measures, she had not received any formal decision on her application, to which she had been entitled under the law. An opinion issued by the regional police had pronounced the application unfounded, describing the series of domestic-violence incidents as mere ill feeling between her and her former partner which were not worthy of State intervention.

The response of the Russian authorities – who had been made aware of the risk of recurrent violence on the part of the applicant's former partner – had been manifestly inadequate, given the gravity of the offences in question. They had not taken any measure to protect the applicant or to censure her former partner's conduct. They had remained passive in the face of the serious risk of ill-treatment to the applicant and, through their inaction and failure to take measures of deterrence, had allowed her former partner to continue threatening, harassing and assaulting her without hindrance and with impunity.

(c) *The obligation to carry out an effective investigation into allegations of ill-treatment* – Special diligence was required in dealing with domestic-violence cases, and the specific nature of the domestic violence had to be taken into account in the course of the domestic proceedings. Since 1 January 2016 the applicant had reported to the police at least seven episodes of recurrent serious violence or threats of violence by her former partner and submitted evidence – including medical reports and statements by witnesses – corroborating her allegations. Her reports had amounted to an arguable claim of ill-treatment, triggering the obligation to carry out an investigation satisfying the requirements of Article 3.

Responding to the applicant's complaints, the police had carried out a series of short "pre-investigation inquiries", which invariably concluded with a refusal to institute criminal proceedings on the ground that no prosecutable offence had been committed. Supervising prosecutors had set aside some of the decisions concluding the pre-investigation inquiries, apparently finding that the applicant's allegations were sufficiently serious as to warrant additional examination of her grievances. However, the police officers had not taken any additional investigative steps and had issued further decisions declining to initiate criminal proceedings. Over more than two years of recurring harassment the authorities had never once opened a criminal investigation into the use or threat of violence against the applicant. The only criminal case that had been instituted did not relate to any violent acts but to the relatively minor offence of publishing photographs of the applicant.

When confronted with credible allegations of ill-treatment, the authorities had had a duty to open a criminal case; a "pre-investigation inquiry" alone had not met the requirement for an effective investigation under Article 3. That preliminary stage had too restricted a scope and could not lead to the trial and punishment of the perpetrator, since the opening of a criminal case and a criminal investigation were prerequisites for bringing charges that might then be examined by a court. A refusal to open a criminal investigation into credible allegations of serious ill-treatment was indicative of the State's failure to comply with its procedural obligation under Article 3.

Police officers' reluctance to initiate and carry out a criminal investigation in a prompt and diligent fashion had led to a loss of time and undermined

their ability to secure evidence concerning the domestic violence. Even when the applicant had presented visible injuries, a medical assessment had not been scheduled immediately after the incident. The police officers had employed a variety of tactics that enabled them to dispose of each inquiry in the shortest possible time. The first such tactic consisted of talking the perpetrator into making amends and repairing the damage caused. Alternatively, the police officers had sought to trivialise the events that the applicant had reported to them. Confronted with indications of prosecutable offences, such as recorded injuries or text messages containing death threats, the police had raised the bar for evidence required to launch criminal proceedings. They had claimed that proof of more than one blow was needed to establish the offence of battery and threats of death had to be "real and specific" in order to be prosecutable. They had not cited any domestic authority or judicial practice supporting such an interpretation of the criminal-law provisions.

In view of the manner in which the authorities had handled the case – notably the authorities' reluctance to open a criminal investigation into the applicant's credible claims of ill-treatment and their failure to take effective measures against her former partner, ensuring his punishment under the applicable legal provisions – the State had failed to discharge its duty to investigate the ill-treatment.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 3: Once a large-scale structural bias had been shown to exist, an applicant did not need to prove that she had also been a victim of individual prejudice. On the strength of evidence submitted by the applicant and information from domestic and international sources, there existed prima facie indications that domestic violence disproportionately affected women in Russia.

Despite the high prevalence of domestic violence, the Russian authorities had not adopted any legislation capable of addressing the problem and offering protection to women who had been disproportionately affected by it. More than forty draft laws had been developed in the previous twenty years but none had been enacted. The existing criminal-law provisions were insufficient to offer protection against many forms of violence and discrimination against women, such as harassment, stalking, coercive behaviour, psychological or economic abuse, or a recurrence of similar incidents protracted over a period of time. The absence of any form of legislation defining the phenomenon of domestic violence and dealing with it on a systemic level distinguished the applicant's case from cases against other member States in which such legislation had already been adopted but had malfunctioned for various reasons.

The continued failure to adopt legislation to combat domestic violence and the absence of any form of restraining or protection orders clearly demonstrated that the authorities' actions in the applicant's case were not a simple failure or delay in dealing with violence against the applicant, but flowed from their reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women. By tolerating for many years a climate which was conducive to domestic violence, the Russian authorities had failed to create conditions for substantive gender equality that would enable women to live free from fear of ill-treatment or attacks on their physical integrity and to benefit from the equal protection of the law.

Conclusion: violation (unanimously).

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

(See also *Valiulienė v. Lithuania*, 33234/07, 26 March 2013, Information Note 161; *Eremia v. the Republic of Moldova*, 3564/11, 28 March 2013, Information Note 163; *T.M. and C.M. v. the Republic of Moldova*, 26608/11, 28 January 2014; *Talpis v. Italy*, 41237/14, 2 March 2017, Information Note 205; *Bălşan v. Romania,* 49645/09, 23 May 2017, Information Note 207; *D.H. and Others v. the Czech Republic* [GC], 57325/00, 13 November 2007, Information Note 102; *Opuz v. Turkey*, 33401/02, 9 June 2009, Information Note 120; and *A v. Croatia*, 55164/08, 14 October 2010, Information Note 134. See also the Factsheet on Domestic violence and the Convention on the Elimination of All Forms of Violence against Women)

ARTICLE 4

Trafficking in human beings/Traite d'êtres humains
Effective investigation/Enquête effective

Failure by the authorities, among other things, to conduct an effective investigation into the issuing of visas by public officials, which allegedly enabled human trafficking: *violation*

Manquement des autorités à mener, entre autres, une enquête effective sur la délivrance, par des agents de l'État, de visas qui aurait permis la traite d'êtres humains : *violation*

T.I. and Others/et autres – Greece/Grèce, 40311/10, Judgment/Arrêt 18.7.2019 [Section I]

English translation of the summary – Version imprimable

En fait – Les requérantes, ressortissantes russes, étaient titulaires de visas délivrés par le consulat général de Grèce à Moscou. Selon leurs allégations, des employés du consulat avaient été soudoyés par des trafiquants russes et avaient établi des visas pour les faire entrer en Grèce à des fins d'exploitation sexuelle. Fin 2003, les requérantes furent reconnues victimes de la traite des êtres humains. Les autorités engagèrent deux procédures pénales contre les personnes qui avaient directement exploité les requérantes, ainsi que des procédures portant sur la délivrance des visas. Les requérantes dénoncent plusieurs défauts dans ces procédures, ainsi que la participation des employés du consulat à leur exploitation.

En droit – Article 4 : À l'époque des faits, la traite des êtres humains sous forme d'exploitation sexuelle ne constituait pas une infraction pénale distincte. Le délit de la traite des êtres humains ayant un délai de prescription plus court, la chambre d'accusation du tribunal correctionnel a mis fin aux poursuites contre deux des accusés pour cause de prescription. Ainsi, le cadre juridique sous lequel s'est déroulée cette procédure ne s'est pas avéré efficace et suffisant, ni pour sanctionner les trafiquants ni pour assurer la prévention efficace de la traite des êtres humains.

Quant aux procédures portant sur la délivrance des visas, l'ouverture d'une enquête n'a été ordonnée qu'environ neuf mois après que les requérantes ont porté les faits en cause à la connaissance du procureur près le tribunal correctionnel compétent en matière de traite des êtres humains. La Direction de la sécurité de la police a renvoyé le dossier de l'affaire au procureur compétent deux ans et sept mois environ après l'avoir reçu, et la phase de l'enquête préliminaire a duré plus de trois ans. S'il est vrai que l'enquête en cause présentait une certaine complexité, plusieurs victimes de la traite des êtres humains devant être entendues comme témoins, une telle durée semble cependant de prime abord excessive. En outre cette durée a entraîné la prescription d'une partie des infractions concernant la falsification de documents et l'usage de faux.

Se tournant vers la question de la participation des requérantes à la procédure en cause, à l'exception de l'une d'entre elles, toutes les tentatives de notification des convocations à témoigner ont échoué, les requérantes n'étant pas connues aux adresses en cause. Si le juge d'instruction, qui a effectivement essayé de retrouver les requérantes, n'est pas resté inactif, rien n'explique pourquoi les intéressées n'ont pas été recherchées à l'adresse déclarée par elles dans leurs demandes de constitution de partie civile.

Eu égard notamment aux informations disponibles sur le phénomène de la traite des êtres humains en Russie et en Grèce à l'époque des faits, étant donné la gravité de la dénonciation des requérantes et le fait que celles-ci accusaient des agents de l'État d'être impliqués dans les réseaux de la traite des êtres humains, les autorités étaient tenues d'agir avec une diligence particulière afin de s'assurer de la soumission des visas à un examen approfondi avant leur délivrance et de faire ainsi disparaître les doutes entourant la probité des agents de l'État.

Les autorités compétentes n'ont pas traité l'affaire avec le niveau de diligence requis par l'article 4 et les intéressées n'ont pas été associées à l'enquête dans la mesure requise par le volet procédural de cette disposition.

Conclusion : violation (unanimité).

Article 41 : 15 000 EUR à chacune des requérantes pour préjudice moral.

(Voir aussi *L.E. c. Grèce*, 71545/12, 21 janvier 2016, Note d'information 192, et *Chowdury et autres c. Grèce*, 21884/15, 30 mars 2017, Note d'information 205, ainsi que la fiche thématique Traite des êtres humains)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention/Arrestation ou détention régulières

Failure to obtain external expert report when reviewing necessity of continuing safe custody in deadlock situation: *violation*

Absence de rapport d'expertise externe lors du contrôle de la nécessité d'un maintien en internement de sûreté dans une situation d'impasse : *violation*

Tim Henrik Bruun Hansen – Denmark/Danemark, 51072/15, Judgment/Arrêt 9.7.2019 [Section IV]

Traduction française du résumé – Printable version

Facts – Following previous similar convictions, the applicant was convicted in 1996 of a serious sexual assault of a minor and sentenced to "safe custody" for an indefinite term. His therapeutic treatment, and thus his chances of rehabilitative release from prison, had reached a deadlock in terms of the relationship of trust with staff of the institution, the applicant having refused chemical castration which was a condition of release and, eventually, having

refused counselling. In 2015 a court ordered his continued deprivation of liberty. He complained under Article 5 § 1 (a) arguing that his continued imprisonment was not sufficiently linked to the original objective of detention.

Law – Article 5 § 1: The main issue was whether there had been a sufficient causal connection, for the purposes of sub-paragraph (a) of Article 5 § 1, between the applicant's criminal conviction by the sentencing court in 1996 and his continued deprivation of liberty ordered in 2015.

In ordering his continued deprivation of liberty, the domestic court had had before it a number of elements for concluding that safe custody had to be maintained in order to prevent an imminent risk of relapse into the very serious sexual crimes of which the applicant had been convicted three times in the period between 1989 and 1996. The domestic court had however dismissed the applicant's specific request for an external expert opinion, although at that point in time the applicant had been detained in safe custody for almost 19 years and the most recent external expert opinion had been from 2007.

There seemed to have been no means of cooperation between the applicant and the medical staff at the detaining Institution, in order to work towards reducing significantly the applicant's dangerousness, the situation had indeed ended in deadlock. In such a situation it was particularly important to consult an external expert in order to obtain fresh propositions for initiating the necessary therapeutic treatment. By failing at least to attempt to obtain fresh advice from an external medical expert on the necessity of the applicant's continuing safe custody, the domestic court had not sufficiently established the relevant facts in this respect. The decision not to release the applicant, or to apply a more lenient sentence than safe custody, had therefore not been based on an assessment that was reasonable in terms of the objectives pursued by the sentencing court in 1996.

Conclusion: violation (unanimously).

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

(See also *S., V. and A. v. Denmark* [GC], 35553/12 et al., 22 October 2018, Information Note 222; *Ruiz Riviera v. Switzerland*, 8300/06, 18 February 2014, Information Note 171; *M. v. Germany*, 19359/04, 17 December 2009, Information Note 125; *H.W. v. Germany*, 17167/11, 19 September 2013, Information Note 166; and *Ilnseher v. Germany* [GC], 10211/12 and 27505/14, 4 December 2018, Information Note 224)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Lack of genuine and serious dispute over establishment of statutory grounds for disbarment mandatory under domestic law and not amenable to appeal: *Article 6 not applicable; inadmissible*

Absence de contestation réelle et sérieuse au sujet de l'établissement des motifs légaux d'une radiation obligatoire en droit interne et non susceptible d'appel : *article 6 non applicable ; irrecevable*

Yankov – Bulgaria/Bulgarie, 44768/10, Decision/Décision 18.6.2019 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant, a notary, was struck off the register of notaries, following his conviction for drawing up a document containing false statements in an official capacity. Under domestic law, persons sentenced to imprisonment for a criminal offence committed intentionally were not allowed to practise as a notary. There was no possibility of appeal.

Law – Article 6 § 1: The applicant had been duly registered and had had the right to practise as a notary. As that registration was not limited in time, the applicant could, in principle, maintain that under Bulgarian law he had had a right to remain on the register of notaries. At the same time, the right of the applicant to continue practising as a notary had been conditioned on the lack of a criminal conviction for an intentional crime.

Under the applicable legislation, the applicant did not have the possibility of challenging the Council of Notaries' decision striking him off the register. However, the Council's decision was not one taken following examination of the merits of the case. In striking the applicant off the register of notaries, the Council had enjoyed no discretion. The legislator itself had made disbarment mandatory upon it being established that the individual concerned had been sentenced to imprisonment for a criminal offence committed intentionally. The applicant's conviction for certifying a document containing false statements had become final. In accordance with the national law, the applicant had thereby fallen within a category of persons excluded from practising as a notary.

The applicant had only challenged his criminal conviction and questioned the competence of the

Council to take the decision for his disbarment. The relevant law unequivocally empowered the Council to strike an individual off the register upon the establishment of statutory grounds on which a notary lost the right to practice. No dispute existed as to whether or not the applicant had been sentenced to imprisonment for a criminal offence committed intentionally. In those circumstances, there was no genuine and serious dispute about a right guaranteed under national law.

Conclusion: inadmissible (incompatible *ratione materiae*).

Independent and impartial tribunal/ Tribunal indépendant et impartial

Alleged bias of judges at three levels of jurisdiction in dispute regarding ownership of a television station: *no violation*

Partialité alléguée de juges à trois degrés de juridiction dans un litige portant sur la propriété d'une chaîne de télévision : *non-violation*

Rustavi 2 Broadcasting Company Ltd and Others/ et autres – Georgia/Géorgie, 16812/17, Judgment/ Arrêt 18.7.2019 [Section V]

Traduction française du résumé – Printable version

Facts – The applicants, the former owners of a television station, Rustavi 2, complained that the examination of an ownership dispute regarding the station had not been conducted by an independent and impartial court either at the first, appellate or cassation levels of jurisdiction.

Law – Article 6 § 1

(a) *Independence and impartiality of the first level of jurisdiction* – The applicants had asserted that, being aware that the first instance judge had been the only civil judge specialising in intellectual-property disputes on duty at the City Court, the former owner, who had initiated the ownership proceedings, had artificially included in his action a clearly unmeritorious copyright claim. On the facts of the case, the Court could not see indices of the type of judicial "forum shopping" alleged by the applicants. The documents available suggested that two other judges with such a specialisation had also been available. The judge himself had confirmed that the decision on allocation of the ownership dispute had been made, in accordance with the relevant legal provisions, in alphabetical order. The applicants had been unable to refute that credible explanation and had not provided any evidence in support of an alternative version as to how the case might have been assigned to him. Those complaints were unsubstantiated.

The judge's wife had published a number of posts on Facebook conveying negative views of Rustavi 2 as a television channel and to its Director General, personally. She had not, however, commented in any manner on the eventual outcome of the ongoing ownership dispute. None of the Facebook posts could be understood as creating an impression that the judge's spouse had been attempting to exploit her husband's judicial position or influence him. According to the Bangalore Principles of Judicial Conduct, a judge should not allow his or her family, social or other relationships to influence his or her judicial conduct. The requirement of judicial impartiality could not prevent a judge's family expressing their views on issues affecting society. However, it could not be excluded that the activities of close family members might, in certain circumstances, adversely affect the public's perception of a given judge's impartiality. In the case at hand, the applicants had not presented any evidence that the judge had been influenced by his spouse's social networking statements while adjudicating the case. In his decision dismissing the applicants' request for him to recuse himself, the judge had emphasised that his spouse had never agreed the contents of her Facebook posts with him and that he had not even been aware of the existence of those posts. From the standpoint of an objective observer, the judge had sufficiently distanced himself from the opinions which his wife had published on Facebook.

The Court also dismissed the applicants' argument that the judge might have been influenced by criminal proceedings brought against his mother. Both the prosecution authority at the domestic level and the Government in the Convention proceedings had provided a sound explanation in respect of the alleged suspicious circumstances relied upon by the applicants in support of that argument. Finally, the Court dismissed the applicants' complaints that the various procedural decisions delivered by the judge and as well as the speed with which the case had been examined suggested that he had been biased against them. A series of procedural decisions unfavourable to one party could not be seized upon by that party as a valid proof of judicial bias.

A violation of Article 6 § 1 could not be grounded on the alleged lack of independence or impartiality of a decision-making tribunal if the decision taken had been subject to subsequent oversight by a judicial body that had had full jurisdiction and ensured respect for the guarantees laid down in that provision. The applicants had had access to the Court of Appeal which had not only ensured a full re-examination of the merits of the ownership dispute but also addressed the applicants' challenge to the judge's independence and impartiality.

Conclusion: no violation (six votes to one).

(b) *Independence and impartiality of the Court of Appeal* – The applicants had challenged the independence and impartiality of the Court of Appeal on account of the alleged proximity of one of the three judges on the appellate bench to the first instance judge. These allegations were unsubstantiated. There was nothing improper in the fact that both judges had been founding members, together with sixteen other judges, of the Union of Judges of Georgia, an association representing acting judges' interests.

As regards the issuance of statements by the association of judges, there was nothing improper about that occurrence either. The Director General of Rustavi 2 had made abusive public attacks on the first-instance judge intentionally, with the aim of provoking the judge and obtaining grounds for requesting the latter's recusal. There was nothing unfitting in the judicial association's decision to issue public statements in defence of the judiciary in general and the first-instance judge in particular, especially since the latter had been precluded himself from replying by a duty of discretion. The statements made had been civil and balanced.

Conclusion: no violation (unanimously).

(c) *Independence and impartiality of the Supreme Court* – The Court dismissed as unconvincing the applicants' complaint that one of the judges should have stepped down because she had made financial contributions to a political party some years previously. The ownership dispute over Rustavi 2 shares concerned two private parties. Neither the political party in question nor any State authority had been a party to the proceedings or had been related to the substance of the case before the Court of Appeal. The judge had contributed to the political party in question some years previously, at a time when she had been employed in the private sector. The applicants had not been able to submit to the Court any other fact suggestive of the judge's involvement in any partisan political activity during her term of office.

The fact that an applicant had challenged for bias all or majority of the judges of the various levels of jurisdiction involved in the examination of his or her case could, under certain circumstances, be considered as an attempt to incapacitate the administration of justice and was therefore indicative of the abusive nature of the motion for bias. Requests for recusal of domestic judges should not be aimed at paralysing the defendant State's legal system and that aspect bore special importance where courts of last instance were concerned and where such requests could not, therefore, be decided upon by the appeal court.

As regards the President of the Supreme Court, the applicants had claimed that she might have had a personal bias against the Director General of Rustavi 2 because the latter had played a role, in his former capacity as a member of the High Council of Justice, in disciplinary proceedings against her eleven years previously. Personal animosity against a party had normally to be treated as a compelling reason for disqualification as judges were required to act without ill-will. The facts referred to by the applicants raised an arguable claim about lack of impartiality. A set of disciplinary proceedings leading to dismissal was a serious matter which, in principle, could have a significant effect on the private and professional life of the person concerned. With that mind, the Court considered that the enlarged bench of the Supreme Court, the body seized with the relevant request for recusal of its President, had had to subject the request to a serious scrutiny. In the circumstances when the applicants had been systematically introducing ill-founded recusal requests against many different judges of all three levels of jurisdiction and when the attacks broadcast by Rustavi 2 against some of the judges involved in the case had been sustained, the Court considered that the Supreme Court's well-reasoned decision to maintain the President had not, given the circumstances of the case and the elements relied on when seeking her recusal, been unjustified.

Lastly, the Court also attached significance to the fact that the President was only one judge of the enlarged bench of the Supreme Court, composed of nine judges, that had examined the ownership dispute. That being so, the Court was of the opinion that, from the standpoint of an objective observer, the whole of the enlarged bench could not be said to have been tainted by the applicants' challenge to the President of the Supreme Court, especially when that judicial formation decided on the case by unanimous vote.

Conclusion: no violation (six votes to one).

(Compare *Morice v. France* [GC], 29369/10, 23 April 2015, Information Note 184)

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Acquittal overturned by Supreme Court without rehearing oral testimony it had disregarded as unreliable: *violation*

Acquittement changé en condamnation par la Cour suprême sans réaudition des témoignages écartés comme non fiables : *violation*

Júlíus Þór Sigurþórsson – Iceland/Islande, 38797/17, Judgment/Arrêt 16.7.2019 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant was charged with criminal price collusion, along with twelve other employees of different hardware companies. The main piece of evidence against him was the recording of a telephone conversation, concerning exchanges of information about prices with one of the other accused.

The trial court took oral statements from the accused in the presence of the other co-accused, irrespective of whether the latter had already testified. It then acquitted the applicant on the ground that the subjective requirement of negligence was not fulfilled, which it deemed corroborated by oral statements taken from other co-accused.

In appeal proceedings before the Supreme Court, although a hearing was held, the accused themselves and the witnesses were not heard again. Under domestic law, the Supreme Court had full jurisdiction to examine questions of fact as well as questions of law – including the evidential value of documentary evidence – but it could not re-evaluate oral evidence given before the trial court without rehearing it.

However, the Supreme Court considered that the method followed for hearing the statements of the defendants had "significantly diminished the evidential value" of their testimonies in court. On that finding, the Supreme Court overturned the acquittal of the applicant and sentenced him to nine months' imprisonment, suspended.

The applicant complained that his right to a fair trial had been impeded by the lack of a rehearing of his oral statement before the Supreme Court.

Law – Article 6 § 1: Admittedly, the Supreme Court had not been under a formal obligation to summon the applicant to give testimony before overturning his acquittal. Nor was it decisive that the applicant, while being aware his conviction had been sought, had not requested a rehearing (assuming that such a possibility had been open to him): if the direct assessment of evidence was deemed necessary, the appeal court had the duty to act of its own accord to that effect.

Thus, the conviction of the applicant was in principle not based on a reassessment of the credibility of the oral evidence as such – in the sense of forming a perception of the veracity of statements, in particular on the basis of the demeanour of the person under examination. Rather, the Supreme Court had concluded that the evidential value of that evidence was "significantly diminished" on technical or procedural grounds – namely the manner in which the evidence had been taken, in particular by allowing the defendants to be present while co-accused were giving evidence.

While the Supreme Court had not excluded the oral testimony entirely, it had nevertheless taken a clear position on the reliability of that evidence, and thus on its evidential value in the overall assessment of the applicant's guilt or innocence. In this context, any substantive distinction between the reliability and the credibility of the oral testimony was imperceptible.

The fact was that the Supreme Court had at the very least disregarded, to a considerable extent, part of the evidence which had been taken into account by the trial court when it had acquitted the applicant and based his conviction primarily, if not exclusively, on its own assessment of the content of the telephone conversation between the applicant and one of the co-accused.

Although the Supreme Court was entitled under domestic law to re-evaluate the tangible evidence, its reliance on that evidence while wholly or largely discounting the explanations provided in the oral testimony inevitably meant that it had to some extent to make its own assessment for the purposes of determining whether the facts provided a sufficient basis for convicting the applicant.

In the Court's view, this could not be regarded as an application of purely legal considerations to the established facts: it involved a fresh evaluation of the evidence as a whole, resulting in the conviction of the applicant on the basis of evidence which differed from that on which the trial court had relied in order to acquit the applicant.

Therefore, as a matter of fair trial and taking into account what was at stake for the applicant, the Supreme Court could not properly examine the issues to be determined on appeal without a direct assessment of the evidence given orally by the applicant, his co-accused and one of the witnesses, which had been relied upon by the trial court in its overall probative assessment of the context in which the telephone conversation in issue had taken place.

In the alternative, the Supreme Court had had the option of quashing the acquittal and referring the case back for a retrial. Instead, it had imposed a prison sentence – albeit suspended – on the applicant without having been in a position to assess his character directly.

Conclusion: violation (unanimously).

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

Fair hearing/Procès équitable

Conviction by substitute judge based on transcripts of oral evidence without hearing witnesses in person: *violation*

Condamnation prononcée par un juge suppléant ayant statué sur la base de transcriptions de dépositions orales sans entendre les témoins en personne : *violation*

Svanidze – Georgia/Géorgie, 37809/08, Judgment/Arrêt 25.7.2019 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant, the head of a hospital's gynaecological department, was convicted of failing to provide a patient with a life-threatening condition with urgent medical treatment for no good reason, which had caused the patient's death. Following the hearing of the evidence at the applicant's trial, a substitute judge was assigned to her case. The substitute judge dismissed the applicant's lawyer's request to restart the examination of the case, noting that the case material was sufficient for him to continue. The applicant's conviction was upheld on appeal without any direct rehearing of evidence.

Law – Article 6 § 1: The substitute judge had not participated in the oral examination of the evidence at all. He had not heard any of the seventeen witnesses, including the two experts and the applicant's co-defendants, and he had convicted the applicant on the basis of the court transcripts.

Throughout her trial the applicant had consistently challenged very specific factual circumstances as presented by the prosecution. In order to establish those facts, which had been central to the decision to convict the applicant, the substitute judge had relied on the transcripts of witness statements. Given the complex factual background of the case and the fact that the substitute judge had examined the case as a single judge, his inability to make any direct assessment of the statements and demeanour of the persons concerned had deprived him of the opportunity to form his own opinion as to their credibility, and had diminished his ability to have an appropriate understanding of the evidence and arguments so that the applicant's right to a fair trial could be respected.

The applicant had explicitly voiced her grievance in that respect in her appeal lodged with the Court of Appeal. However, without going into the substance of the complaint, that court had concluded that, since he had been assigned to the case as a substitute judge, he had been under no obligation to rehear the evidence. The Supreme Court had reached an identical conclusion.

Following the involvement of the substitute judge, the defence had requested that the evidence be re-examined. However, the substitute judge had rejected that application. Furthermore, the applicant had requested the examination of two additional witnesses, but that application had also been rejected. That application had been equally dismissed by the appeal court, which had simply concluded that the first instance court had already dealt with it. In such circumstances, the applicant had done everything that could reasonably and realistically have been expected of her in respect of the matter in issue.

The availability of transcripts of witness statements could not compensate for the lack of immediacy. The higher courts had upheld the first instance court's judgment without directly hearing any of the evidence, although they had been entitled to do so. The first instance judge who had convicted the applicant had acted in disregard of the principle of immediacy, and no appropriate measures had compensated for that deficiency.

Conclusion: violation (unanimously).

Article 41: EUR 3,500 in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

(See also *Cerovšek and Božičnik v. Slovenia*, 68939/12 and 68949/12, 7 March 2017, Information Note 205; and *Cutean v. Romania*, 53150/12, 2 December 2014)

Article 6 § 2

Presumption of innocence/Présomption d'innocence

Compensation claims under legislation for victims of terrorism refused on the basis that deceased had been members of ETA: *inadmissible*

Demandes d'indemnisation au titre de la législation relative aux victimes du terrorisme rejetées au motif que les personnes décédées avaient été membres de l'ETA : *irrecevable*

Martínez Agirre and Others/et autres – Spain/Espagne, 75529/16 et al., Decision/Décision 25.6.2019 [Section III]

Larrañaga Arando and Others/et autres – Spain/Espagne, 73911/16 and/et 79503/16, Decision/Décision 25.6.2019 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants' relatives, Spanish nationals, died in France between 1979 and 1985 as a result of attacks allegedly perpetrated by terrorist groups. The applicants were awarded compensation pay-

ments under Spanish law for their relative's killings. In 2012, by virtue of a new law, they applied for additional compensation which was refused on the basis that the applicants' relatives had been members of the terrorist organisation ETA. The applicants complained that the reasons given by the domestic authorities for dismissing their compensation claims under the legislation for victims of terrorism had breached their late relatives' right to be presumed innocent.

Law – Article 6 § 2: There were two aspects to the protection afforded by the presumption of innocence: a procedural aspect relating to the conduct of the criminal trial, and a second aspect which aimed to protect individuals who had been acquitted of a criminal charge, or in respect of whom criminal proceedings had been discontinued, from being treated by public officials and authorities as though they were in fact guilty of the offence charged. The second aspect came into play when the criminal proceedings had ended with a result other than a conviction. In order for the second aspect to be applicable to subsequent proceedings, an applicant had to demonstrate the existence of a link between the concluded criminal proceedings and the subsequent proceedings.

In the applicants' view, without their late relatives having previously been proved guilty according to law of being members of ETA, the domestic authorities' decisions to refuse compensation, including the reasoning and language used therein, were incompatible with the presumption of innocence. In this connection, what comes into play in the present case is the second aspect of Article 6 § 2 of the Convention. As such, the Court had to examine whether there had been a link between any prior criminal proceedings that might have existed against the applicants' late relatives concerning their alleged membership of ETA and the compensation proceedings brought by the applicants. In that context, the Court had first to examine whether each of the applicants' late relatives had been "charged with a criminal offence" for the purposes of their complaint under Article 6 § 2.

In *Martínez Agirre and Others* the police reports on which the domestic authorities had based their findings had referred to previous criminal investigations opened in Spain in connection with the applicants' relatives' involvement in ETA and its activities and crimes. Although it appeared that the arrest warrants had not been enforced because the applicants' relatives had fled to France, and that they never stood trial in Spain, given that those criminal investigations had related either to membership of ETA or active participation in its crimes and activities, the Court accepted that the applicants' relatives had been "charged with a criminal offence" within the autonomous meaning of that term and in respect of the criminal charge for which the applicants claimed the protection of the presumption of innocence. The criminal proceedings against the applicants' late relatives had been discontinued as a result of their death.

As to whether there had been a link between the discontinued criminal proceedings and the compensation proceedings, the compensation proceedings had been administrative in nature and aimed at determining whether the applicants had had a right to obtain additional compensation from the State for the killings of their relatives by terrorist groups. The subject matter of those proceedings was legally and factually different from that of the criminal proceedings or investigations instituted against their relatives prior to their death for alleged participation or collaboration with ETA.

The relevant legal provisions for claiming compensation did not require that the alleged membership of the person concerned of a criminal or violent organisation be established by a previous criminal conviction following criminal proceedings. While the police reports on which the domestic authorities had relied on had contained some references to the previous criminal investigations concerning the applicants' late relatives, those had not been the only elements that had been taken into account for establishing that the latter had been members of ETA. The police reports had also relied on non-official publications allegedly close to the organisation in which the individuals concerned had been named as being members of ETA, as well as on statements made by other alleged members of the organisation. Therefore, it did not appear that the contents or the outcome of those previous criminal investigations against the applicants' relatives had been decisive for the impugned proceedings.

In any event, the domestic authorities had not engaged in a review or evaluation of the concrete evidence included in the criminal files against the applicants' relatives. Nor had they analysed the decisions taken by the investigating authorities in those proceedings or reassessed the applicants' relatives' participation in the events leading to the criminal charges at issue. The domestic courts had limited themselves to taking into account, among other elements, the previous criminal investigations instituted against the applicants' relatives as mentioned in the police reports.

The applicants had not demonstrated the existence of the necessary link between the discontinued criminal proceedings against their relatives and the compensation proceedings brought by them. It follows that Article 6 § 2 was not applicable to the latter proceedings.

In *Larrañaga Arando and Others*, where the applicants' late relatives had not been subject to any formal criminal investigation, it followed that there had been no "criminal charge" within the meaning of the Court's case-law. The right to be presumed innocent under Article 6 § 2 arose only in connection with the particular offence "charged".

Also, where the applicants' relatives had not been "charged" with the same criminal offence in respect of which the applicants had claimed the protection of the presumption of innocence, it also followed that there had been no "criminal charge".

Finally, where the applicant's relatives had been previously convicted of an equivalent charge to that in respect of which the applicants had claimed the protection of the presumption of innocence, Article 6 § 2 could not apply in respect of that charge in the context of the compensation proceedings at issue.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 6 § 3 (b)

Preparation of defence/Préparation de la défense
Adequate time/Temps nécessaire
Access to relevant files/Accès au dossier

Defence afforded sufficient time to acquaint itself with mass of telecommunication-surveillance data and electronic files: *no violation*

Délai suffisant laissé à la défense pour la consultation des données et des fichiers électroniques volumineux issus d'une surveillance des télécommunications : *non-violation*

Rook – Germany/Allemagne, 1586/15, Judgment/Arrêt 25.7.2019 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant, a senior manager of a major retailer for consumer electronics, was prosecuted and found guilty of taking bribes in commercial practice. During the investigation, around 45,000 recorded telephone calls along with 34,000 sets of other telecommunications-generated data were collected. Eventually transcripts were made of only 28 of the most important telephone conversations. In addition, out of a total of 14 million electronic files, 1,100 were considered relevant enough to be included in the paper investigation file.

The applicant complained that his lawyer had not had a sufficient opportunity to acquaint himself with the entirety of the information collected by the investigator, or at least be able to identify the relevant data and files, in order to prepare the defence.

Law – Article 6 §§ 1 and 3 (b)

(a) *Access to the case file* – Throughout the proceedings, the applicant's lawyer had at all times had unrestricted access to the paper investigation file and any updates. Initial access was granted in November 2011. The trial started in June 2012 and lasted until December of that year. The applicant's lawyer had therefore had the possibility to acquaint himself with the investigation file, regardless of the specific numbers of pages and volumes it comprised. This was all the more true as the applicant had had two other lawyers, who never requested access to the investigation file. Moreover, the possibilities of contact between the lawyer and the detained applicant had not been unduly restricted.

Furthermore, whereas an enormous amount of telecommunication-surveillance data and electronic files had been collected during the investigation, only a relatively small number of files were eventually included in the paper file. Any data considered irrelevant were stored on police computers. In this connection, the prosecution and the courts had made use of neither the entirety nor a single one of the files on police computers and subsequently based neither the applicant's indictment nor his conviction on them. Therefore the defence had been granted sufficient access to the paper file and afforded sufficient time to acquaint itself with the relatively extensive results of the investigation.

(b) *Disclosure of the telecommunication-surveillance data* – Following a request by the applicant, the prosecution and the domestic courts were prompt in deciding to allow disclosure of the entirety of the telecommunication-surveillance data. The applicant's lawyer had been allowed to examine that data on the premises of the police, or in the prison where the applicant was detained, by appointment during regular opening hours and in the presence of a police officer, in order to protect the rights of all those whose conversations may have been recorded. The applicant had not specified in what particular manner the invoked restrictions had interfered with his opportunity to defend himself.

In view of the complexity of the criminal proceedings in issue, it had not been necessary to allow an opportunity for the applicant's lawyer to read through and listen to each and every single item of the telecommunication-surveillance data. Rather, it had, in principle, been sufficient to allow an effective opportunity for the applicant's lawyer to analyse the recordings and text messages in order to identify and then listen or read those which he had considered to be of relevance. In this connection,

the Court was mindful of the fact that modern investigation means could indeed produce, as in the present case, enormous amounts of data, the integration of which into criminal proceedings should not cause unnecessary delays to those proceedings. The applicant's right to disclosure was not to be confused with his right of access to all materials already considered as relevant by the authorities, which would generally require for the possibility to comprehend the materials in their entirety.

The police had been supportive and had provided the applicant's lawyer with the data produced in respect of certain search parameters of his choosing and, subsequently, the lists containing substantial amounts of information on the retrieved data. It had indeed been possible to narrow down the search by looking for specific telephone lines, connections between specific telephone lines and the timing of telephone calls, thus allowing for a substantial reduction in the amount of data to only what was potentially relevant. Moreover, even though the appointments at the police and in the prison had been difficult to set, the applicant's lawyer – who could have been expected to arrange for at least some shift in the emphasis of his work – had managed to examine the data on only twenty-two occasions over a period of more than one year, apparently never together with the applicant on the prison premises nor after 31 October 2012. At the same time, he had not made use of the possibility to have a litigation assistant replace him. Nor had the applicant's two other lawyers engaged substantially in the analysing, listening and reading exercise. Another point is that the applicant would have known best what specific data to look for. It thus could not be said that the authorities had provided the defence with only an ineffective opportunity to identify the relevant files or that the applicant had had insufficient time to acquaint himself with the telecommunication-surveillance data.

(c) *Disclosure of the electronic files* – The lawyer could have accessed the entirety of the files on the premises of the police from the end of February 2012. He had first requested it on 3 April 2012; on 22 May 2012 the authorities provided the applicant's lawyer with a copy of the files. That copy, however, could only be read by means of expensive software, which lawyers and private individuals normally did not appear to have at their disposal. The dispute concerning the question whether the State should bear the cost for the special forensic-data-analysis program, which was expensive, had revealed practical difficulties caused by the encryption of a large amount of data. It was only in July 2012 that the defence had asked to be provided with a copy in a format that was readable with software that was freely available on the internet, a request to which the authorities had agreed on short notice. The applicant's lawyer had provided two hard discs at the end of July 2012, and the data were provided on 4 September 2012. The applicant had not specified in what particular manner the invoked restrictions had interfered with his opportunity to defend himself.

The access had been sufficient in principle to allow an effective opportunity for the applicant's lawyer to analyse the electronic files in order to identify those which he considered to be of relevance.

The exact nature of the 14 million electronic files must have allowed for an initial identification of files with potential relevance to the criminal proceedings, thus making possible a substantial reduction in the number of files that actually needed to be looked at. Moreover, the electronic files must have stemmed from different people, including the applicant, giving him the best knowledge of their content, and covering a long period of time, thus allowing for a further reduction in the search parameters. The applicant's lawyer, who could have been expected to arrange for at least some shift in the emphasis of his work, had had three and a half months to analyse the electronic files, which was sufficient time.

The mere fact that the court proceedings had already begun when the lawyer was given a full copy of the file had not rendered the preparatory time insufficient. Article 6 § 3 (b) of the Convention did not require the preparation of a trial lasting a certain period of time to be completed before the first hearing. The question rather was whether the amount of time actually available before the end of the hearing had been sufficient. In the circumstances of the case the applicant had had sufficient time to acquaint himself with the electronic files.

In conclusion, the proceedings, considered as a whole, had been fair.

Conclusion: no violation (unanimously).

(See also *Mattick v. Germany* (dec.), 62116/00, 31 March 2005, Information Note 73; and *Sigurður Einarsson and Others v. Iceland*, 39757/15, 4 June 2019, Information Note 230)

ARTICLE 8

Respect for private life/Respect de la vie privée

Domestic law lacking safeguards against abuse with respect to permanent video surveillance of detainees in their cells: *violation*

Droit interne dépourvu de garanties contre les abus résultant de la vidéosurveillance permanente de détenus dans leurs cellules : *violation*

Gorlov and Others/et autres – Russia/Russie, 27057/06 et al., Judgment/Arrêt 2.7.2019 [Section III]

Traduction française du résumé – Printable version

Facts – When confined to their cells, the applicant detainees remained under constant surveillance by prison guards via a closed-circuit television camera (CCTV). CCTV camera monitoring was routinely carried out by female officers.

Law – Article 8: The permanent video surveillance constituted an interference with the applicants' right to respect for their private life.

The relevant legislation set forth a general rule enabling the administrations of penal institutions and pre-trial detention centres to have recourse to video surveillance. However, they did not specify whether both the common parts and residential areas should be subject to surveillance; at which time of the day it should be operational; the conditions under which it should be used and for how long at a time; the applicable procedures, and such like. The only obligation was to inform convicts, obtaining their signature as acknowledgment, of the use of the CCTV cameras. The relevant regulations did not set out any specific rules governing the conditions in which the impugned measure could be applied and revoked, the duration or the procedures for review.

In so far as post-conviction penal institutions were concerned, the relevant provisions did not specify whether the obtaining of information about convicts' conduct was limited to monitoring by CCTV cameras, or whether that information was recorded and kept, and, if so, what the applicable safeguards and rules were governing the circumstances in which such data could be collected, the duration of their storage, the ground for their use, and the circumstances in which they could be destroyed. The technical specifications provided for the possibility of keeping the recordings from a CCTV system for a period of thirty days.

Unlike in the decision in *Van der Graaf v. the Netherlands*, the applicants' placement under permanent video surveillance had not been based on an individual decision providing reasons which would have justified the measure in question in the light of the legitimate aims pursued; the measure had not been limited in time, and the administrations of the relevant institutions had not been under an obligation to review regularly (or at all) the well-foundedness of that measure. Indeed, there was no basis in national law for the adoption of such individual decisions.

In such circumstances, whilst the Court was prepared to accept that the contested measure had some basis in national law, it was not convinced that the existing legal framework was compatible with the "quality of law" requirement. Whilst vesting in the administrations of pre-trial detention centres and penal institutions the right to use video surveillance, it did not define with sufficient clarity the scope of those powers and the manner of their exercise so as to afford an individual adequate protection against arbitrariness. In fact, as interpreted by the domestic courts, the national legal framework vested in the administrations of pre-trial detention centres and penal institutions an unrestricted power to place every individual in pre-trial or post-conviction detention under permanent, that is day and night, video surveillance, unconditionally, in any area of the institution, including cells, for an indefinite period of time, with no periodic reviews. As it stood, the national law offered virtually no safeguards against abuse by State officials.

Although the Court was prepared to accept that it might be necessary to monitor certain areas of pre-trial and penal institutions, or certain detainees on a permanent basis, including by using a CCTV system, it found that the existing legal framework could not be regarded as being sufficiently clear, precise and detailed to have afforded appropriate protection against arbitrary interference by the authorities with the applicants' right to respect for their private life.

The measure complained of had therefore not been "in accordance with the law". Accordingly, there was no need to examine whether it pursued any of the legitimate aims and was "necessary in a democratic society", being proportionate to those aims. In particular, the Court left open the question of whether the fact that the permanent video surveillance had been carried out by female operators of CCTV cameras was compatible with the requirements of Article 8 § 2, as, in its view, this was an element of the proportionality of the alleged interference.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 13 because the domestic law, as interpreted by the courts, did not presuppose any balancing exercise or enable an individual to obtain a judicial review of the proportionality of his or her placement under permanent video surveillance to the vested interests in securing his or her privacy.

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

(See *Van der Graaf v. the Netherlands* (dec.), 8704/03, 1 June 2004, Information Note 65; see also *S. and Marper v. the United Kingdom* [GC], 30562/04 and 30566/04, 4 December 2008, Information Note 114; and *M.M. v. the United Kingdom,* 24029/07, 13 November 2012, Information Note 157; as well as the Factsheet on Detention conditions and treatment of prisoners)

Respect for private life/Respect de la vie privée

Lack of access to a private cinema for a disabled person wishing to see a film not being shown in cinemas with disabled access: *Article 8 not applicable; inadmissible*

Défaut d'accès pour une personne handicapée à un cinéma particulier pour voir un film non projeté dans les salles accessibles : *article 8 non applicable ; irrecevable*

Glaisen – Switzerland/Suisse, 40477/13, Decision/Décision 25.6.2019 [Section III]

English translation of the summary – Version imprimable

En fait – En octobre 2008, le requérant, paraplégique, n'a pas pu entrer dans un cinéma d'art et d'essai pour voir le film convoité qui ne figurait à l'affiche d'aucune autre salle de la ville. Il n'y avait pas d'accès pour les fauteuils roulants et le requérant n'a pas été autorisé à être porté à l'intérieur.

Le requérant, estimant avoir subi une discrimination, déposa des recours en indemnisation contre la société exploitant le cinéma. Mais ils furent tous rejetés en 2011 et 2012.

En droit – Article 8 : La Convention des Nations unies relative aux droits des personnes handicapées de 2006 énonce le principe de « la participation et l'intégration pleines et effectives à la société » pour ces personnes. Par contre, la Cour a précédemment établi que l'article 8 de la Convention européenne entre en jeu seulement dans les cas exceptionnels où un manque d'accès aux établissements publics et ouverts au public empêcherait la requérante de mener sa vie de façon telle que le droit à son développement personnel et son droit d'établir et d'entretenir des rapports avec d'autres êtres humains et le monde extérieur soient mis en cause.

Il ne découle pas de l'article 8 un droit d'avoir accès à un cinéma particulier pour y voir un film spécifique, aussi longtemps qu'est assuré un accès général aux cinémas se trouvant dans les environs proches. Or d'autres cinémas exploités par la société en question seraient adaptés aux besoins du requérant. Le pourcentage de films uniquement projetés au cinéma en cause s'élevait seulement à environ 10 à 12 % en 2009 et 2010. Il s'ensuit que le requérant avait généralement accès aux cinémas de sa région.

En d'autres termes, le refus d'accès au cinéma en cause, pour voir le film souhaité, n'a pas empêché le requérant de mener sa vie de façon telle que le droit à son développement personnel et son droit d'établir et d'entretenir des rapports avec d'autres êtres humains et le monde extérieur soient mis en cause.

L'un des buts de la législation interne est de créer des conditions propres à faciliter la participation à la vie de la société aux personnes handicapées, en les aidant notamment à être autonomes dans l'établissement de contacts sociaux. Par contre, le champ d'application de son article portant sur les prestations des particuliers est limité. Cette disposition a pour but de prévenir des comportements ségrégationnistes graves, qui tendent à exclure les personnes handicapées de certaines activités de peur que leur seule présence ne trouble la quiétude ou les habitudes sociales de la clientèle habituelle. Une discrimination est constituée par toute différence de traitement « particulièrement marquée et gravement inégalitaire qui a pour intention ou pour conséquence de déprécier une personne handicapée ou de la marginaliser ».

Le Tribunal fédéral a donné suffisamment de motifs expliquant pourquoi la situation subie par le requérant n'est pas assez grave pour tomber sous le coup de la notion de discrimination. Dès lors, la Cour ne voit aucun motif de se départir des conclusions des tribunaux suisses, en particulier du Tribunal fédéral qui, dans un arrêt circonscrit et se référant aux affaires pertinentes de la Cour, a conclu que la Convention n'oblige pas la Suisse à adopter, dans sa législation interne, une notion de la discrimination telle que demandée par le requérant.

Il s'ensuit que le requérant ne peut se prévaloir de l'article 8 de la Convention. S'agissant de l'applicabilité de l'article 10 de la Convention, cette disposition ne présente pas, pour la présente affaire, une portée qui va au-delà de celle de l'article 8. L'article 10, et plus particulièrement le droit de recevoir de l'information, ne va pas jusqu'à permettre au requérant l'accès au cinéma où est projeté un film qu'il souhaite regarder.

Conclusion : irrecevable (incompatibilité *ratione materiae*).

(Voir aussi *Botta c. Italie*, 21439/93, 24 février 1998 ; *Zehnalová et Zehnal c. République tchèque* (déc.), 38621/97, 14 mai 2002, Note d'information 43 ; *Mółka c. Pologne* (déc.), 56550/00, 11 avril 2006, Note d'information 86 ; et *Neagu c. Roumanie* (déc.),

49651/16, 29 janvier 2019 ; ainsi que la fiche thématique Les personnes handicapées et la Convention européenne des droits de l'homme)

Respect for private life/Respect de la vie privée

Refusal to allow a homosexual prisoner to have conjugal visits: *communicated*

Refus d'autoriser des visites conjugales à un détenu homosexuel : *affaire communiquée*

Duţă – Romania/Roumanie, 8783/15, Communication [Section IV]

(See article 14 below/Voir ci-dessous l'article 14, page 32)

ARTICLE 10

Freedom of expression/Liberté d'expression

Television station fined for broadcasting Hungarian programme without being translated into or subtitled in Slovak in breach of domestic law: *communicated*

Chaîne de télévision condamnée à une amende pour avoir diffusé un programme hongrois non traduit ou non sous-titré en slovaque, en violation du droit interne : *affaire communiquée*

Július Pereszlényi-Servis TV-Video – Slovakia/Slovaquie, 25175/15, Communication [Section III]

Traduction française du résumé – Printable version

The applicant company, a private regional television station operating in a Slovak region where 70-80% of the population belongs to the Hungarian minority, was fined EUR 165 by the National Broadcasting Council for having broadcast a TV programme including an interview in Hungarian that was not translated into or subtitled in Slovak, in breach of the relevant provisions of the Act on Broadcasting and Retransmission and of the Act on the State Language as in force at the material time. The Supreme Court confirmed the decision of the National Broadcasting Council. Under the relevant legislation, broadcasting in Hungarian had to be translated into or subtitled in Slovak while there was no corresponding obligation to subtitle or translate Slovak broadcasting into Hungarian.

Communicated under Articles 6, 10 and 14 of the Convention.

Freedom to impart information/Liberté de communiquer des informations

Criminal proceedings against the management of a newspaper for having published statements by the leader of a terrorist organisation containing an implied threat of a resumption of violence: *no violation*

Poursuites pénales contre les dirigeants d'un journal pour avoir publié des déclarations d'un chef d'organisation terroriste contenant la menace implicite d'une reprise des violences : *non-violation*

Gürbüz and/et Bayar – Turkey/Turquie, 8860/13, Judgment/Arrêt 23.7.2019 [Section II]

English translation of the summary – Version imprimable

En fait – Respectivement propriétaire et rédacteur en chef d'un quotidien, les requérants furent poursuivis pour l'infraction de « publication de déclarations d'une organisation terroriste ». Après plusieurs années, la poursuite visant le premier requérant fut éteinte par la prescription ; le second requérant fut condamné à une amende judiciaire avec sursis.

Était en cause la publication, en septembre 2004, de déclarations d'A.Ö. (chef du PKK) et de M.K. (autre haut dirigeant du PKK, et président du comité de défense populaire Kongra-Gel) portant sur une proposition de trêve faite par Kongra-Gel et sur les appels de cette dernière organisation à faire taire les armes.

A.Ö. y disait notamment : i) qu'il approuvait cette proposition et appelait les autorités à mettre immédiatement en pratique les réclamations de cette organisation ; ii) qu'il fallait absolument développer le dialogue turco-kurde, faute de quoi l'année 2005, même si ce n'était pas souhaitable, serait obligatoirement l'année du passage à la guérilla ; iii) qu'il appelait les patriotes kurdes à se rassembler sous l'étendard de Kongra-Gel.

M.K., quant à lui : i) mettait l'accent sur la paix dans la région, paix qui, selon lui, passait par la reconnaissance et le respect des droits du peuple kurde ; ii) appelait l'État à ouvrir le dialogue avec les représentants kurdes pour trouver une solution démocratique et pacifique au problème kurde ; iii) soulignait en particulier être prêt à déposer les armes si les conditions étaient réunies

En droit – Article 10 : Certes le seul fait d'avoir publié des déclarations d'organisations terroristes ne saurait valoir aux professionnels des médias d'être systématiquement condamnés par les tribunaux sans analyse de la teneur des écrits litigieux ou du contexte dans lequel ils s'inscrivaient (voir *Gözel et*

Özer c. Turquie, 43453/04 et 31098/05, 6 juillet 2010, Note d'information 132).

En revanche, lorsqu'il s'agit de déclarations pouvant être qualifiées de discours de haine, d'apologie de la violence ou d'incitation à la violence, la Cour analyse elle-même les écrits en cause, nonobstant l'insuffisance manifeste des motifs avancés par les tribunaux à l'appui des condamnations prononcées.

Dans la présente affaire, la Cour note que les déclarations de M.K. avaient plutôt une connotation pacifique ; elles ne semblaient pas être de nature à inciter à la perpétration ou à la poursuite d'actes violents.

En revanche, les déclarations d'A.Ö. étaient plus nuancées : même si l'intéressé se montrait favorable à la proposition de cessez-le-feu faite par Kongra-Gel, il envisageait tout de même la possibilité d'un recours à la violence si les autorités ne répondaient pas à l'appel au dialogue lancé par cette organisation dans le cadre des réclamations présentées par celle-ci. En effet, un autre passage de l'article comportait une menace à peine implicite dirigée contre les autorités, ainsi qu'une instruction aux sympathisants d'A.Ö. et aux membres armés du PKK : « dans le cas où la voie du dialogue ne se développerait pas, l'année 2005 serait obligatoirement l'année du passage à la guérilla, même s'ils ne le souhaitaient pas ». Ce passage peut ainsi s'analyser comme une provocation publique à commettre une infraction terroriste au sens de l'article 5 de la Convention du Conseil de l'Europe pour la prévention du terrorisme.

Dans ce contexte, A.Ö. appelait au « rassemblement des patriotes » sous l'étendard de l'organisation illégale Kongra-Gel. Eu égard à la nature, au but et aux actes passés de cette dernière organisation, cet appel s'apparente à un message destiné à recruter des terroristes, au sens de l'article 6 de la Convention du Conseil de l'Europe pour la prévention du terrorisme.

Par conséquent, compte tenu

– de l'identité d'A.Ö., le chef emprisonné du PKK, qui à l'époque des faits continuait à transmettre ses instructions à son ex-organisation par le biais de ses avocats,

– du bilan des actes violents commis par l'organisation illégale qu'il a dirigée,

– du contenu des passages litigieux des déclarations de l'intéressé, contenant une menace et une instruction relativement aux éventuels actes violents susceptibles d'être commis par les membres du PKK en 2005 et

– du contexte fragile d'une proposition de cessez-le-feu faite par Kongra-Gel dans lequel ces déclarations s'inscrivaient,

les déclarations d'A.Ö., lues dans leur ensemble, s'interprètent comme une incitation ou un appel à l'usage de la violence, à la résistance armée ou au soulèvement ; et ce, nonobstant le fait que cet appel n'était émis que sous une forme conditionnelle, à savoir en cas de non-développement d'un dialogue avant 2005.

De fait, ces déclarations donnent l'impression à l'opinion publique – et en particulier aux membres du PKK – que, si les conditions mises en avant par Kongra-Gel ne sont pas satisfaites, le recours à la violence sera nécessaire et justifié en 2005. S'il est vrai que les requérants ne s'y sont pas personnellement associés, ils n'en ont pas moins fourni une tribune à A.Ö et permis leur diffusion.

Dès lors que les déclarations litigieuses s'interprètent bel et bien comme une incitation à la violence, les requérants ne sauraient, en leur qualité respective de propriétaire et de rédacteur en chef de leur journal, s'exonérer de toute responsabilité. Le droit de communiquer des informations ne peut pas servir d'alibi ou de prétexte à la diffusion de déclarations de groupements terroristes.

Par ailleurs, l'ingérence litigieuse n'était pas disproportionnée compte tenu, d'une part, de la marge d'appréciation des autorités nationales en pareil cas et, d'autre part, de la prescription et du sursis dont ont respectivement bénéficié les requérants.

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

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

Criminal conviction for participation in a demonstration denied by accused constituted interference: *violation*

Ingérence à raison d'une condamnation pénale prononcée pour une participation à une manifestation que niait l'accusé : *violation*

Zülküf Murat Kahraman – Turkey/Turquie, 65808/10, Judgment/Arrêt 16.7.2019 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant was convicted of membership of an illegal organisation (the PKK) and was sentenced to six years and three months' imprisonment following his alleged participation in a demonstration.

Law – Article 11: The Government had argued that since the applicant had denied having taken part in the demonstrations before the domestic courts, he

had failed to show how his conviction had affected his right to freedom of assembly. The applicant's criminal conviction had been indisputably directed at activities falling within the scope of freedom of assembly, and he had been sanctioned for participating in the demonstration. In such circumstances, the applicant's conviction had to be regarded as constituting an interference with the exercise of his right to freedom of assembly. To hold otherwise would be tantamount to requiring him to acknowledge the acts of which he had stood accused. In that respect, it had to be borne in mind that the right not to incriminate oneself, although not specifically mentioned in Article 6, was a generally recognised international standard which lay at the heart of the notion of a fair procedure under that provision. Not accepting that a criminal conviction constituted an interference on the grounds that an applicant had denied any involvement in the acts at issue, would lock him in a vicious circle which would deprive him of the protection of the Convention.

The Court had already examined an almost identical grievance in the case of *Işıkırık v. Turkey* and had found a breach of Article 11 and concluded that the relevant provision of the Criminal Code had not been "foreseeable" in its application. There was nothing in the case file that would require the Court to reach a different conclusion in the instant case.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Işıkırık v. Turkey*, 41226/09, 14 November 2017, Information Note 212; compare *Kasparov and Others v. Russia*, 21613/07, 3 October 2013, Information Note 167)

Freedom of association/Liberté d'association

Refusal to register LGBT associations: *violation*

Refus d'enregistrement d'associations LGBT : *violation*

Zhdanov and Others/et autres – Russia/Russie, 12200/08 et al., Judgment/Arrêt 16.7.2019 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants, four Russian nationals and three Russian non-profit organisations, alleged that the refusal to register associations set up to promote and protect the rights of LGBT people in Russia had violated their right to freedom of association and had amounted to discrimination on grounds of sexual orientation.

Law

Article 11: The refusal to register the applicant organisations had amounted to an interference with their freedom of association and had had a basis in domestic law.

(a) *Legitimate aim* – The aims of the applicant associations were to defend and promote the rights of LGBT people, including the right to same-sex marriage. Although States were still free to restrict access to marriage to different-sex couples, the issue in the case was not whether same-sex marriage should be recognised in Russia. The crux of the case was whether a refusal to register an association campaigning against discrimination on grounds of sexual orientation or for recognition of same-sex marriage could be justified on the grounds of the protection of morals. The absence of a European consensus on the question of same-sex marriage was therefore of no relevance, because conferring substantive rights on homosexual persons was fundamentally different from recognising their right to campaign for such rights. There was no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their rights to freedom of peaceful assembly and association. The refusal to register the applicant associations could not be justified on the grounds of the protection of moral values or the institutions of family and marriage and could not therefore be considered to pursue the legitimate aim of the protection of morals.

The national authorities had considered that the applicant associations had threatened Russia's sovereignty, safety and territorial integrity because their activities might have resulted in a decrease in the population. The Court was not convinced that a refusal to register an association defending LGBT rights on such grounds could serve to advance the aims of protecting national security and public safety. Firstly, there was no link between the promotion of homosexuality and the demographic situation, which depended on a multitude of conditions, such as economic prosperity, social-security rights and accessibility of childcare. Secondly, neither the national courts nor the Government had explained how a hypothetical decrease in the population could affect national security and public safety; nor had they provided any assessment of such an impact.

Further, as regards the aim of protecting the rights and freedoms of others, it was the right not to be

confronted with any display of same-sex relations or promotion of LGBT rights or with the idea of equality of different-sex and same-sex relations – which the majority of Russians apparently resented and considered to be offensive, disturbing or shocking – that the national authorities had sought to protect by refusing to register the applicant associations. The Convention did not guarantee the right not to be confronted with opinions that were opposed to one's own convictions. The Court had consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority.

The Court accepted that social or religious hatred and enmity represented a danger for the social peace and political stability of democratic States and was likely to lead to violence. It therefore accepted that the declared aim of preventing such hatred and enmity corresponded to the legitimate aim of prevention of disorder and proceeded on the assumption that the contested measures had pursued that aim.

(b) *Necessity in a democratic society* – It had never been claimed that the applicants themselves had intended to commit any violent, aggressive or otherwise disorderly actions. Instead, the authorities had considered that the applicants might potentially have become victims of aggression by persons who disapproved of homosexuality. It was incumbent upon public authorities to guarantee the proper functioning of associations or political parties, even when they annoyed or gave offence to persons opposed to the lawful ideas or claims that they were seeking to promote. Their members had to be able to hold meetings without having to fear that they would be subjected to physical violence by their opponents. Such a fear would be liable to deter other associations or political parties from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate could not extend to inhibiting the exercise of the right of association.

The positive obligation to secure the effective enjoyment of the right to freedom of association and assembly was of particular importance for persons holding unpopular views or belonging to minorities, because they were more vulnerable to victimisation. Reference to the consciousness of belonging to a minority, the preservation and development of a minority's culture or the defence of a minority's rights could not be said to constitute a threat to "democratic society", even though it might provoke tensions. The role of the authorities in such circumstances was not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerated each other.

It followed that it was the duty of the Russian authorities to take reasonable and appropriate measures to enable the applicant organisations to carry out their activities without having to fear that they would be subjected to physical violence by their opponents. The domestic authorities had had a wide discretion in the choice of means which would have enabled the applicant organisations to function without disturbance, such as for instance making public statements to advocate, without any ambiguity, a tolerant, conciliatory stance, as well as to warn potential aggressors of possible sanctions. There was no evidence that the Russian authorities had considered taking any such measures. Instead, they had decided to remove the cause of tension and avert a risk of disorder by restricting the applicant's freedom of association. In such circumstances the refusal to register the applicant organisations was not "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 11: The decisive ground for refusing to register the applicant organisations had been their aim of promoting LGBT rights. In discrimination cases where more than one ground formed part of an overall assessment of the applicant's situation, grounds should not be considered alternatively, but cumulatively. Consequently, it was immaterial that the Government had referred to other grounds relating to various irregularities in the registration documents; the illegitimacy of one of the grounds had the effect of contaminating the entire decision.

Taking into consideration the narrow margin of appreciation and the previous finding that the decisive ground was not necessary in a democracy, those refusals to register had been differences in treatment which were not reasonably or objectively justified.

Conclusion: violation (unanimously).

The Court also held, unanimously, a breach of the applicants' right to effective access to a court under Article 6 as their appeal had not been examined on the merits although they had seemingly followed the rules for lodging appeals as established by domestic law.

Article 41: sums ranging between EUR 10,000 and EUR 13,000 in respect of non-pecuniary damage.

(See also *Jehovah's Witnesses of Moscow and Others v. Russia*, 302/02, 10 June 2010, Information Note 131; *Bayev and Others v. Russia*, 67667/09 et al., 20 June 2017, Information Note 208; *Alekseyev v. Russia*, 4916/07, 21 October 2010, Information Note

134; *Barankevich v. Russia*, 10519/03, 26 July 2007, Information Note 99; and *Ouranio Toxo and Others v. Greece*, 74989/01, 20 October 2005, Information Note 79)

ARTICLE 14

Discrimination (Article 3)

Absence of legislation defining domestic violence and dealing with it at systemic level: *violation*

Absence de législation définissant les violences domestiques et les réprimant de manière systémique : *violation*

Volodina – Russia/Russie, 41261/17, Judgment/Arrêt 9.7.2019 [Section III]

(See Article 3 above/Voir l'article 3 ci-dessus, page 13)

Discrimination (Article 8)

Refusal to exempt mentally ill alien seeking naturalisation from language and citizenship tests: *communicated*

Refus de dispenser une malade mentale étrangère demandant à être naturalisée des conditions linguistiques et du test de citoyenneté requis : *affaire communiquée*

Aziz Thamer Al-Ebrah – Denmark/Danemark, 32834/18, Communication [Section IV]

Traduction française du résumé – Printable version

The applicant is an Iraqi national born in 1976. She entered Denmark in 2000. In 2014 and 2017, she applied for Danish nationality and enclosed medical certificates stating that she suffered from chronic schizophrenia, which prevented her from ever learning Danish to the level required for being granted citizenship and from taking the special citizenship test. However, the naturalisation committee of the Danish Parliament refused to grant her exemption from language and citizenship tests. As a result, her application for nationality was rejected.

Communicated under Article 14 of the Convention read in conjunction with Article 8.

Discrimination (Article 8)

Refusal to allow a homosexual prisoner to have conjugal visits: *communicated*

Refus d'autoriser des visites conjugales à un détenu homosexuel : *affaire communiquée*

Duţă – Romania/Roumanie, 8783/15, Communication [Section IV]

English translation of the summary – Version imprimable

En septembre 2014, le requérant, qui était en détention, demanda à bénéficier de visites conjugales avec son partenaire de même sexe. La direction de la prison refusa. En décembre 2014, un tribunal ordonna que l'autorisation demandée lui soit accordée. Mais les autorités refusèrent d'obtempérer, bien que le jugement fût définitif. En avril 2015, le requérant bénéficia d'une libération conditionnelle.

Affaire communiquée sous l'angle de l'article 8 pris isolément ou combiné avec l'article 14.

Discrimination (Article 10)

Television station fined for broadcasting Hungarian programme without being translated into or subtitled in Slovak in breach of domestic law: *communicated*

Chaîne de télévision condamnée à une amende pour avoir diffusé un programme hongrois non traduit ou non sous-titré en slovaque, en violation du droit interne : *affaire communiquée*

Július Pereszlényi-Servis TV-Video – Slovakia/Slovaquie, 25175/15, Communication [Section III]

(See Article 10 above/Voir l'article 10 ci-dessus, page 28)

Discrimination (Article 11)

Refusal to register LGBT associations: *violation*

Refus d'enregistrement d'associations LGBT : *violation*

Zhdanov and Others/et autres – Russia/Russie, 12200/08 et al., Judgment/Arrêt 16.7.2019 [Section III]

(See Article 11 above/Voir l'article 11 ci-dessus, page 30)

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Alleged politically motivated deprivation of liberty: *no violation*

Privation de liberté motivée selon le requérant par des considérations politiques : *non-violation*

Korban – Ukraine, 26744/16, Judgment/Arrêt 4.7.2019 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant, a well-known politician, was arrested at his home on 31 October 2015. The time-limit for arrest without a judicial decision expired on 3 November 2015 and the applicant was released. However, he was re-arrested two minutes later. The applicant complained, *inter alia*, that those arrests had been unlawful and arbitrary. He further argued that the deprivation of his liberty had been ordered for ulterior, political motives.

Law – Article 18 in conjunction with Article 5: The Court found that the applicant had been arrested on "reasonable suspicion" of having committed a criminal offence. In other words, even though the Court had found a number of violations of Article 5, it could still be stated that the applicant had been deprived of his liberty for a purpose prescribed by Article 5 § 1 (c). In analysing the applicant's complaint under Article 18, the Court had first to examine whether the restriction in question had additionally pursued any other purpose which was not prescribed by Article 5 § 1. Even in the event of an affirmative answer to that question, there would only be a breach of Article 18 if that other purpose had been predominant.

The timing of the applicant's initial arrest and the manner in which it had been carried out could be interpreted as possible indices of an ulterior purpose. It was only on 31 October 2015, more than a year after the institution of criminal proceedings, that the investigating authorities had notified the applicant of their suspicions and arrested him. His arrest had taken place with the involvement of a special forces unit, which had broken through the entrance door to his flat. All of a sudden, without any apparent reason, the applicant's arrest and criminal prosecution had become a matter of particular urgency and zeal for the prosecuting authorities. In the absence of any convincing explanations from the authorities, it had been broadly perceived by political parties, mass media and civil society as selective justice.

The applicant linked his criminal prosecution and deprivation of liberty, in particular, with the alleged conflict between the then head of a regional state administration and the President of Ukraine, which had led to the former's resignation in March 2015. In the absence of complaints of political persecution raised by the above-mentioned official or any member of his political team other than the applicant, the Court did not find that argument convincing.

The Court was also not convinced by the applicant's allegation that the real impetus for his criminal prosecution might have stemmed from his rivalry with the candidate from the President's party during mid-term parliamentary elections. The applicant had suggested that the whole legal machinery had been misused at the whim of a friend and political ally of the President. There was no evidence in the case-file materials in support of such a serious allegation. Furthermore, it appeared unlikely that the candidate, who had won the elections with almost 36% of the vote, would *post factum* seek to take revenge on the applicant, who had obtained less than half of that percentage. Although the applicant had suggested that the election results had been rigged and were unfair, he had not lodged a complaint under Article 3 of Protocol No. 1.

In so far as the applicant had claimed that he had been sharply criticising the President of Ukraine and those in power, there was no information of any attempts to stifle voices critical of the then President of Ukraine or the government. The plurality of publicly expressed opinions in Ukraine concerning the applicant's criminal prosecution itself was rather an indication to the contrary: that anybody had been free to criticise the President in particular and the authorities in general.

The Court was also sceptical of the alleged link between the deprivation of the applicant's liberty and the success of his party in the local elections. Firstly, the criminal proceedings against the applicant had been instituted about a year prior to the creation of his party (UKROP). Secondly, apart from the "Bloc of Petro Poroshenko", which had won the election, two other parties had obtained better results than UKROP but had not alleged that they had been persecuted.

In the light of all the foregoing, the allegations the applicant had raised in the context of his complaint under Article 18 had not been sufficiently proven. Even if there might have been some ulterior motives for prosecuting the applicant and depriving him of his liberty, the Court was unable to identify them on the basis of the applicant's submissions, let alone find that those ulterior motives were predominant.

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there had been violations of Article 3 (substantive aspect) in respect of the applicant's participation in court hearings in the days following major surgery and on account of his confinement in a metal cage during court hearings. The Court found, unanimously, a breach of Article 5 § 1 in respect of the applicant's arrest and re-arrest. The Court also found, by six votes to one, a violation of Article 5 § 3 due to the absence of relevant and sufficient reasons for the applicant's deprivation of liberty and, unani-

mously, a violation of Article 5 § 5, finding that the applicant's effective enjoyment of the right to compensation had not been ensured with a sufficient degree of certainty. Finally, the Court held, unanimously, that there had been a breach of Article 6 § 2 as regards statements made by high-ranking officials to the mass media in respect of the criminal proceedings against the applicant.

Article 41: no claim made in respect of damage.

(See also *Buzadji v. the Republic of Moldova* [GC], 23755/07, 5 July 2016, Information Note 198; *Svinarenko and Slyadnev v. Russia* [GC], 32541/08 and 43441/08, 17 July 2014, Information Note 176; and *Merabishvili v. Georgia* [GC], 72508/13, 28 November 2017, Information Note 212)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/ Épuisement des voies de recours internes Effective domestic remedy/Recours interne effectif – France

Effectiveness of an action for damages against the State in order to challenge the non-enforcement of a judgment ordering urgent rehousing: *inadmissible*

Effectivité du recours indemnitaire en responsabilité de l'État pour contester l'inexécution d'un jugement ordonnant un relogement en urgence : *irrecevable*

Bouhamla – France, 31798/16, Decision/Décision 25.6.2019 [Section V]

English translation of the summary – Version imprimable

En fait – Selon le mécanisme du droit au logement opposable (DALO), le requérant a d'abord obtenu, le 13 juin 2014, une décision de la commission de médiation qui a été transmise au préfet, et par laquelle il a été « reconnu prioritaire et devant être logé d'urgence » avec sa famille.

Le préfet ne s'étant pas exécuté en proposant au requérant une offre de logement dans le délai légal de six mois, celui-ci a saisi le juge administratif qui a enjoint au préfet, le 3 mars 2015, d'assurer le relogement du requérant et de sa famille, sous une astreinte destinée au Fonds national d'accompagnement vers et dans le logement (FNAVDL). Depuis le 31 janvier 2017, le requérant et sa famille ont été relogés.

En droit – Article 35 § 1 (*épuisement des voies de recours internes*) : Le recours indemnitaire ne constituait pas une voie de recours susceptible de remédier directement à la situation dénoncée par le requérant lors de l'introduction de sa requête, à savoir lorsqu'il était en attente urgente d'une proposition d'offre de logement.

Cependant, depuis le relogement du requérant et sa famille le 31 janvier 2017, le jugement du 3 mars 2015 dont le requérant se plaignait de l'inexécution a finalement été exécuté. Dès lors que la violation continue qu'il dénonçait a cessé le 31 janvier 2017, un recours effectif ne doit avoir, dans les circonstances de l'espèce, pour vocation que d'obtenir la reconnaissance et la réparation de la violation alléguée, à la supposer établie, du 3 mars 2015 jusqu'au 31 janvier 2017.

Le préjudice indemnisable réside dans les troubles dans les conditions d'existence du demandeur résultant du maintien de la situation qui a motivé la décision de la commission de médiation. Avant même l'introduction de la présente requête et les arrêts du Conseil d'État des 13 juillet 2016 et 16 décembre 2016, qui ont précisé les éléments à considérer pour déterminer le préjudice indemnisable, les juridictions du fonds prenaient, généralement, en compte plusieurs éléments pour évaluer le préjudice, notamment la durée du maintien des conditions de logement du demandeur en raison de la carence de l'État, ainsi que la composition du foyer familial.

Ainsi, le recours en responsabilité de l'État, à raison de sa carence dans la mise en œuvre du DALO, permet aux demandeurs d'obtenir le constat que l'inexécution du jugement enjoignant au préfet d'assurer leur relogement constitue une faute de nature à engager la responsabilité de l'État et une indemnisation subséquente.

Par ailleurs, les sommes allouées par les juridictions en réparation du préjudice varient d'une juridiction à l'autre au regard des spécificités de chaque affaire, sans que de manière systématique, le niveau d'indemnisation soit déraisonnable par rapport aux sommes allouées par la Cour dans des affaires similaires.

En conséquence, ce recours présentait des perspectives raisonnables de succès. Partant, le requérant bénéficiait à compter du 31 janvier 2017, d'un recours adéquat pour obtenir une indemnisation de la période d'inexécution du jugement enjoignant au préfet de le reloger. De plus, l'action en responsabilité contre l'État se prescrivant dans un délai de quatre ans à compter du 1er janvier de l'année qui suit la survenance du fait générateur du dommage, le requérant peut encore agir.

Dès lors, le requérant aurait dû exercer ce recours alors même que, eu égard à son caractère pure-

ment compensatoire, il ne s'est avéré effectif qu'une fois le jugement du 3 mars 2015 exécuté, soit en l'espèce le 31 janvier 2017, après l'introduction de la requête devant la Cour.

Conclusion : irrecevable (non-épuisement des voies de recours internes).

(Voir aussi *Tchokontio Happi c. France*, 65829/12, 9 avril 2015, Note d'information 184, et *Tsonev c. Bulgarie* (déc.), 9662/13, 30 mai 2017, Note d'information 208)

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

Deprivation of property/Privation de propriété
Public interest/Intérêt public

Lack of compensation for private garage located on public land and demolished for commercial housing development: *violation*

Absence d'indemnisation pour la démolition d'un garage implanté sur un terrain public affecté à la réalisation d'un projet de promotion immobilière privé : *violation*

Svitlana Ilchenko – Ukraine, 47166/09, Judgment/Arrêt 4.7.2019 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant had used a garage in the courtyard of her house since 1980. In 1995 the garage was registered as her private property. In 2003 the city council allocated the land where the garage was located for a new housing project to be constructed by a private developer. The city proposed monetary compensation to the applicant; however, she failed to follow up on the offers to negotiate. The garage was demolished following the domestic courts' decisions finding, *inter alia*, that the applicant had never properly obtained the right to use the plot of land on which it was situated.

Law – Article 1 of Protocol No. 1: The applicant's situation, which qualified as a deprivation of property, should be distinguished from:

– cases concerning illegal construction, as the applicant had had a regular registered title to the garage, which had never been invalidated or questioned for the twenty years previous to the new high-value development being planned;

– cases where every decision authorising continued situation of a house on coastal public property specified that it was temporary and subject to revocation at will without compensation (*Depalle v. France* [GC], 34044/02, 29 March 2010, Information Note 128).

The allegedly "unauthorised" nature of the applicant's use of land in the present case resulted not from any breach of the law at the time her garage had been built but primarily from the evolution of Ukrainian law, within the framework of the transition from Soviet law, which did not recognise any private ownership of land and tenancy in the classical sense, to a system based on ownership and tenancy which characterised Ukrainian land law at present.

In the instant case, the issue of "public interest" in the interference was inextricably linked to the matter of proportionality; both should thus be examined together.

While the States' margin of appreciation in town-planning policy was wide, in the present case there was no indication, and the Government had not demonstrated, what particular policy consideration had driven the municipal authority's endorsement and support for the location of the housing project.

In that context, regardless of whether the interference could be considered to have been in the public interest, any such public interest was not strong enough to justify the taking of property without compensation. In particular, there was no indication that such particularly strong interests as protection of the environment, the need to uphold the rule of law and prohibition on illegal construction or considerations of social justice had driven the authorities' decisions.

As the applicant had been treated as a mere squatter, she had not only had no right to any compensation but, in principle, had been under an obligation to reimburse the city for the costs incurred in the demolition of her garage. No account had been taken of the specificity of her situation.

It was immaterial that the applicant had failed to follow up on the city's offer to negotiate compensation. Indeed, given how the domestic courts had interpreted and applied domestic law, any offer of compensation could only be *ex gratia*; the only way for the applicant to have been entitled to any legally guaranteed compensation would have been to have it established that she had had a right to the land, which she had attempted to do before the domestic courts.

Moreover, there was no procedural framework for such negotiations and for furnishing her with the information necessary to make an informed decision on any eventual offer. Therefore, her apparent failure to follow up on the city's offer to negotiate an *ex gratia* settlement could not be interpreted

as a waiver of her rights. Indeed, no compensation was due by law and no established procedure was in place to provide any essential safeguards in that process. In such circumstances the applicant's failure to follow up on the city's offer to negotiate was not sufficient to find that there had been no violation of her rights. The applicant had therefore been denied any right to compensation.

Where the development project was primarily to develop housing for private commercial gain, even though the domestic authorities also judged it in the public interest because it contributed to the increase and renovation of the available housing stock, only compensation determined through a procedure ensuring an overall assessment of the consequences of the expropriation, including the award of an amount of compensation in line with the market value of the taken property, could satisfy the requirements of Article 1 of Protocol No. 1.

No such compensation, accompanied by appropriate safeguards, had been offered to the applicant in the present case.

Conclusion: violation (unanimously).

Article 41: EUR 8,000 in respect of pecuniary and non-pecuniary damage.

(See also *Volchkova and Mironov v. Russia*, 45668/05 and 2292/06, 28 March 2017)

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

Stand for election/Se porter candidat aux élections

Lack of time for campaigning due to late registration of candidates in parliamentary elections following initial arbitrary refusals to register them and delays in proceedings: *violation*

Manque de temps pour faire campagne à cause d'un enregistrement tardif de candidats aux élections législatives à la suite de refus arbitraires d'enregistrement et de retards dans la procédure : *violation*

Abdalov and Others/et autres – Azerbaijan/Azerbaïdjan, 28508/11 et al., Judgment/Arrêt 11.7.2019 [Section V]

Traduction française du résumé – Printable version

Facts – The applicants, candidates in the 2010 parliamentary elections, had been registered late following alleged arbitrary initial decisions refusing to register them as candidates and their subsequent appeals, leaving them with a very short time to conduct their respective electoral campaigns. The first applicant had only one full day to campaign, the second applicant had only three full days, and the third applicant had practically no time left for campaigning.

Law – Article 3 of Protocol No. 1: The applicants' cases differed from those where the central issue was alleged inequality of treatment of candidates during the electoral campaign or inequality of campaigning opportunities available to registered candidates. The applicants' ability to campaign had been impaired by a time constraint, which had been a practical consequence of their late registration. The primary issue, therefore, was not, in and of itself, any inequality of treatment or opportunities during the campaign, but whether the applicants' late registration had adversely affected their individual right to stand freely and effectively for election.

The timely registration of candidates was crucial in order for them to be known to voters and to be able to convey their political message during the electoral campaign period in an effort to gain votes and get elected. The free choice of the electorate depended on, *inter alia*, having information concerning all eligible candidates, and receiving it in a timely manner in order to form an opinion and express it on election day.

The applicants' specific situation had to be assessed in the general context of certain systemic issues observed in the Azerbaijani 2010 parliamentary elections stemming from the lack of sufficient safeguards to prevent refusals to register candidates based on arbitrary findings of inauthenticity of supporting signatures. Even though the applicants had eventually been registered after a series of appeals, having regard to the material in the case files, the initial refusals to register the applicants as candidates and the subsequent proceedings, up to the point of the respective decisions granting their appeals, disclosed the existence of those same procedural shortcomings identified in the leading case of *Tahirov v. Azerbaijan* (31953/11, 11 June 2015, Information Note 186).

The domestic law provided for a maximum three-day period for electoral appeals and a maximum three-day period for the electoral commissions and courts to examine the appeals. At the electoral commission level, the three-day period for examination could be extended for an indefinite duration. With three levels of appeal against an electoral commission decision, the electoral appeal proceedings in cases concerning refusals to register candidates could theoretically take up to eighteen days (and sometimes longer, in situations where the appeal period was extended or where a case was remitted to a lower instance). Since the

decision on refusal to register could be delivered as late as on the eve of the official start of the electoral campaign period, the examination of appeals against such decision could take place after the start of the campaign period, as happened in the applicants' cases. Thus, under this system, a degree of overlap was possible between the period for examination of appeals against refusals to register and the electoral campaign period (fixed at twenty-two days). Consequently, given the possibility of overlap between the time periods allocated for those stages of the electoral process and the reduced length of the electoral campaign period, it was of utmost importance to conduct the appeal proceedings in a timely manner in order to ensure that, should an appellant be successful, he or she would have sufficient time before election day to conduct his or her campaign.

The proceedings in the present cases had been subject to a number of delays attributable to the electoral commissions and the courts, which on several occasions had delivered their respective decisions in a belated manner, sometimes in breach of the three-day limit prescribed by law. The delays in the applicants' registrations had not been minor. The applicants had been registered so late and so close to election day that they had not had a reasonable amount of time to conduct effective electoral campaigns. The late registration had been due to a lack of safeguards against arbitrariness in the candidate registration procedures and to delays in the examination of their appeals by the electoral authorities and courts. In such circumstances, the applicants' individual electoral rights had been curtailed to such an extent as to significantly impair their effectiveness.

Conclusion: violation (unanimously).

The Court also held that there had been a violation of Article 34 due to the seizure of the second and third applicants' case files from their representative's office.

Article 41: EUR 7,500 to each applicant in respect of non-pecuniary damage.

(See also *Annagi Hajibeyli v. Azerbaijan*, 2204/11, 22 October 2015, Information Note 189)

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

Reopening by a higher authority of its own motion, without any new facts or fundamental defects requiring correction, of criminal proceedings that had been replaced by an administrative fine: *violation*

Réouverture hiérarchique spontanée, sans élément nouveau ni vice fondamental à corriger, d'une poursuite pénale antérieurement remplacée par une amende administrative : *violation*

Mihalache – Romania/Roumanie, 54012/10, Judgment/Arrêt 8.7.2019 [GC]

English translation of the summary – Version imprimable

En fait

La première procédure : en août 2008, considérant que les faits n'atteignaient pas le degré de gravité d'une infraction, le parquet clôtura des poursuites pénales qui avaient été ouvertes contre le requérant pour le refus de se soumettre à un prélèvement biologique pour établir son taux d'alcoolémie. À la place, une amende administrative (250 EUR) lui fut infligée. Le requérant ne contesta pas cette décision dans le délai de vingt jours prévu par le droit interne et acquitta l'amende.

La deuxième procédure : en janvier 2009, considérant que les circonstances et la dangerosité sociale des faits rendaient inadéquate cette simple sanction administrative, le parquet supérieur annula l'ordonnance d'abandon des poursuites et l'amende administrative infligée dans le cadre de la première procédure. Le requérant fut ensuite condamné à une peine d'emprisonnement d'un an avec sursis : le tribunal estima que le principe *non bis in idem* ne pouvait être valablement invoqué, considérant que l'ordonnance d'abandon des poursuites n'était pas assimilable à un jugement d'acquittement ou de condamnation. Le requérant laissa sans suite une offre de remboursement de l'amende.

En droit – Article 4 du Protocole n° 7 : L'amende infligée était assimilable à une sanction pénale. Les faits visés par les deux procédures étaient bien les mêmes (« *idem* »). Reste à savoir s'il y a eu répétition des poursuites (« *bis* »).

a) *Observations préliminaires : les deux procédures étaient-elles complémentaires ?*

Non. Les deux procédures concernaient une seule et même infraction réprimée par le même texte de loi ; avec une finalité générale identique, une même autorité en charge des poursuites, et les mêmes preuves. Ces procédures se sont succédé dans le temps ; à aucun moment elles n'ont été menées simultanément. Et il n'y a pas eu combinaison des deux sanctions : il fallait appliquer soit l'une soit l'autre, selon que les autorités d'enquête qualifiaient ou non les faits d'infraction.

b) *L'ordonnance du parquet pouvait-elle passer pour « un acquittement ou une condamnation par un jugement définitif » ?*

i. *Sur les notions d'acquittement et de condamnation*

– *Faut-il que la décision émane d'un juge ?* – Pour que l'on se trouve en présence d'une décision, l'intervention d'une juridiction n'est pas nécessaire. Ce qui compte, c'est que la décision en cause émane d'une autorité appelée à participer à l'administration de la justice dans l'ordre juridique national concerné, et que cette autorité soit compétente selon le droit interne pour établir et sanctionner, le cas échéant, le comportement illicite reproché à l'intéressé. Peu importe que ladite décision en cause ne prenne pas la forme d'un jugement, dès lors qu'un tel élément de procédure et de forme ne saurait avoir d'incidence sur ses effets.

– *Quand peut-on dire qu'un accusé a été « acquitté » ou « condamné » ?* – Le choix délibéré des mots « acquitté ou condamné » dans le libellé du Protocole n° 7 implique qu'il y ait eu établissement de la responsabilité « pénale » de l'accusé à l'issue d'une appréciation des circonstances de l'affaire. Pour qu'un tel examen puisse être effectué, il est indispensable que l'autorité appelée à rendre la décision soit investie par le droit interne d'un pouvoir décisionnel à cet égard. Le constat qu'il y a bien eu une appréciation du fond de l'affaire peut être conforté par l'état d'avancement de la procédure concernée. Tel est le cas, par exemple i) lorsqu'une instruction pénale a été ouverte avec l'inculpation de l'intéressé, que la victime a été interrogée et que des preuves ont été rassemblées et examinées par l'autorité compétente et qu'une décision motivée s'appuyant sur ces preuves a été rendue ; ou ii) lorsqu'une sanction a été prononcée par l'autorité compétente comme conséquence du comportement imputé à l'intéressé.

– *Considérations propres au cas d'espèce* – Eu égard à l'enquête menée par le procureur, au pouvoir que lui conférait le droit interne, et compte tenu de ce qu'une sanction à caractère dissuasif et répressif y était infligée au requérant, l'ordonnance en cause constituait bien une « condamnation », au sens matériel du terme.

ii. *La « condamnation » initiale du requérant par le parquet était-elle « définitive » ?*

Si le libellé de l'article 4 du Protocole n° 7 comporte une référence expresse à la loi de l'État qui a rendu la décision en question, la jurisprudence de la Cour fait toutefois ressortir qu'il faut dans une certaine mesure y interpréter le terme « définitif » de manière autonome, lorsque des raisons solides le justifient.

Une décision doit être considérée comme « définitive » lorsqu'elle n'est plus susceptible d'un « recours ordinaire ». Pour établir quels sont les recours « ordinaires » dans une certaine affaire, la Cour partira de la loi et de la procédure internes. En effet, le principe de sécurité juridique exige, d'une part, que l'étendue d'un tel recours soit clairement délimitée dans le temps et, d'autre part, que les modalités de son exercice soient claires pour les parties autorisées à s'en prévaloir. En d'autres termes, les modalités d'un tel recours doivent permettre de savoir clairement quel est le moment où une décision devient définitive.

– *Application des principes en l'espèce* – La possibilité confiée au parquet supérieur de rouvrir d'office des poursuites pénales sans être tenu par aucun délai ne constituait pas « un recours ordinaire ». Elle n'entre donc pas en compte pour déterminer si la première condamnation du requérant était « définitive » au sens autonome de l'article 4 du Protocole n° 7.

Seule la voie de recours ouverte au requérant contre l'ordonnance d'abandon des poursuites pouvait être qualifiée d'« ordinaire », en ce que son exercice était enfermé dans un délai de vingt jours. C'est donc à l'expiration de ce délai, que le requérant a choisi de laisser passer, que l'ordonnance en question était devenue « définitive », au sens autonome de la Convention ; soit bien avant que le procureur hiérarchiquement supérieur n'use de son pouvoir de rouvrir les poursuites pénales.

c) *La répétition des poursuites entrait-elle dans les exceptions admises à son interdiction de principe ?*

i. *Les conditions permettant la réouverture d'un procès* – Aux termes du Protocole n° 7, la réouverture de poursuites est possible, mais à des conditions strictes : i) l'apparition de faits nouveaux ou nouvellement révélés ou ii) la découverte d'un vice fondamental dans la procédure précédente. Ces conditions sont alternatives et non cumulatives. Mais dans les deux cas, les faits ou le vice découverts doivent être de nature à « affecter le jugement intervenu », soit en faveur soit au détriment de la personne concernée. La Cour apprécie au cas par cas si les circonstances invoquées par une autorité supérieure remplissent ces conditions.

La notion de « vice fondamental » tend ici à indiquer que seule une violation grave d'une règle de procédure, qui porte une atteinte considérable à l'intégrité de la procédure précédente, peut servir de base à sa réouverture au détriment de l'accusé lorsque celui-ci a été acquitté d'une infraction ou sanctionné pour une infraction moins grave que celle prévue par la loi applicable. La simple réévaluation des éléments du dossier par le procureur ou le tribunal de niveau supérieur ne peut pas remplir ce critère. Dans le cas où la réouverture envisagée serait favorable à la personne concernée, la nature

du vice devra d'abord et avant tout être évaluée en fonction du point de savoir s'il y avait eu violation des droits de la défense, et donc entrave à la bonne administration de la justice.

ii. *Application en l'espèce* – Le parquet hiérarchiquement supérieur entendait viser les mêmes faits. Le dossier ne contenait pas d'éléments « nouveaux », et il n'y avait pas non plus de « vice fondamental » à corriger. N'entrent en effet dans ces deux types de cas ni le motif expressément invoqué dans l'ordonnance de réouverture (une nouvelle appréciation des faits), ni l'éventuelle volonté sous-jacente d'uniformiser la pratique des parquets en matière d'appréciation de la « gravité » de certains comportements.

Bref, les conditions strictes posées par le paragraphe 2 du présent article n'étaient pas remplies.

Conclusion : violation (unanimité).

Article 41 : 5 000 EUR pour préjudice moral.

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

A member State may, for reasons of public policy such as combating incitement to hatred, impose a temporary obligation to broadcast or retransmit a television channel from another member State only in pay-to-view packages

Un État membre peut, pour des motifs d'ordre public tels que la lutte contre l'incitation à la haine, imposer l'obligation de ne diffuser ou de ne retransmettre temporairement une chaîne de télévision en provenance d'un autre État membre que dans des bouquets payants

Baltic Media Alliance Ltd – Lietuvos radijo ir televizijos komisija, C-622/17, Judgment/Arrêt 4.7.2019 (CJEU/CJUE)

See press release – Voir le communiqué de presse

In the CJEU's opinion, Article 3(1) and (2) of Directive 2010/13/EU must be interpreted as meaning that a public policy measure adopted by a member State, consisting in an obligation for media service providers whose programmes are directed towards the territory of that member State and for other persons providing consumers of that member State with services relating to the distribution of television channels or programmes via the Internet to distribute or retransmit in the territory of that member State, for a period of twelve months, a television channel from another member State only in pay-to-view packages, without however restricting the retransmission as such in the territory of the first member State of the television programmes of that channel, is not covered by that provision.

-ooOoo-

Dans cette affaire, la CJUE a jugé que l'article 3, paragraphes 1 et 2, de la directive 2010/13/UE doit être interprété en ce sens qu'une mesure d'ordre public, adoptée par un État membre, consistant en l'obligation pour les fournisseurs de services de médias dont les émissions sont destinées au territoire de cet État membre et pour les autres personnes fournissant aux consommateurs dudit État membre un service de diffusion par internet de chaînes ou d'émissions de télévision de ne diffuser ou de ne retransmettre sur le territoire de ce même État membre, pendant une durée de douze mois, une chaîne de télévision en provenance d'un autre État membre que dans des bouquets payants, sans toutefois empêcher la retransmission proprement dite sur le territoire de ce premier État membre des émissions télévisées de cette chaîne, ne relève pas de cette disposition.

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

The operator of a website that features a Facebook "Like" button can be a controller jointly with Facebook in respect of the collection and transmission to Facebook of the personal data of visitors to its website

Le gestionnaire d'un site internet équipé du bouton « j'aime » de Facebook peut être conjointement responsable avec Facebook de la collecte et de la transmission à Facebook des données à caractère personnel des visiteurs de son site

Fashion ID GmbH & Co. KG – Verbraucherzentrale NRW eV, C-40/17, Judgment/Arrêt 29.7.2019 (CJEU/CJUE)

See press release – Voir le communiqué de presse

In the CJEU's opinion, the operator of a website that embeds on that website a social plugin causing the browser of a visitor to that website to request content from the provider of that plugin and, to that end, to transmit to that provider personal data of the visitor can be considered to be a controller, within the meaning of Article 2(d) of Directive 95/46. That liability is, however, limited to the operation or set of operations involving the processing of personal data in respect of which it actu-

ally determines the purposes and means, that is to say, the collection and disclosure by transmission of the data at issue.

Articles 2(h) and 7(a) of Directive 95/46 must be interpreted as meaning that the consent referred to in those provisions must be obtained by that operator only with regard to the operation or set of operations involving the processing of personal data in respect of which that operator determines the purposes and means. In addition, Article 10 of that directive must be interpreted as meaning that the duty to inform laid down in that provision is incumbent also on that operator, but the information that the latter must provide to the data subject need relate only to the operation or set of operations involving the processing of personal data in respect of which that operator actually determines the purposes and means.

-ooOoo-

Dans cette affaire, la CJUE a jugé que le gestionnaire d'un site internet qui insère sur ledit site un module social permettant au navigateur du visiteur de ce site de solliciter des contenus du fournisseur dudit module et de transmettre à cet effet à ce fournisseur des données à caractère personnel du visiteur, peut être considéré comme étant responsable du traitement, au sens de l'article 2, sous d), de la directive 95/46. Cette responsabilité est cependant limitée à l'opération ou à l'ensemble des opérations de traitement des données à caractère personnel dont il détermine effectivement les finalités et les moyens, à savoir la collecte et la communication par transmission des données en cause.

L'article 2, sous h), et l'article 7, sous a), de la directive 95/46 doivent être interprétés en ce sens que le consentement visé à ces dispositions doit être recueilli par ce gestionnaire uniquement en ce qui concerne l'opération ou l'ensemble des opérations de traitement des données à caractère personnel dont ledit gestionnaire détermine les finalités et les moyens. En outre, l'article 10 de cette directive doit être interprété en ce sens que l'obligation d'information prévue par cette disposition pèse également sur ledit gestionnaire, l'information que ce dernier doit fournir à la personne concernée ne devant toutefois porter que sur l'opération ou l'ensemble des opérations de traitement des données à caractère personnel dont il détermine les finalités et les moyens.

Inter-American Court of Human Rights (IACtHR)/Cour interaméricaine des droits de l'homme

Violation of right to social security due to the denial of a pension

Violation du droit à la sécurité sociale à raison d'un refus de pension

Case of Muelle Flores v. Peru /Affaire Muelle Flores c. Pérou, Series C No. 375/Série C n° 375, Judgment/Arrêt 6.3.2019

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

[Le présent résumé a été fourni gracieusement (en anglais uniquement) par le Secrétariat de la Cour interaméricaine des droits de l'homme. Il porte uniquement sur les questions de fond et de réparation traitées dans l'arrêt. Un résumé officiel plus détaillé (en espagnol uniquement) est disponible sur le site web de cette cour : www.corteidh.or.cr.]

On 30 September 1990 the applicant, Óscar Muelle Flores, retired from the State-owned company Minera Especial Tintaya Ltd (hereafter "the company"). On 27 January 1991 the company suspended payment of Mr Muelle's pension. Following the suspension, the applicant lodged an *amparo* appeal with the Fifth Civil Tribunal of Lima, which ordered the company to lift the suspension of his pension. The Tribunal's decision was upheld on appeal and upheld again by the Supreme Court of Justice in its judgment of 2 February 1993, which declared that the company's suspension of Mr Muelle's pension was invalid.

On 17 February 1993 the company resumed the suspension of pensions of several former employees, including Mr Muelle. The applicant then lodged a second *amparo* appeal, requesting the reinstatement of his pension, and damages. The Constitutional Court ordered that the company continue to pay Mr Muelle's pension, but declared his request for damages inadmissible. The company then filed a request for judicial review of the administrative decision, asking that Mr Muelle's reintegration in the pension regime be declared inadmissible. The court of first instance ruled in favour of the company, but the decision was overturned on appeal by the Supreme Court of Justice, which found that the request was unfounded. Proceedings for supervising the execution of the decision regarding Mr Muelle's first *amparo* appeal are still pending. In addition, the company was privatised in 1994 under Legislative Decree No. 674, which created additional obstacles for the company's compliance with the judicial decisions ordering the payment of Mr Muelle's pension.

Merits – The Inter-American Court of Human Rights (hereafter "the Court") found that the State had an obligation to pay the pension – as ordered by the courts – immediately, diligently and promptly, because it concerned a right that fulfilled basic needs

and substituted a salary. Moreover, the Court found that the State also had an obligation to establish expressly and clearly which entity would be responsible for complying with the decision, something that was lacking in the present case. The Court observed that the burden had been transferred to the victim. Furthermore, the Court noted that 26 and 19 years had passed since the judgments issued in 1993 and 1999, respectively. This passing of time had an impact on the victim's legal situation, given that he was an elderly person with scarce financial resources. Taking all this into account, the Court concluded that the authorities did not act with the expediency required given Mr Muelle's vulnerable situation and the fact that the delay was therefore unreasonable. The State had therefore violated Articles 8, 25(1) and 25(2)(c) in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights (ACHR).

In addition, in its decision, the Court made its first finding on the right to social security. Specifically, it alluded to an autonomous right to a pension, as part of economic, social, cultural, and environmental rights. It also indicated that the constitutive elements of this right could be derived from Article 45 of the Charter of the Organization of American States, as interpreted in the light of the American Declaration of the Rights and Duties of Man and other international human rights treaties and instruments. Owing to the lack of compliance with the internal judicial decisions, Mr Muelle's right to a pension was not duly protected. On the contrary, to this day these judgments have not been executed, as the proceedings remain pending. Furthermore, the Court established that in the context of non-payment of a judicially recognised pension, the rights to social security, personal integrity and human dignity are interrelated and, in some instances, the violation of one can directly affect the other, particularly in the case of elderly persons. The Court determined that the denial of his right to social security for more than 27 years caused serious harm to the quality of life and health coverage of Mr Muelle, who is a person in need of special protection due to his being an elderly person with a disability. The infringements caused by non-payment of his pension extended beyond those caused by the unreasonable delay because the pension was the victim's only source of income. The prolonged absence of his pension inevitably generated a precarious financial situation that affected Mr Muelle's ability to satisfy his basic needs, which subsequently impacted his psychological and moral integrity, as well as his dignity. Therefore, the existing mechanisms were not successful in guaranteeing the right and the State had violated Article 26 taken in conjunction with Articles 5, 8(1), 11(1), 25(1), 25(2)(c) and 1(1) of the ACHR, and Article 2 of the same instrument.

Additionally, bearing in mind that the lack of judicial protection affected the victim's right to a pension that had become part of his assets, the Court declared that the State had violated the right to private property recognised in Articles 21(1) and 21(2) taken in conjunction with Articles 25(1), 25(2)(c), 26 and 1(1) of the ACHR.

Reparations – In the light of the above-mentioned violations, the Court ordered that the State (i) restore the victim's pension, which also included an obligation on the State to guarantee the victim's healthcare through the Social Health Insurance Plan of Peru ("EsSalud"); (ii) publish the decision and its official summary; and (iii) pay the amounts stated in the judgment for pecuniary and non-pecuniary damages, loss of pension income and costs, as well as pay for the expenses incurred by the Victim's Legal Assistance Fund.

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

Overview of the Court's case-law/Aperçu de la jurisprudence de la Cour

The Court has published an Overview of its case-law for the first 6 months of 2019 (precisely from 1 January to 15 June), which contains a selection of cases of interest from a legal perspective. The Overviews can be downloaded from the Court's website.

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La Cour vient de publier un Aperçu de sa jurisprudence pour le premier semestre de 2019 (pour la période du 1er janvier au 15 juin), correspondant à une sélection d'arrêts et de décisions présentant un intérêt jurisprudentiel. Les Aperçus peuvent être téléchargés à partir du site web de la Cour.

Country Profiles/Fiches par pays

The Country Profiles, which contain data and information, broken down by individual State, on significant cases considered by the Court or currently pending before it, were updated on 1 July 2019. There is one country profile for each Council of Europe member State. All Country Profiles can be downloaded from the Court's website.

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Les *Fiches par pays*, contenant des données et informations par État sur les affaires marquantes examinées par la Cour ou actuellement pendantes devant elles, ont été mises à jour au 1er juillet 2019. Il existe une fiche par État membre du Conseil de

l'Europe. Toutes les fiches peuvent être téléchargées à partir du site web de la Cour.

New case-law research reports/Nouveaux rapports de recherche sur la jurisprudence

New case-law research reports have just been published. All Research Reports can be downloaded from the Court's website.

Article 2 – The nature and the scope of the procedural obligation to punish those responsible in cases concerning the use of lethal force by State agents (eng)

Articles 2, 3 and 10 – The safety of journalists (eng)

Articles 2, 3 and 14 – Equal access to justice in the case-law of Court on violence against women (eng)

Article 3 – The Court's approach to burden of proof in asylum cases (eng)

Articles 3 and 5 § 1 (e) – Treatment of persons of unsound mind and lawfulness of detention (eng)

Article 6 § 1 – Elements of substantive law as obstacles to access to a court (eng)

Article 6 § 3 c) – Absence d'un avocat durant les premiers jours de garde à vue (fre)

Articles 34 and 35 – The notion of "complaint" and/or "subject matter of the dispute", and the application of the principle *jura novit curia* in the case-law of the Court (eng)

De nouveaux rapports de recherche sur la jurisprudence viennent d'être publiés. Tous les rapports sont disponibles sur le site web de la Cour.