253

July
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Juillet

# INFORMATION NOTE
## on the Court's case-law

# NOTE D'INFORMATION
## sur la jurisprudence de la Cour


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

Le panorama mensuel de la jurisprudence de la Cour

**European Court of Human Rights**

**Cour européenne des droits de l'homme**

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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

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

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

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

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



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# TABLE OF CONTENTS / TABLE DES MATIÈRES

**ARTICLE 10**

**Freedom of expression/Liberté d'expression**

- Lack of relevant and sufficient reasons to justify fine, forced product recall and ban on future use of condom packaging designs: *violation*
- Défaut de raisons pertinentes et suffisantes justifiant l'imposition d'une amende, un rappel forcé de produits et une interdiction d'utilisation future de styles d'emballage de préservatifs : *violation*



- Civil defamation award disproportionate to harm caused from television reports on child sexual abusers wrongly alluding to well-known politician: *violation*
- Condamnation en diffamation au civil disproportionnée au préjudice causé par des reportages à la télévision sur des pédophiles faisant allusion à un homme politique connu : *violation*



**Freedom to receive information/Liberté de recevoir des informations**

- Effective review by the courts of the content and quality of information on the management of radioactive waste communicated by a public agency in line with its legal obligation to provide information: *Article 10 applicable; no violation*
- Contrôle effectif par les tribunaux du contenu et de la qualité de l'information sur la gestion des déchets radioactifs diffusée par une autorité publique en vertu d'une obligation légale d'informer : *article 10 applicable ; non-violation*



**Freedom to impart information/Liberté de communiquer des informations**

- Justified prosecution and conviction of prison officer for providing information about prison to journalist in exchange for money: *no violation*
- Poursuites et condamnation justifiées concernant un gardien de prison ayant communiqué à un journaliste, en échange d'argent, des informations sur la prison : *non-violation*



**ARTICLE 13**

**Effective remedy/Recours effectif**

- Hasty return to Turkey of a journalist 24 hours after his arrest at the border, rendering the available remedies ineffective in practice and therefore inaccessible: *violation*
- Renvoi précipité en Turquie d'un journaliste, 24 heures après son arrestation à la frontière, ayant rendu les recours existants inopérants en pratique, et donc indisponibles : *violation*



- Action in tort an effective remedy from 13 January 2021 for obtaining compensation for poor conditions of detention or transport that had now ended: *violation*
- Action civile en responsabilité délictuelle effective, à partir du 13 janvier 2021, pour obtenir indemnisation pour les mauvaises conditions de détention ou de transport ayant cessé : *violation*



- Use of four effective remedies, with suspensive effect, to challenge the return of an asylum seeker, who was heard and, in spite of tight deadlines, enjoyed safeguards to put forward his claims: *no violation*
- Exercice de quatre recours effectifs suspensifs de l'exécution du renvoi d'un demandeur d'asile, entendu et bénéficiant, en dépit de délais brefs, de garanties pour faire valoir ses prétentions : *non-violation*



**ARTICLE 14**

**Discrimination (Article 2)**

- Failure to take preventive action to protect domestic violence victim and to investigate police inaction, against backdrop of systemic failures and gender-based discrimination: *violation*

## ARTICLE 2

### Positive obligations (substantive aspect)/ Obligations positives (volet matériel) Effective investigation/Enquête effective

**Failure to take preventive action to protect domestic violence victim and to investigate police inaction, against backdrop of systemic failures and gender-based discrimination: *violations***

**Absence de mesures préventives de nature à protéger une victime de violences domestiques et défaut d'enquête sur l'inertie de la police dans un contexte de manquements systémiques et de discrimination fondée sur le sexe : *violations***

*Tkhelidze – Georgia/Géorgie*, 33056/17, Judgment/ Arrêt 8.7.2021 [Section V]

Traduction française du résumé – Printable version

*Facts* – The applicant's daughter (M.T.) was domestically abused by her partner (L.M.) and eventually killed by his hand in a murder-suicide. Afterwards, the applicant filed several unsuccessful and/or unanswered criminal complaints with the district public prosecutor's office and the Chief Public Prosecutor's Office, requesting that an investigation be opened into the alleged negligence of police officers who had dealt with her daughter's domestic violence.

*Law*

Article 2 (substantive limb) taken in conjunction with Article 14: The Court was satisfied that there existed an adequate legislative and administrative framework designed to combat domestic violence against women in the country in general. It was rather the manner of implementation of this deterrent mechanism by the law-enforcement authorities, that is to say the issue of compliance with the duty to take preventive operational measures to protect the applicant's life, which raised serious concerns in the present case.

Within a very tight frame of some six months, M.T. and the applicant had requested help from the police on at least eleven occasions. They had always clearly conveyed the level of violence in L.M.'s behaviour. Moreover, the police knew that L.M. had suffered from pathological jealousy and had other mental instabilities, had difficulties in managing his anger and had a criminal record and history of drug and alcohol abuse. The police had also been aware that M.T. had carried various defence weapons with her all the time and experienced extreme fear and anxiety at seeing her partner approaching either her flat or workplace. All those considerations had confirmed the reality of the danger caused by L.M. to M.T. Furthermore, the violence to which M.T. had been subjected could not be seen as individual and separate episodes but had instead to be considered a lasting situation. Where there was a lasting situation of domestic violence, there could hardly be any doubt about the immediacy of the danger posed to the victim. Thus, the police had known or certainly ought to have known of the real and immediate threat to the safety of the applicant's daughter.

As regards the requirement of special diligence, the Court discerned several major failings on the part of the law-enforcement authorities. Firstly, there were indications of inaccurate or incomplete evidence-gathering by police officers. Shortcomings in the gathering of evidence in response to a reported incident of domestic violence could result in an underestimation of the level of violence actually committed, have deleterious effects on the prospects of opening a criminal investigation and even discourage victims of domestic abuse from reporting an abusive family member to the authorities in the future. It was also significant in that connection that, when recording the incidents, the police officers did not appear to have conducted a "lethality risk assessment" in an autonomous, proactive and comprehensive manner (compare *Kurt v. Austria* [GC], 62903/15, 15 June 2021, Legal Summary). They had not attached sufficient importance to potential trigger factors for the violence and had failed to take into account the victim's own perceptions of danger. The police had preferred to downgrade the classification of an incident to a "minor family altercation". The very same shortcomings in the police's initial responses to domestic violence allegations had been identified as systemic failings in Georgia by the United Nations Special Rapporteur on violence against women, its causes and consequences ("the UN Special Rapporteur").

Furthermore, whilst the domestic legislative framework had provided for various temporary restrictive measures in respect of the abuser, the relevant domestic authorities had not resorted to them at all. What was more, neither the applicant nor her daughter had been advised by the police of their procedural rights and of the various legislative and administrative measures of protection available to them. On the contrary, they had been misled as the police had referred to their inability to arrest the abuser or to apply any other restrictive measure. Despite the police failures in that regard, owing to the numerous criminal complaints repeatedly filed by M.T. and the applicant, there had still existed plenty of evidence warranting the institution of criminal proceedings against L.M., which would have opened up the possibility of placing him in

pre-trial detention. It was deplorable that the law-enforcement authorities had not done so. This had been identified by the UN Special Rapporteur as another systemic problem in the country.

The inactivity of the domestic law-enforcement authorities, in particular the police, had been even more unforgivable when assessed against the fact that, in general, violence against women, including domestic violence, had been reported to be a major systemic problem affecting society in the country at the material time. The domestic authorities responsible thus had known or should have known of the gravity of the situation affecting many women in the country and should have shown particular diligence and provided heightened State protection to vulnerable members of that group. In the light of the foregoing, the Court could only conclude that the general and discriminatory passivity of the law-enforcement authorities in the face of allegations of domestic violence such as the present case had created a climate conducive to a further proliferation of violence committed against women. That being so, the respondent State's failure to take preventive operational measures had undermined the rights of the applicant and her daughter to equal protection before the law.

All in all, there had been a persistent failure to take steps that could have had a real prospect of altering the tragic outcome or mitigating the harm and the police inaction in the present case could be considered a systemic failure.

*Conclusion*: violation (unanimously).

Article 2 (procedural limb) taken in conjunction with Article 14: The Court also had to determine whether the State had had a further positive obligation to investigate inaction of any of the law-enforcement officials involved and hold them responsible.

It had already established that the inactivity of the law-enforcement authorities had been one of the causes of the descent of the domestic abuse into the killing of the victim. Given that the authorities had known or should have known of the high level of risk that would be faced by the victim if they failed to discharge their policing duties, their negligence had gone beyond a mere error of judgment or carelessness. However, the prosecution authority had disregarded the applicant's numerous criminal complaints and had made no attempt to establish the identity of the police officers, to interview them and to establish their responsibility in relation to their failure to respond properly to the multiple incidents of gender-based violence that had preceded the killing of the victim. Furthermore, having lodged a criminal complaint seeking the necessary investigation into the actions of law enforcement, the applicant had repeatedly sought but failed to receive information from the Chief Public Prosecutor's Office. It was noteworthy that it had taken the latter over two years to acknowledge receipt of her correspondence, and no further information had been provided even then. Not even a disciplinary probe into the alleged police inaction had been opened, despite the fact of the applicant's having complained to the body in charge of disciplinary supervision of police officers, and no steps had been taken to train the police officers on how to respond properly to allegations of domestic violence for the future. However, in the light of the existence of discriminatory overtones associated with violence committed against women, there had been a pressing need to conduct a meaningful inquiry into the possibility that gender-based discrimination and bias had also been a motivating factor behind the alleged police inaction.

*Conclusion*: violation (unanimously).

Article 41: EUR 35,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

## ARTICLE 3

### Expulsion

**Return to Turkey of a Turkish journalist who had expressed his fear of ill-treatment in the context of the *coup d'état* to the border police, without prior assessment of the risks incurred by him: *violation***

**Renvoi en Turquie d'un journaliste turc ayant exprimé ses craintes de mauvais traitements dans le contexte du coup d'état à la police aux frontières, sans examen préalable des risques encourus : *violation***

*D – Bulgaria/Bulgarie*, 29447/17, Judgment/Arrêt 20.7.2021 [Section IV]

English translation of the summary – Version imprimable

*En fait* – Le requérant est un ancien journaliste d'un quotidien turc entré irrégulièrement en Bulgarie et arrêté le 14 octobre 2016 par la police des frontières bulgares. Il allègue avoir été exposé par les autorités bulgares à des risques de mauvais traitements lors de son renvoi en Turquie au regard de sa situation personnelle envisagée dans le contexte des conditions qui régnaient après la tentative de coup d'État, et notamment des mesures prises à l'égard des journalistes dans le cadre de l'état d'urgence.

*En droit* – Article 3 et article 13 combiné avec l'article 3 : Le droit bulgare prévoit explicitement que

les autorités assurant le contrôle aux frontières sont dans l'obligation d'accueillir les demandes d'asile soumises à la frontière. En effet, lorsque la police aux frontières détecte des indices montrant que la personne détenue souhaite déposer une demande de protection internationale, ces autorités sont dans l'obligation de lui fournir des informations sur les procédures, ainsi qu'une traduction. La demande et tous les documents établis au cours de la détention sont transmis directement, par tous les moyens de communication disponibles, à l'Agence nationale pour les réfugiés. La loi n'autorise pas la police aux frontières à refuser une demande de protection ou à statuer sur la question de savoir si la demande doit être examinée sur le fond ou pas. Seule l'Agence nationale pour les réfugiés peut prendre pareille décision.

a) *Sur la question de savoir si le requérant a exprimé ses craintes devant les autorités bulgares d'être soumis à des traitements contraires à l'article 3 en cas de retour en Turquie* – Le requérant faisait partie d'un groupe de personnes qui voulait transiter par la Bulgarie pour atteindre l'Allemagne. Il n'avait dès lors pas, dans un premier temps, l'intention de demander l'asile en Bulgarie. Toutefois, il semble qu'il ait voulu changer de stratégie en annonçant, dès son arrestation par la police bulgare et son placement en détention au poste de la police aux frontières, son souhait d'introduire une demande de protection en Bulgarie. Il affirme avoir de nouveau exprimé cette volonté oralement, à plusieurs reprises par la suite lors des changements d'équipe des policiers, ainsi qu'à l'arrivée au centre d'accueil pour étrangers. Il ajoute qu'il a formalisé sa demande d'asile dans un document écrit qu'il a remis aux autorités de la police aux frontières et dont il n'a pas reçu de copie. Dans sa version, le Gouvernement contredit toutes ces affirmations.

Il ne convient pas d'accorder un poids décisif à l'absence d'une demande explicite de protection adressée par le requérant aux autorités compétentes dans les enregistrements écrits des dires du requérant devant les autorités bulgares, étant donnée l'absence d'un interprète visant à garantir que toutes les déclarations ont été dûment notées. En l'espèce, lors de sa détention, plusieurs documents ont été établis en un laps de temps assez bref, et la Cour n'est pas convaincue que l'intéressé en ait saisi le contenu ni qu'il ait eu le temps de le comprendre, même avec l'aide des agents parlant le turc ou l'anglais. L'assistance d'un interprète, dans ces circonstances, aurait été essentielle notamment pour que le requérant fût en mesure de comprendre ce que renfermaient les documents qu'il a été amené à signer, tout comme pour l'enregistrement de toutes ses déclarations devant les autorités internes. Il apparaît de plus que l'enquête interne conduite par la commission mandatée par le ministère des Affaires intérieures n'a fait ressortir aucune preuve en lien avec les dépositions des officiers de police impliqués dans le renvoi du requérant. Ainsi, le renvoi a été réalisé en un temps extrêmement court en violation du droit interne. Cependant, la Cour n'estime pas nécessaire de se prononcer sur la présence ou non d'un document écrit sur une demande explicite de protection de la part du requérant. Le requérant aurait pu se trouver en état de désarroi lorsqu'il a livré ses explications aux autorités bulgares, après avoir passé de longues heures de trajet à l'intérieur de la remorque d'un camion. Toutefois, en tout état de cause les documents présentés par le Gouvernement sont suffisants pour l'analyse exposée ci-dessous.

Dans le récit du requérant du 14 octobre 2016, rédigé en bulgare, il existe les formulations suivantes : « Je travaillais en tant que journaliste dans la ville de Bozova. Après la tentative de coup d'État, j'ai été licencié du journal. J'ai changé d'adresse et j'ai appris que la police m'avait cherché à mon ancienne adresse (...) ». Indépendamment de la question de savoir si le requérant a présenté une demande explicite de protection, et compte tenu des obstacles linguistiques ainsi que de l'absence d'intervention d'un avocat pendant les faits litigieux, il se pose la question de savoir si les autorités bulgares pouvaient lire dans ces propos les craintes que le requérant dit leur avoir communiquées. La volonté de demander l'asile n'a pas besoin d'être exprimée dans une forme particulière. L'élément déterminant est la crainte exprimée par rapport au retour dans un pays. D'une façon similaire, le Comité des ministres du Conseil de l'Europe a recommandé aux États membres de dispenser une formation aux agents des frontières afin de leur permettre de détecter et de comprendre les demandes d'asile, même dans les cas où les demandeurs d'asile ne sont pas en position de communiquer clairement leur intention de demander l'asile.

À la lumière de ces facteurs, même si les explications du requérant, telles que notées dans le document présenté, ne contiennent pas le mot « asile », elles indiquent qu'il était un journaliste turc contre lequel une mesure de licenciement avait été prise dans le contexte de l'état d'urgence instauré en Turquie après la tentative de coup d'État, et elles font surtout ressortir la crainte de l'intéressé d'être recherché par les autorités de poursuite.

De surcroît, le consulat turc avait fait savoir que le requérant et ses compagnons turcs étaient considérés comme impliqués dans la tentative de coup d'État. Or les communiqués de presse et avis d'observateurs internationaux, y compris les commentaires du Commissaire aux droits de l'homme, qui avaient été publiés dans les trois mois ayant pré-

cédé les faits litigieux, soulevaient de graves préoccupations quant à la mise en œuvre des mesures adoptées dans le contexte de l'état d'urgence, y compris celles visant les journalistes. En effet, plusieurs communications dénonçaient de la violence, des représailles et des incarcérations arbitraires à l'égard des journalistes. Pourtant, lors de la détention ou de l'éloignement du requérant et de ses compatriotes, les autorités n'ont pas cherché à analyser les éléments enregistrés de l'histoire personnelle du requérant le 14 octobre 2016 à la lumière de la situation ainsi décrite.

En ce sens, les explications du requérant enregistrées le 14 octobre 2016, lues à la lumière des autres éléments décrits, ont été suffisantes, au regard de l'article 3, pour considérer que l'intéressé a exprimé en substance ses craintes auprès des autorités de la police aux frontières bulgares avant d'être renvoyé en Turquie.

b) *Sur la question de savoir si les autorités ont dûment examiné les craintes exprimées par le requérant d'être soumis à des traitements contraires à l'article 3 en cas de retour en Turquie* – Ni les agents de la police aux frontières qui ont recueilli et noté en bulgare le récit susmentionné effectué par le requérant puis rapporté les faits à leurs supérieurs, ni le directeur régional de la police aux frontières, qui a imposé la mesure coercitive de « renvoi forcé jusqu'à la frontière de la République de Bulgarie », ni le Centre national pour la lutte contre la migration illégale, ni le directeur de la direction « Migration » du ministère des Affaires intérieures ayant ordonné la reconduite à la frontière, n'ont considéré que les explications livrées par le requérant valaient demande de protection. Aucune procédure n'a été ouverte auprès des autorités compétentes en matière de protection internationale.

Au vu des éléments démontrés ci-dessus, selon lesquels les autorités bulgares disposaient de suffisamment d'informations indiquant que le requérant pouvait nourrir des craintes réelles au regard de l'article 3, le non-examen manifeste de sa situation étonne la Cour.

Force est par ailleurs de constater que, sur le plan des garanties procédurales, non seulement le requérant n'a pas bénéficié de l'assistance d'un interprète ou d'un traducteur, mais qu'il n'a pas non plus reçu d'informations sur ses droits de demandeur d'asile, y compris sur les procédures à suivre. La Cour ne peut donc pas conclure que les autorités bulgares se sont acquittées en l'espèce de leur devoir de coopération requis dans les procédures de protection.

De même, le requérant n'a pas bénéficié de l'accès à un avocat ou à un représentant des organisations spécialisées qui l'auraient aidé à évaluer si sa situation ouvrait droit à une protection internationale. Il ressort aussi des éléments versés au dossier que l'Ombudsman de la République n'a pas non plus été consulté aux fins d'effectuer une surveillance sur le renvoi des étrangers en question, contrairement à ce qu'imposait la disposition légale expresse à cet égard. De plus, il existe d'autres défaillances dans le déroulement des procédures internes : l'établissement de deux versions de la déclaration sur l'information relative aux droits du requérant, ou l'établissement tardif de l'arrêté de placement au centre d'accueil pour étrangers et son envoi par voie électronique à ce centre au moment où le requérant était déjà en cours de transfert pour la frontière. Le Gouvernement n'explique pas pourquoi l'arrêté porte une mention indiquant que le requérant a refusé de le signer alors qu'il apparaît, en contradiction avec les explications données, que ce document n'a matériellement pas pu lui être notifié. Ces défaillances traduisent pour la Cour la précipitation extrême avec laquelle le requérant a été renvoyé, de plus en violation avec les règles du droit interne. Cette rapidité et le non-respect des procédures internes, alors qu'elles visent à protéger contre un renvoi rapide sans la possibilité d'un examen des circonstances individuelles, ont privé de fait le requérant de l'évaluation du risque prétendu en cas de retour.

De la même manière, l'arrêté de reconduite à la frontière a été exécuté immédiatement, sans que le requérant ait eu la possibilité de comprendre son contenu, et celui-ci a été de fait privé de la possibilité offerte par le droit interne de demander aux tribunaux de prononcer la suspension de son exécution. Ainsi, la hâte avec laquelle la mesure de renvoi a été mise en œuvre, à savoir en l'espace de 24 heures après l'arrestation du requérant à la frontière bulgaro-roumaine, a eu pour effet de rendre les recours existants inopérants en pratique, et donc indisponibles.

En conséquence, le requérant a été renvoyé en Turquie, son pays d'origine qu'il fuyait, sans un examen préalable des risques qu'il courait au regard de l'article 3 de la Convention et donc de sa demande de protection internationale.

Au vu de ce qui précède, le défaut de recours à ces procédures ne peut être imputé au requérant. Alors que celui-ci a exprimé des craintes relatives à de mauvais traitements qu'il risquait de subir en cas de retour en Turquie, les autorités bulgares n'ont pas examiné sa demande de protection internationale.

*Conclusion* : violation (unanimité).

Article 41 : 15 000 EUR pour préjudice moral.

(Voir aussi *M.S.S. c. Belgique et Grèce* [GC], 30696/09, 21 janvier 2011, Résumé juridique ; *Hirsi Jamaa*

*et autres c. Italie* [GC], 27765/09, 23 février 2012, Résumé juridique ; *De Souza Ribeiro c. France* [GC], 22689/07, 13 décembre 2012, Résumé juridique ; et *M.A. et autres c. Lituanie*, 59793/17, 11 décembre 2018, Résumé juridique)

## Expulsion

**Return to Morocco of a Moroccan national who is an activist for Western Sahara independence and thus belongs to a group that is particularly at risk, for failure to establish that he was at personal risk: *no violation***

**Renvoi au Maroc d'un ressortissant marocain militant pour l'indépendance sahraouie et donc appartenant à un groupe particulièrement à risque, faute d'avoir prouvé de risques personnels : *non-violation***

*E.H. – France*, 39126/18, Judgment/Arrêt 22.7.2021 [Section V]

English translation of the summary – Version imprimable

*En fait* – La demande d'asile du requérant, ressortissant marocain d'origine sahraouie et militant de la cause, a été rejetée. Le requérant conteste la mesure d'éloignement forcé vers le Maroc dont il a fait l'objet et l'effectivité des recours contre cette mesure.

*En droit* – Article 3

a) *Sur la situation générale au Maroc* – La situation au jour de l'éloignement du requérant vers le Maroc n'était pas telle que tout renvoi vers ce pays d'un ressortissant marocain aurait été constitutif une violation de l'article 3.

Il s'agit de la première affaire de renvoi vers le Maroc soulevée par un requérant qui allègue que les risques auxquels il aurait été exposé résultent de son origine sahraouie et de son militantisme en faveur de de l'indépendance du Sahara occidental.

Les ressortissants marocains sahraouis militant pour cette cause peuvent être considérés particulièrement à risque. Il s'ensuit que l'appréciation du risque pour le requérant au moment de son éloignement vers le Maroc doit se faire sur une base individuelle, compte tenu du fait que les personnes relevant de l'une des catégories particulièrement à risque sont susceptibles, davantage que les autres, d'attirer l'attention des autorités. La protection offerte par l'article 3 ne peut entrer en jeu que si le requérant est en mesure d'établir qu'il existait des motifs sérieux de croire que son renvoi au Maroc l'exposait personnellement au risque de subir des traitements contraires à cet article.

b) *Sur la situation personnelle du requérant* – Alors même que les ressortissants marocains militant en faveur de l'indépendance du Sahara occidental constituent un groupe particulièrement à risque, la Cour, au vu de l'ensemble des circonstances de l'espèce, ne peut que partager la conclusion à laquelle les autorités nationales sont arrivées dans des décisions dûment motivées, eu égard d'une part à l'absence d'éléments précis au dossier étayant les allégations du requérant tenant à ses craintes liées à son engagement pour la cause sahraouie et aux recherches menées par les autorités marocaines pour le retrouver et le poursuivre avant son départ du Maroc, puis après son retour forcé, et d'autre part à la circonstance que l'intéressé n'a présenté devant elle aucun document ni élément autres que ceux qu'il avait déjà produits devant les autorités nationales.

En conséquence, il ne ressort pas des pièces du dossier qu'il existerait des motifs sérieux et avérés de croire que le renvoi du requérant au Maroc l'a exposé à un risque réel d'être soumis à un traitement contraire à l'article 3.

*Conclusion* : non-violation (unanimité).

Article 13 combiné avec l'article 3 : Suite aux arrêts *Gebremedhin [Gaberamadhien] c. France* et *I.M. c. France* ayant conclu à la violation de l'article 13 combiné avec l'article 3, le législateur a procédé aux modifications nécessaires. Ainsi, le recours contre la décision portant refus d'entrée sur le territoire au titre de l'asile est dorénavant suspensif de plein droit. Par ailleurs, l'examen d'une demande d'asile présentée par un étranger placé en rétention ne se fait plus systématiquement selon la procédure accélérée. En outre, les textes qui étaient applicables à la situation du requérant, que ce soit en zone d'attente ou en centre de rétention administrative (CRA), ont connu d'importantes modifications.

a) *Avant l'éloignement du requérant vers le Maroc alors qu'il était maintenu en zone d'attente* – Pendant la période qui commence le 18 juillet 2018, date du refus d'entrée sur le territoire français opposé au requérant, et se termine le 28 juillet 2018, date de son entrée *de facto* sur le territoire national, le requérant a déposé une demande d'asile à la frontière, a été présenté au juge des libertés et de la détention puis a formé un recours contre la décision de celui-ci devant la cour d'appel, s'est entretenu avec un agent de l'Office français de protection des réfugiés et apatrides (OFPRA) chargé d'émettre un avis sur le caractère manifestement infondé ou non de sa demande d'asile, et a formé un recours en annulation devant le tribunal administratif contre l'arrêté du ministre de l'Intérieur lui refusant l'entrée en France au titre de l'asile, qui a été rejeté à l'issue d'une audience publique.

Le requérant, arrivé à l'aéroport en France le 18 juillet 2018, a été informé en arabe de ses droits et a disposé des informations nécessaires lui permettant d'accéder à la procédure de demande d'asile. Sa demande d'asile a été présentée dès le 19 juillet 2018.

La décision de refus d'admission sur le territoire français au titre de l'asile est prise par le ministre chargé de l'immigration après consultation de l'OFPRA, dont un agent doit préalablement procéder à l'audition de l'étranger, en présentiel ou par visioconférence. À ce stade, il suffit que les persécutions dont l'intéressé fait état ne soient pas dépourvues de toute vraisemblance. En l'espèce, l'entretien du 20 juillet 2018 a duré vingt-huit minutes et les réponses du requérant aux questions de l'agent de l'OFPRA sont demeurées particulièrement évasives, qu'il s'agisse de son engagement pour la cause sahraouie, des persécutions qu'il aurait subies de ce fait, des raisons et des conditions de sa fuite du Maroc ainsi que de ses craintes en cas de retour dans ce pays.

Si le requérant allègue que la seule langue qu'il maîtrise est l'arabe hassanya, rien ne montre que le requérant ne maîtrise pas la langue arabe.

Par ailleurs, le requérant, ayant présenté une demande l'asile à la frontière, a disposé d'un recours suspensif de plein droit lui permettant de contester devant le tribunal administratif, dans un délai de quarante-huit heures à compter de sa notification, l'arrêté du 20 juillet 2018 portant refus d'admission sur le territoire au titre de l'asile.

La Cour ne mésestime pas les difficultés que peuvent rencontrer les étrangers maintenus en zone d'attente demandant l'asile et qui découlent notamment du fait que le code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA) ne prévoit pas le bénéfice, à leur égard, d'un dispositif d'aide juridique à la différence de ce qui existe pour les étrangers placés en CRA. Toutefois, si le requérant n'a été ni assisté d'un avocat ni accompagné par l'une des associations présentes dans la zone d'attente avant, comme lors de l'entretien du 20 juillet 2018 avec l'agent de l'OFPRA, un avocat désigné d'office au titre de l'aide juridictionnelle l'a assisté devant le tribunal administratif. En outre, lors de l'audience du 25 juillet 2018, le requérant a été entendu. Il a été ainsi mis à même de se prévaloir, une nouvelle fois, des risques encourus en cas de retour au Maroc et de produire des pièces au soutien de ses allégations. Le tribunal administratif s'est prononcé sur la demande du requérant par une décision dûment motivée après avoir personnellement entendu l'intéressé.

La possibilité de maintenir un étranger en zone d'attente et de lui refuser l'accès au territoire français dans l'hypothèse où sa demande d'asile apparaît manifestement infondée tend à concilier l'obligation faite à l'État de s'assurer qu'il n'existe pas de motifs sérieux et avérés de croire que l'intéressé courrait en cas d'éloignement un risque réel de traitements contraires à l'article 3. En même temps, la Cour a jugé que le maintien d'étrangers en zone internationale est une restriction à la liberté et qu'il ne doit pas se prolonger de manière excessive. En l'espèce, sous l'angle de l'article 13 combiné à l'article 3, la Cour en déduit que les recours présentés dans ces zones doivent satisfaire à des exigences particulières de célérité.

b) *Avant l'éloignement du requérant vers le Maroc alors qu'il était placé en CRA, entre le 29 juillet et le 24 août 2018* – La mesure d'éloignement dont a fait l'objet un demandeur d'asile n'est susceptible d'être exécutée qu'à la double condition que l'OFPRA ait refusé de lui reconnaître le statut de réfugié et que le tribunal administratif ait rejeté les recours en excès de pouvoir dirigés contre la mesure d'éloignement et la décision de maintien en rétention au terme du contrôle qu'il lui appartient d'exercer au regard de l'article 3 dès lors que lui est présenté un grief en ce sens.

Le 29 juillet 2018, le préfet a pris un arrêté obligeant le requérant à quitter le territoire français (OQTF) et l'a placé en rétention, puis l'intéressé a fait l'objet, après avoir déposé sa demande d'asile, d'un arrêté en date du 2 août 2018 portant refus d'admission au séjour au titre de l'asile. Le 30 juillet 2018 puis le 6 août 2018, le requérant a saisi le tribunal administratif de recours en annulation dirigés respectivement contre la mesure d'éloignement, la fixation du Maroc comme pays de destination et la décision lui refusant le séjour au titre de l'asile, recours qui ont été rejetés par le même jugement du 13 août 2018. Par ailleurs, il a saisi le 2 août 2018 l'OFPRA d'une demande d'asile qui a donné lieu à une décision de rejet en date du 9 août 2018.

Dès son arrivée au CRA, le 29 juillet 2018, le requérant a été informé en langue arabe de ses droits et il l'a été à nouveau le 2 août 2018 lorsqu'il a présenté une demande d'asile. Par un arrêté du 2 août 2018, le préfet a refusé d'admettre le requérant au séjour au titre de l'asile au motif que sa demande d'asile, postérieure à son placement en CRA, devait être regardée comme n'ayant été introduite qu'en vue de faire échec à son éloignement. À ce titre, le requérant avait refusé à plusieurs reprises d'embarquer sur un vol vers le Maroc et il avait pu faire état des risques qu'il alléguait encourir devant l'agent de l'OFPRA et devant le tribunal administratif, et ces différents éléments ont pu valablement être pris en compte par le préfet dans son appréciation de la demande de l'intéressé. L'OFPRA n'a pas usé de la possibilité qui était la sienne d'examiner la

demande d'asile du requérant selon la procédure normale. Ainsi qu'elle l'a déjà jugé, la Cour ne remet pas en cause l'intérêt et la légitimité de l'existence d'une procédure accélérée, aux côtés de la procédure normale de traitement des demandes d'asile, pour les demandes dont tout porte à croire qu'elles sont infondées ou abusives.

Par ailleurs, le requérant a, d'une part, été assisté par la CIMADE, association présente au sein du CRA, pour déposer sa demande d'asile et a, d'autre part, bénéficié d'un interprète en arabe hassanya lors de l'entretien qui a duré cinquante-cinq minutes avec un officier de protection, au cours duquel il a produit des documents et a été interrogé sur leur provenance. En outre, dans sa décision du 9 août 2018, l'OFPRA s'est fondée sur l'audition du requérant pour retenir que ses explications étaient restées peu personnalisées – qu'il s'agisse des conditions concrètes de son engagement pour la cause sahraouie, des menaces qu'il aurait reçues depuis 2011 de ce fait –, qu'il n'a apporté aucun élément tangible quant aux raisons de sa fuite du Maroc et que les documents qu'il avait produits n'étaient pas pertinents. Enfin, le requérant ne pouvait pas être éloigné vers le Maroc où il alléguait risquer de subir des traitements contraires à l'article 3 avant que l'OFPRA ait statué sur sa demande d'asile. En l'espèce, l'OFPRA a rendu sa décision portant refus de reconnaissance du statut de réfugié au requérant le 9 août 2018.

Le requérant qui a saisi le tribunal administratif d'un recours en annulation suspensif de plein droit dirigé contre l'OQTF du 29 juillet 2018 ne pouvait pas être éloigné vers le Maroc avant que cette juridiction se prononce sur son recours, l'exécution de cette mesure d'éloignement ne pouvant intervenir, le cas échéant, qu'après le rejet de celui-ci. Si le délai de quarante-huit heures imparti au requérant pour introduire son recours est bref, il a bénéficié de l'assistance juridique de la CIMADE pour préparer sa requête et, en vertu de l'article R. 77626 du code de justice administrative, il avait la possibilité de la compléter jusqu'à la clôture de l'audience devant le tribunal administratif, soit jusqu'au 13 août 2018, ce qu'il a d'ailleurs fait. Par ailleurs, le requérant a produit des documents devant le juge administratif et il n'a versé devant la Cour aucune autre pièce que celles soumises au juge du tribunal administratif. Enfin, le requérant a été une nouvelle fois personnellement entendu. Lors de l'audience devant cette juridiction au cours de laquelle ont été examinés ensemble les recours dirigés respectivement contre la mesure d'éloignement et contre la décision portant maintien en rétention et refus d'admission au séjour au titre de l'asile, le requérant a bénéficié de l'assistance d'un interprète et d'un avocat désigné d'office au titre de l'aide juridictionnelle afin de faire valoir utilement sa position. Ces deux recours ont été rejetés par un jugement en date du 13 août 2018 devenu définitif.

c) *La décision de rejet d'asile de l'OFPRA jugé par la Cour nationale du droit d'asile (CNDA) postérieurement au 24 août 2018, date de l'éloignement forcé de l'intéressé vers le Maroc* – Postérieurement à l'éloignement forcé du requérant par les autorités françaises, la CNDA a conclu à l'absence de risques avérés et a rejeté le recours dirigé contre la décision de l'OFPRA. S'il est regrettable qu'elle se soit crue tenue de tirer des conséquences de l'absence du requérant lors de l'audience devant elle, il n'en demeure pas moins que, ni devant cette instance ni devant la Cour, le requérant n'a produit de nouveaux éléments relatifs aux risques qu'il alléguait encourir. Enfin, au regard des circonstances de l'espèce et notamment de l'ensemble des garanties dont a bénéficié le requérant et des recours suspensifs qu'il a exercés avant son éloignement forcé vers le Maroc, l'absence d'effet suspensif de son recours devant la CNDA n'a pas porté atteinte à son droit à un recours effectif.

En conclusion, le requérant a bénéficié à quatre reprises de recours suspensifs de l'exécution de son renvoi au Maroc et, dans le cadre de ces différents recours, il a été entendu à quatre reprises et, au cours de ces différentes procédures, il a été mis à même, en dépit de la brièveté des délais qui les caractérise, de faire valoir utilement ses prétentions grâce aux garanties dont il a effectivement bénéficié (assistance d'un interprète, accompagnement par une association conventionnée, désignation d'un avocat au titre de l'aide juridictionnelle).

Les voies de recours exercées par le requérant, considérées ensemble, ont revêtu dans les circonstances particulières de l'espèce un caractère effectif.

*Conclusion* : non-violation (unanimité).

(Voir *Gebremedhin [Gaberamadhien] c. France*, 25389/05, 26 avril 2007, Résumé juridique, et *I.M. c. France*, 9152/09, 2 février 2012, Résumé juridique)

## ARTICLE 5

### Article 5 § 1 (c)

### Reasonable suspicion/Raisons plausibles de soupçonner

**Allegations of active use of encrypted messaging service not used exclusively by a terrorist organisation insufficient to give rise to reasonable suspicion of membership of the organisation: *violation***

**Allégations de l'utilisation active d'une messagerie cryptée à usage non exclusif d'une organisation terroriste, insuffisantes pour justifier un soupçon plausible d'appartenance à celle-ci : *violation***

*Akgün – Turkey/Turquie*, 19699/18, Judgment/Arrêt 20.7.2021 [Section II]

English translation of the summary – Version imprimable

*En fait* – Le requérant, ancien policier, soupçonné d'être membre de l'organisation terroriste armée FETÖ/PDY, sur la seule base de sa prétendue utilisation active d'une messagerie cryptée étant cité sur la liste rouge des utilisateurs, a été placé en détention provisoire le 17 octobre 2016, puis inculpé le 6 juin 2017.

*En droit* – Article 5 § 1 c)

a) *La preuve sur la base de laquelle le requérant, au moment de sa mise en détention provisoire, était soupçonné d'avoir commis l'infraction d'appartenance à une organisation terroriste armée* – Le constat quant à l'utilisation par le requérant de la messagerie ByLock constituait la seule preuve qui a fondé, au moment de sa mise en détention provisoire, la raison de le soupçonner, au sens de l'article 5 § 1 c), d'avoir commis l'infraction d'appartenance au FETÖ/PDY.

b) *Au moment de la mise en détention, le juge national disposait-il d'informations suffisantes sur la nature de la messagerie ByLock ?* – Les activités répréhensibles reprochées au requérant relevaient du crime organisé. De manière générale et sans préjudice de son examen ultérieur en l'espèce, la Cour considère que le recours à une preuve électronique attestant qu'un individu fait usage d'une messagerie cryptée qui avait été spécialement conçue et exclusivement utilisée par une organisation criminelle aux fins des communications internes de ladite organisation peut constituer un instrument très important pour la lutte contre la criminalité organisée. Par conséquent, une telle preuve peut valablement fonder, à son début, la détention d'une personne dans la mesure où elle peut fortement indiquer que cet individu appartient à une telle organisation. Cependant, l'utilisation comme fondement exclusif de tels éléments pour justifier un soupçon pourrait poser un certain nombre de problèmes délicats car, de par leur nature, la procédure et les technologies appliquées à la collecte de ces preuves sont complexes et peuvent dès lors diminuer la capacité des juges nationaux à établir leur authenticité, leur exactitude et leur intégrité. Cela étant, lorsqu'un tel élément constitue le fondement unique ou exclusif des soupçons pesant sur un suspect, le juge national doit disposer d'informations suffisantes sur cet élément avant de se pencher avec prudence sur son éventuelle valeur probante au regard du droit interne.

Dans les décisions rendues par le Haut Conseil des juges et des procureurs (HSYK), les 24 et 31 août 2016, portant révocation des magistrats qui étaient soupçonnés d'avoir un lien avec FETÖ/PDY, le HSYK a fait un constat de la nature de ByLock : un système de communication crypté utilisé par les membres de l'organisation pour leurs communications internes. Cependant, aucune de ces deux décisions du HSYK n'indique que la messagerie cryptée ByLock était utilisée exclusivement par les membres de FETÖ/PDY en vue d'assurer les communications secrètes au sein de l'organisation en question. En principe, le simple fait de télécharger ou d'utiliser un moyen de communication crypté ou bien le recours à toute autre forme de protection de la nature privée des messages échangés ne peuvent en soi constituer un élément à même de convaincre un observateur objectif qu'il s'agit d'une activité illégale ou criminelle. En effet, ce n'est que lorsque l'utilisation d'un moyen de communication crypté est appuyée par d'autres éléments relatifs à son usage, tels que le contenu des messages échangés ou le contexte dans lequel ceux-ci ont été échangés, ou bien par d'autres types d'éléments y relatifs, qu'on peut parler de preuves propres à convaincre un observateur objectif de l'existence d'une raison plausible de soupçonner son utilisateur d'être membre d'une organisation criminelle. En outre, les informations présentées au juge national sur une telle utilisation doivent être suffisamment spécifiques de manière à permettre à ce juge de conclure que la messagerie en question était en réalité destinée à l'usage des seuls membres d'une organisation criminelle. Or ces éléments font défaut en l'espèce.

Au vu des décisions du HSYK, lorsqu'il a décidé de la mise en détention provisoire du requérant le 17 octobre 2016, le juge de paix ne disposait pas, au sujet de la nature de ByLock, d'informations suffisantes pour conclure que l'application était exclusivement utilisée entre les membres de l'organisation FETÖ/PDY à des fins de communication interne. De même, aucun autre élément de fait ou d'information de nature à justifier le soupçon pesant sur le requérant n'était exposé dans l'ordonnance de mise en détention provisoire et les autres décisions pertinentes.

À cet égard, il ressort de l'ordonnance de mise en détention rendue en l'espèce que le juge de paix s'est contenté de citer les termes du code de procédure pénale (CPP) sans se soucier de spécifier en quoi consistaient « des preuves concrètes démontrant l'existence de forts soupçons », au sens de la disposition. Les références vagues et générales aux termes de cette disposition ou mêmes aux pièces du dossier ne sauraient être considérées comme suffisantes pour justifier la « plausibilité » des soupçons

censés avoir fondé la mise en détention provisoire du requérant, en l'absence, d'une part, d'une appréciation individualisée et concrète des éléments du dossier et, d'autre part, d'informations susceptibles de justifier les soupçons pesant sur le requérant ou d'autres types d'éléments ou de faits vérifiables.

En outre, le contrôle exercé par le juge de paix sur l'ordonnance de mise en détention provisoire n'a pas permis de remédier au manquement constaté ci-dessus, dans la mesure où il a rejeté l'opposition formée par le requérant contre la décision de placement en détention provisoire, au motif qu'aucune inexactitude n'avait été constatée dans cette décision. Il en va de même du contrôle opéré par la Cour constitutionnelle, qui a rejeté le recours individuel du requérant en se référant simplement à l'acte d'accusation déposé le 6 juin 2017 – c'est-à-dire un acte pris bien après la mise en détention du requérant – pour justifier le soupçon pesant sur lui au moment de son placement en détention.

c) *Existait-il suffisamment d'éléments de preuve pour soupçonner raisonnablement le requérant d'avoir utilisé ByLock ?* – Au vu de la conclusion à laquelle la Cour est parvenue ci-dessus, en principe, il serait inutile de chercher à répondre à cette dernière question. Cependant, compte tenu de l'importance qu'elle présente en l'espèce, la Cour décide de s'engager dans une telle analyse.

Tel qu'il ressort du dossier, l'élément unique qui a fondé la raison de soupçonner le requérant d'avoir commis l'infraction d'appartenance au FETÖ/PDY est le constat du parquet selon lequel le requérant figurait sur la liste rouge des utilisateurs de ByLock, ce qui indiquerait que l'intéressé est un utilisateur actif de ce moyen de communication. Or il s'agit là d'une pure conclusion sans aucune indication ou explication sur quelle base et surtout à partir de quelles données les autorités sont parvenues à une telle conclusion. Ce document n'inclut donc pas les données sous-jacentes sur lesquelles il était fondé, ni ne renseigne sur la manière dont ces données ont été établies. Les juridictions nationales se sont donc fondées sur ce seul document d'une page, non daté et dont l'auteur est inconnu.

Le document relatif au constat d'utilisation de ByLock par le requérant, en tant que tel, ne spécifie pas et ne met pas en évidence l'activité illégale du requérant, dans la mesure où il ne précise ni les dates de cette activité présumée, ni la fréquence, ni ne renferme d'autres détails concernant celle-ci. Qui plus est, ni ce document ni l'ordonnance de mise en détention provisoire n'explique en quoi cette activité présumée du requérant indiquerait son appartenance à une organisation terroriste.

Par conséquent, en l'absence d'autres éléments ou d'informations, le document en question précisant simplement que le requérant était un utilisateur de ByLock, à lui seul, ne pouvait pas indiquer l'existence de soupçons plausibles propres à convaincre un observateur objectif que l'intéressé avait bel et bien utilisé ByLock d'une manière qui pourrait être constitutif de l'infraction qui lui est reprochée.

d) *Conclusion* – À la lumière de ce qui précède, le Gouvernement n'a pas pu démontrer que, à la date de la mise en détention provisoire du requérant, les éléments de preuve à la disposition du juge de paix répondaient au critère de « soupçons plausibles », et pouvaient ainsi convaincre un observateur objectif que le requérant avait pu commettre l'infraction reprochée pour laquelle il avait été détenu.

Quant à la notion de « plausibilité » des soupçons sur lesquels doit se fonder la détention pendant l'état d'urgence, le présent grief n'a pas pour objet, au sens strict, une mesure dérogatoire prise pendant la période d'état d'urgence. Le juge de paix a décidé de placer le requérant en détention provisoire pour appartenance à une organisation terroriste en application du CPP, disposition qui n'a pas subi de modifications pendant la période d'état d'urgence. Le placement en détention de l'intéressé a donc été décidé sur le fondement de la législation qui était en vigueur avant la déclaration de l'état d'urgence, laquelle législation est d'ailleurs toujours d'application.

Certes, les difficultés auxquelles la Turquie devait faire face au lendemain de la tentative de coup d'État militaire du 15 juillet 2016 constituent certainement un élément contextuel dont la Cour doit pleinement tenir compte pour interpréter et appliquer l'article 5 en l'espèce. Cependant, cela ne signifie pas pour autant que les autorités aient carte blanche pour ordonner la mise en détention d'un individu pendant la période d'état d'urgence sans base factuelle suffisante remplissant les conditions minimales de l'article 5 § 1 c) en matière de plausibilité des soupçons. En effet, la « plausibilité » des soupçons sur lesquels doit se fonder une mesure privative de liberté constitue un élément essentiel de la protection offerte par l'article 5 § 1 c) de la Convention. Dans ces circonstances, la mesure litigieuse ne peut pas être considérée comme ayant respecté la stricte mesure requise par la situation. Conclure autrement réduirait à néant les conditions minimales de l'article 5 § 1 c) en matière de plausibilité des soupçons motivant des mesures privatives de liberté et irait à l'encontre du but poursuivi par l'article 5.

Partant, il n'y avait pas de raisons plausibles, au moment de la mise en détention provisoire du requérant, de soupçonner celui-ci d'avoir commis une infraction.

*Conclusion* : violation (six voix contre une).

La Cour conclut également, par six voix contre une, à la violation de l'article 5 § 3 quant à l'absence alléguée de motivation de la décision de mise en détention provisoire en l'absence de raisons plausibles de soupçonner le requérant, et à la violation de l'article 5 § 4 car ni le requérant ni son avocat n'avaient une connaissance suffisante du contenu de la liste rouge des utilisateurs de ByLock, élément exclusif de l'accusation, qui revêtait une importance essentielle pour la contestation de la détention en cause.

Article 41 : 12 000 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

## Article 5 § 4

### Take proceedings/Introduire un recours

**Applicant's impossibility to be heard in immigration detention appeal in person or by tele- or videoconference due to initial infrastructure problems in Covid-19 pandemic: *inadmissible***

**Impossibilité pour le requérant d'être entendu en personne ou par télé- ou visioconférence lors de son appel contre sa rétention dans un centre pour étrangers à raison des problèmes d'infrastructure rencontrés au début de la pandémie de Covid-19 : *irrecevable***

*Bah – Netherlands/Pays-Bas*, 35751/20, Decision/Décision 22.6.2021 [Section IV]

Traduction française du résumé – Printable version

*Facts* – The applicant, a Guinean national, was placed in immigration detention on 2 March 2020 with a view to his deportation following the rejection of his asylum application. He lodged an appeal with the Regional Court. However, due to the Covid-19 pandemic lockdown which also entailed the closure of all Dutch courts and the cancellation of in-person hearings, his appeal, which was considered as urgent, was heard by teleconference through his lawyer. Despite his express wish to attend in person or by tele- or videoconference, this had not been possible at the material time owing to a lack of adequately equipped tele- and videoconference rooms in the immigration detention centre. His appeal was dismissed as was his further appeal to the Council of State's Administrative Jurisdiction Division.

*Law* – Article 5 § 3: This provision concerned only one specific form of deprivation of liberty, namely, that referred to in paragraph 1 (c) of Article 5. It was thus not applicable in the present case as the Netherlands authorities had detained the applicant not for the reasons mentioned in that provision but "with a view to deportation" which was a ground set out in paragraph 1 (f) of Article 5.

Article 5 § 4: The applicant's hearing had been held in the first weeks of the Covid-19 pandemic lockdown, at which time the immigration detention centres had been largely unprepared to observe the required 1.5-meter distance in tele- and videoconference rooms and lacked the technical infrastructure. The Regional Court had, however, made concrete efforts to enable the applicant's presence at his hearing and had explained in detail why it had not been possible to hear him in person or by videoconference. Further, the Administrative Jurisdiction Division had held that in the circumstances of this particular case, limitations of the applicant's right under domestic law to be present at the hearing had been foreseeable, the impugned measures had served the interest of public health and the limitations had been proportionate and had not impinged on the essence of the right in question. Given therefore the difficult and unforeseen practical problems with which the State had been confronted during the first weeks of the Covid-19 pandemic, the fact that the applicant had benefitted from adversarial proceedings during which he had been represented by and heard through his lawyer who had attended the hearing by telephone and with whom he had had regular contact, the importance of the applicant's other applicable fundamental rights and the general interest of public health, the examination of the detention order without securing his attendance at the hearing in person or by videoconference, had not been incompatible with Article 5 § 4. This provision did not impose the same stringent requirements on hearings as Article 6 under its civil or criminal head.

In conclusion, the Court found that the applicant had been entitled "to take proceedings" within the meaning of Article 5 § 4 and that in the circumstances of the present case those proceedings met the requirements of that provision. As there was therefore no appearance of a breach of Article 5 § 4, paragraph 5 of the same provision did not enter into play.

*Conclusion*: inadmissible (manifestly ill-founded).

# ARTICLE 6

## Article 6 § 1 (civil)

### Civil rights and obligations/Droits et obligations de caractère civil
### Access to court/Accès à un tribunal

**Former Supreme Court of Ukraine judges' inability to contest the prevention from exercising their judicial functions after legislative reform: *violation***

**Impossibilité pour d'anciens juges de la Cour suprême ukrainienne de contester leur incapacité à exercer leurs fonctions judiciaires à la suite d'une réforme législative : *violation***

*Gumenyuk and Others/et autres – Ukraine*, 11423/19, Judgment/Arrêt 22.7.2021 [Section V]

Traduction française du résumé – Printable version

*Facts* – Following legislative amendments in 2016 the Supreme Court of Ukraine ("the SCU") was liquidated and replaced by the new Supreme Court ("the SC"), in which the posts were filled exclusively by way of competition. The eight applicants were SCU judges and as a result of the amendments, since the beginning of the SC's operation in December 2017, they were prevented from exercising judicial functions without their formal dismissal. This was despite a ruling on 18 February 2020 by the Constitutional Court, following a challenge by the plenary SCU, declaring the relevant legislative measures unconstitutional and confirming the validity of the applicants' tenure.

*Law*

Article 6 § 1: At the outset the Court emphasised that the Convention did not prevent States from taking legitimate and necessary decisions to reform the judiciary. It was aware of the complicated background and context of the impugned judicial reform in Ukraine and considered that it was not its role to pronounce on its goals and appropriateness or determine whether it was justified under Ukrainian constitutional law. What had to be examined in the instant case was whether the manner in which the reform had been implemented had affected the applicants' rights under the Convention.

(a) *Applicability*

(i) *Existence of a right* – Firstly, the applicants had been entitled under domestic law to remain judges until their retirement if none of the exceptional grounds set out in the Constitution for early termination of office materialised. Secondly, under the relevant constitutional principles they at least had an arguable basis to claim the right to be protected against arbitrary removal from judicial duties. Thirdly, the exact scope of the applicants' "right" in this context had been sufficiently established and articulated under the domestic law by the Constitutional Court which had made it clear in its ruling that they had had a right to remain judges of the highest judicial body. Accordingly, and having regard to the role of the judicial functions which the applicants had been prevented from exercising, there had been a genuine and serious dispute over a "right" which the applicant could claim on arguable grounds under domestic law.

(ii) *Civil nature of the right* –The applicants' dispute was not about renumeration but about their inability to exercise their mandate as judges which had direct bearing on their professional and personal development and the possibility to establish relationships with others. These private-law aspects of the case were substantial and could not be overweighed by the public nature of the applicants' employment. Moreover, in view of the nature of the impugned unilateral measures and their considerable effects on the applicants' professional life and the exercise of their judicial functions, excluding the dispute at issue from the protection of Article 6 would not only be artificial but also undermine the protection of the judiciary's role in society.

To determine whether the right claimed by the applicants was "civil", the Court applied the criteria developed in the judgment *Vilho Eskelinen and Others v. Finland* [GC]. Although in the circumstances it appeared that the applicants had not had a right of access to a court under national law in relation to their claim, the Court held that it was not necessary to give a conclusive opinion under the first condition of the *Eskelinen* test, since, the second condition of this test had not been met. In particular, bearing in mind the guarantees for the independence of the judiciary, the Court held that it would be a fallacy to assume that judges could uphold the rule of law and give effect to the Convention if domestic law deprived them of the guarantees of the Articles of the Convention on matters directly touching their individual independence and impartiality. It was therefore not justified to exclude members of the judiciary from the protection of Article 6 in matters concerning the conditions of their employment on the basis of the special bond of loyalty and trust to the State. Article 6 was thus applicable under its civil head.

(b) *Merits* – The right of access to a court was one of the fundamental procedural rights for the protection of members of the judiciary and the applicants should have in principle enjoyed the direct access to court in respect of their allegations of unlawful prevention from exercising their judicial functions. Although the possibility of institutional action, as that initiated by the plenary SCU in the present case, could be a supplementary guarantee, it could not replace the right of a member of the judiciary to bring a court action in his or her personal capacity. It was hard to see how the aims of securing fair domestic judiciary and speeding up the domestic proceedings set out in the explanatory note to the draft law on judicial reform could be achieved by restricting the applicants' access to court in relation to their claims regarding their prevention from exercising their judicial functions. In these circumstances, the absence of access to court

was not reasonably proportionate to the legitimate aim sought.

*Conclusion*: violation (unanimously).

Article 8

(a) *Applicability* – In the circumstances, the Court employed the consequence-based approach: having regard to the nature and duration of the negative effects on the applicants, it found that the impugned measures had affected their private lives to a very significant degree, falling therefore within the scope of Article 8. In particular, the impugned measures, albeit not expressly related to the applicants, had deprived them of the opportunity to continue their judicial work and to live in the professional environment where they could pursue their goals of professional and personal development. At the time of the Court's examination of the case, these substantial effects had not been put right after the Constitutional Court's ruling confirming the applicability of the principle of irremovability in their regard.

(b) *Merits* – The main question in the present case was whether the interference with the applicants' right to respect for private life, which originated from a parliamentary law, had been lawful for the purpose of the Convention. The Court found that it had not. In this connection, it attached weight to the Constitutional Court's ruling declaring the relevant legislative measures unconstitutional and, particularly its findings that: the Constitutional amendments did not violate the principle of the institutional continuity of the highest judicial body which continued to operate under the name "Supreme Court"; the renaming of the judicial body envisaged in the Constitution could not take place without the transfer of SCU judges to the offices of SC judges, as there was no difference between their legal status; the removal of the word "Ukraine" from the phrase "the Supreme Court of Ukraine" could not justify the dismissal of all SCU judges or their transfer to another court. Thus, the SCU judges had to continue to exercise their powers as SC judges. The differentiation between SCU and SC judges was not consistent with the principle of irremovability of judges, which was part of the constitutional guarantee of judicial independence. Further, the Government had not shown that the manner in which the applicants had been compelled to compete in order to maintain their right to carry out their judicial duties and, in particular, the manner in which the competition had been organised, including the choice of assessors and the lack of institutional and procedural safeguards, could be reconciled with the Constitutional principles on the general protection of individual rights and with the specific guarantees relating to tenure of judicial office including the principle of the irremovability of judges which, according to the Court's case-law and international and Council of Europe instruments, was a key element for the maintenance of judicial independence and public trust in the judiciary.

Nevertheless, despite the Constitutional Court's ruling, the issue of the applicants' resumption of their judicial functions had still been under examination by Parliament and, since the SC had started to operate, the applicants had not been able to exercise their judicial functions as Supreme Court judges. There had, therefore, been a clear lack of coordination in addressing the applicants' situation for a considerable period which had seriously undermined the legal certainty and predictability of the constitutional principles on judicial independence.

*Conclusion*: violation (unanimously).

Article 41: EUR 5,000 each in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Vilho Eskelinen and Others v. Finland* [GC], 63235/00, 19 April 2007, Legal Summary; *Baka v. Hungary* [GC], 20261/12, 23 June 2016, Legal Summary; and *Bilgen v. Turkey*, 1571/07, 9 March 2021)

## Access to court/Accès à un tribunal

**Environmental NGO denied *locus standi* to contest the accuracy of information on the management of radioactive waste communicated by a public agency: *violation***

**ONG environnementale déclarée sans intérêt à agir pour contester la justesse des informations sur la gestion des déchets radioactifs diffusées par une autorité publique : *violation***

*Association BURESTOP 55 and Others/et autres – France*, 56176/18 et al., Judgment/Arrêt 1.7.2021 [Section V]

English translation of the summary – Version imprimable

*En fait* – Les requérantes sont six associations de protection de l'environnement qui s'opposent au projet de centre industriel de stockage géologique (ci-après « le projet ») destiné à stocker, sur un site, en couche géologique profonde les déchets radioactifs de haute activité et à vie longue, produits par l'ensemble des installations nucléaires françaises et par le traitement des combustibles utilisés dans les centrales nucléaires.

Dans son rapport de synthèse sur l'étude géothermique se fondant sur les résultats d'un forage sur le site en question, l'ANDRA, autorité publique, si-

gnala que la ressource géothermique à l'échelle de la zone de transposition était faible et qu'il n'y avait donc pas de risque de forage intempestif après la disparition de la mémoire des enfouissements. Par une lettre, les associations requérantes demandèrent sans succès à l'ANDRA de reconnaître qu'en donnant l'indication ci-dessus, elle avait diffusé des informations scientifiques et technologiques erronées et insincères et avait en conséquence commis une faute, incompatible avec sa mission légale d'information.

Les associations requérantes assignèrent l'ANDRA devant le tribunal de grande instance en vue de l'indemnisation du préjudice résultant de manquements fautifs à son obligation d'information du public. La juridiction déclara la demande d'une d'entre elles irrecevable pour défaut d'intérêt à agir. Cinq autres associations requérantes virent leur action jugée au fond et furent déboutées.

*En droit* – Article 6 § 1

a) *Applicabilité* – L'action engagée par les associations requérantes devant le juge interne visait à obtenir l'indemnisation du préjudice résultant d'une exécution qu'elles estimaient fautive de la mission d'information du public mise à la charge de l'ANDRA par l'article L. 542-12 7° du code de l'environnement. Ainsi, comme dans l'affaire *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox Mox c. France* (déc.), au cœur de leurs prétentions se trouvait la question du droit à l'information et à la participation au processus décisionnel en matière d'environnement. Il s'ensuit que si la « contestation » qu'elles soulevaient avait indéniablement pour objet la défense de l'intérêt général, elle portait également sur un « droit » de nature « civile » reconnu en droit interne dont les associations requérantes pouvaient se dire titulaires.

En outre, si les associations requérantes ont agi ensemble devant les juridictions internes, elles ont chacune présenté leur propre demande en réparation du préjudice moral que, selon elle, leur avait causé la diffusion par l'ANDRA d'informations erronées. Cela confirme qu'elles entendaient défendre leur propre droit à l'information.

Quant au sérieux de la contestation, il peut se déduire en l'espèce de la substance des moyens relatifs à la méconnaissance de ce droit développés par les associations requérantes dans leur recours et de la motivation retenue par le juge interne pour les écarter. Enfin, la procédure engagée par les associations requérantes, qui visait à obtenir la réparation du préjudice que la méconnaissance du droit à l'information et à la participation au processus décisionnel en matière d'environnement leur avait prétendument causé, était directement déterminante pour ce droit.

*Conclusion* : article 6 § 1 applicable.

b) *Fond* – Lorsque l'article 6 § 1 s'applique, il constitue une *lex specialis* par rapport à l'article 13.

Ensuite, dès lors que l'article 6 § 1 s'applique, la décision déclarant l'action dont l'association MIRABEL-LNE avait saisi le juge interne irrecevable pour défaut d'intérêt à agir soulève une question au regard du droit d'accès à un tribunal que garantit cette disposition.

Pour justifier l'irrecevabilité opposée à l'action de l'association requérante, le Gouvernement renvoie aux conditions de l'accès des associations à la justice lorsqu'elles entendent faire valoir les intérêts collectifs qu'elles se sont donné pour but de défendre. À cet égard, la condition de principe, dont la cour d'appel a contrôlé le respect, repose sur la corrélation entre l'objet statutaire de l'association demandeuse et les intérêts collectifs qu'elle veut défendre devant le juge. Pour le Gouvernement, cette limitation a pour objectif d'éviter l'engorgement des juridictions et d'éventuels abus par les associations, tels que l'utilisation du droit d'accès à la justice dans un but lucratif.

La Cour ne met pas en cause la légitimité de tels objectifs. Toutefois, l'action dont l'association MIRABEL-LNE entendait saisir le juge tendait notamment à l'examen d'une contestation portant sur un droit de caractère civil dont elle était titulaire : le droit à l'information et à la participation en matière d'environnement. Cette action tendait donc aussi à la défense des intérêts propres de l'association MIRABEL-LNE. Or, le Gouvernement, qui se place exclusivement sur le terrain de la défense, par des associations, d'intérêts collectifs, ne fournit aucun élément susceptible de justifier que le refus d'examiner une contestation sur un droit de cette nature poursuivait, dans les circonstances de l'espèce, un but légitime et était proportionné à ce but.

Au surplus, en premier lieu, la cour d'appel n'a pas tenu compte de ce que l'association MIRABLE-LNE était agréée au titre de l'article L. 141-1 du code de l'environnement. Or, un tel agrément lui conférait en principe intérêt à agir, car ces associations « peuvent exercer les droits reconnus à la partie civile en ce qui concerne les faits portant un préjudice direct ou indirect aux intérêts collectifs qu'elles ont pour objet de défendre et constituant une infraction aux dispositions législatives relatives à la protection de la nature et de l'environnement (...) ou ayant pour objet la lutte contre les pollutions et les nuisances, la sûreté nucléaire et la radioprotection (...) ainsi qu'aux textes pris pour leur application ». D'ailleurs la loi du 13 juin 2006 a expressément étendu l'intérêt à agir des associations de protection de l'environnement agréées aux litiges relatifs à des faits constituant une infraction aux

textes ayant pour objet « la sûreté nucléaire et la radioprotection ». En deuxième lieu , la cour d'appel a retenu qu'à la différence des autres associations requérantes, son objet statutaire ne comportait pas expressément la lutte contre les risques pour l'environnement et la santé que représentent l'industrie nucléaire et les activités et projets d'aménagement liés, ou l'information du public sur les dangers de l'enfouissement des déchets radioactifs, mais était rédigé en des termes plus généraux, selon lesquels elle avait pour but la protection de l'environnement. Cette approche ne saurait toutefois emporter l'adhésion. En effet, d'une part, elle revient à faire une distinction entre la protection contre les risques nucléaires et la protection de l'environnement alors qu'il est manifeste que la première se rattache pleinement à la seconde. D'autre part, l'interprétation retenue des statuts de l'association requérante a pour effet de limiter de manière excessivement restrictive le champ de son objet social, alors même que déjà à l'époque des faits, l'article 2 de ses statuts visait la prévention des « risques technologiques ».

La conclusion de la cour d'appel, entérinée par la Cour de cassation, qui a apporté une restriction disproportionnée au droit d'accès au tribunal, apparaît donc manifestement déraisonnable.

*Conclusion* : violation dans le chef de l'association MIRABEL-LNE (unanimité).

Article 10

a) *Applicabilité* – L'article 10 n'ouvre pas un droit général d'accès aux informations détenues par l'État mais garantit seulement, dans une certaine mesure et sous certaines conditions, un droit d'accéder à de telles informations et une obligation pour les autorités publiques de les communiquer selon l'arrêt *Magyar Helsinki Bizottság c. Hongrie* [GC]. Les principes énoncés dans cet arrêt ne vaudraient pas que dans l'hypothèse où l'administration a opposé un refus à une demande d'information.

Certes, dès lors que le droit de recevoir des informations n'impose pas aux États des obligations positives de collecte et de diffusion, *motu proprio*, d'informations, c'est principalement dans l'hypothèse où une demande d'accès à une information est rejetée par les autorités d'un État qu'un problème est susceptible de surgir au regard de cette disposition. Un État peut toutefois se prescrire une obligation de collecter ou de diffuser des informations *motu proprio*.

Or, en l'espèce, le droit interne impose à l'ANDRA, un établissement public, l'obligation de mettre à la disposition du public des informations relatives à la gestion des déchets radioactifs. Cette obligation impliquait celle d'informer *motu proprio* le public de l'évolution du projet, en particulier au regard du potentiel géothermique du site.

Ceci étant, les circonstances de l'espèce relèvent de la seconde branche de l'alternative exposée dans l'arrêt *Magyar Helsinki Bizottság*, selon laquelle un droit d'accès à des informations détenues par une autorité publique et une obligation pour l'État de les communiquer peuvent naître, au regard de l'article 10, lorsque l'accès à l'information est déterminant pour l'exercice par l'individu de son droit à la liberté d'expression, en particulier la liberté de recevoir et de communiquer des informations, et que refuser cet accès constitue une ingérence dans l'exercice de ce droit.

La question de savoir si et dans quelle mesure le refus de donner accès à des informations a constitué une ingérence dans l'exercice par un requérant du droit à la liberté d'expression doit s'apprécier au cas par cas à la lumière des circonstances particulières de la cause, et en fonction des critères suivants : i) le but de la demande d'information ; ii) la nature de l'information recherchée ; iii) le rôle de la requérante ; iv) le fait que les informations sont déjà disponibles.

Il doit en aller de même lorsque l'ingérence alléguée ne résulte pas d'un refus de donner accès à une information mais, comme en l'espèce, dans le caractère prétendument insincère, inexact ou insuffisant d'une information fournie par une autorité publique en vertu d'une obligation d'informer prescrite par le droit interne qui s'apparente à un refus d'informer.

S'agissant du premier des quatre critères, en accord avec leur objet social, les associations requérantes se sont notamment donné pour mission d'informer le public des risques environnementaux et sanitaires que présente le projet. Les informations litigieuses, relatives précisément à ces risques, s'inscrivaient donc directement dans l'exercice de leur liberté de communiquer des informations.

Quant au deuxième critère, l'information litigieuse s'inscrivait directement dans le débat relatif aux risques environnementaux et sanitaires que présente le projet, lequel concerne l'acheminement, la manutention et l'enfouissement sur le site de quantités importantes de déchets radioactifs de haute activité et à vie longue, particulièrement dangereux pour la santé et l'environnement. Un sujet de cette nature relève de l'intérêt public.

S'agissant du troisième critère, les associations requérantes jouent un rôle de « chien de garde », attirant l'attention de l'opinion sur des sujets d'intérêt public, mais agissant aussi auprès des autorités en faveur de la mise à la disposition du public d'informations relatives à de tels sujets. De plus les associations requérantes bénéficient, en droit interne,

d'un agrément au titre de leur activité dans le domaine de la protection de l'environnement.

Quant au quatrième critère, les informations litigieuses étaient disponibles.

*Conclusion* : article 10 applicable.

b) *Fond* – L'accès à un contrôle de l'information revêt une importance particulière lorsqu'il s'agit d'informations relatives à un projet représentant un risque environnemental majeur. Il en va particulièrement ainsi lorsqu'il s'agit du risque nucléaire, qui est susceptible de produire, s'il se réalise, des effets sur plusieurs générations. Or il y a un lien direct entre le potentiel géothermique du site sur lequel portait la communication litigieuse de l'ANDRA et le risque nucléaire que représente le projet. Il ressort en effet du guide de sûreté relatif au stockage définitif des déchets radioactifs en formation géologique profonde de l'autorité de sûreté nucléaire que les sites présentant ce potentiel sont inappropriés à cette fin, car ils sont susceptibles de faire l'objet de forages à visée géothermiques une fois la mémoire de l'enfouissement perdue.

En l'espèce, les associations requérantes ont assigné l'ANDRA devant le juge civil en vue de la réparation du préjudice résultant de manquements fautifs à son obligation d'informer le public. Si leur action a été déclarée irrecevable en première instance, elle a été déclarée recevable en appel pour autant qu'elle était présentée par les cinq associations requérantes.

À l'issue d'un débat contradictoire, dans le cadre duquel les cinq associations requérantes ont pu faire pleinement valoir leurs arguments, la cour d'appel a estimé qu'aucune faute n'était caractérisée.

La cour d'appel a tout d'abord jugé que l'ANDRA avait à juste titre fait valoir que les résultats de ses travaux avaient été corroborés par tous ses partenaires institutionnels, faisant ainsi nécessairement référence aux avis de l'autorité de sûreté nucléaire, de l'institut de radioprotection et de sûreté nucléaire et de la commission nationale d'évaluation.

La cour d'appel a ensuite considéré que l'existence d'une divergence d'appréciation sur les éléments techniques discutés ne suffisait pas en elle-même à démontrer que l'ANDRA aurait fait preuve d'incompétence, de négligence, ou de partialité dans la position qu'elle avait exprimée, et que la formulation, après études approfondies, de conclusions favorables à la création du projet ne pouvait être en elle-même fautive.

Les associations requérantes concernées ont eu la possibilité de se pourvoir en cassation contre l'arrêt de la cour d'appel. La Cour de cassation a jugé que la cour d'appel avait légalement justifié sa décision.

La Cour déduit de l'ensemble des considérations qui précèdent, que cinq des six associations requérantes ont pu saisir les juridictions internes d'un recours qui a permis, dans le cadre d'une procédure pleinement contradictoire, l'exercice d'un contrôle effectif du respect par l'ANDRA de son obligation légale de mettre à la disposition du public des informations relatives à la gestion des déchets radioactifs et portant, au cas particulier, sur le contenu et la qualité de l'information diffusée par l'ANDRA quant au potentiel géothermique du site. La motivation de l'arrêt de la cour d'appel n'est certes pas exempte de toute critique. Il aurait été souhaitable que les juges d'appel étayent davantage leur réponse à la contestation par les requérantes de la fiabilité de l'indication figurant dans le rapport de synthèse de l'ANDRA selon laquelle la ressource géothermique à l'échelle de la zone concernée était faible. Cela ne suffit cependant pas, dans les circonstances de l'espèce, pour mettre en cause le constat que les cinq associations ont eu accès à un recours répondant aux exigences de l'article 10.

*Conclusion* : non-violation dans le chef des cinq associations (unanimité).

Quant à l'association MIRABEL-LNE, le fait que son recours a été déclaré irrecevable par la cour d'appel emporte violation de l'article 6 § 1. En conséquence, il n'est pas nécessaire d'examiner si cette circonstance caractérise une méconnaissance dans le chef de cette dernière du volet procédural de l'article 10.

Article 41 : 3 000 EUR pour préjudice moral à l'association MIRABEL-LNE.

(Voir *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox et Mox Mox c. France* (déc.), 75218/01, 28 mars 2006, et *Magyar Helsinki Bizottság c. Hongrie* [GC], 18030/11, 8 novembre 2016, Résumé juridique)

## Access to court/Accès à un tribunal

**Absence of a judicial remedy to review the suspension by the High Judicial Council of one of its non-judicial members: *Article 6 applicable; violation***

**Absence de recours judiciaire pour contrôler la suspension par le Conseil supérieur de la Justice d'un de ses membres non-magistrat : *article 6 applicable ; violation***

*Loquifer – Belgium/Belgique*, 79089/13 et al., Judgment/Arrêt 20.7.2021 [Section III]

English translation of the summary – Version imprimable

*En fait* – La requérante était un membre « non-magistrat » du Conseil supérieur de la Justice (CSJ).

Suite à son inculpation pénale, elle fut suspendue par l'assemblée générale du CSJ de toutes ses fonctions. Et la suspension fut prolongée pour une période totale de près de deux ans. La requérante allègue l'absence de recours judiciaire pour contester les décisions prises par le CSJ.

*En droit* – Article 6 § 1

a) *Applicabilité* – La question de l'applicabilité du volet civil de l'article 6 § 1 est déterminée par les critères énoncés dans l'arrêt *Vilho Eskelinen et autres c. Finlande* [GC], tels qu'ils ont notamment été appliqués à des litiges concernant des magistrats (voir *Baka c. Hongrie* [GC] et *Denisov c. Ukraine* [GC]).

i. *Sur l'existence d'une contestation relative à un droit* – Il ne fait pas de doute qu'une contestation concernant l'exercice par la requérante de son mandat de membre du CSJ a surgi avec la décision de l'assemblée générale du CSJ de suspendre la requérante de toutes ses fonctions au sein du CSJ. Cette contestation était réelle et sérieuse, la requérante contestant la légalité de la mesure prise à son encontre.

Selon le code judiciaire, la requérante était élue au CSJ pour un mandat renouvelable de quatre ans. Le droit interne lui conférait ainsi, en principe, le droit d'exercer son mandat jusqu'à son terme. En outre, la requérante était élue comme membre du bureau pour toute la durée de son mandat de membre du CSJ.

La mesure provisoire litigieuse avait pour objet et pour effet d'empêcher la requérante d'exercer ses fonctions au sein du CSJ, et ce aussi longtemps qu'il n'y avait pas de décision définitive au pénal, ce qui a en fait résulté en une suspension pour une durée de près de deux ans. Cette mesure était ainsi déterminante pour le droit en jeu.

ii. *Sur le caractère civil du droit en cause* – La requérante était élue membre du CSJ pour une durée déterminée, et elle ne pouvait pas être révoquée par l'organe qui l'avait désignée, le Sénat ; elle exerçait ses fonctions sous l'autorité de l'assemblée générale du CSJ, qui avait le pouvoir de mettre fin à son mandat ; pour l'exercice des fonctions de membre du bureau, elle recevait une rémunération. En outre, la mesure de suspension prise par l'assemblée générale était basée sur le fait que l'inculpation de la requérante était considérée comme nuisant au bon fonctionnement du CSJ. Eu égard à ces éléments, du point de vue de la qualification des droits et obligations en cause, le litige entre la requérante et le CSJ était un litige professionnel, portant sur la façon dont la requérante exerçait ou pouvait continuer à exercer ses fonctions au sein du CSJ. Il opposait la requérante à l'assemblée générale, organe chargé de veiller au bon fonctionnement de l'institution et qui à ce titre pouvait exercer un certain contrôle sur la requérante. En dépit du fait que la requérante exerçait ses fonctions au sein d'une institution dont l'indépendance est garantie par la Constitution, le litige professionnel interne présentait, comme des « conflits ordinaires du travail », des éléments « civils » suffisamment importants pour faire entrer en jeu la présomption selon laquelle le droit en cause était un droit « de caractère civil ».

En outre, le droit national n'exclut pas expressément l'accès à un tribunal pour le poste ou la catégorie de personnes en question.

Et il n'existe pas un lien spécial de confiance et de loyauté entre la requérante et l'État qui pourrait justifier que l'application de l'article 6 soit exclue pour le litige entre la requérante et le CSJ.

Il résulte de ce qui précède qu'il y avait bien une « contestation » sur un « droit » de « caractère civil ». Par conséquent, la requérante devait, dans le cadre de la procédure de suspension de ses fonctions au sein du CSJ, bénéficier de la protection offerte par l'article 6 § 1.

*Conclusion* : article 6 § 1 applicable.

b) *Fond* – Il résulte des dispositions constitutionnelles et légales pertinentes que le CSJ est un organe d'administration active. Ne devant trancher des litiges, il ne constitue pas une juridiction. La Cour en déduit que cet organe ne constitue pas un « tribunal » au sens de l'article 6 § 1.

La requérante s'est abstenue de contester les décisions du CSJ portant suspension de ses fonctions au motif qu'aucune voie de recours effective n'était disponible en droit interne. Selon le Gouvernement, l'intéressée aurait dû contester les décisions litigieuses devant le Conseil d'État ou devant les juridictions.

Or le Gouvernement n'a pas démontré l'existence d'une quelconque voie de recours qui aurait pu permettre à la requérante de faire contrôler, par la voie judiciaire, la décision de suspension de ses fonctions au sein du CSJ et d'obtenir l'annulation ou la suspension de l'exécution de cette décision. L'exception de non-épuisement des voies de recours internes soulevée par le Gouvernement est donc rejetée.

Il résulte également de ce qui précède que les décisions litigieuses n'ont pas été prises par un tribunal ou par un autre organe exerçant des fonctions judiciaires, et qu'elles ne pouvaient pas être soumises au contrôle d'un tel organe. La requérante a ainsi été privée du droit d'accès à un tribunal pour contester la mesure de suspension de ses fonctions au sein du CSJ.

*Conclusion* : violation (six voix contre une).

Article 41 : 12 000 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir *Vilho Eskelinen et autres c. Finlande* [GC], 63235/00, 19 avril 2007, Résumé juridique ; *Baka c. Hongrie* [GC], 20261/12, 23 juin 2016, Résumé juridique ; et *Denisov c. Ukraine* [GC], 76639/11, 25 septembre 2018, Résumé juridique)

## Tribunal established by law/Tribunal établi par la loi

**Grave irregularities in appointment of judges to the newly established Supreme Court's Disciplinary Chamber following legislative reform: *violation***

**Graves irrégularités dans la nomination de juges de la chambre disciplinaire nouvellement créée au sein de la Cour suprême : *violation***

*Reczkowitz – Poland/Pologne*, 43447/19, Judgment/Arrêt 22.7.2021 [Section I]

Traduction française du résumé – Printable version

*Facts* – In July 2017 the applicant, a barrister, was suspended from her duties for a period of three years in connection with various breaches of the Code of Bar Ethics as a consequence of disciplinary proceedings. Her case was examined at the last instance by the newly established Disciplinary Chamber of the Supreme Court following the reorganisation of that court effected through the 2017 Amending Act on the National Council of the Judiciary ("the NCJ") and the 2017 Act on the Supreme Court as part of the large-scale legislative reform of the Polish judicial system initiated by the government in 2017. The Disciplinary Chamber was composed by judges appointed through the procedure involving the new NCJ. The applicant complained that the judges of that Chamber had been appointed by the President of Poland upon the NCJ's recommendation in manifest breach of the domestic law and the principles of the rule of law, separation of powers and independence of the judiciary.

*Background* – The NCJ is a constitutional body whose main role, in accordance with the Constitution was to safeguard the independence of courts and judges. Before the amendments, the NCJ's judicial members were elected by judges, a rule which had been firmly established in the Polish legal order and confirmed in unequivocal terms by the Constitutional Court in a judgment of 18 July 2007. This judgment was, however, reversed by the Constitutional Court on 20 June 2017. Following, the 2017 reform, the NCJ's judicial members are elected by *Sejm*. Pursuant to the relevant domestic provisions read as a whole, judges are appointed to all levels and types of courts, including the Supreme Court, by the President of Poland following a recommendation of the NCJ which the latter issues after a competitive selection procedure in which it evaluates and nominates the candidates.

Following preliminary ruling requests from the Supreme Court in three cases, on 19 November 2019 the Court of Justice of the European Union (CJEU), concluded that the Disciplinary Chamber did not satisfy the requirements of independence.

On 5 December 2019 the Supreme Court gave judgment in the above cases finding that the NCJ did not provide sufficient guarantees of independence from the legislative and executive authorities in the judicial appointment procedure. As to the Disciplinary Chamber, following the guidance given by the CJEU in its judgment, it concluded that it could not be considered a court within the meaning of domestic law and Article 6. These conclusions were endorsed on 23 January 2020 by the joined Chambers of the Supreme Court in a joint resolution. As per the resolution, court formations including Supreme Court judges appointed through the procedure involving the NCJ were unduly composed.

On 28 January 2020 the Constitutional Court issued an interim decision suspending the enforcement of the above resolution and, the Supreme Court's jurisdiction to issue resolutions concerning the compatibility, with national or international law or the case-law of international courts, of the NCJ's composition, the procedure for judicial appointments conducted by that body and the President's prerogative to appoint judges. On 20 April 2020 it issued judgment declaring the above resolution of 23 January 2020 incompatible with the Constitution, the Treaty of the European Union and Article 6 § 1 and holding, in particular, that the President of Poland's decisions on judicial appointments could not be subject to any type of review, including by the Supreme Court. It confirmed this principle in a decision of 21 April 2021 on a "conflict of competence between *Sejm* and the Supreme Court and between the President of Poland and the Supreme Court".

*Law* – Article 6 § 1: The Court's task in the present case was to assess the circumstances relevant for the process of appointment of judges to the Supreme Court's Disciplinary Chamber, after the entry into force of the 2017 Act on the Supreme Court establishing that Chamber, and not to consider the legitimacy of the reorganisation of the Polish judiciary as a whole.

(a) *Applicability* – There was no ground to depart from the well-established principle that disciplinary proceedings in which the right to continue to exercise a profession was at stake gave rise to "*con-*

*testations*" (disputes) over civil rights. This principle had also been applied to proceedings conducted before various professional disciplinary bodies including judges. Article 6 § 1 therefore applied under its civil head. The disciplinary proceedings, however, did not involve the determination of a criminal charge.

(b) *Merits* – The Court examined whether the hearing of the applicant's case by the Disciplinary Chamber gave rise to a violation of the applicant's right to a "tribunal established by law", in the light of the three-step test formulated in *Guðmundur Andri Ástráðsson v. Iceland* [GC] and the general principles set out therein.

(i) *Whether there was a manifest breach of the domestic law* – The Court was faced with two fundamentally opposite views of the Polish highest courts on this point. Its task was to review whether those courts in their respective rulings had struck the requisite balance between the various interests at stake and whether, in carrying out that exercise and reaching their conclusions, they had paid due regard to, and respect for, the Convention standards required of a "tribunal established by law". Further, the 2017 Amending Act, being part and parcel of the legislation on the reorganisation of the Polish judiciary, had to be seen in the context of coordinated amendments to domestic law effected for that purpose and having regard to the fact that those amendments and their impact on the Polish judicial system had drawn the attention and prompted the concern of numerous international organisations and bodies, and had become the subject of several sets of proceedings before the CJEU.

The Supreme Court, in its judgment of 5 December 2019 and resolution of 23 January 2020, had established several flagrant breaches of domestic law. It had explained, with extensive reasoning, its conclusions, which it had reached after a thorough analysis and careful evaluation of the relevant domestic law from the perspective of the Convention's fundamental standards and of EU law, and in application of the CJEU's guidance and case-law. It had carried out an in-depth assessment of all the elements relevant to an "independent and impartial tribunal established by law" in the light of the constitutional principles governing the NCJ's functioning, including the principle of the separation and balance of the legislative, executive and judicial powers and the principle of the independence of the judiciary.

However, this had not been the case with the Constitutional Court in its judgments of 20 June 2017 and 20 April 2020.

Considering the apparent absence of a comprehensive, balanced and objective analysis of the circumstances before it in Convention terms, the Constitutional Court's evaluation must be regarded as arbitrary and as such could not carry any weight in the Court's conclusion as to whether there had been a manifest breach, objectively and genuinely identifiable as such, of the domestic law involved in the procedure for judicial appointments to the Disciplinary Chamber. Furthermore, this judgment had to be seen in conjunction with the general context in which the Constitutional Court had operated since the end of 2015 and its actions aimed at undermining the Supreme Court resolution's finding as to the manifest breach of domestic and international law due to the deficient judicial appointment procedure involving the NCJ. These actions had started from the unprecedented interim decision of 28 January 2020. This kind of interference with a judicial body, aimed at incapacitating it in the exercise of its adjudicatory function in the application and interpretation of the Convention and other international treaties, had to be characterised as an affront to the rule of law and the independence of the judiciary. The Constitutional Court's final ruling on that matter given on 21 April 2020 perpetuated this state of affairs.

In view of the foregoing, and in particular the Supreme Court's convincing and forceful arguments of in its judgment of 5 December 2019 and resolution of 23 January 2020, and its conclusions as to the judicial appointment procedure to the Disciplinary Chamber being contrary to the law – the Court found it established that there was a manifest breach of the domestic law.

(ii) *Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges undermined the very essence of the right to a "tribunal established by law"* – As regards the NCJ's degree of independence and whether there had been undue interference by the legislative and executive powers with the appointment process, the Court first referred to the various – and in substance unanimous – opinions of the international organisations and bodies, according to which the changes in the election procedure for the judicial members of the NCJ introduced under the 2017 Amending Act had resulted in the NCJ no longer being independent or able to fulfil its constitutional obligation of safeguarding the independence of courts and judges. In this context it also took into account the circumstances in which the new NCJ had been constituted, in particular: the apparent boycotting of the elections by the legal community following the small amount of candidates; six out of the fifteen appointed judges had been in the past six months appointed as president

or vice-president of courts by the Minister of Justice; the majority of the members of the current NCJ had been linked to or recommended by the ruling party; most of the candidates for election had been proposed by the executive; and the impossibility to verify whether candidates' had required number of signatures because of the executive authorities' initial non-disclosure of the endorsement lists. In connection to the latter, it was the Court's view, that a situation where the public had not been given official clarification as to whether the formal requirement of obtaining sufficient support for the candidates for the NCJ had been met might raise doubts as to the legality of the process of election of its members. Moreover, a lack of scrutiny of who had supported the candidates might raise suspicions as to its members' qualifications and to their direct or indirect ties to the executive. According to the information now in the public domain, the NCJ had been elected with the support of a narrow group of judges with strong ties to the executive and as indicated by the Supreme Court, there had also been doubts as to whether all elected members of the NCJ had fulfilled the legal requirement of having been supported by twenty-five active judges.

In view of the foregoing, the Court found that by virtue of the 2017 Amending Act, which deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers, had achieved a decisive influence on the composition of the NCJ. The Act had practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard enabling the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities had taken advantage – as shown, for instance, by the circumstances surrounding the endorsement of judicial candidates for the NCJ. At the same time, under the 2017 Act on the Supreme Court, depriving the First President of the Supreme Court her prerogative to announce vacant positions in that court, in favour of the President of Poland, had further weakened the involvement of the judiciary in the judicial appointment process, in particular appointments to the Supreme Court.

Assessing all the above circumstances as a whole, the Court found that the breach of the domestic law had inherently tarnished the impugned appointment procedure since, as a consequence of that breach, the recommendation of candidates for judicial appointment to the Disciplinary Chamber – a condition sine qua non for appointment by the President of Poland – had been entrusted to the NCJ, a body that lacked sufficient guarantees of independence from the legislature and the executive. A procedure for appointing judges which, as in the present case, disclosed an undue influence of the legislative and executive powers on the appointment of judges was per se incompatible with Article 6 § 1 and as such, amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of judges so appointed.

Thus, the breaches in the procedure for the appointment of judges to the Disciplinary Chamber were of such gravity that they impaired the very essence of the right to a "tribunal established by law".

(iii) *Whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed by the domestic courts, and whether remedies were provided* – There was no procedure under Polish law whereby the applicant could challenge the alleged defects in the procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court. Consequently, no remedies had been provided.

*Overall* – The Disciplinary Chamber of the Supreme Court, which examined the applicant's case, was not a "tribunal established by law".

*Conclusion*: violation (unanimously).

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

(See also *Gestur Jónsson and Ragnar Halldór Hall v. Iceland*, 68271/14 and 68273/14, 30 October 2018, Legal Summary; *Guðmundur Andri Ástráðsson v. Iceland* [GC], 26374/18, 1 December 2020, Legal summary; and *Xero Flor w Polsce sp. z o.o. v. Poland*, 4907/18, 7 May 2021, Legal Summary)

## Article 6 § 1 (criminal/pénal)

### Fair hearing/Procès équitable

**Failure by Court of Appeal to order fresh hearing of accused before overturning their acquittal at first instance: *violation***

**Omission de la cour d'appel d'ordonner une nouvelle audition des inculpés avant d'infirmer leur acquittement en première instance : *violation***

*Maestri and Others/et autres – Italy/Italie*, 20903/15 et al., Judgment/Arrêt 8.7.2021 [Section I]

English translation of the summary – Version imprimable

*En fait* – La cour d'appel a omis d'ordonner une nouvelle audition des requérants ainsi que des témoins à charge avant, d'une part, de confirmer

la condamnation des requérants pour l'infraction de fraude aggravée, puis constater leur culpabilité pour le délit d'association de malfaiteurs, infirmant ainsi le jugement de première instance sur ce point et, d'autre part, de renverser le verdict d'acquittement prononcé en première instance à l'égard de la requérante Maestri.

*En droit* – Article 6 § 1

a) *Concernant les requêtes 20973/15, 20980/15 et 24505/15* – Le tribunal a condamné pour fraude aggravée les six requérants après avoir entendu plusieurs témoins et recueilli d'autres preuves, et a acquitté les requérants pour le chef d'inculpation d'association de malfaiteurs. La cour d'appel, tout en confirmant cette condamnation, a également constaté la culpabilité des requérants pour le délit d'association de malfaiteurs, infirmant ainsi le jugement de première instance sur ce point.

Pour condamner pour la première fois les requérants pour le délit d'association de malfaiteurs, la cour d'appel n'a ni procédé à un nouvel établissement des faits ni donné une nouvelle interprétation des déclarations des témoins, mais elle a effectué une appréciation différente des éléments constitutifs de l'infraction. L'existence des faits reprochés aux requérants a été établie par le tribunal sur la base des pièces écrites du dossier et des déclarations des témoins et elle a entraîné dès la première instance la condamnation des intéressés pour le délit de fraude. Le fait que la cour d'appel ait donné une nouvelle qualification juridique aux faits déjà établis par le tribunal et qu'elle soit arrivée à une conclusion différente quant à l'existence des éléments constitutifs de l'infraction d'association de malfaiteurs, en plus de celle de fraude, ne saurait infirmer en soi cette conclusion.

Selon la Cour, on ne saurait dès lors considérer qu'en ne procédant pas à une nouvelle audition des témoins à charge la cour d'appel ait restreint les droits de la défense des requérants en l'espèce. D'ailleurs, les intéressés n'ont pas apporté d'éléments de nature à laisser penser qu'une nouvelle audition desdits témoins aurait été utile dans l'appréciation des points en question.

La Cour doit maintenant déterminer si les questions dont la cour d'appel se trouvait saisie pouvaient effectivement se résoudre, aux fins d'un procès équitable, sans une appréciation directe des témoignages livrés en personne par les requérants.

Concernant tout d'abord le rôle de la cour d'appel et la nature des questions dont elle avait à connaître, en vertu du code de procédure pénale, cette juridiction est compétente pour rendre un nouveau jugement sur le fond après avoir examiné l'affaire en fait et en droit et avoir procédé à une appréciation globale de la culpabilité ou de l'innocence des intéressés. Dans les limites des moyens d'appel présentés par les parties, elle peut décider soit de confirmer soit d'infirmer le verdict du tribunal, en administrant le cas échéant de nouveaux moyens de preuve. En outre, elle peut modifier la qualification juridique des faits et alourdir la mesure ou le type de la peine infligée. La procédure ordinaire devant la cour d'appel est dès lors une procédure régie par les mêmes règles qu'un procès sur le fond et elle est menée par une juridiction dotée de la plénitude de juridiction.

Ensuite, en réformant le verdict du tribunal et en statuant sur la question de la culpabilité des requérants pour le délit d'association de malfaiteurs, la cour d'appel a également examiné les intentions des intéressés et s'est prononcée pour la première fois sur des circonstances subjectives les concernant, affirmant notamment qu'ils ne pouvaient pas ignorer, malgré leur méconnaissance des questions juridiques, que l'activité des sociétés était illégale. Aux yeux de la Cour, un tel examen implique, de par ses caractéristiques, une prise de position sur des faits décisifs pour la détermination de la culpabilité des requérants. Lorsque l'inférence d'un tribunal a trait à des éléments subjectifs, il n'est pas possible de procéder à l'appréciation juridique du comportement de l'accusé sans avoir au préalable essayé de prouver la réalité de ce comportement, ce qui implique nécessairement la vérification de l'intention de l'accusé par rapport aux faits qui lui sont imputés.

Compte tenu de l'étendue de l'examen effectué par la cour d'appel et de l'enjeu pour les requérants, les questions devant être examinées par la cour d'appel appelaient une appréciation directe des déclarations des accusés.

La Cour doit donc établir si les intéressés ont eu en l'espèce une possibilité adéquate d'être entendus et d'exposer en personne leurs propres arguments en défense devant la cour d'appel.

Les requérants, qui avaient participé aux débats en première instance et qui étaient représentés par les avocats de leur choix, ont décidé de ne pas se présenter aux audiences devant la cour d'appel bien qu'ils fussent cités à comparaître en leur qualité d'accusés conformément aux règles de procédure. Il s'ensuit qu'ils ont renoncé de manière non équivoque à leur droit de prendre part aux audiences devant la cour d'appel.

S'agissant de la question de savoir si l'absence des intéressés aux audiences, en plus de constituer une renonciation au droit d'assister aux débats, constituait également une renonciation de leur part au droit d'être entendus par la juridiction d'appel, le fait qu'un accusé ait renoncé à son droit de participer à l'audience n'exempte pas en soi la juridiction

d'appel qui procède à une appréciation globale de la culpabilité ou de l'innocence, de l'obligation qui est la sienne d'évaluer directement les éléments de preuve présentés en personne par l'inculpé qui proclame son innocence et qui n'a pas explicitement renoncé à prendre la parole. Dans ces circonstances, il appartient aux autorités judiciaires d'adopter toutes les mesures positives propres à garantir l'audition de l'intéressé, même si celui-ci n'a pas assisté à l'audience, n'a pas sollicité l'autorisation de prendre la parole devant la juridiction d'appel et ne s'est pas opposé, par l'intermédiaire de son avocat, à ce que cette dernière rende un arrêt au fond.

À cet égard, la Cour de cassation s'est exprimée d'une manière conforme aux principes susmentionnés lorsqu'elle a affirmé que le fait d'être contumax à l'audience ne pouvait pas être interprété comme une renonciation de l'accusé au droit d'être entendu par le juge d'appel pour autant que le juge n'avait pas ordonné d'audition et qu'une audience à cet effet n'avait pas été fixée. En effet, en droit italien, la citation à comparaître à la première audience ordonnée ne correspond pas à une convocation du juge en vue d'être entendu. À cet égard, s'agissant de la requête 20903/15, M^me^ Maestri, bien que présente à l'audience, ne fut pas pour autant auditionnée par la cour d'appel.

Il s'ensuit qu'on ne saurait affirmer que les requérants ont explicitement renoncé en l'espèce à leur droit d'être entendus par la cour d'appel, étant donné que, même selon le droit interne, une telle renonciation aurait été possible uniquement si une audition avait été ordonnée et seulement si les intéressés n'y avaient pas consenti ou s'ils ne s'étaient pas présentés à l'audience fixée pour l'audition.

Par ailleurs, il ressort des observations du Gouvernement qu'aurait été ouverte aux requérants le loisir de se prévaloir des déclarations spontanées qui relèvent du libre choix de l'inculpé, lequel a la possibilité de s'exprimer librement à tout moment sans que ni le juge ni les autres parties au procès puissent lui poser de questions, en vertu du droit de l'accusé de se taire et de ne pas contribuer à sa propre incrimination. Or la Cour n'est pas convaincue que la possibilité pour l'accusé de faire de telles déclarations puisse satisfaire l'obligation faite au juge d'entendre personnellement l'intéressé sur des faits et des questions décisives pour l'établissement de son éventuelle culpabilité. Il est déraisonnable d'avancer que pour assurer sa défense un accusé prendra la parole de sa propre initiative et choisira de s'exprimer sur des faits pour lesquels il a été acquitté en première instance. Un accusé n'a aucun intérêt à demander que les éléments de preuve relatifs à des faits pour lesquels il a été acquitté en première instance soient réévalués par le juge d'appel. Il appartient à la juridiction d'appel de prendre des mesures positives à ces fins.

Sur ce dernier point, la Cour de cassation a affirmé que le juge d'appel qui s'apprête à infirmer un jugement d'acquittement et qui, pour ce faire, ordonne la réouverture de l'instruction ainsi que l'audition des témoins (dans la procédure de l'«*esame*») est également tenu d'ordonner l'audition de l'accusé en personne dès lors que les déclarations de celui-ci sont décisives. La cour d'appel avait tout le loisir de rouvrir l'instruction et d'ordonner l'audition des requérants afin de leur offrir une possibilité adéquate de s'exprimer à propos notamment de l'élément intentionnel du délit d'association de malfaiteurs, question qui revêtait une importance cruciale pour l'établissement de leur éventuelle culpabilité pour ladite infraction.

En revanche, pour ce qui est de l'argument avancé par la Cour de cassation consistant à dire que le fait que l'accusé soit le dernier à prendre la parole suffirait, si le droit de l'accusé à être le dernier à parler revêt une importance certaine, il ne saurait se confondre avec son droit d'être entendu, pendant les débats, par un tribunal.

Vu l'ensemble de la procédure suivie, le rôle de la cour d'appel et la nature des questions à trancher, le fait que la condamnation pour le délit d'association de malfaiteurs soit intervenue sans que les requérants aient pu exposer lors d'une audition (*esame*) devant la cour d'appel leurs arguments concernant des faits déterminants pour l'établissement de leur éventuelle culpabilité n'est pas, sauf renonciation de leur part, compatible avec le principe du procès équitable au sens de l'article 6 § 1.

b) *Concernant la requête 20903/15* – M^me^ Maestri a été acquittée en première instance pour tous les chefs d'inculpation retenus contre elle. Le tribunal a considéré que les déclarations des témoins et les autres pièces du dossier avaient démontré qu'elle s'était contentée de tenir la comptabilité des sociétés en suivant les directives des administrateurs et qu'elle n'avait donc pas joué de rôle actif dans l'activité des sociétés.

La cour d'appel a infirmé le jugement rendu en première instance et elle s'est écartée de l'avis du tribunal au sujet de l'interprétation de ces mêmes déclarations. La cour d'appel a prononcé la culpabilité de la requérante après s'être convaincue que les témoignages de M. et de C., en particulier, lesquels avaient décrit dans le détail les tâches qu'accomplissait l'intéressée, avaient permis de démontrer que celle-ci avait joué un rôle proactif dans la gestion des sociétés. Aux yeux de la Cour, il ne fait aucun doute que les questions que la cour d'appel avait à trancher avant de décider d'infirmer le verdict d'acquittement et de condamner l'intéressée

pouvaient, aux fins d'un procès équitable, être examinées de manière appropriée sans appréciation directe des témoignages à charge de M. et C., compte tenu notamment de la valeur probante de ceux-ci.

Par ailleurs, la requérante, bien que présente aux audiences, n'a pas été auditionnée par la cour d'appel et elle a donc été privée, à l'instar des requérants, de la possibilité d'exposer ses propres arguments sur des questions de faits déterminants pour l'appréciation de sa culpabilité.

Dès lors, en ne procédant pas à une nouvelle audition des témoins à charge et de la requérante en personne avant d'infirmer le verdict d'acquittement dont celle-ci avait bénéficié en première instance, la cour d'appel a sensiblement restreint les droits de la défense de l'intéressée.

Les considérations qui précèdent sont suffisantes pour permettre à la Cour de conclure que, considérée dans son ensemble, la procédure pénale visant la requérante a été inéquitable.

*Conclusion* : violation (unanimité).

Article 41 : 6 500 EUR à chaque requérant pour préjudice moral.

(Voir aussi *Botten c. Norvège*, 16206/90, 19 février 1996, Résumé juridique ; *Hermi c. Italie* [GC], 18114/02, 18 octobre 2006, Résumé juridique ; *Igual Coll c. Espagne*, 37496/04, 10 mars 2009, Résumé juridique ; et *Júlíus Þór Sigurþórsson c. Islande*, 38797/17, 16 juillet 2019, Résumé juridique)

## Fair hearing/Procès équitable

**Allegation of financial incapacity not taken into account in the imposition of administrative detention for non-compliance with judgments ordering repayment of debts: *violation***

**Allégation d'incapacité financière non prise en compte lors de la condamnation à une détention administrative pour la non-exécution de jugements ordonnant de rembourser des dettes : *violation***

*Karimov and Others/et autres – Azerbaijan/Azerbaïdjan*, 24219/16 et al., Judgment/Arrêt 22.7.2021 [Section V]

English translation of the summary – Version imprimable

*En fait* – Les requérants ont été condamnés à des peines de détention administrative pour la non-exécution de jugements leur ordonnant de rembourser des dettes à des créanciers privés. Ils se plaignent d'un manque d'équité de la procédure, alléguant qu'ils ont été condamnés sans que leurs arguments relatifs à leur incapacité financière à rembourser leurs dettes aient été pris en compte, et ce, en dépit des prescriptions posées par le droit interne.

*En droit* – Article 6 § 1 : Le grief soulevé relève de l'équité de la procédure administrative ayant des implications pénales, au regard des exigences de l'article 6.

La Cour limitera son analyse aux procédures clôturées par des décisions définitives de condamnation émanant des juridictions répressives internes et ayant conduit à une privation de liberté de nature administrative des requérants, en tant que débiteurs.

Toute partie à une procédure judiciaire doit pouvoir escompter une réponse spécifique et explicite aux moyens décisifs pour l'issue de la procédure en cause. Par ailleurs, la motivation des décisions rendues par les juridictions nationales ne doit pas être automatique ou stéréotypée.

Les tribunaux internes ont reconnu les requérants coupables de l'infraction réprimée par le code des infractions administratives et leur ont infligé une peine de détention administrative. Pour établir la culpabilité des requérants, il fallait établir qu'ils n'avaient pas exécuté sans raison valable les jugements leur ordonnant de rembourser leurs dettes à leurs créanciers. Les motifs invoqués par le débiteur pour justifier qu'il ne s'acquitte pas de ses obligations pécuniaires sont déterminants dans la caractérisation de l'infraction puisqu'ils sont susceptibles de créer une cause exonératoire de responsabilité. Une appréciation personnalisée de la situation financière des débiteurs et de leur bonne foi dans leur défaillance est essentielle. La procédure étant de nature pénale mais ayant des aspects administratifs imposait à la partie portant l'accusation d'apporter la preuve que les débiteurs défaillants disposaient en réalité et contrairement à leurs positions, de la capacité financière de s'acquitter de leur dette.

Dans ces circonstances, il est clair que les arguments avancés par les requérants devant les tribunaux internes, notamment l'argument selon lequel la raison de non-exécution était leur incapacité financière à rembourser les dettes, revêtaient d'une importance centrale au regard des termes mêmes de la loi, et exigeaient une réponse claire et l'établissement en justice du bien-fondé, ou non, des raisons valables invoquées par les requérants. À cet égard, si la raison de non-exécution avait été l'incapacité financière des requérants, cela pourrait également soulever un problème sous l'angle de l'article 1 du Protocole n° 4, selon lequel « nul ne peut être privé de sa liberté pour la seule raison qu'il n'est pas en mesure d'exécuter une obligation

contractuelle ». Or les tribunaux internes n'ont aucunement cherché à savoir si la non-exécution était sans raison valable et ne se sont jamais prononcés sur ce moyen, bien qu'ils aient été invités à le faire par les requérants à la fois en première instance et en appel. Cette absence d'examen de la raison de non-exécution par les tribunaux internes apparaît d'autant plus contradictoire que les jugements de condamnation eux-mêmes se réfèrent à la situation pécuniaire précaire des requérants sans émettre des doutes sur la véracité factuelle des difficultés financières obérant le remboursement.

De surcroît, la Cour constitutionnelle elle-même a mis en avant l'exigence d'un examen détaillé de tous les faits par les tribunaux lors de l'application de la sanction ou de la peine administrative pour la non-exécution des actes judiciaires, ainsi qu'une nécessaire appréciation du caractère intentionnel du défaut de paiement et de la mise en œuvre par le débiteur des moyens disponibles afin d'exécuter les demandes de l'huissier de justice. Force est de constater que ces éléments n'ont pas fait l'objet d'un examen par les juridictions répressives du fond.

Il s'ensuit que l'argument essentiel que les requérants ont pourtant mis au centre des débats, et qui était décisif pour l'issue de la procédure, n'a pas reçu de réponse spécifique et explicite, et que, par conséquent, les tribunaux internes ont manqué à leur obligation de motiver leurs décisions découlant de l'article 6.

*Conclusion* : violation (unanimité).

Invoquant l'article 1 du Protocole n° 4, les requérants ont dénoncé leur détention administrative en ce qu'elle aurait été seulement motivée par l'impossibilité pour eux d'exécuter leurs obligations contractuelles. Toutefois, eu égard aux faits de l'espèce, aux thèses des parties et aux conclusions formulées sous l'angle de l'article 6 § 1, la Cour a estimé qu'il n'y a pas lieu d'examiner la recevabilité et le bien-fondé du grief.

Article 41 : 3 600 EUR pour préjudice moral.

(Voir aussi *Ruiz Torija c. Espagne*, 18390/91, 9 décembre 1994, Résumé juridique, et *Higgins et autres c. France*, 20124/92, 19 février 1998, Résumé juridique)

## ARTICLE 7

### *Nullum crimen sine lege*

**Foreseeable prosecution of prison officer for providing information about prison to journalist in exchange for money: *no violation***

**Décision prévisible d'engager des poursuites contre un gardien de prison ayant communiqué à un journaliste, en échange d'argent, des informations sur la prison : *non-violation***

*Norman – United Kingdom/Royaume-Uni*, 41387/17, Judgment/Arrêt 6.7.2021 [Section IV]

(See Article 10 below/Voir l'article 10 ci-dessous, page 45)

## ARTICLE 8

### Respect for private and family life/Respect de la vie privée et familiale
### Positive obligations/Obligations positives

**Post-mortem and organ removal for preservation of prematurely born child with rare disease despite mother's objection and specific wishes for ritual burial: *violation***

**Hospital's failure to provide mother with sufficient information required in delicate circumstances of case: *violation***

**Autopsie et prélèvement d'organes, aux fins de leur préservation, d'un enfant prématuré atteint d'une maladie rare malgré les objections de la mère et son souhait spécifique d'un enterrement ritualisé : *violation***

**Manquement de l'hôpital à communiquer à la mère des informations suffisantes dans les circonstances délicates de l'affaire : *violation***

*Polat – Austria/Autriche*, 12886/16, Judgment/Arrêt 20.7.2021 [Section IV]

Traduction française du résumé – Printable version

*Facts* – The applicant's son was born prematurely and died two days later. He had been diagnosed with a rare disease so the treating doctors decided that a post-mortem examination would be necessary to clarify the diagnosis. The applicant and her husband refused on religious grounds and explained that they wished to bury their son in accordance with Muslim rites, which required the body to remain as unscathed as possible. Despite their objections, the post-mortem was performed and practically all the child's internal organs were removed. The applicant, not having been informed of the extent of the post-mortem, believed she could ritually bury her son; she only realised the actual extent during the organised funeral in Turkey which consequently had to be called off. The applicant unsuccessfully brought civil proceedings for damages.

*Law* – Articles 8 and 9 (*performance of post-mortem examination despite applicant's objections*): In the present case, there had been an interference, which had been prescribed by domestic law, with the applicant's private and family life as well as her right to manifest her religion. Further, the post-mortem had been conducted for the safeguarding of scientific interests and served the legitimate aim of the protection of the health of others. As to the proportionality of the interference, the Court noted at the outset that the case concerned the regulation of post-mortem examinations in public hospitals and the question of whether and in which cases close relatives of the deceased should be granted the right to object to a post-mortem examination for reasons related to private life and religion where interests of public health clearly called for such a measure. In this connection, Contracting States were under a positive obligation, by virtue of Article 8, to take appropriate measures to protect the health of those within their jurisdiction; the State's margin of appreciation was thus wide. The Court then found as follows:

There was no ground to question the expert findings of the pathologist that the post-mortem had been carried out *lege artis* or the domestic legislative choice not to grant a right to object to a post-mortem examination of close relatives on religious or any other grounds in all cases; the rights under Articles 8 and 9 were not absolute and therefore did not require the Contracting States to grant an absolute right to lodge an objection in that regard.

Although the relevant domestic laws did not give the authorities the right to conduct post-mortem examinations in each and every case, the Austrian legislature had chosen to give precedence to the interests of science and the health of others over religious or any other reasons for objection on the part of a deceased person's relatives in cases of necessity for safeguarding scientific interests, particularly if a case was diagnostically unclear. In this respect, the Court pointed to the Government's submissions on the importance of such post-mortems to the advancement of modern medicine as well as the long and carefully preserved tradition of autopsy law in Austria, which was perceived as an integral part of the constitutionally guaranteed freedom of science; a right closely related to the positive obligations under Articles 2 and 8 to take appropriate measures to protect the life and health of those within a State's jurisdiction. The legitimate aim of the protection of the health of others through the conduct of post-mortem examinations was thus of particular importance and weight in the instant case. At the same time, the Court was mindful of the relevance in this context of the applicant's interest in ensuring that the remains of her deceased son were respected for the purpose of the funeral, a concern that she had expressed from the beginning.

Bearing in mind the evidence taken during the domestic proceedings, the Court was satisfied, in line with the domestic courts' findings, that the legal requirement that there be a scientific interest in performing a post-mortem examination had been met. Notwithstanding, domestic law left a certain scope of discretion to the doctors deciding on whether a post-mortem examination should be carried out in any given case and as to the extent of the intervention necessary. It therefore did not exclude that a balancing of competing rights and interests could or should have been carried out. The applicant's reasons, however, for opposing the post-mortem, had not been taken into account by the hospital staff. Nor had the Court of Appeal, in deciding her damages' claim, weighed the importance of the scientific interest in the post-mortem against her particular private interest in having her son's body "as unscathed as possible" for the religious funeral. Further, although, the Supreme Court had addressed, to some extent, the proportionality of the interference with her rights, it had given little to no consideration to her reasons for opposing the post-mortem, thus insufficiently addressing her individual rights under Articles 8 and 9 and the "necessity" of the post-mortem in that light.

Consequently, albeit the wide margin of appreciation afforded to the domestic authorities, in the instant case they had not struck a fair balance between the competing interests at stake by reconciling the requirements of public health to the highest possible degree with the right to respect for private and family life nor had they weighed the applicant's interest in burying her son in accordance with her religious beliefs in the balance.

*Conclusion*: violation (unanimously).

Article 8 (*as to the hospital's duty to disclose information regarding the post-mortem*): As the substance of the applicant's complaint was not that the State had acted in a certain way, but that it failed to act, the Court approached the case from the perspective of a positive obligation on the part of the respondent State under Article 8.

Although there appeared to be no clear rule under domestic law governing the extent of information that must or must not be given to close relatives of a deceased person in respect of whom a post-mortem had been performed, this was not sufficient in itself to find a violation of the respondent State's positive obligations. The question was thus whether, given the circumstances, the authorities had undertaken reasonable steps to provide the

applicant with information as to the extent the post-mortem performed, and of the removal and whereabouts of his organs. The Court replied in the negative. In particular, the circumstances of the case were as delicate as those in the case of *Hadri-Vionnet v. Switzerland* and required an equally high degree of diligence and prudence on the part of the hospital staff when interacting with the applicant. The applicant, who had just lost her child, had found herself with no legal right to object to a post-mortem. She had informed the hospital staff of the reasons of her objection and that, according to her religious beliefs, the deceased child's body had to be as unscathed as possible for the burial ceremony. Consequently, they had had an even greater duty to provide her with appropriate information regarding what had been done and what would be done with her child's body as well as, and without undue delay, information concerning the removal and the whereabouts of its organs. They had failed to so, however, leading her to believe that a ritual washing and a funeral ceremony in accordance with her beliefs could be held. While the Supreme Court's argument that omitting to give detailed information would be less burdensome to the relatives might be valid in some situations, it did not take into account the specific situation in the applicant's case and her particular wishes which had been communicated to the hospital at several occasions. As that court held, it could not be seen as common knowledge that all organs were removed during the post-mortem of a new-born. It also remained undisputed that the hospital staff had initially denied having removed any organs, but later admitted that they had in fact done so. The applicant had been handed her son's organs only after two interventions by the Patients' Ombudsperson.

In sum, the behaviour of the hospital staff towards the applicant had clearly lacked the diligence and prudence required by the situation. Last but not least, whereas the expert opinions had unanimously found that the post-mortem had been justified in order to be able to clarify the diagnosis, nothing therein mentioned any necessity to keep the organs for scientific or other reasons for several weeks or months.

*Conclusion*: violation (unanimously).

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

(See also *Hadri-Vionnet v. Switzerland*, 55525/00, 14 February 2008, Legal Summary; *Solska and Rybicka v. Poland*, 30491/17 and 31083/17, 20 September 2018, Legal Summary; and *Vavřička and Others v. the Czech Republic* [GC], 47621/13 et al., 8 April 2021, Legal Summary)

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

### Statutory provision for abortion in the case of foetal abnormalities declared unconstitutional by the Polish Constitutional Court: *communicated cases*

### Disposition légale autorisant l'avortement en cas d'anomalies du fœtus déclarée inconstitutionnelle par la Cour constitutionnelle polonaise : *affaires communiquées*

*K.B. and Others/et autres – Poland/Pologne*, 1819/21 et al., Communication [Section I]
*K.C. and Others/et autres – Poland/Pologne*, 3639/21 et al., Communication [Section I]
*A.L.-B. and Others/et autres – Poland/Pologne*, 3801/21 et al., Communication [Section I]

Traduction française du résumé dans les affaires *K.B. et autres*, *K.C. et autres* et *A.L.-B. et autres* – Printable version in the *K.B. and Others*, *K.C. and Others* and *A.L.-B. and Others* cases

The Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act 1993 provided for the possibility of legal abortion in the case of foetal abnormalities. In 2017 a group of parliamentarians unsuccessfully applied to the Constitutional Court to have the relevant provision declared unconstitutional. A similar application was subsequently lodged by a group of parliamentarians in 2019 and, in October 2020, the Constitutional Court held that the provision was incompatible with the Constitution. The judgment came into force in January 2021, after the present applications with the Court had been lodged.

The applicants – Polish nationals – allege that, following the delivery of the judgment, certain hospitals refused to perform abortions in cases with foetal abnormalities. They also make individual submissions as to their personal circumstances.

They complain in particular that they are potential victims of a breach of Article 8, since the domestic law obliges them to adapt their conduct: if pregnant, they are obliged to carry the foetus to term even in a situation when the foetus is shown to be defective. They also complain that the restriction was not "prescribed by law", as the Constitutional Court was irregularly composed, given that three members had been elected in breach of the Constitution, and the appointment of the President of the Constitutional Court, who presided in the present case, was open to challenge (see *Xero Flor w Polsce sp. z o.o. v. Poland*, 4907/18, 7 May 2021, Legal Summary); and that one of the sitting judges was not impartial, since she had been involved in the previous case as a party, while a member of parliament.

The applicants further complain that they are the potential victims of a breach of Article 3, in the light of the distress caused by the prospect of being forced to give birth to an ill or dead child.

*Communicated* under Articles 3 and 8 of the Convention.

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

**Newspaper publication of private information and non-blurred images of applicant taken covertly and under pretences: *violation***

**Publication dans la presse d'informations privées et d'images non floutées du requérant, prises à son insu et au moyen d'un stratagème : *violation***

*Hájovský – Slovakia/Slovaquie*, 7796/16, Judgment/Arrêt 1.7.2021 [Section I]

Traduction française du résumé – Printable version

*Facts* – After publishing an advertisement in a nationwide daily newspaper aimed at finding a surrogate mother, the applicant found himself the subject of a television report by an investigative reporter who had recorded her meetings with him covertly whilst pretending to be a potential surrogate mother. This was followed by the publication, in print and online, of an article entitled "Trade in unborn children", in a popular daily newspaper with national coverage. This described the applicant's story as depicted by the television report, contained information on his private matters as well as photographs of him from the report taken without his consent. Although, he successfully brought an action for the protection of his personal integrity against Slovak television, the one he brought against the newspaper's publisher was dismissed.

*Law* – The issue in the instant case was whether the domestic courts had ensured a fair balance between the protection of the applicant's private life and the defendant's right to freedom of expression. The Court thus reviewed, in the light of the case as a whole, whether the decisions taken by the domestic courts pursuant to their power of appreciation had been in conformity with the criteria laid down in its case-law. In particular, it examined the following applicable criteria:

(a) *How well-known was the applicant, the applicant's conduct prior to the publication of the article in question and the subject matter* – The domestic courts had considered, in particular, that by publishing the advertisement the applicant had decided to enter the public arena and should thus have had expected a greater amount of public attention, especially as his identity had already been revealed in the television report. However, the sole fact that, as an ordinary person, he had made use of an advertisement, could not be an argument for reducing the protection that should have been afforded to him under Article 8. He had not been a public or newsworthy figure within the meaning of the Court's case-law, had not sought any public exposure beyond placing the advertisement – this had only revealed his readiness to have recourse to commercial surrogacy while promising confidentiality – nor could he have suspected that by talking to the person who had contacted him as a potential surrogate mother, he had run a risk of being recorded and having his intentions and identity revealed in the media. The assessment of the applicant's prior conduct had therefore been flawed.

As to the subject matter, the article had revealed some details of the applicant's private life. However, as it had also mentioned the involvement of (unnamed) doctors who were to have helped with the assisted reproduction and the falsification of documents, and the lack of legislation regulating that practice, the Court accepted the domestic courts' conclusion that it had been aimed at informing people about the controversial public-interest issue of surrogacy.

(b) *The content, form and consequences of the article* – The article contained some details about the applicant's background, his intentions and the content about his negotiations with the pretend surrogate mother. It conveyed a message of indignation about the fact that although trafficking of unborn children had been illegal in Slovakia, the applicant could not be punished for his action. The domestic courts had found that it did not contain any harsh or vulgar expressions intending to defame or create scandal about the applicant, and that the critical value judgments contained therein had relied on the information which, albeit insufficiently precise, had been true in substance. Although, the article had portrayed the applicant rather negatively and unfavourably, in the circumstances and in the light of the previous television report, this in itself did not give rise to a breach of his right to respect for his private life.

(c) *Contribution to a debate of general interest* – The definition of what constituted a subject of general interest depended on the circumstances of the case. In the instant case and assessing the publication as a whole, the article could be considered as having been written as part of a debate which had been likely to be of significant interest to the general public. Although it contained little about the phenomenon of surrogacy in general, it had been published two days after the broadcast of the television report which had, as per the Government,

caused a "public storm" and had thus been closely linked in time to those events.

As regards, however, the potential contribution to a public-interest debate of publishing the applicant's photographs, nothing in the article or the case file materials substantiated any general interest reasons for the journalist's decision to include the photographs without taking any particular precautions, such as masking the applicant's face. Given that the applicant had not been known to the public (apart from the television report), there was nothing to suggest that the publication had had any inherent informative value or had been properly and adequately used. Nor had the domestic courts substantiated their conclusion that the publication of the photographs had been necessary for the purposes of news reporting within the meaning of Article 12 § 3 of the Civil Code by any relevant and convincing arguments. Hence, although the article addressed a matter of public interest, the method used for producing the article, notably the publication of large-size photographs of the applicant, could hardly be said to be capable of contributing to any debate on such a matter.

(d) *Circumstances in which the photographs were taken* – The Court reiterated that the task of imparting information necessarily included "duties and responsibilities", as well as limits which the press had to impose on itself spontaneously. In the present case, the domestic courts appeared to have had attached particular importance to the fact that the applicant's identity had already been revealed in the television report. Admittedly, this was a factor that might be considered in the balancing process and lead to the conclusion of no need to restrict the disclosure of an identity. The fact, however, that information was already in the public domain did not necessarily remove the protection of Article 8 of the Convention especially if the person concerned neither revealed the information nor consented to its disclosure. Thus, notwithstanding that the information in question had already been known to the public, a further dissemination of such "public information" had still to be weighed against the applicant's right to privacy; privacy was also about preventing intrusion.

It was undisputed but also clear from the television report that the reporter had contacted the applicant under pretences and that she had made the recordings with a hidden camera without the applicant being aware of it or having consented to it. The applicant had also not consented to the photographs' publication. As the applicant could not have expected to be recorded or reported on in a public manner and had not voluntarily cooperated with the media, his reasonable expectations as to privacy were significant, although not necessarily conclusive, factor. Further, although it had been an established fact that the material concerning the applicant had been obtained illegally and broadcast in breach of the law, it had not been taken into account by the domestic courts. Nor had they assessed whether the journalist had acted in good faith, with necessary rigour and taking necessary precautions when disseminating material emanating from another source. The circumstances in which the photographs had been taken should have alerted the journalist and the newspaper's publisher to the need to use that material with caution and not to disseminate it without masking or blurring the applicant's face.

Bearing in mind the above, and more specifically, the flawed assessment of the applicant's prior conduct, the failure to consider the manner in which the photographs had been taken and, most importantly, to assess the contribution to the public-interest debate of broadcasting non-blurred images of the applicant, the domestic courts had not exercised the balancing exercise between the competing rights in line with the Court's case-law criteria. In these circumstances, and notwithstanding the margin of appreciation allowed to the domestic courts in this field, the State had failed to fulfil its positive obligations under Article 8 of the Convention.

*Conclusion*: violation (unanimously).

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

(See also *Peck v. the United Kingdom*, 44647/98, 28 January 2003, Legal Summary; *Von Hannover v. Germany*, 59320/00, 24 June 2004, Legal Summary; and *Haldimann and Others v. Switzerland*, 21830/09, 24 February 2015, Legal Summary)

## Respect for private life/Respect de la vie privée

**Practically unfettered power exercised by intelligence service implementing surveillance operation, without adequate legal safeguards: *violation***

**Pouvoir pratiquement illimité des services de renseignement pour mener une opération de surveillance sans garanties juridiques suffisantes : *violation***

*Varga – Slovakia/Slovaquie*, 58361/12 et al., Judgment/Arrêt 20.7.2021 [Section III]

Traduction française du résumé – Printable version

*Facts* – The applicant was subjected to surveillance under an operation code-named "Gorilla", which aimed at monitoring him and meetings tak-

ing place in a flat which he owned. The operation was authorised by three warrants issued by the Regional Court and at the request of the Slovak Intelligence Service ("the SIS"); the warrants were subsequently annulled by the Constitutional Court. Some of the material allegedly linked to the operation was anonymously posted on the internet. The applicant took numerous steps at the domestic level, among other things, to verify the facts and obtain more information, to complain about the implementation of the warrants, and to have all of the material produced by the operation destroyed, with only partial success.

*Law* – Article 8

(a) *Interference* – No products of the implementation of the three warrants had been submitted to the Court for assessment, in particular as to whether the monitoring and collection, storing and use of data had actually concerned the applicant's "private life".

However, it was undisputed that the applicant had been subjected to surveillance on the basis of the three warrants and that various material originating from the implementation of those warrants and concerning him was or still was retained by the SIS and the Regional Court. In view of the findings of the said domestic courts and the specific nature of measures of covert surveillance, which inherently made it difficult if not impossible for the person concerned to establish the facts in any detail, the Court was prepared to accept that the implementation of the three warrants and the material resulting from it, at least in part, concerned the "private life" of the applicant.

The implementation of the three warrants and the production and retention of the various material resulting from it accordingly had constituted an interference with the applicant's right to respect for his private life.

(b) *Whether the interference was justified* – The Court considered whether the interference had been "in accordance with the law".

(i) *Implementation of the warrants* – The implementation of the three warrants in principle had had a statutory basis and, as required by the domestic law, the warrants had been issued by a judge. No reproach had been made as to the clarity or accessibility of said rules.

However, as the Constitutional Court had subsequently established, the warrants had been fundamentally flawed such as to render them unlawful and unconstitutional. While those deficiencies had been attributable to the issuing court, it had been essentially on the basis of the quashing of the warrants by the Constitutional Court that the Regional Court had found, ruling on the applicant's appeal in his action for the protection of personal integrity, that the implementation of the warrants by the SIS had also violated his rights.

The Regional Court's judgment had involved no assessment of the SIS' acts as such and no such assessment had been made by the Constitutional Court. The submissions by the applicant and the issuing court before the Constitutional Court proceedings tended to portray the image of an intelligence agency that itself drafted the warrants authorising its interference with individual human rights and fundamental freedoms and that of a court which endorsed those drafts without genuinely checking the facts. In those circumstances, the deficiencies of the three warrants as established by the Constitutional Court had tainted the use of technical means of gathering intelligence ("TMGI") by the SIS against the applicant on that basis.

As regards any other means of legal protection against arbitrary interference, domestic legislation provided for a duty on the part of the issuing judge systematically to examine whether the grounds on which the use of the TMGI was authorised continued to exist. However, in the present case, there was no indication that the judges who had issued the warrants in question had undertaken any supervisory task on the basis of that provision. In so far as the contents of their files were known to the Court, they rather suggested a pattern of inaction, which was again supported by the submission of the Regional Court in the constitutional proceedings concerning warrant 3. In particular, it had stated that, as was common at that time, the SIS had not submitted to the Regional Court any records on the implementation of that warrant or the minutes of the destruction of any records so obtained; and that, at that time, those matters had not been governed by any specific rules.

As to any subsequent review of the implementation of the impugned warrants, the passive attitude of the issuing court had culminated in the destruction of its files concerning the implementation of the three warrants. Other authorities, such as the Public Prosecution Service and the Office of the Government, had directly denied having any jurisdiction with regard to the lawfulness of actions by the SIS. Although the applicant's situation had been referred to the Special Parliamentary Committee, it did not appear that the Committee could or did examine any individual aspect of it. In that connection, the Regional Court had found that the control of the SIS had been mainly political and that, in the case of the applicant's associate, the Committee had had no power to decide on any individual claims against the SIS for the protection of personal integrity or compensation for erroneous official conduct of the SIS. In so far as there should

have been any strengthening of parliamentary supervision by the creation of a special commission for the supervision of the use of the TMGI, there was no indication that the commission had actually been created and taken up its duties. In addition, the implementation of the warrants had fallen outside the purview of the administrative-law judiciary and beyond the scope of the relevant legislative act on state liability.

It was true that the Regional Court had ultimately found the implementation of the three warrants to have violated the applicant's rights. However that appeared to have been based on the mere fact of the warrants having been annulled, without any substantive review of the actions of the SIS being made by the Constitutional Court or the Regional Court (see, *mutatis mutandis*, *Akhlyustin v. Russia*, 21200/05, 7 November 2017, Legal Summary). Further, the judgment of the Regional Court appeared to be a turn of events after nearly a decade of the applicant's having actively, albeit in vain, sought a forum in which to have his claims examined. That effort had been marked by an unworkable legislative reference, circular jurisdictional referrals from the Constitutional Court to the Regional Court, together with futile referrals between other authorities and from them to the administrative courts.

In sum, in view of the lack of clarity of the applicable jurisdictional rules, the lack of procedures for the implementation of the existing rules and flaws in their application, when implementing the three warrants the SIS had practically enjoyed a discretion amounting to unfettered power, not being accompanied by a measure of protection against arbitrary interference as required by the rule of law.

(ii) *Retention by the SIS of primary and derivative material* – Since the annulment of warrant 3 by the Constitutional Court, the retention by the SIS of the primary material from its implementation had as such been lacking sufficient basis in law. Although the Constitutional Court had specifically found that it had been a matter within the Regional Court's jurisdiction to ensure compliance by the SIS with the relevant provision of the Privacy Protection Act, the latter had repeatedly denied having jurisdiction to do so. In that connection, the Regional Court had concluded that it had been impossible for the applicant, the court or a judicial enforcement officer to identify the material concerned with any precision, which in practice had also meant that no such claim could be made before the ordinary courts (in that regard see, *mutatis mutandis*, *Centrum för rättvisa v. Sweden* [GC], 35252/08, 25 May 2021, Legal Summary).

Moreover, as to the storing of both the primary material from the implementation of warrant 3 and the derivative material from the implementation of all three warrants under the SIS Act, important aspects of the applicable legal regime had been governed by an internal regulation of the SIS Director, issued under the Act. Its actual content could not be assessed, however, since the regulation was classified and had been disclosed neither to the Court nor to the applicant. Furthermore, there appeared to be no body vested with authority to review the actions taken by the SIS in implementing warrants for the use of TMGI and, by extension, to supervise its compliance with its own internal regulation. In other words, the storing of both the primary and derivative material had been subject to confidential rules which had been both adopted and applied by the SIS, with no element of external control. Such rules had clearly been lacking in accessibility and had provided the application with no protection against arbitrary interference with his right to respect for his private life.

In the light of the above, it was not necessary to examine whether the other requirements of Article 8 § 2 had been complied with, nor to examine on the merits the remainder of the applicant's Article 8 complaint.

*Conclusion*: violation (unanimously).

Article 41: EUR 9,750 in respect of non-pecuniary damage.

## Respect for private life/Respect de la vie privée

**Unlawful prevention of former Supreme Court of Ukraine judges from exercising judicial functions after legislative reform: *violation***

**Anciens juges de la Cour suprême ukrainienne irrégulièrement empêchés d'exercer leurs fonctions judiciaires à la suite d'une réforme législative : *violation***

*Gumenyuk and Others/et autres – Ukraine*, 11423/19, Judgment/Arrêt 22.7.2021 [Section V]

(See Article 6 above /Voir l'article 6 ci-dessus, page 19)

## Respect for family life/Respect de la vie familiale
## Positive obligations/Obligations positives

**Unjustified statutory three-year waiting period for family reunification of persons benefitting from subsidiary or temporary protection, not allowing individualised assessment: *violation***

**Délai d'attente légal de trois ans injustifié pour le regroupement familial des bénéficiaires du statut**

**de protection subsidiaire ou temporaire, en ce qu'il ne permettait pas une appréciation individualisée : *violation***

*M.A. – Denmark/Danemark*, 6697/18, Judgment/Arrêt 9.7.2021 [GC]

Traduction française du résumé – Printable version

*Facts* – The applicant is a Syrian national who fled the country in 2015 and entered Denmark. In Denmark, he was granted "temporary protection status" for one year under the Aliens Act ("the Act") and his residence permit was subsequently extended for one year at a time. The Immigration Service did not find that he had fulfilled the requirements for being granted special "Convention status" or "protection status", for which residence permits were normally granted for five years. After five months of residing in Denmark, the applicant requested family reunification with his wife and two adult children. His request was rejected because he had not been in possession of a residence permit for the last three years, as required in law, and because there were no exceptional reasons to otherwise justify family reunification. The applicant unsuccessfully appealed against the refusal to grant him family reunification with his wife up to the Supreme Court, which handed down its decision in 2016.

In 2018, having resided in Denmark for just over two years and ten months, the applicant submitted a new request for family reunification. After submitting the correct documentation, the applicant's wife was granted a permit and entered the country.

*Law* – Article 8: The Court had not previously been called on to consider whether, and to what extent, the imposition of a statutory waiting period for granting family reunification to persons who benefit from subsidiary or temporary protection status was compatible with Article 8.

(a) *Case-law on the substantive requirements regarding family reunification* – In general, the Court had been reluctant to find that there had been a positive obligation on the part of the member State to grant family reunification, when one or several of the following circumstances had been present:

– family life had been created at a time when the persons involved had been aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious;

– the person requesting family reunification had limited ties to the host country, which by implication was usually the case when he or she had only stayed there for a short time, or stayed there illegally;

– there had been no insurmountable obstacles in the way of the family living in the country of origin of the person requesting family reunification; and

– the person requesting family reunification (the sponsor) could not demonstrate that he/she had sufficient independent and lasting income, not being welfare benefits, to provide for the basic cost of subsistence of his or her family members.

On the other hand, the Court had generally been prepared to find that there had been a positive obligation when several of the following circumstances had been cumulatively present:

– the person requesting family reunification had achieved a settled status in the host country or had strong ties with that country;

– family life had already been created when the requesting person achieved settled status in the host country;

– both the person requesting family reunification, and the family member concerned, had already been staying in the host country;

– children had been involved, since their interests had to be afforded significant weight; and

– there had been insurmountable or major obstacles in the way of the family living in the country of origin of the person requesting family reunification.

(b) *Scope of the margin of appreciation* – It was also pertinent for the Court to consider the scope of the margin of appreciation available to the State when taking policy decisions of the kind at issue. A series of factors came into play:

(i) *The Convention and existing case-law* – Several arguments militated in favour of according the States a wide margin of appreciation. Firstly, there were no absolute rights under Article 8; where immigration was concerned, the said provision could not be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorise family reunification on its territory. The Court had on numerous occasions recognised that immigration control is a legitimate aim for the State to interfere with the right to respect for family life within the meaning of Article 8. The same applied with regard to positive obligations. Secondly, the Court had acknowledged that immigration control served the general interests of the economic well-being of a country in respect of which a wide margin was usually allowed to the State.

On the other hand, the situation of general violence in a country might be so intense as to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his or her presence

there. The absolute nature of the right under Article 3 did not allow for any exceptions or justifying factors or balancing of interests. Accordingly, an increased influx of migrants could not absolve a State of its obligation under that provision. In principle, that factor might also reduce the latitude enjoyed by States in striking a fair balance between the competing interests of family reunification and immigration control under Article 8, albeit that, during periods of mass influx of asylum-seekers and substantial resource constraints, recipient States should be entitled to consider that it fell within their margin of appreciation to prioritise the provision of Article 3 protection to a greater number of such persons over the Article 8 interest of family reunification of some. Furthermore, considerations as to procedural requirements under Article 8 for the processing of family reunion requests of refugees had to apply equally to beneficiaries of subsidiary protection, including to persons who were at a risk of ill-treatment falling under Article 3 due to the general situation in their home country and where the risk was not temporary but appeared to be of a permanent or long-lasting character.

(ii) *The quality of the parliamentary and judicial review* – The Court had repeatedly held that the choices made by the legislature were not beyond its scrutiny and had assessed the quality of the parliamentary and judicial review of the necessity of a particular measure. The Court also noted that Protocol No. 15 amending the Convention, including by emphasising the principle of subsidiarity and the doctrine of the margin of appreciation, would enter into force on 1 August 2021.

(iii) *The degree of consensus at national, international and European levels of relevance to the present case* – The Court did not discern any common ground at the national, international and European levels in regard to the length of waiting periods.

(iv) *Overall* – Having regard to all the elements, the Court considered that member States should be accorded a wide margin of appreciation in deciding whether to impose a waiting period for family reunification requested by persons who had not been granted refugee status but who enjoyed subsidiary protection or, like the applicant, temporary protection.

Nevertheless, the discretion enjoyed by the States in this field could not be unlimited and fell to be examined in the light of the proportionality of the measure. While the Court saw no reason to question the rationale of a waiting period of two years as that underlying Article 8 of the EU Council Directive 2003/86/EC on the right to family reunification (three years being accepted only by way of derogation), beyond such duration the insurmountable obstacles to enjoying family life in the country of origin progressively assumed more importance in the fair balance assessment. Although Article 8 could not be considered to impose on a State a general obligation to authorise family reunification on its territory, the requirements of the Convention had to be practical and effective, not theoretical and illusory in their application to the particular case.

Furthermore, the said fair-balance assessment had to form part of a decision-making process that sufficiently safeguarded the flexibility, speed and efficiency required to comply with the applicant's right to respect for family life under Article 8.

(c) *Application to the present case* – The crux of the matter was whether the Danish authorities, in September 2016, when refusing the applicant's request for family reunion, owing to the three-year waiting period, had struck a fair balance between the competing interests of the individual and of the community as a whole. The applicant had had an interest in being reunited with his wife as soon as possible, whereas the Danish State had had an interest in controlling immigration as a means of serving the general interests of the economic well-being of the country, and of ensuring the effective integration of those granted protection with a view to preserving social cohesion. However, on the latter point, it should be borne in mind that family reunification might also favour preserving social cohesion and facilitate integration.

(i) *The legislative and policy framework* – The Court found no reason to question the distinction made by the Danish legislature in respect of persons granted protection due to an individualised threat, namely refugee status under the UN Convention relating to the status of refugees or "protection status", on the one hand, and persons granted protection due to a generalised threat, the so-called "temporary protection status", on the other hand.

The Court also found that the general justifications for the provisions concerning the "temporary protection status" had been based on a need to control immigration, which had served the general interests of the economic well-being of the country, and the need to ensure effective integration of those granted protection with a view to preserving social cohesion. Moreover, when introducing the three-year waiting period in 2016, the Danish legislature had not had the benefit of any clear guidance being given in the existing case-law on whether, and to what extent, the imposition of such a statutory waiting period would be compatible with Article 8.

However, a waiting period of three years, although temporary, was by any standard a long time to be separated from one's family, when the family mem-

ber left behind remained in a country characterised by arbitrary violent attacks and ill-treatment of civilians and when insurmountable obstacles to reunification there had been recognised. Moreover, the actual separation period would inevitably be even longer than the waiting period and would exacerbate the disruption of family life and, as in this case, the mutual enjoyment of matrimonial cohabitation, which was the essence of married life. The family members would also be separated during the period of flight, during the initial period after arrival in the host country pending the immigration authorities' processing of the asylum application, and for some time after the three-year waiting period (or two months before, as in the present case), pending their decision.

Moreover, although a "revision clause" had been maintained in the Act so that the three-year waiting period could be reviewed during the 2017/2018 parliamentary year at the latest, it did not appear that the sharp fall in the number of asylum-seekers in 2016 and 2017 had prompted any reconsideration of the three-year rule.

(ii) *The applicant's individual case* – As to the particular circumstances of the persons involved, it was evident that the applicant and his wife had a longstanding family life, since the spouses had been married for twenty-five years. The applicant had fled Syria owing to the arbitrary violent attacks and ill-treatment of civilians. He had left his wife behind, according to the applicant, in order to spare her from the hardship of travelling, and in the hope that she would be able to join him in a host country as soon as he had obtained settled status there. As to the extent of their ties to the respondent State, the applicant had been residing in Denmark for five months when he applied for family reunification in June 2015, and for one year and three months when his request was refused in September 2016. Thus, at the relevant time, he had had limited ties and his wife had had no ties to the country.

In its judgment refusing to grant the applicant family reunification with his wife, the Supreme Court had had regard to the applicable principles under Article 8 and the relevant case-law on family reunification. It had noted that a number of other member States had similar rules, and that the European Court had not yet considered to what extent such statutory waiting periods would be compatible with Article 8. The Supreme Court had also had regard to the preparatory notes to the legislative amendments leading to the three-year waiting period and had noted the background of the amendment. It had accepted that the spouses had faced insurmountable obstacles to cohabiting in Syria, but had emphasised that the obstacle to their exercise of family life together had only been temporary. The applicant could return to Syria when the general situation in the country improved. If there was no such improvement within three years from the date on which he was granted residence in Denmark, he would normally be eligible for family reunification with his spouse. Should exceptional circumstances emerge before the expiry of the three-year period, he could be granted family reunification. Against that background, the Supreme Court had found that the three-year waiting period had fallen within the margin of appreciation enjoyed by the State when balancing the relevant interests at stake.

The Court could not but note that, as amended, the Act did not allow for an individualised assessment of the interest of family unity in the light of the concrete situation of the persons concerned beyond very limited exceptions. Nor had it provided for a review of the situation in the country of origin with a view to determine the actual prospect of return or obstacles thereto. Thus, for the applicant, the statutory framework and three-year waiting period had operated as a strict requirement for him to endure a prolonged separation from his wife, irrespective of considerations of family unity in the light of the likely duration of the obstacles. It could not be said that the applicant had been afforded a real possibility under the applicable law of having an individualised assessment of whether a shorter waiting period than three years had been warranted by considerations of family unity.

(iii) *Overall* – Having regard to the above considerations, the Court was not satisfied, notwithstanding the margin of appreciation, that the authorities had struck a fair balance between the relevant interests at stake.

*Conclusion*: violation (sixteen votes to one).

The Court also found, unanimously, that there was no need to examine separately the applicant's complaint under Article 14 read in conjunction with Article 8.

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

## Respect for family life/Respect de la vie familiale

**Restriction of applicant's parental rights and deprivation of contact with her children without required scrutiny on gender identity grounds: *violation***

**Restriction des droits parentaux de la requérante et privation de tout contact avec ses enfants, en l'absence de l'examen requis, pour des motifs liés à son identité de genre : *violation***

*A.M. and Others/et autres – Russia/Russie*, 47220/19, Judgment/Arrêt 6.7.2021 [Section III]

(See Article 14 below/Voir l'article 6 ci-dessous, page 50)

## Positive obligations/Obligations positives

**Lack of any opportunity to have same-sex relationships formally acknowledged: *violation***

**Absence de toute possibilité de faire officialiser une relation entre personnes de même sexe : *violation***

*Fedotova and Others/et autres – Russia/Russie*, 40792/10 et al., Judgment/Arrêt 13.7.2021 [Section III]

Traduction française du résumé – Printable version

*Facts* – The applicants – three same-sex couples – gave notice of intended marriage to local departments of the Register Office. Their notices were rejected on the basis that the relevant domestic legislation referred to marriage as a "voluntary marital union between a man and a woman", and thus precluded same-sex couples. The applicants appealed unsuccessfully. They complain before the Court of the lack of opportunity to have their relationships formally registered.

*Law* – Article 8: The Court had to determine whether Russia, at the date of the analysis of the Court, had failed to comply with the positive obligation to ensure respect for the applicants' private and family life, in particular through the provision of a legal framework allowing them to have their relationship recognised and protected under domestic law.

The applicants, as other same-sex couples, were not legally prevented from living together in couples as families. However, they had no means to have their relationship recognised by law. The domestic law provided for only one form of family unions – a different-sex marriage. Without formal acknowledgment, same-sex couples were prevented from accessing housing or financing programmes and from visiting their partners in hospital, they were deprived of guarantees in criminal proceedings (the right not to witness against the partner), and rights to inherit the property of the deceased partner. That situation created a conflict between the social reality of the applicants who lived in committed relationships based on mutual affection, and the law, which failed to protect the most regular of "needs" arising in the context of a same-sex couple. That conflict could result in serious daily obstacles for same-sex couples.

The Court took note of the Government's assertion that the majority of Russians disapproved of same-sex unions. While popular sentiment might play a role in the Court's assessment when it came to the justification on the grounds of social morals, there was a significant difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support was relied on in order to deny access of a significant part of the population to the fundamental right to respect for private and family life. It would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority (see, *mutatis mutandis*, *Alekseyev v. Russia*, *Bayev and Others v. Russia* and *Beizaras and Levickas v. Lithuania*).

The interest in protecting minors from display of homosexuality to which the Government had referred was based on the domestic legal provision criticised by the Court in *Bayev and Others*. That argument was not relevant to the present case and therefore could not be accepted by the Court.

The protection of "traditional marriage" stipulated by the amendments to the Russian Constitution in 2020 was in principle a weighty and legitimate interest, which might have positive effect in strengthening family unions. The Court, however, could not discern any risks for traditional marriage which the formal acknowledgment of same-sex unions might involve, since it did not prevent different-sex couples from entering marriage, or enjoying the benefits which the marriage gave.

In the light of the above, the Court could not identify any prevailing community interest against which to balance the applicants' interests. The respondent State had failed to justify the lack of any opportunity for the applicants to have their relationship formally acknowledged. A fair balance between competing interests had not therefore been struck in the case at hand.

The respondent Government had a margin of appreciation to choose the most appropriate form of registration of same-sex unions, taking into account its specific social and cultural context (for example, civil partnership, civil union, or social solidarity act). In the present case they had overstepped that margin, because no legal framework capable of protecting the applicants' relationships as same-sex couples had been available under domestic law. Giving the applicants access to formal acknowledgment of their couples' status in a form other than marriage would not be in conflict with the "traditional understanding of marriage" prevailing in Russia, or with the views of the majority

to which the Government referred, as those views opposed only same-sex marriages, but they were not against other forms of legal acknowledgment which might exist.

*Conclusion*: violation (unanimously).

The Court also held, unanimously, that it was not necessary to examine the merits of the complaints under Article 14 in conjunction with Article 8, having regard to its finding under Article 8.

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

(See *Alekseyev v. Russia*, 4916/07 et al., 21 October 2010, Legal Summary; *Bayev and Others v. Russia*, 67667/09 et al., 20 June 2017, Legal Summary; and *Beizaras and Levickas v. Lithuania*, 41288/15, 14 January 2020, Legal Summary)

## ARTICLE 9

### Manifest religion or belief/Manifester sa religion ou sa conviction

**Post-mortem and organ removal for preservation of prematurely born child with rare disease despite mother's objection and specific wishes for ritual burial: *violation***

**Autopsie et prélèvement d'organes, aux fins de leur préservation, d'un enfant prématuré atteint d'une maladie rare malgré les objections de la mère et son souhait spécifique d'un enterrement ritualisé : *violation***

*Polat – Austria/Autriche*, 12886/16, Judgment/Arrêt 20.7.2021 [Section IV]

(See Article 8 above/Voir l'article 8 ci-dessus, page 31)

## ARTICLE 10

### Freedom of expression/Liberté d'expression

**Lack of relevant and sufficient reasons to justify fine, forced product recall and ban on future use of condom packaging designs: *violation***

**Défaut de raisons pertinentes et suffisantes justifiant l'imposition d'une amende, un rappel forcé de produits et une interdiction d'utilisation future de styles d'emballage de préservatifs : *violation***

*Gachechiladze – Georgia/Géorgie*, 2591/19, Judgment/Arrêt 22.7.2021 [Section V]

Traduction française du résumé – Printable version

*Facts* – The applicant produced condoms with various designs on the packaging, to be sold online and via vending machines. Four of her designs became the subject of administrative-offence proceedings, on the basis that they constituted unethical advertising under the Advertising Act. During first-instance proceedings, the applicant relied, unsuccessfully, on various cases heard by the Constitutional Court to argue that sufficient justification had not been given as to why the images had been in breach of the Act. The applicant was fined, ordered to cease using and disseminating the relevant designs and to issue a product recall in respect of those products already distributed. She appealed unsuccessfully.

*Law*

(a) *Admissibility* – Article 35 § 3 (b) (no significant disadvantage): The fine of approximately EUR 165 did not seem particularly onerous, especially considering that the applicant was a successful entrepreneur. However, she had also claimed to have suffered a loss of income on account of the ban on using the four disputed designs on her products. The applicant had been ordered to recall and, therefore, stop selling merchandise of significant financial value. She had also been banned from using those designs in the future and, as a result, the impugned measures had been of such nature and magnitude that, potentially, they could have caused her to suffer an important financial impact. Accordingly, even if the applicant had not submitted a detailed financial account, having regard to the sweeping nature of the impugned measures, the Court could not accept that those measures had had an insignificant impact on her.

Further, the domestic court's application of the Advertising Act in respect of what they regarded as unethical advertising contrary to the religious and national values of Georgian society, and whether such an interpretation was compatible with the principles established in the Constitutional Court's practice and the Court's case-law, had concerned important questions of principle and went beyond the scope of the applicant's case.

Therefore, given what had been at stake for the applicant, as well as considering the important questions of principle arising in her case, it was not appropriate to dismiss the present application with reference to Article 35 § 3 (b).

*Conclusion*: admissible (unanimously).

(b) *Merits* – Article 10: The imposition of the fine, the obligation to issue a product recall, and the ban on the future use of the disputed designs had constituted an interference with the applicant's right to freedom of expression. The Court proceeded on the assumption that the impugned measures had a basis in domestic law, despite the lack of reference to previous domestic case-law concerning the concept of unethical advertising involving religious symbols, and the Court was prepared to accept that the interference in respect of all four designs had pursued the legitimate aims of protecting the religious rights of others and/or protecting public morals.

The Court had to determine whether the designs used by the applicant had only had a commercial purpose. The applicant's brand also appeared to have aimed at initiating and/or contributing to a public debate concerning various issues of general interest. In particular, the declared objective of the brand, expressed at the time of its launch, had been to shatter stereotypes and "to aid a proper understanding of sex and sexuality". Some of the images used by the applicant had concerned same-sex relationships (see, in so far as negative attitudes towards the LGBT community in Georgian society are concerned, *Identoba and Others v. Georgia*). Several designs also appeared to have been a social as well as political commentary on various events or issues. It was also relevant to note that the organisation which had launched a complaint in respect of the applicant's brand had apparently been active in civil and political matters. The Court therefore could not accept that the applicant's "expression" had to be treated as having been made solely in a commercial context. In circumstances where a message on issues of public interest had at least been partly involved, the margin of appreciation afforded to the domestic courts had necessarily been narrower compared to situations concerning solely commercial speech.

As to the four disputed designs, one of them had featured the text "the Royal Court inside Tamar" and had referred the former female ruler of Georgia, King Tamar, who had been canonised as a saint by the Georgian Orthodox Church. Canonising a public figure or, indeed, any person, could not of itself serve to exclude a discussion of his or her persona in public debate. Nor should, contrary to what the domestic courts' reasoning suggested, the choice of the medium of expression – the production and dissemination of condoms, in the present case – be deemed in and of itself inappropriate in the assessment of whether the expression could contribute to a public debate on matters important to society. However, the applicant had failed, at domestic level, to explain why or how the use of that persona on condoms with the sign which had accompanied it had either started or contributed to any public debate on a matter of general interest. It was regrettable that the domestic courts had not assessed the meaning of the text accompanying the disputed image. Nonetheless, in the absence of convincing arguments raised by the applicant at domestic level, it was difficult to accept that the domestic authorities had erred in finding that the design could be seen as a gratuitous insult to the object of veneration of Georgians following the Orthodox Christian faith.

As concerns the remaining designs, however, the circumstances were different. As regards the design featuring a panda face and referencing a Christian holy day, the Court noted the appellate court's reasoning that the image and accompanying text had unjustifiably insulted the lifestyle of practising Orthodox Christians and the religious teaching that sexual relations should be avoided during the fast related to important religious holidays. However, those reasons were not sufficient to justify the necessity of the interference in a democratic society. In particular, the fact that the design had merely replicated a popular, pre-existing piece of artistic expression by an anonymous group called Panda, could not be overlooked. As to its content, the piece appeared to have been a satirical take on different phrases used frequently in Georgia, essentially constituting the criticism of various ideas, including those relating to religious teachings and practices. Against that background, the appellate court had effectively left unaddressed the crucial question of whether there had existed any "pressing social need" to limit the dissemination of the disputed design.

The two remaining designs had featured a female left hand with a condom placed over two raised fingers and an image of a crown apparently made from a condom with a caption referring to a historical event. As regards the former image, the applicant's argument about the absence of any religious connotation, on account of the fact that it had depicted a female left hand rather than the right hand used in a religious contact, and suggesting the lack of a legal basis for the interference, had been left unaddressed. While it could not be excluded that even the most trivial image might contain elements provoking very specific associations with a religious symbol, it had been for the domestic courts to demonstrate why that had been the case with regard to the image of a female hand, and they had failed to do so. As regards the latter image, despite the applicant's submissions, it had remained unclear throughout the proceedings against her why the domestic courts had considered that the image could fall within the definition of unethical

advertising provided for in the Advertising Act. Nor had it been explained whether there had existed any "pressing social need", within the meaning of the Court's case-law, to limit the dissemination of those two designs. Accordingly, none of the reasons given by the domestic courts had been relevant to justify the necessity and proportionality of the interference with the applicant's freedom of expression.

Finally, the Court took issue with the apparent implication in the domestic courts' decisions that the views on ethics of the members of the Georgian Orthodox Church took precedence in the balancing of various values protected under the Convention and the Constitution of Georgia. Such an implication went against the views of the Constitutional Court and was at odds with relevant international standards. In a pluralist democratic society, those who chose to exercise the freedom to manifest their religion had to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

In the light of the foregoing, at least in so far as three of the four disputed designs were concerned, the reasons adduced by the domestic courts had not been relevant and sufficient to justify an interference under Article 10 § 2.

*Conclusion*: violation (unanimously).

(See also *Identoba and Others v. Georgia*, 73235/12, 12 May 2015, Legal summary, and *Sekmadienis Ltd. v. Lithuania*, 69317/14, 30 January 2018, Legal Summary)

## Freedom of expression/Liberté d'expression

**Civil defamation award disproportionate to harm caused from television reports on child sexual abusers wrongly alluding to well-known politician: *violation***

**Condamnation en diffamation au civil disproportionnée au préjudice causé par des reportages à la télévision sur des pédophiles faisant allusion à un homme politique connu : *violation***

*SIC - Sociedade Independente de Comunicação – Portugal*, 29856/13, Judgment/Arrêt 27.7.2021 [Section IV]

Traduction française du résumé – Printable version

*Facts* – The applicant, a television network and media company, on 6 and 7 December 2003 respectively, broadcast television reports on a network of child sexual abusers, wrongfully alluding to the involvement of R.R., a well-known politician who served as Regional Secretary of Agriculture and Fisheries. The source of the news was an investigative report published on the former date in *Expresso*, a leading weekly newspaper in Portugal, and compiled by both the applicant company and that newspaper. On 8 December 2003 R.R. resigned from his above-mentioned post. In a subsequent news report broadcast by the applicant company in the morning of 9 January 2004 it was falsely reported that R.R. had been arrested and questioned by the police. A few hours later it rectified its statement. Following civil liability proceedings instituted by R.R., the applicant company was convicted for disseminating wrongful information and ordered by the Supreme Court, at final instance, to pay EUR 50,000 for non-pecuniary damage and EUR 65,758 for pecuniary damage. With the addition of legal interests, the amount came to EUR 145,988.28.

*Law* – Article 10: The Supreme Court's judgment ordering the applicant company to pay R.R. damages for infringing his right to reputation amounted to an "interference" with the exercise of the applicant company's freedom of expression which was lawful and pursued the legitimate aim of the protection of the reputation or rights of others" – namely, those of R.R. The main question therefore that arose was whether the interference was necessary in a democratic society.

(a) *Whether the news reports contributed to a debate of public interest and whether R.R. was a public figure* – The impugned statements comprised several opening reports on the primetime evening and midday news about the ongoing investigations into a network implicated in the sexual abuse of minors in the Azores. There was thus no doubt that they had conveyed information of public interest. R.R. had been a public figure both in his own region in the Azores and in the entire country and, at the time the reports had been broadcast, he had held a high-level political appointment.

(b) *The method of obtaining information, and the content, form and consequences of the impugned statements* – The December news reports had originated from different sources and had been collected through the report compiled by both the applicant company and *Expresso*, whereas the facts that had been disseminated at this point had already been published in the above paper. As to the January news report, it was considered established that the source of the information had been the reporters working for the applicant company.

Taking into account the reports' content and the particular stigma attached to offences of a sexual nature involving children, allegations of involve-

ment in this type of offence had the capacity to cause prejudice to the personal enjoyment of the right to respect for private life. Further, although R.R. had not been directly identified in the December news reports, he had still been easily identifiable. Therefore, while the news reports had been the result of a journalistic investigation conducted by the applicant company and *Expresso*, both of whom were widely regarded by the public as reliable news media outlets, they had been able to cause prejudice to him. As to the January news report, despite the rectification made, the applicant company had accepted that the false reference to R.R.'s arrest and questioning by the police had infringed R.R.'s right to reputation and honour. In this connection, the Court considered that when making this reference, the applicant company had not acted in a responsible way, particularly as it had known of the wide dissemination of the news via media outlets both domestically and internationally. Accordingly, there had been compelling reasons to impose a sanction on the applicant company for the false information. It had, however, limited the harm to R.R.'s reputation, both in scope and in time, by rectifying this mistake a few hours after the news broke. Moreover, although the domestic courts had considered that it was still possible to find references to his potential involvement in such a crime on different online platforms, R.R. had resumed his role in politics shortly after the news report; he had served as a member of the national parliament for several years and had remained, to this day, a well-established and active politician.

(c) *Severity of the sanction* – While it was not possible to conclude that there had been no harm at all to R.R.'s right to a reputation and honour, the Court found it difficult to accept that the injury to R.R's reputation in the present case was of such a level of seriousness as to justify an award of the size the applicant had had to pay. Such an amount of compensation, which was high when compared with previous cases concerning Portugal that the Court had examined, was also capable of discouraging the participation of the press in debates over matters of legitimate public concern and had a chilling effect on the freedom of expression and of the press. It had therefore been excessive in the circumstances of the present case.

In view of the foregoing considerations, the Court concluded that the interference with the applicant company's right to freedom of expression was disproportionate and not "necessary in a democratic society" within the meaning of Article 10.

*Conclusion*: violation (unanimously).

Article 41: No award in respect of non-pecuniary damage as under domestic law the applicant could seek the reopening of the civil proceedings in respect of which the Court had found a violation.

(See also *Público - Comunicação Social, S.A. and Others v. Portugal*, 39324/07, 7 December 2010; *Bédat v. Switzerland* [GC], 56925/08, 29 March 2016, Legal Summary; and *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], 55391/13 et al., 6 November 2018, Legal Summary)

## Freedom to receive information/Liberté de recevoir des informations

**Effective review by the courts of the content and quality of information on the management of radioactive waste communicated by a public agency in line with its legal obligation to provide information: *Article 10 applicable; no violation***

**Contrôle effectif par les tribunaux du contenu et de la qualité de l'information sur la gestion des déchets radioactifs diffusée par une autorité publique en vertu d'une obligation légale d'informer : *article 10 applicable ; non-violation***

*Association BURESTOP 55 and Others/et autres – France*, 56176/18 et al., Judgment/Arrêt 1.7.2021 [Section V]

(See Article 6 § 1 (civil) above/Voir l'article 6 § 1 (civil) ci-dessus, page 20)

## Freedom to impart information/Liberté de communiquer des informations

**Justified prosecution and conviction of prison officer for providing information about prison to journalist in exchange for money: *no violation***

**Poursuites et condamnation justifiées concernant un gardien de prison ayant communiqué à un journaliste, en échange d'argent, des informations sur la prison : *non-violation***

*Norman – United Kingdom/Royaume-Uni*, 41387/17, Judgment/Arrêt 6.7.2021 [Section IV]

Traduction française du résumé – Printable version

*Facts* – The applicant – a prison officer at the relevant time – passed information about the prison he was working in to a tabloid journalist in exchange for money over the course of a number of years. In 2011, a public inquiry ("the Leveson Inquiry") was launched into the conduct of some journalists working for certain newspapers in the UK, and the police launched a criminal investigation ("Operation Elveden") into allegations of inappropriate payments by some journalists to public officials. The police requested from the owner of a news-

paper, Mirror Group Newspapers ("MGN"), details of public officials who had been paid for information. A Memorandum of Understanding ("MoU") was agreed between the police and MGN for the voluntary provision of material to the Operation. Within the framework of the MoU, MGN disclosed the name of the applicant to the police. The applicant was subsequently convicted of misconduct in public office and sentenced to twenty months' imprisonment. The applicant unsuccessfully appealed against his conviction and sentencing.

*Law*

Article 7: The applicant contended that the content of the offence had been too vague to satisfy the requirements of Article 7; his challenge to the clarity of the offence had essentially concerned the seriousness test, one of four elements of the offence articulated by the Court of Appeal in *Attorney General's Reference (No 3 of 2003)*.

The Court's starting point was the explanation of the seriousness test given in *Attorney General's Reference (No 3 of 2003)*. There, the Court of Appeal had pointed to the role played by the motive with which a public officer had acted, the circumstances in which the impugned conduct had occurred and the consequences of the breach, in establishing whether the requisite seriousness threshold had been attained.

The fact that the applicant had been paid to disclose the sensitive information in question indisputably pertained to his motive for acting and also formed part of the circumstances in which the conduct had occurred. It therefore ought to have been clear to him before embarking on his course of conduct that his accepting payment in exchange for stories was likely to be a factor which would be taken into account by the court in assessing whether the offence had been committed. The Court agreed with the trial judge that the fact that the applicant had chosen to have a number of cheques made out to his son had been capable of giving rise to the inference that he had known what he was doing was wrong and in breach of duty. In particular, the Court considered that the attempt to conceal the payments demonstrated that the applicant had been well aware of the potential role that the payment of money might have played in any subsequent investigation of wrongdoing. The applicant had argued that the importance of payment to the establishment of the offence had not been fully evident until a subsequent domestic court judgment. However, payment had only been one of the elements taken into consideration by the domestic authorities in establishing the requisite seriousness threshold for the offence. The Court further reiterated that Article 7 did not preclude the gradual clarification of the rules of criminal liability through judicial interpretation, and that any development in subsequent case-law had been consistent with the essence of the offence and could have been reasonably foreseen.

It must also have been apparent to the applicant from *Attorney General's Reference (No 3 of 2003)* that the consequences of his actions would be taken into account when establishing whether the seriousness test had been met. The domestic courts had pointed to the suspicion that had fallen on innocent members of staff as a result of the leaks by an unknown source, the damage to prisoners demonised in the press and the general enmity and mistrust that the leaks had caused both within the prison population and between prisoners and staff; and that the corruption of a prison officer on the scale present in the applicant's case had undermined public confidence in the prison service. Those consequences had been serious and none of the conclusions by the domestic courts could be said to have been unforeseeable or surprising.

Finally, the description of the seriousness test itself in *Attorney General's Reference (No 3 of 2003)* tended to suggest that the scope and scale of the behaviour in question could have been a relevant factor when assessing seriousness. As pointed out by the domestic courts, the applicant had disclosed information to a newspaper in exchange for payment on forty occasions over a period of five years in flagrant breach of rules of which he had been well aware. The applicant had argued that his behaviour ought to have been sanctioned only in disciplinary proceedings rather than by way of a criminal prosecution. However, conduct did not fall outside the scope of the criminal law merely because it also constituted a disciplinary offence.

The Court did not exclude that there might be cases in which, given their specific facts, prosecution and conviction for misconduct in public office were arguably not foreseeable. However, for the reasons outlined above, it did not consider the applicant's prosecution and conviction to be such a case. Overall, the Court was satisfied that the applicant ought to have been aware, if necessary after having sought legal advice, that by providing internal prison information to a journalist in exchange for money on numerous occasions over a five-year period, he had risked being found guilty of the offence of misconduct in public office.

*Conclusion*: no violation (unanimously).

Article 10

(i) *The disclosure of the applicant's identity* – The applicant complained that the disclosure by MGN had not been voluntary but had resulted from im-

proper pressure from the police and had therefore been akin to the compelled disclosure by the State of his name as a journalistic source. However, as the Court of Appeal had pointed out, the reference by the trial judge to the motivation of MGN in assisting the police could not be equated to a finding that pressure had been put on MGN to disclose the applicant's name. The terms of the MoU had allowed MGN to refuse to disclose information on Article 10 grounds, including the right to protect journalistic sources. MGN had enjoyed access to legal advice and, as the Court of Appeal had found, it was inconceivable that they had not given careful consideration to whether to make the disclosure to the police in the context of the publicity which Operation Elveden and the Leveson Inquiry had been attracting. In those circumstances, the Court accepted the finding that the disclosure had been "truly voluntary".

In the absence of any compulsion on MGN to disclose the applicant's name, the applicant had failed to demonstrate that the disclosure had been attributable to the respondent State and it could not be said that merely by requesting the information, agreeing an MoU or accepting receipt of the information, the police had interfered with the applicant's Article 10 rights.

*Conclusion*: inadmissible (unanimously).

(ii) *The prosecution and conviction of the applicant* – The prosecution and conviction had been prescribed by law and pursued the legitimate aims of the interests of public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others and the prevention of the disclosure of information received in confidence.

As to whether the applicant's prosecution and conviction had been necessary in a democratic society, there could be no doubt that the applicant had knowingly engaged in a course of conduct contrary to the requirements of his public office and that the scope and scale of his unlawful conduct had been significant. The Court also attached significant weight in that context to the serous harm caused to other prisoners, to staff and to public confidence in the prison as a result of the applicant's behaviour. There had therefore been a strong public interest in prosecuting him, in order to maintain the integrity and efficacy of the prison service and the public's confidence in it.

On the other hand, the domestic courts had noted that there had been no public interest in the majority of the information disclosed by the applicant, nor had he been primarily motivated by public interest concerns: instead, the sentencing judge had found that the applicant had been motivated by money and by an intense dislike of the prison governor. Since the applicant, moreover, had not claimed before the Court to have acted as a whistle-blower, there was no need for the Court to enquire into the kind of issue which had been central in the case-law on whistle-blowing, namely whether there had existed any alternative channels or other effective means for the applicants to remedy the alleged wrongdoing which the applicants had intended to uncover (compare *Guja v. Moldova* [GC], 14277/04, 12 February 2008, Legal Summary). The Court nonetheless observed that the sentencing judge had pointed to the fact that, as a trade union representative, the applicant could have used official channels to disseminate information had the public interest been his sole concern.

The reasons for the applicant's prosecution and conviction had therefore been relevant and sufficient.

*Conclusion*: no violation (unanimously).

## ARTICLE 13

### Effective remedy/Recours effectif

**Hasty return to Turkey of a journalist 24 hours after his arrest at the border, rendering the available remedies ineffective in practice and therefore inaccessible: *violation***

**Renvoi précipité en Turquie d'un journaliste, 24 heures après son arrestation à la frontière, ayant rendu les recours existants inopérants en pratique, et donc indisponibles : *violation***

*D – Bulgaria/Bulgarie*, 29447/17, Judgment/Arrêt 20.7.2021 [Section IV]

(See Article 3 above/Voir l'article 3 ci-dessus, page 10)

### Effective remedy/Recours effectif

**Action in tort an effective remedy from 13 January 2021 for obtaining compensation for poor conditions of detention or transport that had now ended: *violation***

**Action civile en responsabilité délictuelle effective, à partir du 13 janvier 2021, pour obtenir indemnisation pour les mauvaises conditions de détention ou de transport ayant cessé : *violation***

*Polgar – Romania/Roumanie*, 39412/19, Judgment/Arrêt 20.7.2021 [Section IV]

English translation of the summary – Version imprimable

*En fait* – Le requérant a été incarcéré en prison. Il se plaint de ses mauvaises conditions de détention et de la voie de recours, l'action en responsabilité civile délictuelle, qu'il a empruntée pour être indemnisé au titre du préjudice moral subi.

*En droit* – Article 3 : Les juridictions internes ont constaté d'une manière définitive que, lors de sa détention dans la prison de Deva (du 27 février 2014 au 29 avril 2015 et du 14 mai au 25 mai 2015), le requérant a disposé d'un espace personnel inférieur à 3 $m^2$.

Dans l'arrêt pilote *Rezmiveș et autres c. Roumanie*, la Cour a déjà conclu à la violation de l'article 3 dans des circonstances de fait similaires à celles de la présente affaire.

*Conclusion* : violation (unanimité).

Article 13 combiné avec l'article 3 : Pour soutenir que l'article 13 n'a pas été violé en l'espèce, le Gouvernement s'appuie sur un recours, résultat d'une évolution jurisprudentielle suite à l'arrêt pilote *Rezmiveș et autres*, qui permettrait de résoudre les nombreuses affaires individuelles nées du problème des mauvaises conditions de détention dans les prisons roumaines.

a) *La création d'une nouvelle voie de recours interne* – Sur la base des informations disponibles au dossier, la Cour n'est pas en mesure de confirmer si toutes les décisions internes citées sont définitives. Toutefois, compte tenu du nombre important d'exemples de jurisprudence et des constats par les tribunaux internes, la Cour est en mesure de constater ce qui suit.

En premier lieu, en matière d'accessibilité du recours, la charge de la preuve incombant aux plaignants ne s'avère pas avoir été excessive. Dans la majorité de ces exemples, les plaignants avaient fait usage de moyens de preuve faciles à apporter, par exemple des descriptifs des conditions de détention ou de transport incriminées, parfois des témoignages, de sorte qu'il appartenait ensuite aux autorités de réfuter les allégations en question.

En deuxième lieu, s'agissant des garanties procédurales, la majorité des procédures a duré moins de deux ans, pour un ou deux degrés de juridiction. Seulement quatre procédures ont duré un peu plus de deux ans, pour un ou deux degrés de juridiction. À cet égard, bien qu'il n'existe pas, dans la législation en vigueur, de délai spécifique en ce qui concerne le prononcé d'une décision dans ce type de litige, le temps que les juridictions internes ont pris pour examiner les actions en responsabilité civile délictuelle ne semble pas avoir été trop long. De plus, les règles en matière de frais ne semblent pas avoir pesé un fardeau excessif sur les plaignants. En effet, en droit roumain, les personnes souhaitant engager une action contre l'État pour obtenir réparation à raison de mauvaises conditions de détention ou de transport ne doivent pas s'acquitter de frais judiciaires à cette fin.

En troisième lieu, les tribunaux internes ont analysé les actions civiles en question en conformité avec les normes découlant de la jurisprudence de la Cour. Les tribunaux ont apprécié le seuil de gravité requis pour qu'il y ait une violation de l'article 3, tenu compte des obligations positives des États sur le terrain du même article, pris en considération les conséquences de la surpopulation sévère sur le constat d'une violation de l'article 3 et accordé une importance particulière au caractère raisonnable des indemnités à octroyer au titre du dommage moral, tout en retenant à ce titre la durée des traitements en cause.

En quatrième lieu, le constat relatif aux mauvaises conditions de détention ou de transport a fait présumer l'existence d'un préjudice moral.

En cinquième et dernier lieu, s'agissant de savoir si les plaignants ont obtenu une réparation adéquate et suffisante, la Cour vérifiera, d'une part, si la réparation a couvert l'intégralité de la période dénoncée et, d'autre part, si les montants octroyés par les autorités juridictionnelles n'étaient pas déraisonnables par rapport à ce que la Cour aurait octroyé au titre de la satisfaction équitable dans des affaires similaires.

i. *La réparation a-t-elle couvert l'intégralité de la période dénoncée ?* – La majorité des juridictions a reconnu la violation de l'article 3 et a couvert l'intégralité des périodes dénoncées. Une juridiction saisie d'une demande civile en responsabilité pour de mauvaises conditions de détention a limité la période prise en compte pour le calcul de l'indemnité accordée au plaignant en jugeant que chaque transfert dans une autre prison faisait courir un nouveau délai de prescription de trois ans. Deux autres juridictions ont adopté une position différente, en ce qu'elles ont rejeté comme prescrites les périodes de détention qui étaient interrompues par la libération des plaignants et qui se situaient en dehors du délai de trois ans à compter de l'introduction de l'action civile.

Pour qu'une voie de recours puisse être effective, les tribunaux internes doivent analyser les griefs tirés de l'article 3 conformément aux principes et normes établis par la Cour dans sa jurisprudence. Ceci est d'autant plus important lorsque certains plaignants dénoncent des durées de détention continue supérieures au délai légal de prescription. Cependant, seul un nombre très restreint de juridictions s'étaient prononcées sur cette question et la jurisprudence ainsi dégagée ne saurait donc

passer pour généralisée et constante. Aux yeux de la Cour, seul un refus systématique, opposé par les juridictions internes et caractérisé par une jurisprudence établie refusant d'appliquer la notion de « situation continue » développée par elle dans sa jurisprudence relative à l'article 3 pourrait remettre en cause l'effectivité du recours en cause. Tel n'est pas le cas en l'espèce.

ii. *Le montant de la réparation était-il adéquat et suffisant ?* – Les tribunaux internes ont appliqué les règles de la responsabilité civile délictuelle et ont fixé en équité le montant de la somme accordée en réparation du préjudice moral subi par les plaignants. Et ils n'ont pas octroyé de sommes inférieures à celles fixées par la Cour dans des affaires similaires.

Au vu de ces éléments, ainsi que du niveau général de vie dans l'État défendeur, les indemnités obtenues par les plaignants ne décèlent pas, dans leur ensemble, un problème structurel d'insuffisance des sommes octroyés par les juridictions nationales.

iii. *Conclusion* – Au regard des critères que les juridictions nationales ont retenus pour apprécier les mauvaises conditions de détention et réparer le préjudice moral subi par les plaignants, la jurisprudence interne a beaucoup évolué depuis l'arrêt pilote *Rezmiveş et autres*.

Cette jurisprudence s'est consolidée avec l'arrêt rendu le 19 février 2020 par la Haute Cour qui a énoncé les critères de base à appliquer dans les recours de ce type. Cet arrêt, qui avait été notifié aux parties le 14 avril 2020, était consultable à partir du 13 juillet 2020 sur la base de données de jurisprudence et ne pouvait plus être ignoré du public six mois après sa publication, soit à compter du 13 janvier 2021.

Ainsi, l'action en responsabilité civile délictuelle, dans l'interprétation constante qu'en ont donné les juridictions internes, représente, depuis le 13 janvier 2021, une voie de recours effective pour les personnes qui estiment avoir fait l'objet de mauvaises conditions de détention ou de transport, n'étant plus, au moment de l'introduction de leur action, détenues dans ces conditions.

Un éventuel refus systématique des juridictions internes d'analyser les griefs de mauvaises conditions de détention en conformité avec les principes et normes établis par la Cour dans sa jurisprudence pourrait remettre en question l'effectivité du recours. La Cour conserve sa compétence de contrôle ultime pour tout grief présenté par des requérants qui, comme le veut le principe de subsidiarité, auront épuisé les voies de recours internes disponibles.

b) *L'effectivité du recours dans le cas du requérant* – Le requérant s'est prévalu de l'action civile en responsabilité délictuelle qui ne lui a pas permis de se voir reconnaître intégralement la violation de la Convention et de recevoir une indemnisation adéquate et suffisante. La décision interne définitive est intervenue le 13 février 2019, soit bien avant la date retenue par la Cour comme point de départ de l'effectivité du recours interne en question.

*Conclusion* : violation (unanimité).

Article 46 : S'agissant des recours préventifs, la Cour observe avec intérêt que le niveau de la surpopulation a commencé à diminuer juste après l'adoption de l'arrêt pilote et que la saisine du juge de l'exécution des peines permettait aux tribunaux internes d'analyser les situations de surpopulation dénoncées par certains détenus. Toutefois, la tendance vers la diminution de la surpopulation s'est arrêtée en juin 2020 et celle-ci est repartie à la hausse pendant six mois, le taux de surpopulation étant de 119,2 % en décembre 2020. Cette tendance à la hausse est également confirmée par les données récentes consultables sur le site Internet de l'administration nationale des prisons. De ce fait, la Cour n'est pas en mesure d'arriver à une conclusion différente de celle à laquelle elle était parvenue dans l'affaire pilote *Rezmiveş et autres*. Bien que la législation nationale prévoie un recours préventif, à défaut d'une nette amélioration des conditions de détention dans les prisons roumaines, notamment en matière de surpopulation carcérale, rien n'indique que cette voie soit susceptible d'offrir aux détenus une possibilité effective de rendre ces conditions conformes aux exigences de l'article 3. La Cour encourage l'État roumain de s'assurer de la continuité des réformes visant à réduire la taille de la population carcérale et à la maintenir à des niveaux gérables.

Pour ce qui est du recours compensatoire, la Cour estime que depuis le 13 janvier 2021, l'action civile en responsabilité délictuelle représente, en principe, une perspective de redressement approprié de griefs de violation de la Convention pour les personnes qui estiment avoir fait l'objet de mauvaises conditions de détention dans les dépôts de police ou dans les prisons et qui ne sont plus, au moment de l'introduction de leurs actions, détenues dans des conditions qu'elles allèguent être contraires à la Convention, ainsi que pour les personnes qui dénoncent de mauvaises conditions de transport.

Article 41 : 2 500 EUR pour préjudice moral.

(Voir aussi *Rezmiveş et autres c. Roumanie*, 61467/12 et al., 25 avril 2017, Résumé juridique, et *Brudan c. Roumanie*, 75717/14, 10 avril 2018, Résumé juridique)

## Effective remedy/Recours effectif

**Use of four effective remedies, with suspensive effect, to challenge the return of an asylum seeker, who was heard and, in spite of tight deadlines, enjoyed safeguards to put forward his claims: *no violation***

**Exercice de quatre recours effectifs suspensifs de l'exécution du renvoi d'un demandeur d'asile, entendu et bénéficiant, en dépit de délais brefs, de garanties pour faire valoir ses prétentions : *non-violation***

*E.H. – France*, 39126/18, Judgment/Arrêt 22.7.2021 [Section V]

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

# ARTICLE 14

## Discrimination (Article 2)

**Failure to take preventive action to protect domestic violence victim and to investigate police inaction, against backdrop of systemic failures and gender-based discrimination: *violation***

**Absence de mesures préventives de nature à protéger une victime de violences domestiques et défaut d'enquête sur l'inertie de la police dans un contexte de manquements systémiques et de discrimination fondée sur le sexe : *violation***

*Tkhelidze – Georgia/Géorgie*, 33056/17, Judgment/Arrêt 8.7.2021 [Section V]

(See Article 2 above/Voir l'article 2 ci-dessus, page 9)

## Discrimination (Article 8)

**Restriction of applicant's parental rights and deprivation of contact with her children without required scrutiny on gender identity grounds: *violation***

**Restriction des droits parentaux de la requérante et privation de tout contact avec ses enfants, en l'absence de l'examen requis, pour des motifs liés à son identité de genre : *violation***

*A.M. and Others/et autres – Russia/Russie*, 47220/19, Judgment/Arrêt 6.7.2021 [Section III]

Traduction française du résumé – Printable version

*Facts* – The applicant is a transgender woman who went through medical and legal gender transition (male-to-female). She was married and has two children who were born before her transition. The children's mother, following the dissolution of their marriage, successfully brought judicial proceedings restricting the applicant's parental rights and depriving her of all contact with the children. The applicant's appeal and cassation appeals were dismissed. The applicant has not been able to have any information about the children or their whereabouts.

*Law*

Article 35 § 3 (a): In cases arising out of disputes between parents such as the instant one, it was the parent entitled to custody who was entrusted with safeguarding the child's interests. In these situations, the position as natural parent could not be regarded as a sufficient basis to bring an application on behalf of a child. Consequently, having regard to its case-law on the matter and the specific circumstances of the present case, the Court dismissed the application in so far as it had been lodged by the applicant on behalf her children.

Article 8: It was undisputed that the domestic courts had restricted the applicant's parental rights and deprived her of contact with her children on account of her gender transitioning and the allegedly negative effect that communication with them and information on her transitioning might have had on the children's psychological health and development. Although it was not the Court's task to take the place of the domestic authorities in examining these questions, it had to satisfy itself that the domestic courts, when taking their decision, had conducted an in-depth examination of the entire family situation and a whole series of other relevant factors and that they had made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child. In the present case, it found that this had not been so and accordingly, that the restriction of the applicant's parental rights and of her contact with her children was not "necessary in a democratic society". In reaching this conclusion, the Court took into account the following factors:

The domestic courts had attached significant weight to the psychiatric expert assessments of the applicant and her children which had concluded, taking into account the results of the children's psychological testing, their age, and the lack of psychotherapeutic practice in redressing the negative psychological consequences for children of transgender parents, that information about the applicant's transition would have had a negative effect on the children's psychological health. How-

ever, the Court expressed concern that the experts had reached their unfavourable conclusion after explicitly acknowledging that there had been no reliable scientific research on transgender parenthood. All the expert reports had also lacked any indication of how the information about the applicant's gender transition represented a risk to her children's psychological health and development or any indication of how that risk could have been mitigated.

The available international material was unanimous that domestic courts deciding on the restriction of parental rights and contact should aim to (i) keep children together with their parents and, in the event of their separation, maintain direct contact between them on a regular basis, (ii) take the child's best interests as a primary consideration, and (iii) assess the entire family situation through close and individualised scrutiny. The third parties' submissions had also supported these principles highlighting in particular the need to avoid reliance on negative perceptions and prejudice about transgender parenthood. In the present case, however, the domestic courts' judgments had fallen short of the above requirements. More specifically, although they had taken into account the mother's opinion, her fears of the possible negative effect of the applicant's gender transition on the children, the conflicts between the parents, and the findings of social services, they had relied predominantly on the experts' findings without closely scrutinising them in the specific circumstances of the entire family situation. This had been despite the self-acknowledged lack of scientific research supporting the experts' conclusions and the apparent lack of an explanation as to how the applicant's contact with her children could have negatively affected their psychological health. While the findings of expert assessments would in any comparable situation be of relevance and significance to judicial decisionmaking, the courts should not forgo scrutiny of the reliability and quality of such findings.

It was well established that measures totally depriving an applicant of his or her family life with the child were inconsistent with the aim of reuniting them and should "only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests". The domestic courts, however, in the present case had applied the most restrictive measure possible and had completely deprived the applicant of any contact with her children. Given that the passage of time could have irremediable consequences for relations between the child and the parent with whom that child did not live they should have been exceptionally cautious in resorting to that measure.

As the domestic courts had failed to demonstrate that there had been an appropriate basis for the restriction, it was not appropriate for the Court to contemplate on the existence of less restrictive means or to endorse any of the measures and practices put forward by the third parties in their submissions. Further, in the absence of any demonstrably harmful effect of contact between the applicant with her children, it was not necessary either to speculate as to whether a particular restriction might have been appropriate if such potential or real harm had been established or to consider whether the possibility of reviewing the restriction, as mentioned by the domestic courts, provided an effective avenue for re-establishing contact between the applicant and her children or for ensuring the children's gradual adjustment to their changing family situation.

*Conclusion*: violation (unanimously).

Article 14 taken together with Article 8: It was clear from the domestic decisions and the judicial proceedings that the influence of the applicant's gender identity on the assessment of her claim had been a decisive factor leading to the decision to restrict her contact with her children. The applicant had therefore been treated differently from other parents who also sought contact with their estranged children, but whose gender identity matched their sex assigned at birth. Further, the domestic courts had not conducted their assessment in accordance with the established domestic practice reflected in the Supreme Court's interpretative guidelines and, hence with the required scrutiny. Notably, they had not examined the possible danger to the children, the nature and severity of the restriction of the applicant's parental rights, the consequences it might have had for the children's health and development, or any other relevant circumstances. Their decisions had been based on the alleged possible negative effect of the applicant's gender transition on her children. Yet, the reasons and the evidence put forward by the authorities in support of their position could not be regarded as convincing and sufficient to prove the existence of any possible harm to the children's development and to justify the restriction. Accordingly, the domestic courts, by relying on her gender transition, had singled her out on the ground of her status as transgender person and had made a distinction which had not been warranted in the light of the existing Convention standards.

Although there was no reason to doubt that the domestic authorities had pursued a legitimate aim of the protection of the rights of children in these proceedings, in the absence of any demonstrably convincing and sufficient reasons for the difference in treatment, it was impossible to conclude that a reasonable relationship of proportionality

existed between the means employed and the aim pursued. Consequently, the impugned decision amounted to discrimination.

*Conclusion*: violation (unanimously)

Article 41: EUR 9,800 in respect of non-pecuniary damage.

(See also *Salgueiro da Silva Mouta v. Portugal*, 33290/96, 21 December 1999, Legal Summary; *E.B. v. France* [GC], 43546/02, 22 January 2008, Legal Summary; *S.H. v. Italy*, 52557/14, 13 October 2015, Legal Summary; and *Strand Lobben and Others v. Norway* [GC], 37283/13, 10 September 2019, Legal Summary)

## Discrimination (Article 8)

**Entitlement to parental leave of male police personnel conditional upon lack of maternal care for their children: *violation***

**Droit à un congé parental conditionné pour les agents de police de sexe masculin à l'absence de soins maternels : *violation***

*Gruba and Others/et autres – Russia/Russie*, 66180/09 et al., Judgment/Arrêt 6.7.2021 [Section III]

Traduction française du résumé – Printable version

*Facts* – Under domestic law, female and male police personnel are entitled to three years' parental leave to take care of their minor children. However, for policemen this is conditional on their children having been left without maternal care. The applicants, policemen, were refused parental leave this condition having not been fulfilled and unsuccessfully brought proceedings before the domestic courts. They were also dismissed from their posts: three of them for systematic absences and the remaining one on health grounds.

*Law*

Article 14 in conjunction with Article 8: In the case of *Konstantin Markin v. Russia* [GC] the Court held that Article 14, taken together with Article 8, was applicable to parental leave and thus, if a State decided to create a parental leave scheme, it had to do so in a manner which was compatible with Article 14. In that case, the Court also found that men were in an analogous situation to women with regard to parental leave (as opposed to maternity leave) and parental-leave allowances. Accordingly, for the purposes of parental leave the applicants, policemen, had been in an analogous situation to policewomen. Although under domestic law policemen, unlike servicemen who were completely excluded from entitlement to parental leave, were entitled to apply for three years' parental leave, this was subject to the condition that their children were left without maternal care. They were, thus, treated differently from policewomen who were unconditionally entitled to such leave. Consequently, it had to be ascertained whether this difference was objectively and reasonably justified. In doing so the Court examined the arguments advanced by the Russian Constitutional Court and the Government to justify this difference in treatment. In particular, and referring, *inter alia*, to its findings in the *Konstantin Markin* case, it found as follows:

– Gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, could not be considered to amount to sufficient justification for a difference in treatment between men and women as regards entitlement to parental leave. That finding applied just as much to police personnel as to military personnel.

– The fact that the applicants had signed a police service contract could not constitute a waiver of their rights not to be discriminated against. In view of the fundamental importance of the prohibition of discrimination on grounds of sex, no waiver of the right not to be subjected to discrimination on such grounds could be accepted as it would be counter to an important public interest.

– Although maintaining the operational effectiveness of the police was a legitimate aim that might justify certain restrictions on police personnel rights, it could not justify a difference in treatment between male and female personnel. In particular, the Court was not persuaded that the exclusion from entitlement to parental leave in the present case could be regarded as having been based on an inherent requirement of police service. Firstly, policewomen were unconditionally entitled to parental leave and the restriction only concerned policemen. Secondly, entitlement to parental leave depended on the sex of the police personnel rather than on their position in the police, the availability of a replacement or any other circumstance relating to the operational effectiveness of the police. Thirdly, there had been no restrictions on grounds of sex for holding the posts equivalent to the applicants' posts. Yet, policewomen holding those posts, unlike the applicants, had an unconditional entitlement to three years' parental leave. Fourthly, and most importantly, the domestic authorities in their decisions refusing the applicants' parental leave had not referred to any circumstances showing that their temporary departure on parental leave would have undermined the operational effectiveness of the police. The circumstances of the present case showed the difficulties a policeman might

encounter even in cases where his particular family situation required him to assume the role of the primary caregiver for his child and that the exception to the rule that policemen were not entitled to parental leave appeared to be interpreted strictly. More specifically, two of the applicants had been refused parental leave despite the fact that their wives had not been fully able to take care of the children on account of health issues. The authorities therefore had failed to perform any balancing exercise between the legitimate interest in ensuring the operational effectiveness of the police, on one hand, and on the other, the applicants' right not to be discriminated against on grounds of sex as regards access to parental leave.

In view of the above, the difference in treatment between policemen and policewomen as regards entitlement to parental leave could not be said to be reasonably and objectively justified. There was no reasonable relationship of proportionality between the legitimate aim of maintaining the operational effectiveness of the police and the contested difference in treatment. The applicants had therefore been subjected to discrimination on grounds of sex.

*Conclusion*: violation (unanimously)

The Court also found a violation of Article 6 § 1 of the Convention in respect of the applicant in application no. 22165/12 in that the principle of equality of arms had not been respected.

Article 41: In respect of pecuniary damage: EUR 1,196 to the applicant in application no. 50089/11 and remaining applicants' claim dismissed. In respect of non-pecuniary damage: EUR 7,500 to each applicant in applications nos. 66180/09 and 50089/11, EUR 1,000 to the applicant in application no. 30771/11 and EUR 5,500 to the applicant in application no. 22165/12.

(See *Konstantin Markin v. Russia* [GC], 30078/06, 22 March 2012, Legal Summary)

## ARTICLE 33

### Inter-State application/Requête interétatique

**Inter-State case brought by Russia against Ukraine**

**Affaire interétatique introduite par la Russie contre l'Ukraine**

*Russia/Russie – Ukraine*, 36958/21

Press release – Communiqué de presse

## ARTICLE 46

### Execution of judgment – General measures/Exécution de l'arrêt – Mesures générales

**Respondent State required to ensure pursuit of reforms aimed at reducing size of the prison population and keeping it at manageable levels**

**État défendeur tenu de s'assurer de la continuité des réformes visant à réduire la taille de la population carcérale et à la maintenir à des niveaux gérables**

*Polgar – Romania/Roumanie*, 39412/19, Judgment/Arrêt 20.7.2021 [Section IV]

(See Article 13 above/Voir l'article 13 ci-dessus, page 47)

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

### Peaceful enjoyment of possessions/ Respect des biens

**Individual, reasoned assessment required to counterbalance deficiencies in legislation on forfeiture of crime proceeds: *violation; no violation***

**Appréciation individuelle et motivée requise pour contrebalancer les lacunes de la législation sur la confiscation des produits du crime : *violation ; non-violation***

*Todorov and Others/et autres – Bulgaria/Bulgarie*, 50705/11 et al., Judgment/Arrêt 13.7.2021 [Section IV]

Traduction française du résumé – Printable version

*Facts* – The applicants in each of the cases had assets forfeited as alleged proceeds of crime under the Forfeiture of the Proceeds of Crime Act (2005) ("the 2005 Act").

*Law* – Article 1 of Protocol No. 1: The forfeiture of the applicants' property had constituted an interference with their rights under Article 1 of Protocol No. 1. In the case at hand, the Court did not have to determine with finality whether that interference had fallen with the scope of the second paragraph of that provision (control of the use of property) or the second sentence of the first paragraph (deprivation of liberty). The principles governing the question of justification were substantially the same.

The interference had a basis in domestic law (the 2005 Act), which had pursued a legitimate aim in the public interest, namely to prevent the illicit acquisition of property through criminal activity and the use of such property. The Court therefore had to determine whether the interference had been proportionate.

The procedure under the 2005 Act, in its entirety, had placed considerable burden on the applicants. The Act's scope of application had been very large, as concerns the periods of time examined, as well as the list of offences capable of triggering forfeiture proceedings. Proof of the lawful provenance of the assets and of the facts of the case in general could have been difficult, due to the need for the applicants to establish their financial situation as of many years earlier and in the light of evidentiary limitations, in most cases during a period of economic turmoil, also due to the fact that the percentage of shadow economy and thus of undeclared income in Bulgaria had been relatively high. At the same time, the 2005 Act had operated a presumption on the criminal provenance of assets, meaning that the authorities had not had to prove such provenance but could rely only on the lack of lawful income; in some cases this had resulted in an implicit assumption, without evidence and specifications, that the applicants had been involved in other criminal activity.

While none of the deficiencies of the procedure under the 2005 Act could in principle, in themselves, have affected decisively the proportionality of the forfeiture measures against the applicants, the Court had to take into account their cumulative effect. Taken together, the above factors could result in the uncertainty and imprecision criticised by the Court in *Dimitrovi v. Bulgaria* (12655/09, 3 March 2015), in other words, they could render forfeiture under the 2005 Act disproportionate to the legitimate aim pursued by it.

In those circumstances, in assessing the proportionality of the interference, the Court would follow the position of the Bulgarian Supreme Court in its Interpretative Decision of 2014, by considering critical, for the achievement of the requisite balance under Article 1 of Protocol No. 1, the establishment of a causal link, direct or indirect, between the assets to be forfeited and the criminal activity, which was "logically justified" and based on the individual circumstances of each case. The Court would therefore verify whether, in the context of each specific case, and as a counterbalance and a guarantee for the applicants' rights, the domestic courts had provided some particulars as to the criminal conduct in which the assets to be forfeited had been alleged to have originated, and had shown in a reasoned manner that those assets could have been the proceeds of the criminal conduct shown to exist. Such an approach was also reflected in the case law of the Court and in Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. As long as such an analysis had been carried out, the Court would generally defer to the domestic courts' assessment, unless the applicants had shown such assessment to be arbitrary or manifestly unreasonable.

Depending on the quality of the domestic courts' assessment, the Court found a breach of Article 1 of Protocol No. 1 in respect of some of the applicants (*Todorov, Gaich, Barov, Zhekovi*) and no violation in respect of the others (*Rusev, Katsarov, Dimitrov*).

*Conclusion*: violation; no violation (unanimously).

Article 41: sums ranging between EUR 2,000 and 4,000 to each applicant in *Todorov*, *Gaich* and *Barov* in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

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

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

**Migrant's push-back to a narrow strip of State territory on external side of a border fence amounting to expulsion: *Article 4 of Protocol No. 4 applicable***

**Applicant's removal, after irregular but undisruptive entry, without an individual decision, despite limited access to means of legal entry lacking formal procedure and safeguards: *violation***

**Le refoulement d'un migrant vers une étroite bande de territoire appartenant à l'État défendeur et longeant une clôture frontalière est constitutif d'une expulsion : *article 4 du Protocole n° 4 applicable***

**Renvoi du requérant opéré à la suite d'une entrée irrégulière mais non génératrice de perturbations, sans décision individuelle des autorités et malgré le caractère limité de l'accès aux voies d'entrée légales et l'absence de procédure et de garanties formelles : *violation***

*Shahzad – Hungary/Hongrie*, 12625/17, Judgment/Arrêt 8.7.2021 [Section I]

Traduction française du résumé – Printable version

*Facts* – In August 2016 a group of twelve Pakistani nationals, including the applicant, entered Hungary irregularly by cutting a hole in the border fence between Hungary and Serbia. They walked for several hours before resting in a cornfield where they were intercepted by Hungarian police officers and subjected to the "apprehension and escort" measure under section 5(1a) of the State Borders Act. They were transported in a van to the nearest border fence and then escorted by officers through the gate to the external side of the fence into Serbia. The applicant, who had been injured, went to a reception centre in Subotica, Serbia, and from there was taken to a nearby hospital.

*Law* – Article 4 of Protocol No. 4

(a) *Applicability* – The fact that the applicant had entered Hungary irregularly and had been apprehended within hours of crossing the border and possibly in its vicinity did not preclude the applicability of Article 4 of Protocol No. 4. Further, this provision might apply even if the measure in question was not classified as "expulsion" in domestic law. In the present case, the Court had to examine whether the fact that the applicant had not been removed directly to the territory of another State but to the strip of land between the border fence and the actual border between Hungary and Serbia, belonging to Hungary, meant that the impugned measure fell outside this provision's scope. It found that this was not the case and that the removal of the applicant to the external side of the border fence amounted to expulsion within the meaning of Article 4 of Protocol No. 4.

In particular, the border fence had clearly been erected in order to secure the border between the two countries. The narrow strip of land with no apparent infrastructure on the external side of that fence only had a technical purpose linked to the management of the border and in order to enter Hungary, deported migrants had to go to one of the transit zones, which normally involved crossing Serbia. The CJEU in its judgment of 17 December 2020 on Hungary's compliance with Directives 2008/115/EC and 2013/32/EU had found that migrants removed pursuant to section 5(1a) of the State Borders Act had no choice but to leave Hungarian territory and further, in the instant case, it transpired that the group had been directed by the officers towards Serbia. Hence, the measure to which the applicant had been subjected to, aimed at and resulted in his removal from Hungarian territory. Relying merely on the formal status of the strip of land on the external side of the border fence as part of Hungarian territory and disregarding the practical realities referred to above would lead to Article 4 of Protocol No. 4 being devoid of practical effectiveness in cases such as the present case, and would allow States to circumvent the obligations imposed on them by virtue of that provision. Problems with managing migratory flows could not justify an area outside the law where individuals were covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention.

(b) *Merits* – It had not been disputed that the applicant had been removed without having been subjected to any identification procedure or examination of his situation by the Hungarian authorities. It therefore had to be ascertained whether the lack of an individual removal decision could be justified by his own conduct. In this connection the Court had regard to the following:

– First, although the applicant, along with the other migrants, had crossed the Hungarian border in an unauthorised manner, it transpired from the submitted video footage that they had followed the officers' orders and that the situation had been entirely under the officers' control. There had been no indication that they had resisted or used force against the officers. Nor had Government argued that their crossing of the border had created a disruptive situation which had been difficult to control, or that public safety had been compromised as a result. Consequently, apart from the unauthorised manner of entry, the present case could not be compared to the situation to that in the case of *N.D. and N.T. v. Spain* [GC].

– Second, and as to whether the applicant, by crossing the border irregularly, had circumvented an effective procedure for legal entry, each of the two available transit zones admitted a significantly low number of applicants for international protection per day and those wishing to enter the transit zone had to first register their name on the waiting list with a potential wait of several months in Serbia before being allowed entry. Although the applicant submitted that he had asked the person managing the waiting list to add his name, he had never in fact been registered. In this regard, both UNHCR and the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees had pointed to irregularities and a lack of transparency in managing access to the transit zones and the handling of the waiting lists. UNHCR had also observed that single men who had not been visibly in need of special treatment had been actively discouraged from approaching the transit zones. In view of the foregoing and, in particular, the informal nature of this procedure, the applicant could not be criticised for not having his name added to the waiting list.

Having regard thus to the limited access to the transit zones and lack of any formal procedure accompanied by appropriate safeguards govern-

ing the admission of individual migrants in such circumstances, the respondent State had failed to secure the applicant effective means of legal entry. Consequently, the lack of an individual expulsion decision could not be attributed to the applicant's own conduct. In conclusion, in view of the fact that the authorities had removed the applicant without identifying him and examining his situation and, having regard to the lack of effective access to means of legal entry, his removal had been of a collective nature.

In the light of the above, the Court also dismissed the Government's objection which had been joined to the merits, as to the applicant's lack of victim status on account of the fact that he had not lodged an application for international protection.

*Conclusion*: violation (unanimously).

Furthermore, the Court held, unanimously, that there had been a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4 due to the absence of an effective remedy for the applicant to complain about his removal.

Article 41: EUR 5,000 in respect of non-pecuniary damage.

(See also *Hirsi Jamaa and Others v. Italy* [GC], 27765/09, 23 February 2012, Legal Summary; *Khlaifia and Others v. Italy* [GC], 16483/12, 15 December 2016, Legal Summary; *N.D. and N.T. v. Spain* [GC], 8675/15 and 8697/15, 13 February 2020, Legal Summary; and *M.K. and Others v. Poland*, 40503/17 et al., 23 July 2020, Legal Summary)

## PROTOCOL No. 15/PROTOCOLE N° 15

### Entry into force/Entrée en vigueur

**Protocol No. 15 amending the European Convention on Human Rights enters into force**

**Le Protocole n° 15 portant amendement à la Convention européenne des droits de l'homme entre en vigueur**

Press release – Communiqué de presse

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

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دليل حول المادة 14 من الاتفاقية (حظر التمييز)
وحول المادة الأولى من البروتوكول رقم 12 (الحظر الشامل للتمييز)

Czech/Tchèque

Příručka evropského práva v oblasti ochrany osobních údajů – Vydání z roku 2018

Romanian/Roumain

Ghid privind art. 46 din Convenție – Forța obligatorie și executarea hotărârilor

Raport – Exprimarea și publicitatea făcută pozițiilor politice prin intermediul mass-mediei/internetului în contextul alegerilor/referendumurilor

Raport – Abuzul sexual asupra copiilor și pornografia infantilă în jurisprudența Curții