264

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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

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

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

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

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

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Safi and Others/et autres – Greece/Grèce, 5418/15, Judgment/Arrêt 7.7.2022 [Section I]

English translation – Version imprimable

En fait – Le 20 janvier 2014, un bateau de pêche avec vingt-sept ressortissants afghans, syriens et palestiniens à bord a fait naufrage au large d'une île dans la mer Égée alors qu'il était remorqué par les garde-côtes grecs. Le naufrage entraîna la mort de onze personnes dont des proches des requérants.

La procédure sur l'éventuelle responsabilité pénale des garde-côtes impliqués dans la gestion de l'incident en cause et celle à l'encontre des militaires concernant les mauvais traitements prétendument subis par les requérants après leur arrivée ont été classées sans suite.

Entre autres, une procédure a été engagée à l'encontre deux hommes, qui ont fait office d'interprètes pendant les dépositions des requérants, pour parjure lors de l'exercice de la fonction d'interprète. L'un des deux a été acquitté. Le dossier ne contient pas d'informations sur l'issue de la procédure à l'encontre de l'autre.

Les seize requérants, rescapés du naufrage, se plaignent entre autres : de la mise en danger de leurs vies lors du naufrage du bateau en raison des actes et/ou omissions des garde-côtes et pour certains d'entre eux du décès de leurs proches lors du naufrage dudit bateau, du caractère inadéquat de l'enquête sur les responsables de l'accident mortel en cause, et d'avoir été soumis à des mauvais traitements à la suite de leur transfert par les garde-côtes sur l'île.

En droit

Article 2 (procédural) – La procédure pénale à l'encontre des garde-côtes était susceptible en principe de faire la lumière sur les circonstances de l'affaire, d'établir les faits et de conduire, le cas échéant, à sanctionner les responsables.

Neuf requérants sur les seize ont déposé en tant que témoins pour la première fois en janvier 2014. Ils se plaignent de problèmes d'interprétation lors du recueil de leurs dépositions et ils soutiennent, d'une part, que le véritable contenu de leurs dépositions n'est pas celui qui a été enregistré et, d'autre part, qu'ils n'ont jamais déclaré que le bateau avait fait naufrage en raison du mouvement brusque de ses passagers.

En septembre 2015, le tribunal correctionnel, ayant acquitté l'un des deux garde-côtes ayant fait fonction d'interprète, a reconnu qu'il ne parlait pas la langue des requérants. S'il est vrai que le procureur près le tribunal maritime avait déjà classé l'affaire en juin 2014, les autorités ont été informées de ces problèmes graves d'interprétation dès janvier 2014 par la conférence de presse tenue par les requérants.

Alors que le contenu des dépositions des requérants présentait des défaillances très sérieuses, il a fait partie intégrale du dossier de l'affaire jusqu'à son classement par le procureur près le tribunal maritime. Or, à partir du moment où les autorités ont pris connaissance des allégations des requérants concernant les défaillances précitées, elles devaient au moins enquêter sur celles-ci, avant de procéder à leur inclusion dans le dossier de l'affaire.

En second lieu, l'affaire présentait des aspects très complexes qui étaient uniquement connus des autorités. Il est fort douteux que les requérants aient pu participer de manière adéquate à la procédure, qui concernait des faits très graves, sans les enregistrements contenant la communication des garde-côtes ainsi que les éléments ressortant du signal et du radar de la base militaire de l'île qu'ils avaient demandés, car l'essence de l'affaire résidait justement dans cet aspect.

En troisième lieu, en classant l'affaire, le procureur s'est limité à constater que « le refoulement comme procédure de renvoi ou de remorquage (...) vers les eaux territoriales turques n'existe pas en tant que pratique (...) ». Il a ajouté qu'il serait « inutile et superflu » de prendre en compte les paramètres spécifiques des allégations des requérants en raison du fait que leur version des faits était basée sur l'hypothèse que leur bateau était remorqué vers les côtes turques, ce qui, selon ses évaluation et appréciation des preuves, ne pouvait pas être le cas en l'espèce. Selon les requérants, le ministre de la Marine nationale avait déclaré que les autorités grecques auraient « renvoyé (les migrants) côté turc » et que les garde-côtes avaient empêché

(d'arriver en Grèce) un nombre « multiple » de migrants (par rapport aux 7 000 personnes arrêtés). Par ailleurs, les requérants avaient également présenté d'autres allégations, qui n'ont pas été examinées par le procureur. Ils s'étaient plaints que l'ensemble de l'opération n'avait pas été organisé et conduit de manière à garantir la protection de leur droit à la vie et de celui de leurs proches, que le centre de coordination et de recherche n'avait pas été informé et que les dispositions des textes internationaux en la matière n'avaient pas été respectées. Ces pistes d'investigation s'imposaient de toute évidence mais elles n'ont pas été poursuivies, ce qui a compromis leur capacité à faire toute la lumière sur les circonstances du naufrage.

Conclusion : violation à l'égard de tous les requérants (unanimité).

Article 2 (matériel) – La Cour ne peut pas se prononcer sur des détails de l'opération de sauvetage ni sur le fait de savoir si les requérants ont fait l'objet d'une tentative de refoulement vers les côtes turques en l'absence d'une enquête approfondie et effective par les autorités nationales. Toutefois, certains des faits entourant les événements ne sont pas contestés entre les parties ou ressortent indéniablement des éléments du dossier et des décisions des juridictions internes.

L'on ne peut pas attendre des garde-côtes, de réussir le sauvetage de toute personne en situation de danger en mer, d'autant plus qu'il s'agit d'une obligation de moyens et non pas de résultat. Après leur arrivée sur place, ils avaient à leur disposition un éventail d'options quant aux actions à entreprendre. Toutefois, ces actions devraient être examinées dans le contexte particulier de l'opération en cause.

En effet, le commandant et l'équipage d'un bateau étatique impliqué dans le sauvetage de personnes en mer doivent souvent prendre des décisions difficiles et rapides et en règle générale, elles relèvent de la discrétion du commandant. Or, il doit être démontré que ces décisions s'inspiraient de l'effort primordial de garantir le droit à la vie des personnes se trouvant en danger.

À cet égard, en premier lieu, à l'arrivée du bateau des garde-côtes sur place, l'équipage a pris connaissance des conditions exactes dans lesquelles se trouvait le bateau de pêche, y compris son état, et la présence de femmes et d'enfants. En effet, c'était en raison de l'état du bateau de pêche, mal entretenu et impropre à la navigation, ainsi que du nombre des passagers, excédant la limite maximale autorisée, et des conditions météorologiques défavorables que le responsable de la coordination et de la gestion des incidents liés à l'immigration illégale en mer Égée a ordonné de remorquer le bateau de pêche pour le mettre en sécurité sur l'ile à proximité.

Rien n'explique comment les autorités envisageaient de mettre en sécurité les intéressés avec leur bateau, une vedette rapide sans équipements nécessaires au sauvetage. Les garde-côtes n'ont à aucun moment considéré la possibilité de demander de l'aide supplémentaire ou les autorités compétentes n'ont pas été informées d'envoyer sur place un bateau davantage adapté à une opération de sauvetage. Des gilets de sauvetage n'ont pas pu être distribués au préalable.

La première phase du remorquage a été interrompue par l'arrachement du point d'ancrage situé au niveau de la proue du bateau. À supposer même que le chavirement du bateau de pêche a eu lieu, en raison de la panique de ses passagers et de leurs mouvements brusques, elle était à prévoir, étant donné les conditions prévalant sur place. Les garde-côtes ont néanmoins procédé à une deuxième tentative de remorquage. Le Gouvernement n'explique pas pourquoi ils ont insisté, malgré la panique constatée la première fois.

Le centre de coordination et de recherche n'a été informé sur l'incident en cause que lorsque le bateau de pêche avait déjà à moitié sombré. Trois minutes après, il avait entièrement coulé et certains des proches des requérants se trouvaient acculés dans la cabine. Le facteur temps peut avoir une incidence cruciale sur le sauvetage des victimes, la noyade se produisant en quelques minutes. Mais il n'appartient pas à la Cour de spéculer sur la question de savoir si les victimes auraient eu la vie sauve si le centre national de coordination et de recherche avait été contacté plus tôt.

Par ailleurs, un message d'alerte afin que des bateaux qui navigueraient à proximité se dépêchent de se rendre sur place, n'a été transmis que douze minutes après que le centre de coordination fut informé, en retard, du naufrage par les garde-côtes. Qui plus est, la mobilisation et l'arrivée des moyens de sauvetage disponibles a eu lieu avec un nouveau retard considérable.

Pendant la période où les requérants et leurs proches ont essayé d'atteindre le territoire grec, le nombre d'arrivées de réfugiés par la mer était en augmentation. Eu égard à la difficulté de la mission des autorités maritimes dans un tel contexte, à l'imprévisibilité du comportement humain et à l'inévitabilité de choix opérationnels en termes de priorités et de ressources, il y a lieu d'interpréter l'étendue de l'obligation positive pesant sur les autorités internes de manière à ne pas imposer à celles-ci un fardeau insupportable. Cela dit, le Gouvernement ne fournit aucune explication quant aux omissions et retards concrets dans la présente affaire. Il ne soutient pas, à titre d'exemple, que le jour du naufrage des moyens de sauvetage plus appropriés n'étaient pas disponibles en raison d'un

afflux considérable de réfugiés qui aurait nécessité l'engagement ailleurs de ces moyens de sauvetage.

Selon le Gouvernement, la vie des passagers du bateau de pêche avait déjà, avant l'entrée de ces derniers en territoire grec et l'intervention des garde-côtes, été mise en danger par les conditions dans lesquelles se serait trouvé ce bateau, le nombre de passagers qu'il aurait transporté et l'inexistence de moyens de sauvetage à son bord. À cet égard, l'article 2 ne saurait être interprété comme garantissant à toute personne un niveau absolu de sécurité dans toutes les activités de la vie comportant un risque d'atteinte au droit à la vie, en particulier lorsque la personne concernée est responsable dans une certaine mesure de l'accident qui l'a exposée à un danger injustifié. Or, dans la présente affaire, de sérieuses questions se posent quant à la manière dont l'opération a été conduite et organisée.

Ainsi, les autorités n'ont pas fait tout ce que l'on pourrait raisonnablement attendre d'elles pour offrir à tous les requérants et à leurs proches le niveau de protection requis par l'article 2.

Conclusion : violation (unanimité).

Article 3 (matériel) – À leur arrivée sur l'ile, douze requérants n'étaient pas libres de leurs mouvements, étant sous le contrôle des autorités et censés suivre les instructions des forces de l'ordre. Soumis à des fouilles corporelles, ils ont été obligés de se déshabiller en même temps et au même endroit, devant au moins treize personnes. Les intéressés se trouvaient dans une situation d'extrême vulnérabilité : ils venaient de survivre à un naufrage et certains d'entre eux avaient perdu leurs proches. Ils vivaient sans aucun doute une situation de stress extrême et ils éprouvaient déjà des sentiments de douleur et de chagrin intense.

Ces fouilles corporelles ne reposaient pas comme il se doit sur un impératif convaincant de sécurité, de défense de l'ordre ou de prévention des infractions pénales. Elles ont pu provoquer chez les requérants un sentiment d'arbitraire, d'infériorité et d'angoisse caractérisant un degré d'humiliation dépassant celui, tolérable parce qu'inéluctable, que comporte inévitablement la fouille corporelle. Elles s'analysent en un traitement dégradant.

Conclusion : violation (unanimité).

Article 41 : 100 000 EUR au requérant numéro 1, 80 000 EUR conjointement aux requérants numéros 2, 4 et 5, 40 000 EUR au requérant numéro 7 et 10 000 EUR à chacun des requérants restants pour préjudice moral.

(Voir aussi *Osman c. Royaume-Uni*, 23452/94, 28 octobre 1998, Résumé juridique)

Positive obligations (substantive aspect) / Obligations positives (volet matériel)

Absence of real and immediate risk to life of well-known writer, subject of a religious fatwa with no subsequent threats or intimidation, fatally stabbed by unknown person: *violation*

Absence de risque réel et immédiat pour la vie d'un écrivain connu qui avait été visé par une fatwa religieuse, non suivie de menaces ou d'intimidations, et qui est mort poignardé par un inconnu : *violation*

Tagiyeva – Azerbaijan/Azerbaïdjan, 72611/14, Judgment/Arrêt 7.7.2022 [Section V]

Traduction française – Printable version

Facts – The applicant's husband was a well-known writer and columnist. In November 2006 he published an article entitled "Europe and us" which expressed critical views about Islam. Following the article's publication, the applicant's husband was publicly criticised by various Azerbaijani and Iranian religious figures and groups. In particular, that same month, a prominent religious figure of Iran issued a religious fatwa calling for the applicant's husband's death. The article also triggered protests in Iran in front of the Azerbaijani embassy and consulate. The applicant's husband was subsequently convicted of a criminal offence in relation to the article (incitement to ethnic, racial, social or religious hatred and hostility, committed publicly or by use of the mass media), the criminal proceedings of which were subject to the Court's judgment in *Tagiyev and Huseynov v. Azerbaijan*. In December 2007, he received a presidential pardon and was released from prison.

The applicant's husband continued to collaborate with various newspapers and journals after his release and, on 10 November 2011, published an article entitled "Iran and the inevitability of globalisation", criticising the religious and totalitarian nature of the Iranian State and its global policy. On 19 November 2011, the applicant's husband was stabbed by an unknown person. He died several days thereafter. Criminal proceedings were instituted immediately after the stabbing but suspended two years later owing to the inability to identify the perpetrators of the crime.

Law – Article 2

(a) *Substantive aspect* – The Court considered the religious fatwa about the applicant's husband that had been issued following the publication of his article "Europe and us" and the protests that had ensued. It did not exclude that in some circumstances, a fatwa issued by a religious figure, holding a considerable religious and political influence on a

community, might trigger the State's duty to act by taking preventive operational measures. However, the Court was not convinced that in the particular circumstances of the present case the authorities had known or ought to have known at the relevant time, namely in the days preceding 19 November 2011, of the existence of a real and immediate risk to the life of the applicant's husband from the criminal acts of a third party, solely on the basis of above-mentioned information.

There was no material in the case file indicating that at the relevant time the law-enforcement authorities had been aware of the danger to the life of the applicant's husband or had held any information which might have given rise to such a possibility. Amongst other things, the applicant's husband had never applied to the domestic authorities or informed them of any danger or threat to his life before his stabbing. He had neither received any verbal threat nor been subjected to any kind of intimidation, let alone physical violence, in connection with his publications following his release from prison. The Court also could not overlook the applicant's husband's statements before his death in which he had not referred to the religious fatwa or protests, but to his 2011 article, while indicating that he had not received any threat following its publication.

For those reasons, there was no basis on which to conclude that the domestic authorities had known or ought to have known at the relevant time of the existence of a real and immediate risk to the life of the applicant's husband.

Conclusion: no violation (unanimously).

(b) *Procedural aspect* – There had been no shortcomings as might call into question the overall adequacy of the investigation conducted by the domestic authorities into the death of the applicant's husband. However, although the applicant had been granted victim status in the investigation, the investigating authorities had repeatedly denied her access to the case file. The relevant domestic law provided no right of access, a situation the Court found to be unacceptable. That situation had deprived the applicant of the opportunity to safeguard her legitimate interests and had prevented sufficient scrutiny of the investigation by the public. Accordingly, the investigation had been ineffective as it had lacked an important guarantee, that of the involvement of the deceased person's family.

Conclusion: violation (unanimously).

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

(See also *Huseynova v. Azerbaijan*, 10653/10, 13 April 2017, Legal Summary; *Tagiyev and Huseynov v. Azerbaijan*, 13274/08, 5 December 2019, Legal Summary; *Shuriyya Zeynalov v. Azerbaijan*, 69460/12, 10 September 2020)

ARTICLE 3

Degrading treatment / Traitement dégradant

Body searches of refugees arriving on a Greek island after their boat had sunk, who were ordered by the security forces to undress at the same time and in the same place, in front of at least thirteen people: *violation*

Fouilles corporelles sur des réfugiés naufragés, à leur arrivée sur une île grecque, obligés par les forces de l'ordre de se déshabiller en même temps et au même endroit, devant au moins treize personnes : *violation*

Safi and Others/et autres – Greece/Grèce, 5418/15, Judgment/Arrêt 7.7.2022 [Section I]

See under Article 2 – Voir l'article 2

Inhuman or degrading treatment / Traitement inhumain ou dégradant

Placement of minor in adult reception centre in inadequate conditions for more than four months and subjected to age-assessment procedure breaching Article 8: *violation*

Placement d'un mineur dans un centre d'accueil pour adultes, où il a été soumis à des conditions inadéquates pendant plus de quatre mois ainsi qu'à une procédure d'évaluation de l'âge contraire à l'article 8 : *violation*

Darboe and/et Camara – Italy/Italie, 5797/17, Judgment/Arrêt 21.7.2022 [Section I]

See under Article 8 – Voir sous l'article 8

ARTICLE 6

Article 6 § 1 (criminal / pénal)

Fair hearing / Procès équitable

Sufficiently reasoned dismissal of criminal appeal, consequent on a tie vote, based on applicant's

failure to discharge his burden of proof as required by domestic law: *no violation*

Rejet suffisamment motivé d'un appel en matière pénale, à la suite d'un partage de voix, basé sur le manquement du requérant à s'acquitter de la charge de la preuve que le droit interne faisait peser sur lui : *non-violation*

Loizides – Cyprus/Chypre, 31029/15,
Judgment/Arrêt 5.7.2022 [Section III]

Traduction française – Printable version

Facts – The applicant who had been the Chief of the Special Unit for Disaster Response at the time of the 2011 Evangelos Florakis Naval Base explosion, was convicted of causing death by a rash, reckless or dangerous act and sentenced to two years' imprisonment in relation to the incident. On appeal the Supreme Court, sitting in a twelve-judge formation (one judge had not sat owing to his upcoming retirement), came to a tie vote. It delivered three judgments: one judgment by six judges dismissing the appeal and two separate judgments by the remaining two and four judges respectively indicating that they would allow the appeal. After the judgments were pronounced the President of the Supreme Court made a separate announcement concerning, *inter alia*, the summary of the applicant's appeal. In this connection, he stated that the appeal was dismissed because there was a tie vote and the applicant did not discharge the burden of proving that the first-instance decision and sentence were incorrect. Still on the same day, the Supreme Court issued a similar a press release.

Law – Article 6 § 1: Domestic law did not preclude ties in Supreme Court votes and that court was deemed to be duly constituted, notwithstanding any vacancy in its membership. In the event of a tie in the Supreme Court, its President did not have a casting vote and judgment was issued against the party who has the burden of proof (section 27(2) of Law 14/1960). According to the domestic case-law the burden of quashing a conviction in criminal appeals rested with the appellant, while the burden of showing that there was not a substantial miscarriage of justice despite an error in the trial court judgment, rested with the prosecution.

The Court has not interpreted a tied vote to constitute *per se* a violation of Article 6 nor, in the circumstances of the present case, could it find that section 27(2) was *per se* contrary to the above provision. That being said, given the applicant's complaints and arguments, the core question was whether the Supreme Court's judgments resulting in the dismissal of his appeal had been reasoned enough to allow him to understand why the dismissal had resulted from the operation of section 27(2), and whether that decision had been clear enough as to its conclusion and outcome. The Court replied in the affirmative for the following reasons.

As the parties had been informed at the beginning of the trial that one of the judges would not be part of the bench, the possibility of a tie vote had been evident to the applicant whose lawyer did not raise any concerns regarding the court's formation. No issue arose as to the Supreme Court's examination of the merits of the case and issues pertaining to the correctness of the first instance decision, all three judgments being sufficiently reasoned in this respect. Although the Supreme Court had not expressly referred to section 27(2) in the judgments, the dismissal of the applicant's appeal had been the inevitable result of the tie vote, significantly reducing thus the degree of legal debate required by the Supreme Court on the matter. In this connection, the wording of the judgments could not be ignored; those allowing the appeal had used hypothetical language whereas the judgment of dismissal had expressly stated that the appeal was dismissed. Furthermore, the announcements made by the Supreme Court's President and then the Supreme Court itself, ensured that the applicant had understood that his appeal had been dismissed as result of his failure to discharge his burden of proof. Lastly, it transpired from the applicant's submissions before this Court, that there was no doubt that he had understood that the dismissal had been by reason of the operation of section 27(2).

Although the inclusion of a correspondingly short reasoning on the matter and a brief conclusion as to the outcome of the case in the written judgments might have been suitable, its absence in the particular circumstances of the case did not infringe the requirements of Article 6 § 1.

Conclusion: no violation (four votes to three)

ARTICLE 7

Retroactivity / Rétroactivité

Retroactive application of criminal law for deliberate false registration of immigrants at applicant's property: *violation*

Application rétroactive de la loi pénale pour faux enregistrement délibéré d'immigrés à l'appartement de la requérante : *violation*

Kotlyar – Russia/Russie, 38825/16 et al.,
Judgment/Arrêt 12.7.2022 [Section III]

See under Article 10 – Voir sous l'article 10

ARTICLE 8

Respect for private life / Respect de la vie privée

General and indiscriminate ban on prisoner possession of pornographic material not permitting proportionality assessment in an individual case: *violation*

L'interdiction générale et indifférenciée faite aux détenus de posséder du matériau pornographique ne permet pas d'apprécier la proportionnalité dans un cas donné : *violation*

Chocholáč – Slovakia/Slovaquie, 81292/17, Judgment/Arrêt 7.7.2022 [Section I]

Traduction française – Printable version

Facts – The applicant is serving a life sentence in prison. After a routine search, pictures from adult magazines and depicting "classic" adult heterosexual intercourse were found in his possession. The material was found to be pornographic and, as such, a threat to morality within the meaning of the Execution of Prison Sentences Act. The material was taken away from the applicant and he was found guilty of a disciplinary offence, for which he received a reprimand. He appealed unsuccessfully and his constitutional complaint was also dismissed.

Law – Article 8

(a) *Applicability and interference* – It was uncontested that the applicant had held printed material capable of being used as a stimulant for autoeroticism in his private sphere for that purpose. The case accordingly involved no issue of any positive obligations in relation to it in general or *in concreto*. The Court noted that the possession of such material was not normally against the law in the respondent State. However, in the applicant's specific situation it had been forbidden. Moreover, the fact that the prison system concerned allowed for no conjugal visits formed a part of the context in which the impugned restriction on the applicant's ability to lead sexual life had to be viewed.

In those circumstances, the facts of the present case fell within the material scope of the right to respect for private life under Article 8. The seizure of the material from the applicant and the reprimand he had received for its possession had accordingly constituted an interference with that right.

(b) *Justification for the interference* – The interference had been in accordance with the law. The Court expressed some doubt as to the whether the disputed measure had in fact pursued any of the legitimate aims put forward by the Government (protection of morals, the prevention of disorder and the protection of the rights and freedoms of others) but did not find it necessary to take a definitive stance, since, in any event, it had not been necessary in a democratic society.

The possession of explicit material in the prison context put the private interest of the person concerned in opposition to the public interest:

As to the applicant's private interest, since imprisonment entailed a total exclusion of intimate contact with the opposite sex, the Constitutional Court had recognised that pornography could serve as a stimulus for auto-erotic satisfaction. In addition, and concerning the applicant's individual situation, his state of deprivation of any direct intimate contact was long-term, if not permanent. There was no indication that he had ever been convicted of a sexual offence or had suffered from any condition in which the material in question could trigger violent or otherwise inappropriate behaviour. Furthermore, there had been no suggestion that the material in question had involved any elements proscribed by law as such. On the contrary, material of that kind was commonly available through the general distribution of the press to the adult population in the respondent State and beyond. The material had been kept in the applicant's private sphere and had been destined exclusively for his individual and private use within that sphere, in particular in his cell of which he had been the sole occupant. In that context, the relatively negligible level of penalty that had been imposed on the applicant was not decisive as the core of the problem was the underlying ban and not the sanction. In addition, had the ban been breached repeatedly, the sanction had been bound to increase in severity.

Concerning the public interests at play, while the margin of appreciation in relation to the means of protection of morals was a wide one, a justification for any restriction on Convention rights of prisoners could not be based solely on what would offend public opinion. As to the prevention of disorder in prison and the protection of the rights and freedoms of others, no concrete evidence of examples had been furnished supporting the allegation that possession of adult content as in the applicant's case had entailed genuine risks in relation to those values. As to the rehabilitation and reintegration aspect of the purpose of a prison sentence, it was generally recognised at the national and prisoners were forbidden to keep objects incompatible with that purpose. However, that particular ground for sanctioning the applicant for the possession of the impugned material had not been relied on in the assessment of the case at the national level.

Lastly, there had not been any balancing of the competing individual and public interests. There had been no legislative scope for taking into ac-

count any individual interests, the prison administration had been unable in practice to deal with individual cases in a differentiated manner, and the Constitutional Court had held that it had no power to deal with the problem in response to an individual complaint, presuming that the lawmakers would have based the legislation they had passed on the requisite expert assessment. That presumption, however, had not been supported by reference to any actual expert evaluation.

The contested ban thus had amounted to a general and indiscriminate restriction not permitting the required proportionality assessment in an individual case. The absence of such an assessment both at the legislative level and on the facts of the applicant's individual case regarding a matter of importance for him fell outside any acceptable margin of appreciation, such that a fair balance had not been struck between the competing public and private interests involved.

Conclusion: violation (five votes to two).

Article 41: EUR 2,600 in respect of non-pecuniary damage.

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

Unaccompanied minor asylum-seeker placed in adult reception centre, not provided minimum procedural guarantees in age-assessment procedure: *violation*

Demandeur d'asile mineur non accompagné placé dans un centre d'accueil pour adultes et n'ayant pas bénéficié des garanties procédurales minimales dans une procédure d'évaluation de l'âge : *violation*

Darboe and/et Camara – Italy/Italie, 5797/17, Judgment/Arrêt 21.7.2022 [Section I]

Traduction française – Printable version

Facts – The applicant, a Guinean national, arrived in Italy and sought asylum claiming to be an unaccompanied minor. He submitted that he had declared his minor age and intention to apply for international protection shortly after arrival. However, no information on how to initiate the relevant procedure had been provided to him and no request for international protection had been lodged in his case.

The applicant was initially placed in a centre for foreign unaccompanied minors but subsequently transferred to an adult reception centre, which he further alleged was overcrowded and lacking in facilities and healthcare. A month after his transfer, a medical examination (wrist X-ray examination) was carried out on the applicant to determine his age, which concluded that he was an adult of eighteen years old.

After eventually being assisted by lawyers, the applicant promptly filed an application to the domestic court to obtain the appointment of a guardian and recognition of his rights protected by domestic law as an unaccompanied minor asylum-seeker. However, there was no information on the outcome of the application. Subsequent to a Rule 39 request, the applicant was transferred to a centre for minors. His stay in the adult reception centre lasted more than four months.

Law – Article 8

(a) *Admissibility* – In determining that the applicant's complaint under Article 8 was admissible, the Court considered that the age of a person was a means of personal identification and that the procedure to assess the age of an individual alleging to be a minor, including its procedural safeguards, was essential in order to guarantee all the rights deriving from a person's minor status. The Court also emphasised the importance of age-assessment procedures in the migration context. The applicability of domestic, European and other international legislation protecting children's rights started from the moment of identification as a child. Determining if an individual was a minor was thus the first step to recognising his or her rights and putting into place all necessary care arrangements. Indeed, if a minor was wrongly identified as an adult, serious measures in breach of his or her rights might be taken.

(b) *Merits* – It was appropriate to approach the case from the perspective of the State's positive obligation under Article 8. In that connection, it was not the Court's task to speculate on whether or not the applicant had been a minor at the time of his arrival in Italy, or whether he had submitted any document to prove his age. He had declared his minor age at some point after his arrival and there was no indication that his claims that he had been a minor had been unfounded or unreasonable. The question was rather whether the domestic authorities had ensured the procedural rights stemming from the applicant's status as an unaccompanied minor requesting international protection.

The Court welcomed the fact that guarantees put in place by the EU and international law since the time of the facts had gone further to ensure a holistic and multidisciplinary age-assessment procedure. However, the national and international legal framework applicable at the time of the facts had also showed a general recognition, at the material time, of the need for special protection of unaccompanied minor migrants. That had included the

safeguards of appointment of a legal representative or guardian, access to a lawyer and informed participation in the age-assessment procedure of the person whose age had been in doubt:

– The national authorities had failed to promptly provide the applicant with a legal guardian or representative. Despite having orally expressed his wish to apply for international protection after his arrival, he had been unable to request to have a guardian until his application before the domestic court on more than six months after his arrival. The failure had prevented him from duly and effectively submitting an asylum request.

– The X-ray examination of the applicant's wrist had been carried out without any information as to the type of age-assessment procedure he was undergoing and to its possible consequences. The relevant medical report, which had failed to indicate any margin of error, had not been served on him. Moreover, no judicial decision or administrative measure concluding that the applicant had been of adult age had been issued, making it impossible for him to lodge an appeal.

– Further, the applicant had not been provided with any information concerning the outcome of his application to the domestic court to obtain the appointment of a guardian and recognition of his rights as an unaccompanied minor asylum-seeker.

Overall, the Italian authorities had failed to apply the principle of presumption of minor age, which was an inherent element of the protection of the right to respect for private life of a foreign unaccompanied individual declaring to be a minor. While age assessment of an individual might be a necessary step in the event of doubt as to his or her minority, that principle implied that sufficient procedural guarantees had to accompany the relevant procedure. The applicant had not benefitted from the minimum procedural guarantees, and his placement in an adult reception centre for more than four months must have affected his right to personal development and to establish and develop relationships with others. That could have been avoided had he been placed in a specialised centre or with foster parents – measures more conducive of the best interests of the child.

Conclusion: violation (unanimously).

Article 3: Upon the applicant's arrival, the adult reception centre had been overcrowded, with insufficient number of staff and difficulties in accessing medical care. In addition, there were a number of circumstances in themselves problematic with regard to the applicant's vulnerability: despite having declared himself to be a minor, the applicant had been housed in an adult reception centre; once there, he had been subject to an age-assessment procedure conducted in breach of Article 8; and he had then been considered to be an adult and kept there for more than four months. The Court was sensitive to the fact that the reception centre in question had been converted from a former military facility to deal with the massive phenomenon of migration. The number of unaccompanied minors arriving in Italy had dramatically increased during the period in which the facts of the case had taken place. However, the difficulties deriving from the increased inflow of migrant and asylum seekers in particular States from external EU borders did not exonerate member States of the Council of Europe from their obligations under Article 3, which was of an absolute character.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 13 in conjunction with Articles 3 and 8, in that there had been no effective remedies under domestic law by which to lodge the applicant's complaints.

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

ARTICLE 9

Manifest religion or belief / Manifester sa religion ou sa conviction

Prohibition on the ritual slaughter of animals without stunning: *communicated*

Interdiction de l'abattage rituel d'animaux sans étourdissement : *affaire communiquée*

Executief van de Moslims van België and Others/et autres – Belgium/Belgique, 16760/22, Communication 4.7.2022 [Section III]

English translation – Version imprimable

Par décrets adoptés en 2017 et 2018 respectivement, dans le cadre de leur législation sur le bien-être des animaux, la Région flamande et la Région wallonne ont interdit l'abattage rituel sans étourdissement. Y voyant une atteinte injustifiée et discriminatoire à leur liberté de religion, les requérants – des personnes de religion musulmane ou juive ainsi que diverses organisations représentatives – formèrent des recours en annulation de cette interdiction. Après un arrêt de la Cour de justice de l'Union européenne en réponse à diverses questions préjudicielles (affaire C-336/19), la Cour constitutionnelle rejeta ces recours par deux arrêts du 30 septembre 2021 (n^{os} 117/2021 et 118/2021).

Affaire communiquée sous l'angle de l'article 9 de la Convention, pris isolément ou combiné avec l'article 14.

ARTICLE 10

Freedom of expression / Liberté d'expression

Insufficient reasons and disproportionate damages award in defamation action against journalist for newspaper article on high-ranking attorney in the Law Office of the State: *violation*

Motivation insuffisante et montant disproportionné des dommages-intérêts auxquels a été condamné un journaliste pour un article de presse consacré à un juriste de haut rang du service contentieux de l'État : *violation*

Drousiotis – Cyprus/Chypre, 42315/15, Judgment/Arrêt 5.7.2022 [Section III]

Traduction française – Printable version

Facts – The applicant, a journalist, was found liable for defamation in civil proceedings brought by S.P., a high-ranking attorney in the Law Office of the Republic of Cyprus, in respect of an article he published in the national daily newspaper "*Politis*" concerning the extension of S.P.'s term of service for one year beyond retirement age. The applicant and the publishing house were ordered, *inter alia*, to pay damages jointly and/or severally to S.P. in the amount of EUR 25,000 plus statutory interest. The applicant unsuccessfully appealed. While the first instance court proceedings were pending, S.P. was appointed to the position of Deputy Attorney General.

Law – Article 10: The domestic courts' judgments had constituted an "interference" with the applicant's right to freedom of expression which had been prescribed by law and pursued the legitimate aim of protecting the reputation or the rights of others. The Court found, however, that the interference had not been "necessary in a democratic society".

The case concerned a conflict of the right to respect for the applicant's right to freedom of expression under Article 10 and S.P.'s right to the protection of his reputation under Article 8. The article had made direct reference to S.P., had presented him as a sycophant and had commented negatively on the extension of his service. The characterisations given to S.P. had been capable of tarnishing his reputation and causing him prejudice in his professional and social environment. They thus attained the requisite level of seriousness and could harm S.P.'s rights under Article 8.

(a) *Whether the impugned article contributed to a debate of general interest* – It had been natural that the extension of S.P.'s service would be subjected to scrutiny by the press. It had been a matter of public interest and had given rise to considerable controversy and political debate. It had been the subject of other publications and commentaries which, *inter alia*, had considered the decision to be a scandal. There was therefore little scope for restrictions under Article 10 § 2.

(b) *The status of S.P.* – S.P. could be compared to a public figure on account of a combination of factors: namely, his high position in the Law Office of the Republic of Cyprus, the fact that he had aspired to become the next Attorney General and at the time of the article's publication was being considered for the post, as well as his systematic participation in public debates through his publications in the press and his books with political content. As result, in this context, he had to be considered to have inevitably and knowingly entered the public domain and laid himself open to close scrutiny, to which he ought to have shown a greater degree of tolerance.

(c) *The nature of the offending remarks and their factual basis* – The applicant had heavily criticised the extension of S.P.'s service, as he had believed that no good reason had been provided for the extension and that it had taken place, without the knowledge of S.P.'s superior, the Attorney General, in the context of a broader political exchange between the President of the Republic of Cyprus and the President of Parliament. It appeared from publications at the time that other persons in the political sphere had expressed similar concerns, albeit in a less exaggerated manner. Hence, the admittedly strong and coarse expressions of the applicant had to be read within this broader context.

The applicant had used a caustic and ironic style with harsh expressions aimed at stirring controversy, provoking the public and attracting its attention. The domestic courts had concentrated heavily on the tone of the article and the excessiveness of the expressions used without, however, affording adequate importance to other relevant factors that had to be considered when undertaking their balancing exercise between the competing rights at stake. In particular, despite acknowledging that S.P. had been a person in the public sphere and that the extension of his service had been a matter of public interest, they had not really incorporated those factors in their assessment and had not considered the article against the general background at the time it had been written. Further, there was no indication that the article had been published in bad faith, or that the domestic courts had considered it as such. Moreover, the expressions used in the article had been essentially made up of value judgments and not concrete statements of fact.

Although the applicant had endeavoured during the domestic proceedings to explain the factual basis of his allegations, this aspect had not been sufficiently elaborated upon by the domestic courts. Indeed, in the circumstances, and given the information available at the time, in particular earlier publications on the issue which the applicant had relied upon, the Court could not conclude that the impugned expressions had been without factual basis. Consequently, the reasons provided by the domestic courts to justify the interference, albeit relevant, had not been sufficient.

(d) *The severity of the sanction imposed* – The amount that had been awarded in respect of damages had been disproportionate to the aims pursued. It had been unusually high in absolute terms. Further, it was difficult to accept that any presumed or potential injury to S.P.'s reputation had been of such a level of seriousness as to justify an award of that size especially considering that during the proceedings, S.P. had been appointed to the position of Deputy Attorney General. While this appointment had been subsequent to the article's publication, it might constitute an indication as to the concrete extent of the damage that S.P. suffered to his reputation and status. Although the amount had been paid in full by the publishing house and not the applicant, at the time the judgment had been rendered, he had been personally liable to pay the amount, either alone or jointly with the publishing house. Such an award, given its magnitude, might, discourage open discussion of matters of public concern and the fact that the publishing house eventually chose to pay the amount in full could not alter this finding.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed (the applicant having failed to submit evidence that he was bound to repay any amount to the publishing company).

Freedom of expression / Liberté d'expression

Criminal liability for deliberate false registration of immigrants at applicant's property, in protest against residence registration system for migrants: *Article 10 inapplicable*

Responsabilité pénale pour faux enregistrement délibéré d'immigrés à l'appartement de la requérante, en signe de protestation contre le régime d'enregistrement du lieu de résidence des immigrés : *article 10 inapplicable*

Kotlyar – Russia/Russie, 38825/16 et al.,
Judgment/Arrêt 12.7.2022 [Section III]

Traduction française – Printable version

Facts – The applicant is a human-rights defender and member of a town council. She has worked for many years to provide legal advice and social assistance to people who decided to move to Russia from other republics of the former Soviet Union.

In 2013, a new migration law was enacted, which introduced the concept of "fictitious residence registration", creating new criminal offences under Articles 322.2 and 322.3 of the Criminal code, and establishing new grounds for administrative liability. Between 2014-2019, the applicant was prosecuted and tried under those provisions for falsely certifying, in respect of hundreds of non-Russian nationals seeking residence registration, that they had lived in her flat on a temporary or permanent basis, whereas they were actually living elsewhere. This included false registrations which predated Articles 322.2 and 322.3 entering into force. The applicant appealed unsuccessfully against her convictions in that respect. She submitted, *inter alia*, that she had provided residence certification on compassionate grounds to immigrants who had needed to secure such registration in order to be able to apply for Russian nationality. Moreover, her actions constituted a form of civil disobedience.

Law – Article 7: The Government had argued that, even before the new law had come into force, the applicant could have been prosecuted for the impugned false registrations under Article 322.1 of the Criminal Code, which had sanctioned the organisation of the illegal entry, stay or transit of non-Russian nationals.

It had not been alleged that the non-nationals in question – whom the applicant had registered as residents in her flat – had entered Russia illegally or had lacked the proper documentation to stay legally in Russia. It therefore did not appear that the applicant could have foreseen that she would be held responsible for organising the illegal entry or illegal stay of non-nationals in so far as the required element of illegality had not been made out.

Regarding the application in practice of Article 322.1, the Government had not submitted evidence to indicate that any homeowners who had made fraudulent registration applications had been prosecuted under that provision. According to the explanatory note to the new law, the issue of "elastic flats", whereby hundreds of people were registered as residents while living elsewhere, had reached considerable proportions. An issue of that magnitude should have given rise to extensive case-law on the prosecution of owners of "elastic flats" under Article 322.1, and yet not one conviction had been submitted to the Court. The absence of evidence of any prior convictions tended to indicate that such activities could not be

prosecuted under the previous legislation. Indeed, the explanatory note had made it apparent that the Russian authorities had been concerned that there had been no sufficient legal means of tackling the problem of "elastic flats".

The timing of the criminal proceedings against the applicant was also significant. The authorities had been aware of her activities for years before the adoption of the new law. However, criminal proceedings had only been initiated after the new law had entered into force, and initially only in respect of the three instances of "fictitious registration" that had taken place after the date of entry into force. At a later stage, further charges relating to a period prior to the new law's entry into force had been added, despite the applicant's objection regarding the retroactive application of criminal law.

It therefore had not been shown that the applicant's acts had constituted a prosecutable offence under domestic law prior to the entry into force of Articles 322.2 and 322.3. It followed that, in so far as the applicant's conviction had concerned the acts carried out before that date, it had amounted to the retroactive application of criminal law.

Conclusion: violation (six votes to one).

Article 10: The applicant further complained that the criminal proceedings against her had sought to stifle her freedom to express an opinion on a systemic social problem.

The applicant had been a vocal critic of the deficiencies in the legal framework and its practical implementation which had prevented immigrants from accessing State benefits or applying for Russian citizenship. She had used a variety of means to raise awareness of the issues faced by immigrants, including seeking to draw the authorities' attention to those issues, making statements to the media, giving interviews and publishing open letters.

There was no indication that any repressive measures had been taken in reaction to the forms of expression she had chosen to voice her opinions on that matter. In so far as the applicant had not been prevented from bringing her views to the public's attention, the present case did not concern a restriction on a communicative activity aimed at broader public, but rather the taking of measures against the applicant for actions that, under the domestic legal system, had infringed criminal law in a manner unrelated to the exercise of freedom of expression. Even assuming that the applicant had intended to convey a message of protest through her disruptive conduct in the administrative proceedings, such conduct could not, seen from an objective point of view, be considered to amount to an expressive act in the circumstances of the case.

The present case also had to be further distinguished from cases like *Erdtmann v. Germany* (dec.) (carrying a knife onto an airplane to prepare a television documentary about airport security flaws) and *Salihu and Others v. Sweden* (dec.) (illegal purchase of a firearm to investigate how easy it had been to obtain one). In those cases, the sanction had interfered with the applicants' right to freedom of expression in so far as they had been held responsible for acts that had formed part of an investigation undertaken while gathering material for a planned article. The applicant in the instant case had not claimed that she had committed residence-regulation offences as part of an investigation into any official abuse or for the purposes of preparing material that was to be published.

The residence registration law that the applicant had been found to have infringed had not targeted the exercise of freedom of expression as such or any specific form of expression. It had gone no further than requiring that the information about a person's place of residence be truthful and accurate, so that the authorities could, among other purposes, reliably calculate how many public services were needed in each area and ensure that official correspondence was properly addressed and delivered. Providing untrue information about the place of residence impeded the achievement of those legitimate aims, and the authorities could take measures to counteract such conduct by introducing administrative or criminal sanctions.

The Court could not accept that either the applicant's altruistic motivation or the sincerity of her conviction of the wrongness of the residence regulations had released her from the duty to obey the law. Admittedly, a protest taking the form of impeding the activities of which applicants disapprove might constitute an expression of opinion within the meaning of Article 10 (see, for example, *Steel and Others v. the United Kingdom,* and *Hashman and Harrup v. the United Kingdom* [GC], involving protests, respectively, against hunting by disrupting organised hunts and against the enlargement of a motorway by breaking into a construction site). However, there was a significant difference between being sanctioned for offering some form of resistance to lawful activities of others and actively engaging in criminally reprehensive conduct by making false representations to the authorities. The law had made it an offence to provide deliberately false information in official applications and there was nothing unusual or unreasonable in that approach, nor was there any basis in the Court's case-law to find that Article 10 protected the provision of such for neutral regulatory purposes.

As the applicant had been held liable for breaching a generally applicable law that had not been designed to suppress, or had had the effect of interfering

with, any "communicative activity" on her part, the conduct for which she had been sanctioned had not fallen within the ambit of Article 10.

Conclusion: inadmissible (incompatible *ratione materiae*).

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

(See also *Steel and Others v. the United Kingdom*, 24838/94, 23 September 1998, Legal Summary; *Hashman and Harrup v. the United Kingdom* [GC], 25594/94, 25 November 1999, Legal Summary; Erdtmann *v Germany* (dec.), 56328/10, 5 January 2016, Legal Summary; *Salihu and Others v. Sweden* (dec.), 33628/15, 10 May 2016, Legal Summary)

ARTICLE 11

Form and join trade unions / Fonder et s'affilier à des syndicats

Legislation, rendering conflicting collective agreements concluded by minority trade unions inapplicable, within the respondent State's margin of appreciation: *no violation*

Marge d'appréciation de l'État englobant une législation par l'effet de laquelle les conventions collectives conflictuelles passées par les syndicats minoritaires étaient inapplicables : *non-violation*

Association of Civil Servants and Union for Collective Bargaining and Others/et autres – Germany/Allemagne, 815/18 et al., Judgment/Arrêt 5.7.2022 [Section III]

Traduction française – Printable version

Facts – The applicants are a confederation of trade unions and associations, an association and trade union, and individual trade union members. Their complaint concerns the issue of conflicting collective agreements between a company and different trade unions, covering employees working in the same business unit of the company.

In 2015, the domestic legislature adopted the Uniformity of Collective Agreements Act ("the Act"), which provided a new solution in case of conflicting collective agreements; under the relevant provision, only the collective agreement concluded by the trade union which has the highest number of members employed within the business unit of the company concerned remains applicable. Other collective agreements become inapplicable.

The applicants lodged an unsuccessful constitutional complaint with the Federal Constitutional Court targeting the Act, and arguing that the relevant legal provisions breached, in particular, their right to form associations and to safeguard and improve working and economic conditions under the German Basic Law.

Law – Article 11

(a) *Whether there was an interference* – The impugned provisions of the Act might lead to a collective agreement concluded by a trade union with an employer becoming fully inapplicable if a conflicting collective agreement – which contained at least partly differing provisions on working conditions and overlapped with the minority union's agreement – had been concluded by another trade union having more members in the business unit of the company concerned. Moreover, as a result of the impugned provisions, trade unions might be obliged to disclose the number of their members in a business unit in the labour court proceedings to determine the majority union, and thus their strength in case of industrial action. Those provisions interfered with the applicants' right to form and join trade unions under Article 11 § 1, which includes a right, held by both trade unions and their members, to bargain collectively with the employer.

(b) *Whether the interference was justified* – The impugned interference had been "prescribed by law" and pursued the legitimate aim of protecting the rights of others: namely, the employees not holding key positions and of trade unions defending their interests, but also the rights of the employer. The Court therefore had to determine whether the interference had been necessary in a democracy society.

The trade unions concerned did not lose the right as such to bargain collectively – and to take industrial action in that context if necessary – and to conclude collective agreements. The relevant provision intended to encourage trade unions to coordinate their collective bargaining negotiations. In the event of a failure of coordination, it provided for different legal effects regarding the conflicting collective agreements concluded with the employer (in that only the collective agreement concluded by the largest trade union within the business unit remained applicable). The extent of the restriction on trade union freedom and in particular the right to collective bargaining by the said provision was limited in several respects:

The trade unions whose collective agreements became inapplicable were entitled to adopt the legal provisions of the collective agreement of the majority union in their entirety. Those unions were not, therefore, left without any collective agreement against their will;

Minority trade unions retained the right to effectively present claims and make representations to the employer for the protection of the interests of

their members, to negotiate with the employer and to conclude collective agreements;

Conflicting collective agreements would not become inapplicable where the statutory duty to hear those unions had not been observed. A conflicting collective agreement could only become inapplicable under domestic legislation if the majority trade union had seriously and effectively taken into account the interests of the employees of particular professions or sectors whose collective agreement had become inapplicable.

Longer-term benefits such as contributions to a pension in a minority union's agreement could only be rendered inapplicable if there had been a comparable benefit in the majority union's agreement;

In the procedure to determine which of several trade unions had the majority of members in that unit and whose collective agreement was thus applicable, the disclosure of the number of trade union members in a business unit had to be avoided, if possible.

In view of the scope of the restriction on collective bargaining, the interference with the applicants' right to collective bargaining could not be regarded as affecting an essential element of trade-union freedom, without which that freedom would become devoid of substance. The right to collective bargaining did not include a "right" to a collective agreement. What was essential was that trade unions might make representations to and were heard by the employer, which the impugned domestic law provisions effectively guaranteed in practice, as interpreted by the Federal Constitutional Court. Furthermore, minority trade unions' right to strike, as an important instrument to protect the occupational interests of their members, had not been curtailed by the impugned provisions.

In its case-law, the Court had considered more far-reaching restrictions on the right to collective bargaining, particularly the complete exclusion of a right of minority or less representative unions to conclude collective agreements at all.

The Court recalled that the breadth of the States' margin of appreciation depended also on the objective pursued by the contested restriction and the competing rights of others who were liable to suffer as a result of the unrestricted exercise of the right to bargain collectively. The impugned provisions were aimed, in particular, at ensuring a fair functioning of the system of collective bargaining by preventing trade unions representing employees in key positions from negotiating collective agreements separately to the detriment of other employees, and also at facilitating an overall compromise. Those objectives, which protected the rights of the said other employees and of trade unions defending their interests, but also the rights of the employer, had to be considered to be very weighty in that they were aimed at strengthening the entire system of collective bargaining and thus also trade union freedom as such.

There was a high degree of divergence between the domestic systems in the sphere of protection of trade union rights. The Court's case-law and comparative material submitted by third party interveners illustrated that most Contracting Parties had rules which prevented the application of several conflicting collective agreements. Moreover, legal systems permitting only "representative" trade unions to conclude collective agreements – which were more restrictive than the impugned provisions in the present case – were considered by international bodies to be compatible with pertinent international law instruments.

Having regard to the above, the respondent State had had a margin of appreciation as regards the restriction on trade union freedom at issue. That margin of appreciation was to be afforded all the more as the legislature had had to make sensitive policy choices in order to achieve a proper balance between the respective interests of labour – including the competing interests of different trade unions – and also of management.

Moreover, the fact that the impugned provisions might lead to a loss of attractivity and thus a decline in the membership of smaller trade unions often representing specific professional groups did not as such infringe union members' right to join or remain member of such trade unions, which they fully retained.

Accordingly, there had not been an unjustified interference with the applicants' right to collective bargaining, the essential elements of which they were able to exercise, in representing their members and in negotiating with the employers on behalf of their members. Since the respondent State enjoyed a margin of appreciation in the area, there was no basis to consider the impugned provisions as entailing a disproportionate restriction on the applicants' rights under Article 11.

Conclusion: no violation (five votes to two).

(See also *National Union of Belgian Police v. Belgium*, 4464/70, 27 October 1975*; Swedish Engine Driver's Union v. Sweden*, 5614/72, 6 February 1976; *Demir and Baykara v. Turkey* [GC], 34503/97, 12 November 2008, Legal Summary)

ARTICLE 14

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

Advisory opinion on the difference in treatment between landowners' associations "having a

recognised existence on the date of the creation of an approved municipal hunters' association" and those set up after that date

Avis consultatif sur la différence de traitement entre les associations de propriétaires « ayant une existence reconnue à la date de la création d'une association communale de chasse agrée » et celles créées ultérieurement

Advisory opinion requested by the French Conseil d'État/Avis consultatif demandé par le Conseil d'État français, P16-2021-002, Opinion/Avis 13.7.2022 [GC]

English translation – Version imprimable

Contexte et question – La question posée à la Cour s'inscrit dans le cadre d'une procédure pendante devant le Conseil d'État, lequel a été saisi par une fédération des forestiers privés mettant en cause une modification législative de 2019. Cette dernière entraîne, pour les propriétaires fonciers qui se sont constitués en association *après* la date de création d'une association communale de chasse agrée (ACCA) dans leur commune, l'impossibilité de recouvrer l'exclusivité des droits de chasse sur leurs terres qu'ils avaient perdue à l'occasion de l'apport de ces dernières, sans que leur droit de propriété en soit autrement altéré.

Les ACCA ont été créés par la loi dite « loi Verdeille » de 1964 afin d'endiguer l'exercice de la chasse dite « banale », pratiquée sur les terrains d'autrui en vertu d'une autorisation présumée qui a eu pour conséquence le déclin de certaines espèces animales, de créer des dégâts importants sur les cultures et les écosystèmes et d'aboutir à une augmentation du nombre d'accidents de chasse.

Pour la fédération requérante, la distinction temporelle entre les groupements de propriétaires créés *avant* ou *après* la constitution de l'ACCA était disproportionnée et contraire à l'article 14 de la Convention combiné avec l'article 1 du Protocole n° 1. Selon elle, l'objectif d'éviter l'affaiblissement des ACCA existantes que le législateur avançait pour justifier cette différence de traitement aurait pu être atteint par d'autres moyens.

Dans ce contexte, le Conseil d'État a demandé à la Cour un avis consultatif sur la question suivante :

« Quels sont les critères pertinents pour apprécier si une différence de traitement établie par la loi, poursuit, au regard des interdictions posées par l'article 14 de la Convention en combinaison avec l'article 1er du premier Protocole additionnel, un objectif d'utilité publique fondée sur des critères objectifs et rationnels, en rapport avec les buts de la loi l'établissant qui, en l'espèce, vise à prévenir une pratique désordonnée de la chasse et à favoriser une gestion rationnelle du patrimoine cynégétique, notamment en encourageant la pratique de la chasse sur des territoires d'une superficie suffisamment stable et importante ? »

Avis

1. Considérations préalables

Le Conseil d'État devra examiner deux questions avant de répondre à celle de savoir si la différence de traitement litigieuse est compatible, ou non, avec l'article 14 combiné avec l'article 1 du Protocole n° 1.

a) *Sur le point de savoir si la différence de traitement en question relève du champ d'application de l'article 14 de la Convention combiné avec l'article 1 du Protocole n° 1*

Le critère temporel en l'espèce renvoie indirectement au critère de la taille du terrain, autrement dit de « la fortune » foncière qui est un motif de discrimination expressément prohibé par l'article 14. En effet, si les propriétaires qui se sont regroupés en association après la constitution de l'ACCA dans leur commune avaient disposé individuellement d'un terrain d'une superficie suffisante pour faire opposition à leur apport initial, ils n'auraient pas eu besoin de se regrouper postérieurement pour devenir éligibles au droit de retrait. Or, la Cour a déjà jugé que l'article 14 combiné avec l'article 1 du Protocole n° 1 est applicable aux distinctions de traitement fondées sur ce motif (*Chabauty c. France* [GC] et *Chassagnou et autres c. France* [GC]).

Partant, une différence de traitement fondée sur la date de création d'une personne morale (postérieure ou antérieure à celle d'une ACCA) ne saurait *a priori* être exclue du champ d'application de l'article 14 combiné avec l'article 1 du Protocole n° 1.

b) *Sur les critères permettant de déterminer si la différence de traitement en cause porte sur des personnes placées dans des situations analogues ou comparables*

La fédération requérante n'a pas étayé, devant le Conseil d'État, les raisons pour lesquelles elle estimait que la différence de traitement alléguée portait sur des situations similaires ou comparables. Une juridiction nationale peut exiger de la personne qui allègue faire l'objet d'un traitement discriminatoire contraire à l'article 14 de démontrer, eu égard à la nature particulière de son grief, qu'elle se trouvait dans une situation analogue ou comparable à celle d'autres personnes ayant reçu un traitement plus favorable. Il lui appartient de réunir, autant que possible, les informations appropriées concernant tant sa situation personnelle que le régime juridique applicable à cette situation.

L'examen de ces éléments doit tenir compte du domaine concerné, de la finalité de la mesure qui opère la distinction en cause et du contexte dans

lequel cette mesure s'inscrit. Il doit se fonder sur des éléments de nature objective et vérifiables. Les situations doivent être considérées dans leur globalité, en évitant d'isoler des aspects marginaux, ce qui rendrait alors l'analyse artificielle.

Dès lors que l'existence d'une « situation analogue » n'implique pas que les catégories comparées soient identiques, il convient de rechercher si les deux catégories identifiées en l'espèce, quoique placées dans des situations apparemment différentes, ne présentent pas, au regard du grief dénoncé, des similitudes dont l'importance serait prédominante par rapport aux différences, comme par exemple le fait que les propriétaires fonciers qui composent les ACCA et les associations de propriétaires et qui pratiquent eux-mêmes la chasse mettent en commun leurs terrains au profit d'une association, permettant ainsi aux autres membres de cette association de pratiquer la chasse sur leur terrain.

Enfin, quant à l'importance à donner à l'objectif poursuivi par le législateur lorsqu'il a adopté une mesure donnant lieu à une différence de traitement, si le critère de différenciation retenu suffisait, à lui seul, à faire obstacle à la constatation, entre les situations à comparer, de similitudes ou d'analogies pertinentes sous l'angle de l'article 14, cela pourrait vider cette disposition de sa substance, dans la mesure où il suffirait alors pour un État d'adopter des lois ou des mesures plaçant les deux éléments à comparer dans des situations différentes au regard de l'objectif poursuivi pour faire obstacle à tout contrôle de la compatibilité de ces situations avec la Convention. Le critère de l'objectif du législateur garde néanmoins toute sa pertinence au stade de l'analyse du caractère « légitime et raisonnable » de la différence de traitement.

2. Sur les critères pertinents quant à la justification de la différence de traitement en cause

a) *Sur la poursuite d'un ou de plusieurs « buts légitimes »* – C'est à la lumière de tous les éléments issus du droit national qu'il convient d'identifier les buts poursuivis par la différence de traitement litigieuse qui peuvent passer pour « légitimes » au regard de l'article 14 qui ne contient pas de liste limitative des buts à reconnaître comme « légitimes ». La notion d'« intérêt général » prévue par le second alinéa de l'article 1 du Protocole n° 1 est ample par nature.

Le droit de chasser sur son propre terrain ou sur le terrain d'autrui n'est protégé en tant que tel par aucune disposition de la Convention ou de ses protocoles additionnels. En revanche, la protection de l'environnement, au sens large, et, dans ce cadre, la protection, plus spécifique, de la nature et des forêts, des espèces menacées, des ressources biologiques, du patrimoine ou de la santé publique, comptent, quant à elles, parmi les objectifs considérés, à ce jour, comme relevant de l'« intérêt général » au titre de la Convention. Même si aucune disposition de la Convention n'est spécialement destinée à assurer une protection générale de l'environnement, la responsabilité des pouvoirs publics devrait se concrétiser par leur intervention au moment opportun, afin de ne pas priver de tout effet utile les dispositions protectrices de l'environnement qu'ils ont décidé de mettre en œuvre.

La Cour a précédemment traité de la question des ACCA en reconnaissant et précisant l'intérêt général de regrouper des espaces de chasse en leur sein (*Chassagnou et autres*, *Chabauty*, *Baudinière et Vauzelle* (déc.), et *A.S.P.A.S. et Lasgrezas c. France*).

b) *Sur l'existence d'un « rapport raisonnable de proportionnalité entre les moyens employés et le but visé »*

i) *Le respect de l'exigence de légalité inscrite à l'article 1 du Protocole n° 1* – Au moment de l'entrée en vigueur de la loi de 2019, la procédure judiciaire en l'espèce n'avait pas encore débuté. La seule question qui pourrait dès lors se poser est celle de savoir si l'entrée en vigueur de la loi, à supposer qu'elle ait rendu inopérante une décision de justice définitive dans un litige antérieur dont l'issue aurait été favorable aux intérêts de la fédération requérante, enfreindrait l'exigence de légalité inscrite à l'article 1 du Protocole n° 1 et le principe de la prééminence du droit inhérent aux articles de la Convention.

La Cour n'a jamais constaté une violation d'un des droits garantis par la Convention ou par ses protocoles additionnels quand elle a eu à connaître d'une intervention législative du Parlement influant sur un litige futur dont les juridictions n'étaient pas encore saisies à la date de l'adoption de la loi, ou d'une intervention législative du Parlement qui « répondait à une évidente et impérieuse justification d'intérêt général », soit pour combler un vide juridique soit pour rétablir et réaffirmer son intention initiale.

Des lois à effet rétroactif considérées comme constitutives d'une ingérence du législateur dans l'administration de la justice se sont révélées conformes à l'exigence de légalité de l'article 1 du Protocole n° 1. Des mesures réglementant l'usage de biens mises en œuvre pour réglementer rétroactivement des droits découlant de lois existantes ont été jugées conformes à l'exigence de légalité dès lors que l'adoption de l'amendement législatif en cause ne visait pas spécifiquement à influencer l'issue d'une affaire donnée.

ii) *Le critère du « défaut manifeste de base raisonnable »* – La loi de 2019 pourrait s'apparenter à un moyen de réglementer l'usage des biens conformément à l'intérêt général (*Herrmann c. Allemagne* [GC] et *Chassagnou et autres*). C'est à la lumière du

second alinéa de l'article 1 du Protocole n° 1 que l'ingérence qui en découle dans le droit au respect des biens des propriétaires fonciers concernés pourrait, dès lors, s'analyser.

Les États ont le droit de réglementer l'usage des biens conformément à l'intérêt général en adoptant les « lois » qu'ils jugent nécessaires. La Cour respecte la manière dont le législateur conçoit les impératifs de l'« utilité publique » ou de l'« intérêt général », sauf si son jugement se révèle manifestement dépourvu de base raisonnable.

La Cour a déjà jugé qu'obliger les seuls petits propriétaires à mettre en commun leurs territoires de chasse dans le but de favoriser une meilleure gestion cynégétique n'était pas en soi disproportionné. Elle a vu dans les dispositions légales de 1964 « l'expression d'une légitime volonté institutionnelle » d'éviter la multiplication des entités cynégétiques et d'encadrer étroitement une activité de loisir présentant un danger pour les biens et les personnes et ayant un impact significatif sur l'environnement. Elle n'a décelé « rien de déraisonnable » dans l'affirmation du Gouvernement selon laquelle la multiplication de telles entités était de nature à augmenter le risque d'accidents inhérent à cette activité, avant de conclure que les autorités pouvaient légitimement juger nécessaire de placer, autant que possible, la pratique de la chasse dans le cadre réglementé des ACCA existantes.

iii) *La nature du critère de distinction institué par la loi et son impact sur la marge d'appréciation des autorités nationales* – La marge d'appréciation des autorités nationales est ample en l'espèce pour deux raisons.

La première tient au domaine et au contexte dans lesquels s'inscrit la mesure instituant la différence de traitement. La Convention n'empêche pas les États contractants d'introduire des programmes de politique générale au moyen de mesures législatives en vertu desquelles une certaine catégorie ou un certain groupe de personnes sont traités différemment des autres, sous réserve que l'ingérence dans l'exercice des droits de l'ensemble de cette catégorie ou de ce groupe définis par la loi puisse se justifier au regard de la Convention.

La seconde raison tient au fait que la différence de traitement contestée dans la procédure devant le Conseil d'État est fondée sur le critère temporel, qui renvoie, indirectement, au critère de la taille du terrain, autrement dit à celui de « la fortune » foncière et qui a justifié précédemment une marge d'appréciation considérablement plus ample que si la différence en question découlait d'un motif que la Cour juge inacceptable par principe, tel que la race ou l'origine ethnique, ou en l'absence de considérations très fortes, par exemple le sexe ou l'orientation sexuelle.

iv) *Le choix des moyens employés pour atteindre le(s) but(s) visé(s) et l'adéquation entre le(s) but(s) visé(s) et le(s) moyen(s) employé(s)* – Le point de savoir si le critère temporel retenu par le législateur est ou non en adéquation avec le(s) but(s) d'intérêt général poursuivi(s) par la loi constitue un élément essentiel dans l'analyse de proportionnalité.

Les mesures de politique économique ou sociale impliquent souvent l'introduction et l'application de critères fondés sur des distinctions entre catégories ou groupes de personnes. La création d'un nouveau régime imposait, parfois, l'adoption, par le législateur national, de dates limites applicables à d'importants groupes de personnes (*Maggio et autres c. Italie*). Elles n'étaient pas en soi incompatibles avec l'article 14 combiné avec l'article 1 du Protocole n° 1 et il appartenait à l'État de démontrer leur caractère raisonnable et objectif.

La création en droit français d'une association est rapide et peu coûteuse, ce qui rend plausible le risque qu'une multitude de structures associatives réunissant de petits propriétaires aient pu, à la suite de l'évolution de la jurisprudence du Conseil d'État, être constituées dans le but principal de permettre à leurs membres de retirer leurs terrains des ACCA existantes. Si tel était le cas, la distinction temporelle retenue par le législateur pourrait être en adéquation avec sa volonté de préserver les ACCA existantes.

D'autres mesures, aux conséquences moins lourdes pour les propriétaires fonciers soumis à l'apport forcé, auraient raisonnablement pu être mises en œuvre par les autorités au service de la cause d'utilité publique visée. En tout état de cause, l'éventuelle existence de solutions alternatives ne rend pas à elle seule injustifié(s) le(s) moyen(s) employé(s) par le législateur national. Tant qu'il ne dépasse pas les limites de sa marge d'appréciation, et donc que les mesures choisies sont en adéquation avec les buts légitimes visés par la loi, il n'appartient pas à la Cour de juger s'il a choisi la meilleure façon de traiter le problème ou s'il aurait dû exercer son pouvoir différemment.

v) *L'impact du/des moyen(s) employé(s)* – La question se pose de savoir si la distinction temporelle a fait peser sur les associations de propriétaires fonciers créées postérieurement à l'ACCA une charge spéciale et exorbitante. Le Conseil d'État doit prendre en compte si les effets de la mesure en cause peuvent s'avérer contrebalancés, ou, du moins, atténués, par certains droits ou avantages réservés aux membres des associations créées après l'ACCA, par exemple le fait qu'ils continuent à tirer des avantages du maintien de leur adhésion au dispositif des ACCA quand bien même ils ne bénéficieraient pas du droit de retrait de ce dispositif. Dans l'affaire *Chabauty*, la Cour a constaté la non-violation de l'article 1 du Protocole n° 1, pris seul ou combiné

avec l'article 14, après avoir relevé l'existence de certains droits et avantages au bénéfice des petits propriétaires fonciers dont le terrain avait été inclus, contre leur gré, dans le périmètre de l'ACCA dont ils relevaient. Les arguments développés pourraient garder leur pertinence dans l'examen de proportionnalité de la différence de traitement instituée en 2019.

En l'absence d'une indemnité suffisante de nature à couvrir la perte, définitive ou temporaire, d'un « outil de travail » dont le propriétaire concerné tirait ses moyens de subsistance ou à permettre la reconstitution de celui-ci à la suite d'une mesure d'ingérence s'analysant en une privation de propriété, la Cour a souvent conclu que le propriétaire affecté par la mesure en cause avait subi une « charge spéciale et exorbitante » contraire à l'article 1 du Protocole n° 1. En revanche, s'agissant des mesures relevant de la « réglementation de l'usage des biens », l'absence de lois prévoyant une indemnisation destinée à compenser les préjudices causés aux propriétaires concernés ou des décisions individuelles refusant de les indemniser d'une partie des préjudices qu'ils avaient subis n'ont pas empêché la Cour de conclure que le juste équilibre n'avait pas été rompu.

Sur le terrain de l'article 1 du Protocole n° 1, les autorités nationales bénéficient d'une ample marge d'appréciation tant pour déterminer la mesure de réglementation devant s'appliquer pour répondre à un impératif d'intérêt général que pour choisir, parmi les différents dommages qu'une telle mesure est susceptible d'occasionner, ceux qui peuvent donner lieu à indemnisation.

c) *Conclusion* – C'est notamment à la lumière de ces éléments qu'il revient au Conseil d'État de déterminer si la différence de traitement établie par la disposition législative mise en cause dans la procédure devant lui satisfait, ou non, à l'exigence de proportionnalité et, partant, si cette différence de traitement est compatible, ou non, avec l'article 14 combiné avec l'article 1 du Protocole n° 1.

(Voir aussi *Chassagnou et autres c. France* [GC], 25088/94 et al., 29 avril 1999, Résumé juridique ; *Maggio et autres c. Italie*, 46286/09 et al., 31 mai 2011, Résumé juridique ; *Herrmann c. Allemagne* [GC], 9300/07, 26 juin 2012, Résumé juridique ; *Chabauty c. France* [GC], 57412/08, 4 octobre 2012, Résumé juridique)

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

Application by the courts of the statute of a 16th-century private foundation, reserving income to the founder's male descendants, to the detriment of a woman and her heirs: *violation*

Tribunaux appliquant, au détriment d'une femme et de ses héritiers, le statut d'une fondation privée du 16e siècle réservant un revenu aux descendants masculins du fondateur : *violation*

Dimici – Türkiye, 70133/16, Judgment/Arrêt 5.7.2022 [Section II]

English translation – Version imprimable

En fait – Les juridictions nationales ont refusé de reconnaître à l'épouse et mère des requérants (leur *de cujus)* la qualité d'ayant droit à l'excédent de revenu d'une fondation privée instituée à l'époque ottomane, qui verse ces sommes aux descendants du fondateur en fonction du degré de parenté en ligne directe. Le refus était motivé uniquement par le sexe féminin de la *de cujus* des requérants. À cet égard, les tribunaux se sont fondés sur l'acte constitutif de la fondation datant du 16e siècle, selon lequel seuls les descendants de sexe masculin peuvent bénéficier de ce revenu.

En droit – Article 14 de la Convention combiné avec l'article 1 du Protocole n° 1

1. *Sur l'existence d'une différence de traitement fondée sur le sexe* – En premier lieu, la *de cujus* des requérants s'est vu refuser le droit de bénéficier de l'excédent de revenu de la fondation alors que, parce qu'elle était une descendante en ligne directe, elle y aurait eu droit si elle avait été de sexe masculin.

En second lieu, elle a également été privée de la possibilité de « transmettre » à ses enfants la qualité de bénéficiaire de l'excédent de revenu (lorsque l'ordre générationnel le leur aurait permis), contrairement aux descendants de sexe masculin se trouvant dans une situation non pas simplement analogue mais strictement identique à la sienne.

Quant à l'affirmation du Gouvernement selon laquelle la situation dont se plaignent les requérants n'était pas préjudiciable à leur *de cujus* dans la mesure où les sommes versées aux descendants de sexe masculin sont celles qui restent après le versement de l'aide vestimentaire et de la pension alimentaire aux descendantes, la Cour estime, sachant que la fondation disposerait de plusieurs millions de livres turques de revenus, qu'elle est spéculative et qu'elle ne correspond aucunement à la situation ici en cause. L'éventualité que les sommes versées aux descendants au titre de l'excédent de revenu puissent éventuellement être inférieures à celles versées aux descendantes ne change rien à l'existence d'une discrimination.

Au demeurant, cette thèse n'a aucune incidence sur le second point de la différence de traitement. Et l'argument du Gouvernement à ce sujet est fallacieux. En effet, si certains hommes se trouvent privés de la qualité de bénéficiaire des revenus, c'est en raison non pas d'une absence de

discrimination mais précisément de la discrimination subie par leurs mères.

Par conséquent, il ne fait aucun doute que la *de cujus* des requérants avait fait l'objet d'une différence de traitement fondée sur le sexe.

2. *Sur l'observation de l'article 14 de la Convention combiné avec l'article 1 du Protocole n° 1*

a) *Sur la nature des obligations en jeu* – Pour le Gouvernement, le grief devrait être examiné sur le terrain des obligations positives, la fondation est administrée non pas par les autorités publiques mais par les descendants du fondateur et le différend en cause est d'ordre purement privé. Toutefois la mesure constitutive de la discrimination en cause n'est pas une décision adoptée par la fondation mais par un jugement du tribunal.

En vertu du droit interne, le pouvoir de reconnaître la qualité d'ayant droit appartient aux seules autorités judiciaires, les fondations n'ont pas compétence pour ce faire. L'atteinte au droit de la *de cujus* des requérants découle donc d'un acte de l'autorité judiciaire.

Les tribunaux ont fondé leur décision sur les dispositions de l'acte constitutif de la fondation. Les tribunaux n'ont pas écarté les dispositions discriminatoires de cet acte, c'est-à-dire une omission ou une passivité de leur part. Dès lors, la question soulevée doit être examinée sur le terrain des obligations positives (voir, *a contrario*, *Molla Sali c. Grèce* [GC]).

b) *Sur le respect des obligations* – La discrimination subie par l'intéressée ne reposait sur aucune justification autre que la volonté du fondateur, laquelle procède de considérations sociales et d'une vision de la femme qui prévalaient à l'époque de la création de la fondation au début du 16e siècle.

La circonstance que le litige relevait d'une relation entre personnes privées n'exonère pas l'État de ses obligations de prévenir et de sanctionner la discrimination entre des personnes privées.

Les tribunaux se sont contentés d'établir puis d'appliquer la volonté du fondateur, tel qu'exprimée dans l'acte constitutif, sans vérifier sa conformité à la Convention, à la Constitution ou aux lois, selon la hiérarchie des normes, alors même qu'elle soulevait manifestement une question au regard des principes de non-discrimination et de l'égalité entre hommes et femmes.

La légalité de la volonté du fondateur au droit en vigueur à l'époque ne saurait en soi garantir une quelconque primauté ou immunité face aux normes actuelles relatives à l'ordre public et à la Convention. Cela est d'autant plus que cette pratique procède de conceptions sociales et morales et d'une vision archaïque du rôle de la femme qui n'ont plus cours dans la société turque et plus largement dans les sociétés européennes.

Il n'y a aucun lien entre les modalités de répartition de l'excédent de revenus de la fondation découlant de la volonté du fondateur et la réalisation d'activités relevant de l'intérêt général. Si la fondation utilise ses revenus en priorité pour l'entretien de son patrimoine immobilier, dont des biens offerts à un usage commun du public, et pour la distribution de nourriture aux nécessiteux pendant une période donnée, et si ces activités relèvent de l'intérêt général, la répartition de l'excèdent de revenu n'a aucune incidence sur la capacité de la fondation à réaliser ces missions puisque qu'elle ne concerne que les sommes qui restent une fois ces missions accomplies.

Il découle de l'ensemble de ce qui précède que les autorités ne se sont pas dûment acquittées de leur obligation positive de protéger la *de cujus* des requérants contre une discrimination fondée sur le sexe.

La Cour estime utile de préciser la portée du présent arrêt dans le temps. Elle n'ignore pas que des différences de traitement entre descendants d'une fondation dans le domaine patrimonial ont durant de longues années passé pour licites en Turquie. Elle considère que le principe de sécurité juridique dispense l'État défendeur de remettre en cause des actes ou situations juridiques antérieurs au présent arrêt.

Conclusion : violation (unanimité).

Article 41 : demande de dommage matériel rejetée. Le redressement le plus adéquat serait une réouverture de la procédure.

(Voir aussi *Molla Sali c. Grèce* [GC], 20452/14, 19 décembre 2018, Résumé juridique)

ARTICLE 46

Article 46 § 4

Infringement proceedings / Procédure en manquement

Infringement proceedings against Türkiye for failure to abide by Court's final judgment explicitly indicating applicant's immediate release: *violation*

Procédure en manquement contre la Türkiye pour non-respect de l'arrêt définitif de la Cour, qui demandait explicitement la libération immédiate du requérant : *violation*

Kavala – Türkiye, 28749/18, Judgment/Arrêt 11.7.2022 [GC]

Traduction française – Printable version

Facts – In a judgment of 2019 (hereafter the "*Kavala* judgment") the Court found a violation of Article 5 §§ 1 and 4 and of Article 18 taken together with Article 5 § 1, considering that the applicant's pre-trial detention was not justified by any "reasonable suspicion", but was based on the mere exercise of Convention rights or normal activism on the part of a human-rights defender; and that it had, moreover, pursued an ulterior purpose of reducing him to silence. It further held under Article 46 that the respondent State had to take every measure to put an end to Mr Kavala's "detention and to secure his immediate release". Since he was not released, in February 2022, the Committee of Ministers referred to the Court, in accordance with Article 46 § 4, the question whether the Republic of Türkiye had failed to abide by the above judgment.

The Government argued that the Kavala judgment had been executed in full since the applicant was no longer detained on the basis of any of the charges which the Court had examined therein. In particular, his detention imposed on the basis of Article 312 of the Criminal Code (attempting to overthrow the Government through force and violence) in connection with the 2013 mass protests had ended on 18 February 2020 with his acquittal; further, the detention based on Article 309 of the Criminal Code (attempting to overthrow the constitutional order) in connection with the 2016 attempted *coup d'état* had lasted until 20 March 2020 when his release on bail had been ordered. These decisions did not result in the Mr Kavala's actual release, since on 9 March 2020 he had been placed in pre-trial detention on a *new* charge (military or political espionage under Article 328 of the Criminal Code), a charge which had not been examined in the Kavala judgment. Further, from 25 April 2022, Mr Kavala was detained on a *new* ground - as a convicted person: his acquittal was quashed, he was found guilty of the charge under Article 312 and sentenced to aggravated life imprisonment. At the same time, he was acquitted of the charge under Article 328.

Law – Article 46

(a) *Preliminary question* – The Government had submitted that the institution of proceedings by the Committee of Ministers under Article 46 § 4 had not been justified by any exceptional circumstances and had, moreover, amounted to a breach of the Convention system, in so far as it had interfered in the ongoing domestic criminal proceedings. The Court observed that infringement proceedings should indeed be brought only in "exceptional circumstances", as provided for by the Committee of Ministers' relevant Rules and the Explanatory Report to Protocol No. 14. This criterion was intended to indicate that the Committee of Ministers should apply a high threshold before launching this procedure, which had to be viewed therefore as a measure of last resort, where the Committee of Ministers considered that the other means to secure the execution of a judgment had ultimately proved unsuccessful and were no longer adapted to the situation. Moreover, infringement proceedings were not intended to upset the fundamental institutional balance between the Court and the Committee of Ministers. The right to initiate a referral was the Committee of Ministers' "procedural prerogative". Consequently, where this procedure had been duly initiated, it was not the Court's task to express a view on the desirability of such a decision by the Committee of Ministers.

The Government had further argued that Mr Kavala should have lodged a new application with the Court within a six-month period after having exhausted the domestic remedies. However, pleas of inadmissibility were not relevant in the context of infringement proceedings.

(b) *The Court's assessment* – The essential question in this case was whether or not there had been a failure by Türkiye to adopt the individual measures required to abide by the Court's judgment and remedy the violation of Article 5 § 1, taken individually and in conjunction with Article 18. In considering it, the Court applied the general principles set out in the *Ilgar Mammadov v. Azerbaijan* [GC] judgment relating to the execution of its judgments under Article 46 §§ 1 and 2 and to the nature of the Court's task in infringement proceedings under Article 46 § 4.

(i) *The scope of the Kavala judgment* – It was clear from the Court's reasoning that the findings under Article 5 § 1 (lack of a reasonable suspicion) and Article 18 applied to the totality of the charges against Mr Kavala concerning the 2013 mass protests and the 2016 attempted coup. Consequently, in the absence of other relevant and sufficient circumstances, a mere reclassification of the same facts could not in principle modify the basis for those conclusions, since such a reclassification would only be a different assessment of facts already examined by the Court. Were it otherwise, the judicial authorities could continue to deprive individuals of their liberty simply by opening new criminal investigations in respect of the same facts. Such a situation would amount to permitting the law to be circumvented and might lead to results incompatible with the object and purpose of the Convention.

Even more importantly, it was clear that the Court had not accepted "the stated aim" of the applicant's detention, which had been, firstly, to carry out investigations, and secondly, to establish whether Mr Kavala had indeed committed the impugned offences. Its finding as to the ulterior purpose of these measures was central in the light of the object

and purpose of Article 18, which was to prohibit the misuse of power.

It followed that the Court's finding of a violation of Article 5 § 1, read separately and in conjunction with Article 18, had vitiated any action resulting from the charges relating to the 2013 mass protests and the attempted coup. Moreover, in the absence of other relevant and sufficient circumstances capable of demonstrating that Mr Kavala had been involved in criminal activity, any measure, especially one depriving him of his liberty, on grounds pertaining to the same factual context, would entail a prolongation of the violation of Mr Kavala's rights as well as a breach of the obligation on the respondent State to abide by the Court's judgment in accordance with Article 46 § 1 of the Convention.

Furthermore, in contrast to the *Ilgar Mammadov v. Azerbaijan* judgment, the *Kavala* judgment contained, in its reasoning and operative provisions, an explicit indication as to how it was to be executed, namely that Mr Kavala be released immediately. Thus, by its very nature the violation found might not leave any real choice as to the measures required to remedy it. This was particularly true where the case concerned detention that the Court had found to be manifestly unjustified under Article 5 § 1, in that there was an urgent need to put an end to the violation in view of the importance of the fundamental right to liberty and security. That observation was all the more valid where, as in the present case, the violation had originated in detention that had also been held to be contrary to Article 18 taken together with Article 5 § 1.

In consequence, the fact of giving indications under Article 46 as in the present case firstly enabled the Court to ensure, as soon as it delivers its judgment, that the protection afforded by the Convention was effective and to prevent continued violation of the rights in issue, and subsequently assisted the Committee of Ministers in its supervision of the execution of the final judgment. Such indications also enabled and required the State concerned to put an end, as quickly as possible, to the violation of the Convention found by the Court.

(ii) *Whether Türkiye had failed to fulfil its obligation to abide by a final judgment under Article 46 § 1* – Whatever the grounds advanced by the Government to justify his subsequent detention, Mr Kavala had been deprived of his liberty, without interruption, between 18 October 2017 and – at the least – 2 February 2022, the date on which the matter had been referred to the Court. The corresponding obligation of *restitutio in integrum* had required Türkiye to release Mr Kavala from detention immediately and to eliminate the negative consequences of the criminal charges found by the Court to be unjustified. The Court thus had to consider whether, as the Government had claimed, the charges against Mr Kavala had changed in substance. In examining this question, the Court found as follows.

The fact that had not lodged a new application to the Court in respect of his continued detention after the Kavala judgment had no fundamental bearing for the purpose of its examination of whether Türkiye had complied with its obligation under Article 46 § 1. It was for the Committee of Ministers to supervise and assess the specific measures to be taken in order ensure the maximum possible reparation for the violations found by the Court. The question of compliance by the High Contracting Parties with its judgments fell outside the Court's jurisdiction if it was not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention.

Where the Court considered that Article 46 did not preclude its examination, it might find that it had competence to entertain complaints in follow-up cases (for example where the domestic authorities carried out a fresh examination of the case by way of implementation of one of the Court's judgments) or when the 'new issue' resulted from the continuation of the violation found in the Court's initial judgment. In consequence, the Court and the Committee of Ministers, in the context of their different duties, might be required to examine, even simultaneously, the same domestic proceedings without upsetting the fundamental institutional balance between them.

In the present case, the Committee of Ministers had not terminated its supervision of the execution of the *Kavala* judgment and had brought the infringement proceedings on the ground that since the Court's judgment had become final, the applicant had remained in detention on the basis of proceedings that had been criticised by the Court or based on evidence which it had had found insufficient to justify his detention. The Court was thus required to make a definitive legal assessment of the question of compliance with the judgment in question.

Furthermore, in the context of infringement proceedings following a finding of a violation of Article 5 § 1, read separately and in conjunction with Article 18 of the Convention, the Court could not disregard the conclusions and indications addressed by it to the respondent State in the initial judgment, on the sole grounds that a new charge had been brought against Mr Kavala under domestic law. In its analysis, the Court had to look behind appearances and investigate the realities of the situation complained of, especially where it had ordered the immediate release of a detained person. Even though the charge of military or political espionage (Article 328) had been technically speaking a new charge, there had been striking similarities, or even complete duplication, between the facts supporting the suspicions against him and those already exam-

ined in detail in the *Kavala* judgment. Neither the detention decisions nor the bill of indictment had contained any substantially new facts relating to the constituent elements of the offence defined in Article 328 capable of justifying this new suspicion. As during Mr Kavala's initial detention, which had been examined in the judgment concerning him, the investigating authorities once again used numerous acts which had been carried out entirely lawfully to justify his continued pre-trial detention.

Lastly, the Court took into account other relevant factors. Firstly, a considerable period of time had elapsed since the facts, all prior to July 2016, which had given rise to this new charge. In the *Kavala* judgment, this factor had been considered crucial for the assessment under Article 18. Secondly, the country's high-ranking officials had given many speeches on the criminal proceedings against Mr Kavala. Thirdly, the Council of Judges and Prosecutors had begun an examination to establish whether it had been necessary to open a disciplinary investigation against the judges who had delivered the 2020 acquittal judgment.

In conclusion, although Türkiye had taken some steps towards executing the Kavala judgment, on the date on which the Committee of Ministers had referred the matter to the Court, and in spite of three decisions ordering his release on bail and one acquittal judgment, Mr Kavala had still been held in pre-trial detention for more than four years, three months and fourteen days, on the basis of facts which, in its initial judgment, it had held to be insufficient to justify the suspicion that he had committed "any criminal offence" and which had been "largely related to the exercise of Convention rights". These considerations were crucial in the present case, particularly since, on 25 April 2022, Mr Kavala had been acquitted of the charge of military or political espionage under Article 328, but convicted of the charge under Article 312 and sentenced to the heaviest penalty under Turkish criminal law; that conviction had been based on facts primarily related to the 2013 mass protests, which the Court had scrutinised with particular care in its initial judgment on account of the clear absence of reasonable suspicion; the conviction had moreover been vitiated by the finding of a breach of Article 18.

Accordingly, the Court was unable to conclude that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the *Kavala* judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court found to have been violated in that judgment. Türkiye had therefore failed to fulfil its obligation under Article 46 § 1 to abide by the *Kavala v. Turkey* judgment of 10 December 2019.

Conclusion: violation (sixteen votes to one).

With regard to Mr Kavala's additional requests the Court noted that, as indicated in the Explanatory Report to Protocol No. 14, the infringement procedure did not aim to reopen before the Court the question of a violation already decided in its first judgment. Nor did it provide for payment of a financial penalty by a High Contracting Party found to be in violation of Article 46 § 1. The Court was thus not competent to find a further violation of Articles 5 and 18. The finding of a violation of Article 46 § 1 meant that the primary obligation resulting from the Court's initial judgment, namely *restitutio in integrum*, with all the ensuing consequences, continued to exist, and that it was for the Committee of Ministers to continue to supervise the execution of the Court's initial judgment.

(See *Ilgar Mammadov v. Azerbaijan* (infringement proceedings) [GC], 15172/13, 29 May 2019, Legal Summary; *Kavala v. Turkey*, 28749/18, 10 December 2019, Legal Summary)

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

Interim measures / Mesures provisoires

Interim measures in case of Polish military judge's immunity

Mesure provisoire dans une affaire concernant l'immunité d'un juge militaire polonais

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Latvian – Letton

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