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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

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

European Court of Human Rights

Cour européenne des droits de l'homme

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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

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

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

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

Les résumés juridiques publiés dans la Note d'information sur la jurisprudence de la Cour sont également disponibles dans la base de données HUDOC, sous la catégorie de documents « Résumés juridiques ». La base de données HUDOC, disponible en libre accès à partir du site internet de la Cour (http://hudoc.echr.coe.int), permet d'accéder à la jurisprudence de la Cour européenne des droits de l'homme (arrêts et décisions de Grande Chambre, de chambre et de comité, affaires communiquées, avis consultatifs et résumés juridiques extraits de la Note d'information sur la jurisprudence), ainsi qu'à celle de l'ancienne Commission européenne des droits de l'homme (décisions et rapports) et aux résolutions du Comité des Ministres du Conseil de l'Europe.

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

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ARTICLE 2

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

Failure to prevent a suicide committed in an unusual way by a vulnerable detainee, left unguarded in a police cell for forty minutes, with a refusal to prosecute: *violations*

Défaut de prévenir le suicide commis de façon inhabituelle par un détenu vulnérable laissé dans une cellule de police sans surveillance durant quarante minutes et refus de poursuites : *violations*

S.F. – Switzerland/Suisse, 23405/16, Judgment/ Arrêt 30.6.2020 [Section III]

English translation of the summary – Version imprimable

En fait – En 2014, le fils de la requérante, D.F., a causé un accident avec une voiture appartenant à son employeur alors qu'il se trouvait en état d'ébriété et sous l'influence de médicaments antidépresseurs.

Les policiers dépêchés sur les lieux de l'accident, R.B. et A.S., suivirent la procédure standard prévue pour ce type d'accidents. Entre-temps, la requérante était arrivée sur les lieux, appelée par son fils qui exprimait des pensées suicidaires. Puis D.F. fut amené par les deux policiers à l'hôpital afin d'obtenir un échantillon de ses sang et urine. Il y eut à nouveaux des paroles évoquant le suicide. Les deux policiers appelèrent la base routière pour les informer de leur venue et y dépêcher un médecin. D.F y fut amené, en présence de la requérante et il fut laissé dans une cellule individuelle pendant quarante minutes et sans surveillance. Il s'y donna la mort en se pendant à une grille de ventilation avec l'entrejambe de son jean qu'il avait accrochait.

Une enquête préliminaire fut conduite par le ministère public. Les instances internes ont constaté qu'il n'existait pas d'indices suffisants de la commission d'infractions pénales de la part des agents de police. Pour cette raison, sur demande du ministère public, en 2015 la Cour suprême cantonale n'a pas autorisé l'ouverture d'une poursuite pénale. Puis le Tribunal fédéral rejeta le recours de la requérante contre cette décision.

En droit – Article 2 (volet matériel)

a) *Connaissance par les autorités du risque de suicide et de la vulnérabilité particulière de D.F.* – Sur les lieux de l'accident, l'agent de police A.S. avait immédiatement discuté des allusions suicidaires de D.F. avec la requérante pour prendre des mesures en conséquence. Le policier C.R. à la base routière avait été informé du risque suicidaire préalablement à la venue de D.F.

D.F. a montré dès le premier contact avec la police un comportement inhabituel, de dépendance émotionnelle à sa mère dans une situation qui lui faisait peur. Il avait causé un accident sous l'emprise de l'alcool et de médicaments. En outre, la possibilité d'un placement à des fins d'assistance avait été discutée entre A.S. et la requérante. Enfin, à la base routière, D.F. avait été placé seul dans une cellule.

Or, dans son rapport d'autopsie, l'Institut de médecine légale (IRMZ) a indiqué que le placement seul dans une cellule individuelle, des pensées suicidaires « actuelles », des tentatives de suicide dans le passé et un « problème d'alcool » étaient des facteurs de risque associés à des suicides en détention et qu'au moins deux de ces facteurs étaient réunis dans le cas de D.F.

Les autorités avaient ou auraient dû avoir connaissance, sur le moment, que D.F. risquait de commettre un suicide et qu'il s'agissait d'un risque certain et immédiat pour sa vie. Et les autorités disposaient de suffisamment d'éléments pour avoir connaissance de la vulnérabilité particulière de D.F. Par conséquent, les autorités auraient dû conclure qu'il avait indéniablement besoin d'une surveillance étroite.

b) *Omission de prendre les mesures nécessaires pour parer au risque de suicide* – Les agents de police ont procédé aux mesures de sécurité et prévention usuelles dans la cellule de la base routière, en retirant, entre autres, ses chaussures, sa ceinture en cuir et une chaînette à l'intéressé, afin qu'il ne disposât plus d'objets au moyen desquels il aurait pu s'étrangler ou se faire du mal d'une quelque autre manière. Mais D.F. s'est suicidé de manière inhabituelle. Cependant, cinq agents de police se trouvaient à la base routière et la garde de D.F. aurait été possible, en la présence de la requérante, dans un bureau. De plus, la piste envisagée de transférer D.F. dans une cellule munie d'un système de vidéosurveillance n'a jamais été poursuivie par les agents de police.

Les autorités n'ont pas pu laisser D.F. seul dans une cellule sans surveillance pendant quarante minutes sans méconnaître le droit à la vie au sens de l'article 2. Les autorités auraient, avec un effort raisonnable et non exorbitant, pu pallier le risque de suicide de D.F., dont elles avaient ou auraient dû avoir connaissance. La responsabilité des autorités réside dans le fait d'avoir traité D.F. comme une personne capable de résister au stress et aux pressions subis, sans prêter suffisamment d'attention à sa situation personnelle. Indépendamment de la question de savoir si les agents de police ont agi

ou non selon les règles applicables dans une telle situation, en ne reconnaissant pas D.F. comme une personne appelant un traitement particulier, elles ont engagé la responsabilité de leur État en vertu de la Convention.

Conclusion : violation (unanimité).

Article 2 (volet procédural) : Selon le Tribunal fédéral, il faut disposer d'« indices minimaux » d'un comportement punissable pour l'octroi de l'autorisation par la Cour suprême pour le déclenchement d'une procédure pénale complète. L'autorisation en question nécessite la probabilité d'une responsabilité pénale moins élevée que celle requise pour l'ouverture d'une instruction. Cela vaut d'autant plus pour des infractions graves, et, en particulier, si le jugement pénal porte sur la mort d'une personne.

Lors de l'examen du volet matériel de l'article 2, la Cour a conclu à la responsabilité des autorités dans la méconnaissance du droit à la vie de D.F.

Ni la Cour suprême cantonale ni le Tribunal fédéral ne se sont référés au rapport d'autopsie de l'IRMZ indiquant les facteurs de risque associés à des suicides en détention, et, en particulier, n'a pris en compte les observations concernant les deux critères qui étaient réunis dans le cas de D.F.

L'IRMZ a également indiqué qu'il aurait mieux valu appeler un psychiatre urgentiste au lieu d'un simple médecin urgentiste. Le Tribunal fédéral a rejeté l'argument formulé à ce sujet par la requérante estimant que la qualification du médecin n'importait pas, étant donné que celui-ci était arrivé après le décès de D.F. Or la Cour juge assez convaincante la thèse défendue par la requérante selon laquelle un psychiatre urgentiste aurait pu donner des instructions précises aux agents de police par téléphone en vue de limiter, voire éliminer le risque de suicide. À cet égard, le Tribunal fédéral l'a considéré non pertinente étant donné qu'il n'y avait eu à aucun moment de contact direct entre les agents de police et le médecin urgentiste. Cependant, il appartient aux États contractants d'organiser leurs services et de former leurs agents de manière à leur permettre de répondre aux exigences de la Convention.

Enfin, le compte rendu de la réunion du Conseil d'État du canton de 2011 préconise qu'une personne manifestant des intentions suicidaires soit placée dans une cellule double ou, si les circonstances l'exigent, surveillée constamment. De surcroît, il semble privilégier le recours à un psychiatre urgentiste, même s'il n'exclut pas un médecin urgentiste dans certaines circonstances. Ces deux recommandations n'ont pas été suivies dans le cas de D.F.

Ainsi la Cour n'est pas convaincue qu'il n'existait pas d'« indices minimaux » d'un comportement punissable de la part des agents impliqués dans les événements ayant mené à la mort de D.F. Par conséquent, on ne saurait estimer que la façon dont le système de justice pénale suisse a répondu à l'allégation crédible de violation de l'article 2 face à la situation d'un individu ayant exprimé des intentions suicidaires claires et répétées, dénoncée en l'occurrence, a permis d'établir la pleine responsabilité des agents de l'État quant à leur rôle dans les événements en cause. Partant, le système en place n'a pas garanti la mise en œuvre effective des dispositions du droit interne assurant le respect du droit à la vie, en particulier la fonction dissuasive du droit pénal.

Il s'ensuit qu'il y a eu une absence, face à la situation de vulnérabilité particulière du fils de la requérante, d'une protection adéquate « par la loi », propre à sauvegarder le droit à la vie, ainsi qu'à prévenir, à l'avenir, tout agissement similaire mettant la vie en danger.

Conclusion : violation (unanimité).

Article 41 : 50 000 EUR pour préjudice moral ; 5 796 EUR pour dommage matériel.

(Voir aussi *Keenan c. Royaume-Uni*, 27229/9, 3 avril 2001, Note d'information 29 ; *Anguelova c. Bulgarie*, 38361/97, 13 juin 2002, Note d'information 43 ; *Troubnikov c. Russie*, 49790/99, 5 juillet 2005, Note d'information 77 ; *Mikayil Mammadov c. Azerbaïdjan*, 4762/05, 17 décembre 2009, Note d'information 125; et *Keller c. Russie*, 26824/04, 17 octobre 2013, Note d'information 167)

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

Authorities' efforts sufficient, despite some delays and omissions, in view of obstructive behaviour of witnesses placed under protection: *no violation*

Malgré quelques retards et omissions, les autorités ont déployé des efforts suffisants eu égard au comportement obstructionniste des témoins placés sous protection : *non-violation*

A and/et B – Romania/Roumanie, 48442/16, Judgment/Arrêt 2.6.2020 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants, witnesses in a high profile anti-corruption case, were included in a witness protection programme. They complained about the organisation of that programme, arguing that it was inefficient.

Law – Article 2 (substantive aspect): The Court accepted that there had indeed been a serious threat of real and immediate risk to the applicants' life, physical integrity and liberty at the material time. Having established that the authorities knew or ought to have known that there was a real and immediate risk to the applicants' life, the question was whether they had done all that could have been reasonably expected of them to avoid it.

The authorities had placed the applicants under protection as soon as a risk had been identified. The initial protection order had given rise to a series of measures being taken to protect the applicants: an action plan had been adopted the same day, the parties concerned had entered into negotiations to set the details of that protection, and two teams had been assigned to protect the applicants.

There had then been a number of delays and the Court was concerned that a matter of such importance and urgency had been left unresolved by the authorities for such long periods of time, amounting to a total of more than one year and four months, from when the risk had first been identified to when the applicants had been formally included in the programme. That said, the applicants had not been left without protection during that time, even if that protection had at least in the beginning been mostly improvised, in the absence of regulations. The inevitable deficiencies had, however, been corrected by the authorities. Moreover, no direct attack against the applicants had taken place during that time.

The police officers assigned to protect the applicants had received comparable, high risk assignments in the past. However, their past experience could not make up for the absence of clear instructions from their superiors concerning the scope and aim of the mission in question. The Court could not but note that several incidents pointed to a lack of adequate preparation on the part of the police officers on duty. They had sometimes been found to be unarmed or without uniforms, had left the post before the next team arrived, had failed to report, or had simply lost the liaison file which contained sensitive data concerning the applicants. Those omissions risked compromising the applicants' protection. However, they had been taken seriously by the authorities, who had investigated and when necessary had reprimanded those responsible.

Notwithstanding the authorities' prompt response to correct the failures identified, the Court accepted that they must have contributed to the escalation of the conflicts and mistrust between the applicants and the police. They did not, however, justify the applicants' provocative behaviour and repeated disregard of their own responsibilities towards their protection. Domestic law imposed on protected witnesses a duty to cooperate with the authorities and abstain from any action that might compromise the safety of the mission. Those duties were clearly set out in the protection protocols to which the applicants had eventually given their consent. Failure to comply with the obligations undertaken by signing the protocols could result in exclusion from the programme. It could therefore be accepted that the applicants had been fully aware of their duty to cooperate with the authorities.

The applicants had repeatedly failed to comply with their obligations and had breached the protection protocols. They had been uncooperative and had very often exhibited inappropriate behaviour towards the police officers. They had made considerable efforts to elude the protection measures and obstruct the work of the officers assigned to protect them. They had refused to cooperate with the protection teams and had used offensive language towards the police. The applicants had also allegedly made unattainable demands to the authorities concerning the obligation to find them new jobs and had refused to compromise. Moreover, the applicants, through their presence on social media and on television, had risked compromising their protected witness status.

Furthermore, the applicants had refused the offer of relocation within Romania. As for their request to have their identities changed and be relocated abroad, the High Court of Cassation and Justice had dismissed them after careful examination and had provided reasons as to why those measures would not be feasible in their situation. In complete disregard of that court's decision and of their obligation to comply with the protection protocols, the applicants had decided unilaterally to change their residence abroad. That act, in practice, had effectively ended their protection and had potentially exposed them to a serious risk to their lives and physical integrity. It appeared, however, that despite the additional difficulties raised by that new situation created by the applicants' actions, the authorities had not withdrawn protection but had maintained contact with them abroad and had continued to offer them financial support.

The authorities had made efforts to continue the protection, despite the applicants' lack of cooperation, instead of withdrawing them from the witness protection programme, an option that had been provided for by law. Their willingness to ensure the applicants' protection and find alternative solutions had not weakened despite the applicants' lack of cooperation, breach of the rules and provocative behaviour. The authorities had done what

could reasonably be expected of them to protect the applicants from the alleged risk to their lives.

Conclusion: no violation (unanimously).

(See *Osman v. the United Kingdom*, 23452/94, 28 October 1998, Information Note; and *R.R. and Others v. Hungary*, 19400/11, 4 December 2012, Information Note 158)

ARTICLE 3

Inhuman and degrading treatment/ Traitement inhumain et dégradant

Life prisoners automatically placed, for the first ten years of their sentence, under a strict regime involving segregation, limited outdoor exercise and a lack of purposeful activity: *violation*

Condamnés à perpétuité automatiquement soumis, pendant les dix premières années de leur peine, à un régime strict impliquant isolement, exercice en plein air limité et absence d'activité motivante : *violation*

N.T. – Russia/Russie, 14727/11, Judgment/Arrêt 2.6.2020 [Section III]

Traduction française du résumé – Printable version

Facts – Under Russian law, all persons sentenced to life imprisonment have to spend the first ten years of their sentence under a strict regime. Under this regime, the applicant, a life prisoner, was detained separately from other convicts in cells holding no more than two people. Several years of his sentence were spent in solitary confinement. Locked up in his cell without any purposeful activity, such as work or education, he was allowed to leave it only for 90 minutes of outdoor exercise. His contact with the outside world and ability to spend money were significantly restricted. In addition, during the first five years of his imprisonment, the prison guards routinely handcuffed the applicant, even when he had to empty his heavy thirty-litre lavatory bucket into a cesspool outside the building. This caused him physical pain.

Law – Article 3 (substantive aspect)

(a) *Strict regime of imprisonment* – Confinement in a double cell might have negative effects similar to those of solitary confinement. Only particular security reasons, which had obtained throughout detention, might justify prolonged isolation. By the same logic, adequate justification was required for the prolonged detention of prisoners in double cells if the intensity and duration of their segregation were so significant that the effect was comparable to solitary detention, particularly regarding their well-being and social skills. The Government had not provided any justification for the applicant's solitary confinement. The applicant had been segregated for years solely on the ground of his life sentence, which, in the Court's view, was not sufficient to warrant such a measure. That situation had run counter to the Recommendation Rec(2003)23 of the Committee of Ministers of the Council of Europe and the European Prison Rules. The first instrument highlighted the importance of the principle of non-segregation and the second explicitly required that the security measures applied to prisoners be the minimum necessary to ensure their custody and that they be reviewed at regular intervals throughout a person's imprisonment.

Taken cumulatively, the applicant's isolation, limited outdoor exercise and lack of activity had resulted in intense and prolonged feelings of loneliness and boredom, causing him significant distress. Moreover, due to the lack of appropriate mental and physical stimulation, that situation could have resulted in the loss of social skills and individual personal traits.

(b) *Routine handcuffing* – While the applicant had been registered on the list of dangerous prisoners, during the entire period of his detention in a highly secure facility he had never breached prison discipline. His systemic handcuffing for more than five years had therefore palpably exceeded the legitimate requirements of prison security. It had diminished his human dignity and caused him feelings of inferiority, anguish and accumulated distress going far beyond the unavoidable suffering and humiliation inherent in a sentence of life imprisonment.

Conclusion: violation (unanimously).

Article 46: The violation found stemmed in large part from the relevant provisions of domestic law and therefore disclosed a systemic problem. A further reform of the existing regulatory framework was required. The choice of instruments remained fully at the discretion of the respondent Government, which might decide to remove the automatic application of a strict regime to all life prisoners, put in place provisions envisaging that such a regime could only be imposed – and maintained – on the basis of an individual risk assessment of each life prisoner and be applied for no longer than strictly necessary and (or) mitigate the modalities of the regime, particularly those concerning physical restrictions, isolation and access to various activities for the purpose of socialisation and rehabilitation.

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

Inhuman treatment/Traitement inhumain
Positive obligations (substantive aspect)/ Obligations positives (volet matériel)
Expulsion

Unaccompanied minors in administrative detention, arbitrarily associated with an unrelated adult and deported without precautions to a third State: *violations*

Jeunes mineurs isolés placés en rétention administrative, rattachés arbitrairement à un adulte tiers et renvoyés sans précaution vers un État tiers : *violations*

Moustahi – France, 9347/14, Judgment/Arrêt 25.6.2020 [Section V]

(See Article 4 of Protocol No. 4 below/Voir l'article 4 du Protocole n° 4 ci-dessous, page 48)

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

Lack of necessary and appropriate measures by State to protect child from lethal ill-treatment by parents: *violation*

Défaut de mesures nécessaires et appropriées de l'État pour protéger une enfant des maltraitances de ses parents ayant abouti à son décès : *violation*

Association Innocence en Danger et Association Enfance et Partage – France, 15343/15 and/et 16806/15, Judgment/Arrêt 4.6.2020 [Section V]

English translation of the summary – Version imprimable

En fait – Une enfant de huit ans, M., a subi des maltraitances de la part de ses parents qui ont abouti à son décès en août 2009. Les autorités en avaient été averties dès juin 2008, à la suite du signalement de la directrice de son école.

Les requérants, deux associations de protection de l'enfance, se plaignent de savoir si les autorités françaises ont rempli leurs obligations positives pour protéger l'enfant des maltraitances de ses parents ayant abouti à son décès. En outre, elles soulèvent la question du droit à un recours effectif pour engager la responsabilité civile de l'État français du fait du fonctionnement défectueux du service public de la justice.

En droit

Article 3 (volet matériel) : Le « signalement pour suspicion de maltraitance » de la directrice de l'école de juin 2008 a déclenché l'obligation positive de l'État de procéder à une investigation afin d'apprécier l'éventualité de mauvais traitements et, le cas échéant, d'en déterminer l'auteur, ainsi que de protéger l'enfant de futurs semblables traitements.

Le procureur a fait montre d'une grande réactivité en ayant adressé, le jour même du signalement, un « soit-transmis » à la gendarmerie. Aussi, dans le cadre de l'enquête, des mesures utiles et pertinentes ont été prises, telles que l'audition filmée de l'enfant et son examen par un médecin légiste. Cependant, plusieurs facteurs tempèrent la portée de ces constats.

Tout d'abord, en réponse à la réaction instantanée du parquet, un agent de police n'a été saisi que treize jours plus tard et les préconisations quant aux prises de décisions du parquet en temps réel (TTR) n'ont finalement pas été mises en œuvre.

Ensuite les enseignantes de M. avaient informé les autorités par écrit de leur constat de nombreuses marques sur l'enfant lors du signalement en juin 2008. Mais il aurait été aussi utile de les entendre, afin de recueillir des éléments sur le contexte et la réaction de M. lors de la découverte des blessures. Cela d'autant plus que le médecin légiste ne pouvait exclure des faits de violence ou de mauvais traitements et que l'ASE avait informé le procureur du constat de nouvelles ecchymoses apparues après le signalement. À cet égard, en présence de signes de maltraitance d'un enfant, les enseignants peuvent jouer un rôle primordial dans le système de prévention de la violence.

Il aurait aussi été utile de procéder à des actes d'enquête afin d'apporter des éclaircissements sur l'environnement familial de M. parce qu'il y avait eu de nombreux déménagements successifs de la famille connus des autorités.

La mère de M. a été entendue, par l'agent de police judiciaire en charge de l'enquête, de manière succincte, à son domicile et non pas au sein des locaux de la gendarmerie. Par ailleurs, la déclaration du père faite en tant que représentant légal de l'enfant devant un médecin expert ne saurait équivaloir à une véritable audition dans le cadre d'une enquête, lors de laquelle des questions ciblées sont posées.

En outre, M. ne dénonçait aucun fait lors de son audition. Toutefois, celle-ci a été réalisée sans la participation d'un psychologue. Or, sans être obligatoire, sa présence aurait pu être appropriée pour écarter tout doute face aux questionnements que soulevaient le signalement et le rapport du médecin légiste.

Au regard des nombreuses lésions suspectes rapportées par le médecin légiste, ainsi qu'un nouveau déménagement de la famille concomitamment à la clôture de l'enquête, les autorités auraient dû s'entourer de certaines précautions lorsque la décision de classer l'affaire sans suite avait été prise et non se

contenter d'un classement sans suite pur et simple. Ainsi, si le parquet avait informé le service de l'aide sociale à l'enfance (ASE) de sa décision tout en attirant l'attention de celle-ci sur la nécessité d'une enquête sociale ou du moins d'une surveillance à l'égard de l'enfant, il aurait accru les chances d'une réaction appropriée des services sociaux en aval du classement sans suite.

En outre, la combinaison du classement sans suite pur et simple et du défaut d'existence d'un mécanisme centralisant les informations ont fortement diminué les chances d'une surveillance accrue de l'enfant et d'un échange utile d'informations entre les autorités judiciaires et sociales.

Les services sociaux ont certes pris des mesures par la suite. Cependant, face aux facteurs combinés de l'information préoccupante d'avril 2009 de la directrice de la nouvelle école de M. suite à l'énième déménagement de la famille et l'hospitalisation concomitante de M. pour des plaies sur ses pieds, ils auraient dû redoubler de vigilance dans l'appréciation de la situation de l'enfant. Or, force est de constater que, dans le sillage de la décision du classement sans suite, ils n'ont pas engagé d'action véritablement perspicace qui aurait permis de déceler l'état réel dans lequel se trouvait l'enfant.

Ainsi le système a failli à protéger M. des graves abus qu'elle a subis de la part de ses parents et qui ont d'ailleurs abouti à son décès.

Conclusion : violation (unanimité).

Article 13 au regard de l'article 3 : Compte tenu du constat de violation de l'article 3, le grief de l'association requérante est défendable aux fins de l'article 13, qui s'applique par conséquent.

Les conditions de mise en œuvre de la responsabilité de l'État ont été assouplies au fur et à mesure par la jurisprudence française. Ainsi, l'interprétation de la notion de « faute lourde » permet de retenir des fautes simples, en particulier dans les cas de fautes multiples ayant conduit à un dysfonctionnement du service de la justice, pour conclure qu'ensemble elles caractérisent une faute lourde engageant la responsabilité de l'État.

Les États jouissent en effet d'une certaine marge d'appréciation quant à la manière de se conformer aux obligations que leur impose cette disposition. Il n'apparaît pas déraisonnable en l'espèce que le législateur français ait encadré la possibilité d'engager la responsabilité civile de l'État dans ce contexte particulier dans un but de protection de l'indépendance de la justice au regard de la complexité de son fonctionnement et de la spécificité de la fonction juridictionnelle, y compris les activités d'enquête et de police. Toutefois, le choix opéré doit assurer un recours effectif en pratique comme en droit.

L'association requérante a été en mesure de saisir le juge judiciaire aux fins de voir ses doléances examinées quant aux manquements qu'elle reprochait aux services de police et au ministère public. Le juge judiciaire avait compétence pour se prononcer sur ces griefs et a procédé à leur examen, sans se limiter à un examen isolé des seules fautes lourdes, à l'issue d'une procédure au cours de laquelle l'association requérante a pu faire valoir tous ses arguments et moyens. Le seul fait que l'association requérante ait été déboutée de sa demande ne constitue pas en soi un élément suffisant pour juger du caractère « effectif ou non » du recours en question. Ainsi, l'effectivité d'un recours ne dépend pas de la certitude d'une issue favorable pour le requérant.

En conclusion, le fait que l'association requérante n'ait pas rempli les conditions posées par la loi ne saurait suffire pour conclure que le recours, pris dans son ensemble, est contraire à l'article 13.

Conclusion : non-violation (unanimité).

Article 41 : 1 EUR symbolique pour le préjudice moral.

(Voir aussi concernant l'article 3 : *C.A.S. et C.S. c. Roumanie*, 26692/05, 20 mars 2012, Note d'information 150 ; *M. et M. c. Croatie*, 10161/13, 3 septembre 2015, Note d'information 188 ; et concernant l'article 13 : *Kontrová c. Slovaquie*, 7510/04, 31 mai 2007, Note d'information 97 ; *De Souza Ribeiro c. France* [GC], 22689/07, 13 décembre 2012, Note d'information 158)

ARTICLE 4

Positive obligations/Obligations positives
Effective investigation/Enquête effective

Significant flaws in domestic procedural response to arguable claim of human trafficking and forced prostitution, supported by prima facie evidence: *violation*

Lacunes importantes dans la réponse procédurale apportée par les autorités internes à un grief défendable de traite d'êtres humains et de prostitution forcée étayé par un commencement de preuve : *violation*

S.M. – Croatia/Croatie, 60561/14, Judgment/Arrêt 25.6.2020 [GC]

Traduction française du résumé – Printable version

Facts – The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution. The policeman was subsequently indicted on charges of forcing somebody to prostitution, as an aggravated offence of organising prostitution. In 2013 the criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring in which he had recruited the applicant, it had not been established that he had forced her into prostitution. He had only been indicted for the aggravated form of the offence in issue and thus he could not be convicted for the basic form of organising prostitution. The State Attorney's Office appeal against the decision was dismissed and the applicant's constitutional complaint was declared inadmissible.

In a judgment of 19 July 2018 (see Information Note 220), a Chamber of the Court held, by six votes to one, that the relevant State authorities had not fulfilled their procedural obligations under Article 4. In particular, they had neither investigated in depth all the relevant circumstances, nor made any assessment of the possible impact of psychological trauma on the applicant's ability to consistently and clearly relate the circumstances of her exploitation.

On 3 December 2018 the case was referred to the Grand Chamber at the Government's request.

Law – Article 4: The Court clarified certain aspects of its case-law on human trafficking for the purpose of exploitation of prostitution.

Trafficking in human beings and "exploitation of prostitution" under Article 4

(i) Human trafficking fell within the scope of Article 4. This, however, did not exclude the possibility that, in the particular circumstances of a case, a particular form of conduct related to human trafficking might raise an issue under another provision of the Convention;

(ii) It was not possible to characterise conduct or a situation as an issue of human trafficking , which fell within the ambit of Article 4, unless the constituent elements of the international definition of trafficking, under the Anti-Trafficking Convention and the Palermo Protocol, were present.

The three constituent elements of that crime were: (1) an action (what was done: the recruitment, transportation, transfer, harbouring or receipt of persons); (2) the means (how it was done: by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); (3) an exploitative purpose (why it was done: this includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs). A combination of the three constituent elements was necessary in order for the crime of trafficking to be established as regards adult victims.

In that connection, from the perspective of Article 4, the concept of human trafficking related to both national and transnational trafficking in human beings, irrespective of whether or not connected with organised crime;

(iii) The notion of "forced or compulsory labour" under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human trafficking context. Any such conduct might have elements qualifying it as "slavery" or "servitude" under Article 4, or might raise an issue under another provision of the Convention. In that context, "force" might encompass the subtle forms of coercive conduct identified in the Court's case-law on Article 4, as well as by the International Labour Organization (ILO) and in other international materials;

(iv) The question whether a particular situation involved all the constituent elements of "human trafficking" and/or gave rise to a separate issue of forced prostitution was a factual question which must be examined in the light of all the relevant circumstances of a case.

The scope of the States' positive obligations concerning human trafficking and forced prostitution

The nature and scope of the positive obligations concerning human trafficking and forced prostitution under Article 4 were comprehensively set out in the case of *Rantsev v. Cyprus and Russia*: (1) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking; (2) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and (3) a procedural obligation to investigate situations of potential trafficking. In general, the first two aspects of the positive obligations can be denoted as substantive, whereas the third aspect designates the States' (positive) procedural obligation. Moreover, given the conceptual proximity of human trafficking and forced prostitution under Article 4, the relevant principles relating to human trafficking were accordingly applicable in cases concerning forced prostitution.

States' procedural obligations concerning human trafficking and forced prostitution

Traditionally, ever since the *Siliadin v. France* case, the converging principles of the procedural obligation under Articles 2 and 3 of the Convention informed the specific content of the procedural obligation under Article 4. There were no grounds for revisiting that well-established approach. Moreover, those principles were accordingly applicable to instances of forced prostitution. As the Court had stressed in *Siliadin*, possible defects in the relevant proceedings and the decision-making process had to amount to significant flaws in order to raise an issue under Article 4. In other words, the Court was not concerned with allegations of errors or isolated omissions but only with significant shortcomings, namely those that were capable of undermining the investigation's capability of establishing the circumstances of the case or the person responsible.

Whether the circumstances of the present case had given rise to an issue under Article 4 of the Convention

While the applicant had obtained administrative recognition of the status of a potential victim of human trafficking, that could not be taken as recognition that the elements of the offence of human trafficking had been carried out. That question had to be answered in subsequent criminal proceedings. In that connection, the Court would also stress the necessity of protection of the rights of the suspects or accused, in particular the right to the presumption of innocence and other fair trial guarantees under Article 6 of the Convention.

When an applicant's complaint had been essentially of a procedural nature as in the present case, the Court had to examine whether, in the circumstances of a particular case, the applicant had made an arguable claim or whether there had been prima facie evidence (*commencement de preuve*) of her having been subjected to such prohibited treatment. In that connection, a conclusion as to whether the domestic authorities' procedural obligation arose had to be based on the circumstances prevailing at the time when the relevant allegations had been made or when the prima facie evidence of treatment contrary to Article 4 had been brought to the authorities' attention and not on a subsequent conclusion reached upon the completion of the investigation or the relevant proceedings. This was particularly true when there had been allegations that such conclusions and the relevant domestic proceedings had been marred by significant procedural flaws.

The preliminary police investigation concerning the applicant's allegations of forced prostitution had led to a search of T.M.'s premises and his car, during which the police had found condoms, two automatic rifles and the accompanying ammunition, a hand grenade and a number of mobile phones. In addition, it had been established that T.M., trained as a policeman, had previously been convicted of procuring prostitution using force and of rape.

Regarding the constituent elements of human trafficking, T.M. had allegedly contacted the applicant via Facebook and promised her employment, which was one of the recognised ways used by traffickers to recruit their victims. The applicant's allegations that T.M. had made the necessary arrangements for her to provide sexual services by securing accommodation and other facilities, suggested the elements of harbouring, as one of the possible "actions" of trafficking. Moreover, regarding the means employed, T.M. had admitted to having used force against her on one occasion and lending money to her, which raised an issue of possible debt bondage. The applicant's personal situation undoubtedly suggested that she had belonged to a vulnerable group, while T.M.'s position and background suggested that he had been capable of assuming a dominant position over her and abusing her vulnerability for the purpose of exploitation of prostitution.

In sum, the applicant had made an arguable claim and there had been prima facie evidence that she had been subjected to treatment contrary to Article 4, human trafficking and/or forced prostitution.

Compliance with the procedural obligation under Article 4

While the prosecuting authorities had reacted promptly to the applicant's allegations, they had failed to follow some obvious lines of inquiry capable of elucidating the circumstances of the case and establishing the true nature of the relationship between both parties. Although the available evidence suggested that T.M. had used Facebook to recruit the applicant and to threaten her after she had left him, the authorities had failed to inspect their respective accounts to determine the real nature of their first contacts and relationship, in particular whether those threats suggested the use of a means of coercion by T.M.. Nor had they given any consideration to obtaining evidence from the applicant's parents, despite the fact that the applicant's mother had had earlier contacts and difficulties with T.M., which the latter had used as one of the means of pressure and threats towards the applicant. The prosecuting authorities had never identified and interviewed any of the neighbours and the owner of the flat where the applicant lived with T.M., who could have provided information on the relationship between the applicant and T.M. and clarified whether she had been under his

control at the material time. The owner, moreover, could have shed light on the circumstances in which the flat had been rented and thus clarified who in reality had been in charge of the whole rental process, which was relevant for establishing the potential action of "harbouring" (one of the constituent elements of human trafficking). The persons, who could have provided details on the applicant's alleged escape from T.M., had not been questioned either.

The prosecuting authorities had relied heavily on the applicant's statement and thus, in essence, created a situation in the subsequent court proceedings where her allegations simply had to be pitted against the denial of T.M., without much further evidence being presented. In that connection, as noted by international expert bodies, there might be different reasons why victims of human trafficking and different forms of sexual abuse might be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma had to be taken into account. There was thus a risk of overreliance on the victim's testimony alone, which led to the necessity to clarify and, if appropriate, support the victim's statement with other evidence.

The multiple shortcomings in the conduct of the case by the prosecuting authorities had fundamentally undermined the domestic authorities', including the relevant courts', ability to determine the true nature of the applicant's and T.M.'s relationship and whether the applicant had been exploited by him as she had alleged. In sum, there had been significant flaws in the domestic authorities' procedural response to the arguable claim and prima facie evidence that the applicant had been subjected to treatment contrary to Article 4.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 for non-pecuniary damage.

(Also see concerning Articles 2 and 3: *Makaratzis v. Greece* [GC], 50385/99, 20 December 2004, Information Note 70; *Nachova and Others v. Bulgaria* [GC], 43577/98 and 43579/98, 6 July 2005, Information Note 77; *Beganović v. Croatia*, 46423/06, 25 June 2009, Information Note 120; *Denis Vasilyev v. Russia*, 32704/04, 17 December 2009, Information Note 125; *Hassan v. the United Kingdom* [GC], 29750/09, 16 September 2014, Information Note 177; *Mocanu and Others v. Romania* [GC], 10865/09 and al., 17 September 2014, Information Note 177; *Bouyid v. Belgium* [GC], 23380/09, 28 September 2015, Information Note 188; *Armani da Silva, v. the United Kingdom* [GC], 5878/08, 30 March 2016, Information Note 194; *Hovhannisyan v. Armenia*, 18419/13, 19 July 2011, Information Note 220; concerning Article 4: *Siliadin v. France*, 73316/01, 26 July 2005, Information Note 77; *Rantsev v. Cyprus and Russia*, 25965/04, 7 January 2010, Information Note 126; *M. and Others v. Italy and Bulgaria*, 40020/03, 31 July 2012, Information Note 154; *C.N. v. the United Kingdom*, 4239/08, 13 November 2012, Information Note 157; *L.E. v. Greece*, 71545/12, 21 January 2016, Information Note 192; *J. and Others v. Austria*, 58216/12, 17 January 2017, Information Note 203, *Chowdury and Others v. Greece*, 21884/15, 30 March 2017, Information Note 205; and concerning Article 6: *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Information Note 191; ILO Forced Labour Convention, 1930 (No. 29)

ARTICLE 5

Article 5 § 1

Deprivation of liberty/Privation de liberté
Lawful arrest or detention/Arrestation ou détention régulières

Unaccompanied minors placed *de facto* in administrative detention by arbitrary association with an unrelated adult for purposes of removal measure in breach of domestic law: *violation*

Jeunes mineurs isolés placés en rétention administrative *de facto* par rattachement arbitraire à un adulte tiers aux fins d'un refoulement contraire au droit interne : *violation*

Moustahi – France, 9347/14, Judgment/Arrêt 25.6.2020 [Section V]

(See Article 4 of Protocol No. 4 below/Voir l'article 4 du Protocole n° 4 ci-dessous, page 48)

Article 5 § 4

Take proceedings/Introduire un recours
Review of lawfulness of detention/Contrôle de la légalité de la détention

Unaccompanied minors placed *de facto* in administrative detention for several hours by arbitrary association with an unrelated adult, without any effective remedy: *violation*

Jeunes mineurs placés *de facto* en rétention administrative pendant plusieurs heures par rattachement arbitraire à un adulte tiers, ne laissant pas de possibilité de recours effective : *violation*

Moustahi – France, 9347/14, Judgment/Arrêt 25.6.2020 [Section V]

(See Article 4 of Protocol No. 4 below/Voir l'article 4 du Protocole n° 4 ci-dessous, page 48)

ARTICLE 6

Article 6 § 1 (administrative/ administratif) (constitutional/ constitutionnel)

Access to court/Accès à un tribunal

Refusal by President of Poland to appoint judges proposed by National Legal Commission and lack of related judicial remedies: *communicated*

Refus du président de la République de nommer des juges proposés par le Conseil national de la magistrature et défaut de recours juridictionnels y afférents : *affaire communiquée*

Sobczyńska and Others/et autres – Poland/Pologne, 62765/14 et al., Communication [Section I]

English translation of the summary – Version imprimable

Les requêtes concernent le refus non motivé du président de la République, en 2008 ou 2016 selon les requérants, de les nommer à des postes de juge vacants dans différents tribunaux du pays, alors que leur candidature avait reçu un avis favorable du Conseil national de la magistrature. Les juridictions administratives puis – pour certains requérants – la Cour constitutionnelle se déclarèrent successivement incompétentes.

Affaires communiquées sous l'angle des articles 6, 8 et 13 de la Convention.

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Case repeatedly remitted to first-instance court for new examination until guilty verdict obtained on fifth occasion: *violation*

Affaire renvoyée à plusieurs reprises devant les juridictions de première instance, jusqu'à obtention d'un constat de culpabilité à l'issue du cinquième examen : *violation*

Tempel – Czech Republic/République tchèque, 44151/12, Judgment/Arrêt 25.6.2020 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant was convicted of murder by the Prague Regional Court after the High Court had quashed four consecutive judgements of the Plzeň Regional Court acquitting him.

Law – Article 6: The applicant's case had been examined five times by the courts of first and second instance, with the additional and repeated involvement of the Constitutional Court. Initially, the High Court had remitted the case to the same chamber of the first-instance court which had given the original judgment. Thereafter, relying on Article 262 of the Code of Criminal Procedure ("the CCP"), the High Court had referred the case to another chamber of the same court which had examined the case twice, and then lastly, to a different first-instance court within its jurisdiction.

Article 262 of the CCP provided that when an appellate court remitted a case to a first-instance court for a new examination, it could order the case to be assigned to another chamber, or to another first-instance court, if there were important reasons for that assignment. According to the case-law of the Constitutional Court, Article 262 of the CCP was to be interpreted as enabling an appellate court to remit a case to another chamber or another first-instance court only if there were "distinct, evident and undeniably important reasons for that procedure and the existence of those reasons h[ad] been clearly proved". An appellate court could order a first-instance court to eliminate the discrepancies in factual findings or re-examine and obtain certain pieces of evidence, and its instructions had to be adequately concrete. When those requirements had been fulfilled, the appellate court could not quash the first-instance court's decision only in order to push through its own assessment of the evidence and its own findings. Accordingly, regarding the assessment of evidence, the appellate court could only indicate to the first-instance court what circumstances were to be taken into account, but should not bind the first-instance court as to what factual conclusions it should reach.

While a decision under Article 262 of the CCP should be "entirely exceptional", the High Court had applied that provision repeatedly, until the Prague Regional Court – to which the case had ultimately been transferred by the High Court – had found the applicant guilty of murder and had sentenced him to life imprisonment, in contrast to the Plzeň Regional Court, which had acquitted the applicant four times.

When quashing the first-instance judgments, the High Court had mainly criticised the court of first-instance for how it had assessed the evidence and the credibility of the key witness in particular. However, that approach seemed to be at odds with Article 263 § 7 of the CCP as interpreted by the Constitutional Court, in accordance with which the

appellate court had been bound by the assessment of the evidence carried out by the court of first instance. The reasoning of the High Court's judgment by which the case had been transferred to a different chamber of the Plzeň Regional Court for a second time had gone on to draw an alternative conclusion from the evidence previously examined by the court of first instance, without the relevant witness being heard by the High Court.

One of the High Court's judgments had contained formulations that could be interpreted as suggesting that the first-instance court should reach different conclusions as to the credibility of the witness, and that the appellate court would not accept any outcome other than the applicant's conviction. Such conclusions sat uneasily with the Constitutional Court's long-standing case-law, which established, that an appellate court could not assess the credibility of a specific witness unless it heard him itself, as provided for in Article 263 § 7 of the CCP, and should not quash a judgment on acquittal unless the doubts of the first-instance court concerning the guilt of the accused were without any merit. Moreover, it could not, under any circumstances, instruct the first-instance court as to whether it should or should not find the accused guilty. The High Court had provided no reason justifying its decision not to hear the witness directly and assess his credibility itself. Indeed, as the disagreement between the concerned jurisdictions had turned essentially on the credibility of that witness, an issue which inherently depended on seeing the witness give evidence, it would have been appropriate to at least give some reasons on why hearing the witness in question had been unnecessary.

It appeared that the High Court had based its doubts concerning the independence and impartiality of the judges of the first-instance court, and its conclusion that the first-instance court had failed to comply with its (the High Court's) binding instructions, exclusively on the fact that the first-instance court had made factual findings and conclusions as to the applicant's guilt which were different from what was right in the appellate court's view. An appellate court might decide to reassign a case to another chamber of the same court, or to another court, in cases where it had doubts as to a first-instance court's impartiality and independence, or in cases where a first-instance court had failed to comply with a binding instruction. However, according to the long-standing case-law of the Constitutional Court, an appellate court did not have competence to criticise a first-instance court's assessment of evidence or factual findings, or its actual judgment on an acquittal. Therefore, it could base neither its doubts concerning judges' independence and impartiality nor its criticism of a first-instance court's failure to comply with binding instructions on the mere fact that a first-instance court had made factual findings and a conclusion in respect of an applicant's guilt which the appellate court had merely disagreed with.

Against that background, the procedural approach adopted by the High Court could have had as a consequence that the Prague Regional Court come to the conclusion that the only decision susceptible of being accepted by the High Court and bring the proceedings to an end was a guilty verdict. The particular succession of events strongly indicated a dysfunction in the operation of the judiciary, vitiating the overall fairness of the proceedings.

Conclusion: violation (unanimously).

The Court also found, unanimously, a further violation of Article 6 in respect of the length of the proceedings.

Article 41: EUR 12,500 in respect of non-pecuniary damage.

Article 6 § 1 (civil) (disciplinary/ disciplinaire)

Independent and impartial tribunal/ Tribunal indépendant et impartial
Tribunal established by law/Tribunal établi par la loi

Alleged lack of independence of the Supreme Court: *communicated*

Manque d'indépendance allégué de la Cour suprême : *affaire communiquée*

Reczkowicz and Others/et autres – Poland/Pologne, 43447/19 et al., Communication [Section I]

Traduction française du résumé – Printable version

The first applicant, Ms Reczkowicz, is a barrister. She was suspended for three years following several incidents when she was representing a client. She appealed the decision before the courts. Her case was ultimately dismissed in 2019 by the Disciplinary Chamber of the Supreme Court, one of the two new chambers created following the changes to the judiciary.

The other two applicants are district and regional court judges who applied for posts elsewhere. The NCJ decided not to recommend their candidatures in 2018 and they lodged appeals with the Supreme Court. The Chamber of Extraordinary Control and Public Affairs, the other newly created chamber following the changes to the judiciary, gave judgment in the judges' cases in 2019.

Relying on Article 6, all the applicants complain that the chambers of the Supreme Court which examined their cases did not constitute an "independent and impartial tribunal established by law" because they were composed of judges recommended by the NCJ. They referred in particular to proceedings before the Court of Justice of the European Union which ended in a ruling of 19 November 2019 (see Information Note 234) and subsequent rulings by the Polish Supreme Court finding that the judges of the Supreme Court appointed in the procedure involving the NCJ were not a court constituted in accordance with domestic law. The second two applicants additionally allege that the NCJ, which dealt with their cases, was not an independent and impartial authority, pointing out in particular various procedural and legal controversies around it.

Communicated under Article 6 § 1 of the Convention.

ARTICLE 7

Nullum crimen sine lege

Existence of a case-law precedent rendering a criminal conviction foreseeable: *no violation*

Existence d'un précédent jurisprudentiel rendant prévisible une condamnation pénale : *non-violation*

Baldassi and Others/et autres – France, 15271/16, Judgment/Arrêt 11.6.2020 [Section V]

(See Article 10 below/Voir l'article 10 ci-dessous, page 32)

ARTICLE 8

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

Courts' refusal to examine the merits of request to exhume remains of spouse for transfer to new resting place: *violation*

Refus des juridictions internes d'examiner le bien-fondé de la demande d'exhumation de la dépouille du conjoint de la requérante en vue de sa réinhumation en un lieu différent : *violation*

Drašković – Montenegro/Monténégro, 40597/17, Judgment/Arrêt 9.6.2020 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant's husband died in 1995. Owing to the ongoing armed conflict at the time, it was not possible for him to be buried in Bosnia and Herzegovina, where they had lived and had a family burial plot. He was buried in Montenegro in a plot owned by his nephew, together with the remains of some other family members. The remains of all the occupants of the plot became mixed up. In 2014 the applicant sought the nephew's consent for the exhumation and transfer of her husband's remains, to no avail. The domestic courts did not examine the applicant's complaint on the merits, holding that she did not have any "property-related, status-related and any other interests in her claim".

Law – Article 8: In the case of *Elli Poluhas Dödsbo v. Sweden* the Court had not taken an explicit position on whether a request by a close family relative, like the applicant in the present case, to exhume the remains of a deceased family member for transfer to a new resting place fell under Article 8. In the instant case, the Court found that such a request fell, in principle, to be examined under both aspects of this provision ("private and family life"). However, the Court made clear that the nature and scope of this right, and the extent of the State's obligations under the Convention in cases of that type, would depend on the particular circumstances and the facts adduced.

The applicant's interest in the exhumation and transfer of her husband's remains had to be weighed not only against society's role in ensuring the sanctity of graves, but also against the rights of her husband's nephew. The States had to be afforded a wide margin of appreciation in such an important and sensitive issue.

Unlike in the case of *Elli Poluhas Dödsbo*, the substance of the applicant's complaint was directed at the lack of a substantive examination by the national courts of her claim in civil proceedings against a third party. Therefore, the present case concerned an issue of the State's positive obligations in the sphere of relations between individuals and required primarily an examination by the Court of whether the respondent State had put in place an appropriate legal framework to balance any competing interests, and whether it had identified and properly balanced such interests in the present case.

As regards the appropriate legal framework, the domestic legislation did not provide a mechanism by which to review the proportionality of the restrictions on the relevant Article 8 rights. Notably, the relevant legislation did not set forth any substantive standards for resolving disputes among family members regarding exhumation, or the final

resting place, of the remains of a late relative. In addition, the body in charge of resolving such disputes was not defined. In particular, the domestic courts had taken the standpoint that the applicant needed to lodge a request with the administrative body, which in turn could not follow any such request in the absence of the third party's (i.e. the late husband's nephew's) consent. The administrative bodies did not in general deal with such issues. In the event of a dispute, they instructed the parties first to resolve the matter and only then to lodge a request for exhumation. Such proceedings, in the Court's view, clearly lacked the ability to balance the competing interests. Possibly, such interests could be properly balanced in civil contentious proceedings that the applicant had actually initiated.

The domestic courts, however, had failed to recognise any legal interest on behalf of the applicant and thus the existence of her rights under Article 8. Apart from considering whether the exhumation and removal, in practical terms, were possible and/or easy and whether there were any public-health interests involved, a number of other issues had required clarification. In particular, it had not been clarified whether the applicant's husband had lived in Bosnia and Herzegovina and whether the burial plot there was the applicant's alone or if they had acquired it jointly with the aim of them both being buried there one day. It also appeared that there had been a dispute as to whether the applicant's husband had been buried in Montenegro pursuant to his own wish or not. It had not been clarified either whether there had been anything preventing the applicant from having her final resting place in the same burial spot as her husband in the event that the exhumation was not undertaken. The domestic courts had therefore failed to properly balance the applicant's rights against the competing interests of her husband's nephew.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 in respect of non-pecuniary damage

(See *Pannullo and Forte v. France*, about the delay in releasing the body of the applicant's child for a funeral; *Znamenskaya v. Russia*, about a mother wishing to change the family name on the tombstone of her stillborn child; *Elli Poluhas Dödsbo v. Sweden*, concerning the refusal to allow the removal of a burial urn to a new resting place; and *Hadri-Vionnet v. Switzerland*, about the burial of a still-born baby in a common grave without consulting or informing the mother)

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

Failings in decision-making process depriving foreign national in difficulty of contact with her baby, who was taken into care at her request, then adopted without her consent six years later: *violation*

Carences du processus décisionnel privant une étrangère en difficulté de contact avec son bébé mis sous tutelle à sa demande puis adopté, six ans plus tard, malgré son opposition : *violation*

Omorefe – Spain/Espagne, 69339/16, Judgment/Arrêt 23.6.2020 [Section III]

English translation of the summary – Version imprimable

En fait – La requérante est une ressortissante nigériane. En février 2009, son fils, âgé à l'époque de presque deux mois, fut placé dans un centre d'accueil, à la demande de sa mère, mis sous tutelle de l'État et déclaré en situation légale d'abandon. L'autorité parentale de la requérante fut suspendue, mais le régime de visites fixé par les autorités et le droit des parents du mineur à être informés de sa situation furent toutefois maintenus. Au début, les autorités avaient envisagé que l'enfant puisse réintégrer sa famille biologique à moyen terme à condition que ses parents réalisent certains objectifs et cela avec l'assistance du service social. Aussi ce processus devait faire l'objet d'un examen par le service de protection des mineurs dans un délai de six mois.

Toutefois, en mai 2009, les visites de la requérante à son fils furent suspendues et l'enfant fut placé en famille d'accueil préadoptif. Cette décision fut motivée par l'absence de ressources des parents de l'enfant, en situation irrégulière et sans emploi ni logement stable, à la situation de crise et de conflit qui aurait existé entre les parents et au sentiment ambivalent de la mère à l'égard de son bébé. La requérante s'opposa à la privation de contacts avec son fils et à son adoption.

S'appuyant dans une large mesure sur le manque d'aptitudes parentales de la requérante, le juge de première instance estima que l'adoption pouvait avoir lieu sans son consentement. Mais ce jugement fut annulé, en 2012, par l'*Audiencia provincial* car la requérante, n'ayant pas été déchue de son autorité parentale, devait nécessairement donner son accord à l'adoption. La mesure d'accueil familial préadoptif fut donc annulée. En juin 2015, le juge de première instance reconnut le droit de la requérante de rendre visite à son fils, une heure par mois, dans le cadre de rencontres supervisées.

Mais en octobre 2015, l'*Audiencia provincial* infirma son précédent arrêt (de 2012) et autorisa l'adoption du fils de la requérante en dépit de l'absence de consentement de cette dernière et de l'avis contraire du procureur. Cependant, elle signala la possibilité d'adopter à l'avenir « une quelconque forme de relation ou de contact au travers de visites ou de communications avec la mère biologique ».

En droit – Article 8 : Les décisions litigieuses ayant abouti à l'adoption de l'enfant de la requérante s'analysent en une ingérence dans l'exercice du droit au respect de la vie privée et familiale de la requérante et de son enfant biologique. Cette ingérence était prévue par la loi et poursuivait le but légitime de la protection des droits et libertés de l'enfant. La Cour a estimé, cependant et nonobstant la marge d'appréciation de l'État défendeur en la matière, que le processus à l'origine des décisions litigieuses n'a pas été conduit de manière à ce que tous les avis et les intérêts de requérante fussent dûment pris en compte et n'a pas été entouré de garanties proportionnées à la gravité de l'ingérence et des intérêts en jeu.

Premièrement, alors que la requérante était censé recevoir l'appui et l'encadrement du service social en vue de la récupération de son enfant, aucune évaluation de l'assistance menée par ce service n'a été effectuée avant 2013, laissant ainsi à la seule charge de la requérante les efforts à réaliser afin de parvenir à accomplir les objectifs déterminés à cet égard.

Deuxièmement, la décision de la commission d'évaluation proposant la mise en œuvre de l'accueil familial préadoptif de l'enfant est intervenue à peine vingt jours après que la requérante ait été informée qu'elle aurait un délai de six mois pour réaliser les objectifs susmentionnés pour retrouver son fils. Aussi, bien avant l'expiration de ce délai, elle a été privée de contacts avec son fils et l'adoption de l'enfant sans le consentement de sa mère a été proposée au juge par les autorités compétentes.

Troisièmement, comme il a été indiqué par l'*Audiencia provincial* dans son arrêt de 2012, la loi exige, pour que la déchéance d'autorité parentale puisse être décidée, une procédure judiciaire contradictoire, ce qui n'avait pas été le cas en l'espèce. Aucun motif grave n'avait par ailleurs été invoqué à cet égard.

Quatrièmement, les autorités n'ont pas mis en balance les intérêts de l'enfant et ceux de sa mère biologique mais elles se sont concentrées sur ceux de l'enfant, et elles n'ont pas sérieusement envisagé la possibilité de réunion de l'enfant et de sa mère biologique. Elles n'ont pas dûment pris en compte les efforts de la requérante pour régulariser et stabiliser sa situation.

À cet égard, dans son arrêt de 2012, l'*Audiencia provincial* a relevé plusieurs insuffisances dans le processus décisionnel. Elle a indiqué qu'il n'existait aucun rapport psychologique faisant état d'une absence d'affection de la mère pour son fils et que la pauvreté ne pouvait pas être le motif principal invoqué pour priver une mère de ses droits et obligations. Elle a aussi estimé que, bien que la législation ait pour but la réintégration des mineurs dans leur famille biologique, cette question prioritaire n'avait aucunement été examinée par l'autorité publique.

Cinquièmement, le droit de visite de la requérante lui fut retiré, en mai 2009, sans aucune expertise psychologique. Ceci a considérablement restreint l'appréciation factuelle de l'évolution de la situation de la requérante et de ses aptitudes parentales à l'époque considérée. Par ailleurs, la requérante a peiné par son insistance et la cohérence de ses demandes pour que son droit à rendre visite à son fils soit finalement reconnu par le juge de première instance dans le cadre de rencontres supervisées. Toutefois, malgré ce jugement, des visites n'ont pas non plus eu lieu. Aucun contact n'a eu lieu entre la requérante et son enfant même après la dernière décision de l'*Audiencia provincial* indiquant qu'une possibilité « de relation ou de contact au travers de visites ou de communications avec la mère biologique » pouvait être explorée si cela devait correspondre à l'intérêt supérieur du mineur.

Au demeurant, le passage du temps a eu pour effet de rendre définitive une situation qui était censée être provisoire. En octobre 2015, l'*Audiencia provincial* a ainsi autorisé l'adoption du fils de la requérante au motif que l'enfant habitait dans sa famille d'accueil pratiquement depuis sa naissance et que sa mère n'avait pas toutes les compétences parentales requises et ce, sans procéder à des expertises indépendantes.

Tout en reconnaissant que les juridictions internes se sont appliquées de bonne foi à préserver le bien-être du mineur, il y a eu de graves manques de diligence dans la procédure menée par les autorités ainsi que par certaines juridictions de première instance. On peut certes comprendre que l'enfant de la requérante ait été placé sous tutelle de l'administration à sa demande. Cela étant, cette décision aurait dû s'accompagner dans les meilleurs délais des mesures les plus appropriées permettant d'évaluer en profondeur la situation de l'enfant et ses rapports avec ses parents, au besoin avec le père et la mère séparément, le tout dans le respect du cadre légal en vigueur. Cette situation était particulièrement grave compte tenu du jeune l'âge de l'enfant. La Cour n'est guère convaincue par les raisons que l'administration et les juridictions internes ont estimé suffisantes pour justifier le placement en

accueil préadoptif du mineur puis son adoption, malgré l'opposition claire de la requérante qui n'a pu exercer son droit de visite que pendant trois mois, au début de la procédure, ce qui semble suggérer l'existence dès le début d'une intention de placer l'enfant en accueil familial préadoptif. Les autorités administratives n'ont pas envisagé d'autres mesures moins radicales prévues par la législation telles que l'accueil temporaire ou accueil simple, non préadoptif, qui est également plus respectueux des parents d'accueil dans la mesure où il ne crée pas de faux espoirs, Le rôle des autorités de protection sociale est précisément d'aider les personnes en difficulté, en l'espèce notamment la mère de l'enfant, qui s'est vue contrainte de placer volontairement son fils compte tenu de la gravité de sa situation personnelle et familiale.

Eu égard à ces considérations, les autorités n'ont pas déployé des efforts adéquats et suffisants pour faire respecter le droit de la requérante à garder le contact avec son enfant, méconnaissant ainsi le droit de celle-ci au respect de sa vie privée et familiale.

Conclusion : violation (unanimité).

Article 46 : La Cour estime qu'il ne lui appartient pas de donner suite, en tant que telle, à la prétention de la requérante qui demande à se voir restituer le contact avec son enfant biologique. Cependant, eu égard aux circonstances particulières de la présente affaire et au besoin urgent de mettre fin à la violation du droit de la requérante au respect de sa vie familiale, la Cour invite les autorités internes à réexaminer, dans un bref délai, la situation de la requérante et de son fils mineur à la lumière du présent arrêt et d'envisager la possibilité d'établir un quelconque contact entre eux en tenant compte de la situation actuelle de l'enfant et de son intérêt supérieur, et à prendre toute autre mesure appropriée conformément à ce dernier. La Cour estime que l'exécution du présent arrêt devrait ainsi donner suite à la décision l'*Audiencia provincial* indiquant une telle possibilité. La forme la plus appropriée de redressement consiste à faire en sorte que la requérante se retrouve autant que possible dans la situation qui aurait été la sienne si l'article 8 n'avait pas été méconnu. Le droit interne prévoit la possibilité de réviser les décisions définitives déclarées contraires aux droits reconnus dans la Convention par un arrêt de la Cour « pourvu qu'elle ne porte pas préjudice aux droits acquis par des tiers de bonne foi ».

Article 41 : aucune demande formulée pour dommage.

(Voir aussi *Pini et autres c. Roumanie*, 78028/01 et 78030/01, 22 juin 2004, Note d'information 65 ; *K.A.B. c. Espagne*, 59819/08, 10 avril 2012, Note d'information 151 ; *Ageyevy c. Russie*, 7075/10, 18 avril 2013, Note d'information 162 ; *Soares de Melo c. Portugal*, 72850/14, 16 février 2016, Note d'information 193 ; *Haddad c. Espagne*, 16572/17, 18 juin 2019, Note d'information 230 ; *Strand Lobben et autres c. Norvège* [GC], 37283/13, 10 septembre 2019, Note d'information 232 ; et *Zelikha Magomadova c. Russie*, 58724/14, 8 octobre 2019, Note d'information 233)

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

Deprivation of nationality of respondent State on the basis of a conviction for a terrorism offence committed over ten years earlier: *no violation*

Déchéance de la nationalité de l'État défendeur, en considération d'une condamnation antérieure pour une infraction à caractère terroriste commise plus de dix ans auparavant : *non-violation*

Ghoumid and Others/et autres – France, 52273/16 et al., Judgment/Arrêt 25.6.2020 [Section V]

English translation of the summary – Version imprimable

En fait – Les requérants sont cinq binationaux. En 2007 (2008 pour ceux d'entre eux qui firent appel) ils furent condamnés pour participation à une association de malfaiteurs dans un contexte terroriste ; ces condamnations devinrent définitives. En 2009-2010, ils firent libérés. Suite aux graves attentats ayant frappé la France en 2015, les autorités entendirent faire preuve d'une fermeté renforcée à l'égard de personnes condamnées pour acte de terrorisme. Dans ce contexte, en octobre 2015, les requérants furent déchus de leur nationalité française par décrets du Premier ministre, après avis conforme du Conseil d'État. Leurs demandes en référé tendant à la suspension des décrets ainsi que celles visant à leur annulation pour excès de pouvoir furent rejetées.

En droit – Article 8

1. *Vie familiale* – Le grief des requérants sous cet angle a déjà été déclaré irrecevable en formation de juge unique, aucune ingérence n'étant à constater. En effet, un décret portant déchéance de la nationalité française n'a pas d'effet sur la présence de l'intéressé sur le territoire français. Par ailleurs, les requérants, qui ont déposé des demandes de cartes de séjours « vie privée et familiale », disposent de ce fait de récépissés leur permettant de vivre en France. Le cas échéant, ils pourront contester devant le juge administratif l'éventuel rejet de ces demandes ainsi que les mesures d'éloignement qui s'ensuivraient.

2. *Vie privée* – La mesure de déchéance n'apparaît en l'espèce ni arbitraire ni disproportionnée dans ses conséquences.

a) *Absence d'arbitraire : circonstances de temps, légalité et garanties procédurales*

i. *Diligence et promptitude* – Certes, les autorités administratives n'ont informé les requérants de leur intention de les déchoir de la nationalité française que plus de dix ans après les faits qui leur ont valu d'être condamnés, presque huit ans après le jugement de première instance et presque sept ans après l'arrêt d'appel (pour les requérants concernés)

La Cour prend note de l'explication du Gouvernement selon laquelle ce laps de temps s'explique par la circonstance que la France a été touchée par une série de graves attentats l'année où la mesure fut décidée.

Même si les requérants estiment que ce délai donne une connotation politique à la mesure prise contre eux, la Cour peut admettre qu'en présence d'évènements de cette nature, un État puisse reprendre avec une fermeté renforcée l'évaluation du lien de loyauté et de solidarité existant entre lui-même et des personnes condamnées antérieurement pour un crime ou un délit constituant un acte de terrorisme et qu'il puisse en conséquence, sous la condition d'un strict contrôle de proportionnalité, décider de prendre contre elles des mesures qu'il n'avait pas initialement retenues.

En conséquence, le temps écoulé entre la condamnation des requérants et leur déchéance de nationalité ne suffit pas ici, à lui seul, pour entacher la mesure d'arbitraire.

ii. *Légalité* – Certes, à l'époque des faits de la cause, le droit interne enfermait la possibilité de déchoir un individu de la nationalité française dans un délai de dix ans à compter de la perpétration des faits visés par la condamnation. Or, en l'espèce, les décisions furent prises en 2015 alors que les faits les plus récents dataient de 2004. Cependant, le législateur avait porté ce délai à quinze ans en 2006 par des dispositions qui, conformément à la jurisprudence du Conseil d'État, étaient d'application immédiate. La Cour en déduit que les mesures prises contre les requérants étaient légales (et note que cette approche du Conseil d'État est compatible avec la jurisprudence de la Cour relative à l'article 7 de la Convention).

iii. *Garanties procédurales* – Conformément au droit interne, les requérants ont été informés au préalable de la mesure projetée ainsi que de ses motifs de droit et de fait, avec un délai d'un mois pour produire des observations en défense. Le Conseil d'État a ensuite été saisi pour avis, la déchéance de nationalité ne pouvant être prononcée que sur son avis conforme. Les décrets portant déchéance de nationalité étaient motivés en fait et en droit. Les requérants ont eu la possibilité de saisir le juge des référés d'une demande de suspension en urgence et de de former un recours en annulation pour excès de pouvoir. Représentés par des avocats, ils ont pu faire valoir leurs droits au regard de la Convention et ont bénéficié d'un contrôle de proportionnalité, d'une décision motivée, à l'issue d'une procédure dont ils ne mettent pas en cause le caractère pleinement contradictoire.

b) *Absence de conséquences disproportionnées* – Certes, la capacité des requérants à rester en France s'en trouve fragilisée. De fait, la procédure contradictoire préalable au prononcé d'une expulsion a été déclenchée à l'encontre de deux d'entre eux, envers lesquels la commission départementale d'expulsion a donné un avis favorable à leur expulsion. Bien qu'aucune décision n'ait été prise à l'issue de cette procédure, cela montre que les requérants peuvent désormais faire l'objet d'une mesure d'éloignement. Or une mesure de ce type serait susceptible d'avoir des incidences sur leur vie privée. Toutefois, en l'état du dossier, dès lors qu'aucune mesure d'éloignement n'a été prise, la conséquence de la déchéance de nationalité sur la vie privée des requérants tient seulement à la perte d'un élément de leur identité.

Cependant, la violence terroriste constitue en elle-même une grave menace pour les droits de l'homme. La Cour comprend donc que les autorités françaises aient pu décider, à la suite des attentats qui ont frappé la France en 2015, de faire preuve d'une fermeté renforcée à l'égard de personnes condamnées pour un crime ou un délit constituant un acte de terrorisme.

La Cour prend note également de la position du Gouvernement d'après laquelle cela peut justifier que de telles personnes ne bénéficient plus du lien spécifique que constitue la nationalité du pays où ils se trouvent ; et de la considération du rapporteur public devant le Conseil d'État selon laquelle les actes pour lesquels les intéressés ont été condamnés révèlent des allégeances qui montrent le peu d'importance qu'a eu leur attachement à la France et à ses valeurs dans la construction de leur identité personnelle.

À cela s'ajoutent les circonstances suivantes :

– la participation à une association de malfaiteurs en vue de la préparation d'un acte terroriste dont ils se sont rendus coupables tous les cinq s'est poursuivie pendant dix années consécutives ;

– certains des requérants venaient d'acquérir la nationalité française quand ils ont commis ces faits,

et les autres l'ont acquise alors qu'ils étaient en train de les commettre ;

– les requérants ayant tous une autre nationalité, la décision de les déchoir de la nationalité française n'a donc pas eu pour conséquence de les rendre apatrides (ce qui est une condition *sine qua non* d'applicabilité de cette mesure selon le droit interne) ;

– la perte de la nationalité française n'emporte pas automatiquement éloignement du territoire ; si une décision ayant cette conséquence venait à être prise, les requérants disposeraient de recours pour faire valoir leurs droits.

Conclusion : non-violation (unanimité).

Article 4 du Protocole n° 7 : À l'aune des « critères *Engel* », la Cour parvient ci-après à la conclusion que la déchéance de nationalité litigieuse n'est pas une « punition pénale » au sens de la présente disposition ; de sorte que celle-ci n'est pas applicable en l'espèce.

i. *Qualification en droit interne* – La déchéance de la nationalité française n'est pas prévue par le code pénal mais insérée dans le code civil. Elle n'est pas du ressort des juridictions pénales mais des autorités et juridictions administratives. Le Conseil d'État a précisé en l'espèce qu'il s'agit d'une « sanction de nature administrative ».

ii. *Nature de la mesure* – La déchéance litigieuse a un objectif particulier en ce qu'elle vise à tirer conséquence du fait qu'une personne ayant bénéficié d'une mesure d'acquisition de la nationalité française a par la suite brisé son lien de loyauté envers la France en commettant des actes particulièrement graves qui, s'agissant d'actes de terrorisme, sapent le fondement même de la démocratie. Cette mesure tend ainsi avant tout à prendre solennellement acte de la rupture de ce lien entre eux et la France.

iii. *Sévérité de la mesure* – Nonobstant le caractère sérieux du message (que le terme « déchéance » exprime clairement) que l'État adresse ainsi aux intéressés et l'impact que la déchéance de leur nationalité peut avoir sur leur identité, le degré de sévérité de cette mesure doit cependant être significativement relativisé : elle répond à des comportements qui, s'agissant d'actes terroristes, sapent le fondement même de la démocratie et n'a pas en elle-même pour effet (voir ci-dessus) l'éloignement hors du territoire français. Enfin, il ne s'agit pas d'une sanction que l'on peut dire « pénale par nature ».

Conclusion : irrecevable (incompatibilité *ratione materiae*).

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

Time-bar precluding DNA test of deceased man and review of final judgment approving his disavowal of paternity, without applicant's knowledge, before such tests became available: *violation*

Délai de prescription s'opposant au test de l'ADN d'un homme décédé et au réexamen d'une décision définitive ayant fait droit à son action en désaveu de paternité à l'insu du requérant et alors que les tests ADN n'existaient pas : *violation*

Boljević – Serbia/Serbie, 47443/14, Judgment/Arrêt 16.6.2020 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant thought that Mr A, his mother's ex-husband, was his biological father until Mr A died. In 2011-2012 the applicant discovered that Mr A had in fact successfully brought proceedings, which concluded in 1972, to disavow paternity of the applicant, who was 3 years old at the time. The applicant unsuccessfully sought to re-open those proceedings in order to establish the identity of his biological father on the basis of DNA testing, which was unavailable in 1972. The domestic courts ruled against the applicant, mainly on the grounds that the five-year time-limit for re-opening had expired (in 1977) and that the applicant had been represented in the impugned proceedings by an appointed legal guardian.

Law – Article 8: The Court examined the present case from the standpoint of the respondent State's positive obligations.

(a) *Whether the refusal to re-open the earlier civil proceedings was in accordance with the law and pursued a legitimate aim* – There was no evidence of arbitrariness in the reasoning of the national courts. Furthermore, when it came to the re-opening of proceedings already concluded by means of a final court judgment, in the paternity context or otherwise, there were, in the nature of things, serious implications for legal certainty, among other considerations. Time-limits in paternity-related proceedings, in particular, had a legitimate aim: they were intended to protect purported fathers from stale claims, thus preventing the injustice that might arise if courts were required to make findings in respect of facts dating back many years. In addition, it was of course possible that domestic courts might legitimately refuse to re-open proceedings on other grounds, unrelated to time-limits, if those

grounds were properly deemed as unsubstantiated.

In view of the foregoing, the refusal to re-open the civil proceedings concluded in the 1970s had been in accordance with the law and had pursued the legitimate aims of ensuring legal certainty and protecting the rights of others.

(b) *Whether a fair balance has been struck* – Firstly, the applicant had attempted to establish the identity of his biological father, which has been recognised as a vital interest protected by the Convention that does not disappear with age. Secondly, there had been no legal way for the applicant to have the deadline for the submission of his request for re-opening extended. Domestic law did not allow for the relevant elements of the applicant's specific situation to be taken into account or for a balancing of the relevant interests to be carried out. Thirdly, the private life of a deceased person, from whom a DNA sample would have had to be taken, could not have been adversely affected by a request to that effect. Fourthly, there was no indication in the case file as to what the position of the deceased's family would have been in respect of a DNA test. In any event, the applicant's complaint had concerned the denial of an opportunity to prove that Mr A was indeed his biological father. After all, as far as he had known, that fact had not been in doubt until 2011 or 2012. Even in birth certificates issued much later, in 2014 and 2019, Mr A had still been identified as the applicant's father. Finally, the Court was unable to accept the Government's argument that the applicant should have lodged a new civil claim.

In light of the foregoing, the preservation of legal certainty could not suffice in itself as a ground for depriving the applicant of the right to ascertain his parentage. Indeed, the Government themselves had acknowledged that the domestic courts had been unable to deal with the substantive issue of whether Mr A had indeed been the applicant's biological father given the existing temporal limitations on the re-opening of proceedings. Having regard to the circumstances of the case and the overriding interest at stake for the applicant, and despite the margin of appreciation afforded to them in the present context, the authorities had not secured to him respect for his private life (compare and contrast, *mutatis mutandis*, *A.L. v. Poland* and *R.L. and Others v. Denmark*, where the findings of no violation of Article 8 was largely based on an analysis of what was in the best interests of children who were not the applicants in those cases).

In respect of applications involving sensitive and important issues, such as the ones raised by the applicant in this case, various competing interests would be involved and a balancing exercise would have to be carried out. This in turn might, depending on the specific circumstances, lead the Court to adopt different conclusions in those cases, provided that they were consistent with the general principles.

Conclusion: violation (unanimously).

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

(See also *Mikulić v. Croatia*, 53176/99, 7 February 2002, Information Note 39; *Odièvre v. France* [GC], 42326/98, 13 February 2003, Information Note 50; *Jäggi v. Switzerland*, 58757/00, 13 July 2006, Information Note 88; *Backlund v. Finland*, 36498/05, 6 July 2010; *A.L. v. Poland*, 28609/08, 18 February 2014; *R.L. and Others v. Denmark*, 52629/11, 7 March 2017, Information Note 205; *Silva and Mondim Correia v. Portugal*, 72105/14 and 20415/15, 3 October 2017; and *Mifsud v. Malta*, 62257/15, 29 January 2019, Information Note 225)

Respect for private life/Respect de la vie privée

Five-year retention of photographs, description of the person, finger and palm prints of a repeat offender, subject to safeguards and individualised review: *no violation*

Conservation pendant cinq ans des photographies, du signalement et des empreintes digitales et palmaires d'un récidiviste subordonnée à des garanties et à un contrôle individualisé : *non-violation*

P.N. – Germany/Allemagne, 74440/17, Judgment/Arrêt 11.6.2020 [Section V]

Traduction française du résumé – Printable version

Facts – Following the opening of criminal proceedings against the applicant, a repeat offender, for handling stolen goods, the police ordered the collection of his identification data (photographs, fingerprints and palm prints). A description of his person was also drawn up for the police records. The criminal proceedings in issue were subsequently discontinued for lack of proof.

Law – Article 8: The taking and storage of various types of personal data had amounted to an interference with the applicant's right to respect for his private life. In particular, the taking of palm prints constituted a measure which, both in its intensity and as regards the possible future use of the data obtained, was very similar to the taking of fingerprints. Therefore, the same considerations had to apply. The physical description of the applicant and

its inclusion in the police records for future identification purposes had to be considered comparable to the taking of a photograph, albeit less intrusive. Article 8 was therefore likewise applicable to that measure. The impugned interference had been in accordance with the law and served the purpose of the prevention of crime as well as the protection of the rights of others, namely by facilitating the investigation of future crimes.

For the following reasons, the impugned measure had struck a fair balance between the competing public and private interests and therefore fell within the respondent State's margin of appreciation.

In particular, the domestic courts had conducted an individualised assessment of whether it was likely that the applicant might reoffend in the future. Even though the applicant had not been found guilty of a particularly serious offence, he had been convicted on numerous occasions and some of his offences were sufficiently serious for terms of imprisonment to be imposed on him. The present case differed in that respect from cases such as *S. and Marper v. the United Kingdom* or *M.K. v. France*, as in those two cases, there had not been any previous convictions to be taken into account in the decision to collect the data in question. Moreover, criminal investigations had been opened repeatedly against the applicant, including in the years preceding the order for the collection of identification data. The Court could therefore accept that those discontinued proceedings, none of which had ended with the domestic authorities' finding that the applicant had been innocent and in the absence of any indication that they had been instituted arbitrarily, were also relevant, to a very limited extent, in that assessment. Furthermore, the domestic courts had included his physical condition (the restrictions on his mobility caused by his rheumatoid arthritis) in their overall assessment and expressly found that the applicant's previous offences had not necessitated much physical movement. In accordance with domestic law, the outcome of the proceedings underlying the police order in issue was not relevant for the decision to collect and store the applicant's data. Moreover, two years after the impugned measure, the applicant had again been found guilty of an offence.

For the assessment of the proportionality of the interference, it was important that the collection and retention of the identification data here in issue – photographs, fingerprints, palm prints and a description of the person – had constituted a less intrusive interference than the collection of cellular samples and the retention of DNA profiles, which contained considerably more sensitive information.

As regards the duration of retention of the identification data in question, the relevant domestic law provided for specific deadlines for review of whether the continued storage of the data was still necessary. The purposes of the storage, as well as the type and significance of the reason for the storage, had to be taken into account in the assessment thereof. In a case like that of the applicant – an adult offender whose offences were neither of minor nor of special significance as defined by the relevant directive – personal data were to be deleted, as a rule, after five years, if there were no fresh criminal investigation proceedings against the applicant in that period. Therefore, the applicant could obtain the deletion of his data from the police register if his conduct showed that the data were no longer needed for the purposes of police work. The present case thus differed from cases such as *S. and Marper* and *Gaughran v. the United Kingdom*, which concerned the indefinite retention of data, or *M.K. v. France*, where it had been found that in practice data were retained for twenty-five years.

Moreover, in the instant case there was a possibility of review – by the police authorities, subject to judicial review – of the necessity of further retaining the data in question. There was nothing to indicate that the identification data were insufficiently protected against abuse such as unauthorised access or dissemination.

In view of the relatively limited intrusiveness and duration of the collection as such of the identification data in question, the limited effect of the retention of the data in an internal police database on the applicant's daily life, and the presence of safeguards, the impugned measure had constituted a proportionate interference with the applicant's right to respect for his private life.

Conclusion: no violation (unanimously).

Respect for family life/Respect de la vie familiale

Natural father divested of parental rights due to voluntary and prolonged separation from child who was well integrated into mother's new family from an early age: *no violation*

Retrait de son autorité parentale à un père naturel séparé de manière volontaire et prolongée de son enfant, lequel s'est dès son plus jeune âge intégré dans la nouvelle famille de sa mère : *non-violation*

Ilya Lyapin – Russia/Russie, 70879/11, Judgment/Arrêt 30.6.2020 [Section III]

Traduction française du résumé – Printable version

Facts – In 2003 the applicant divorced the mother of his child when the child was two years of age. In 2005 his former wife remarried and lives with her new husband and the child, as well as a further child the new couple had together. The applicant's last contact with his child was in 2004. There was no obstacle to contact. In 2011 the applicant's former wife began proceedings to divest him of his parental rights. The applicant countered with a request for contact with the child. The courts found in favour of the mother and the applicant lost his parental rights. In 2012 the child was adopted by his step-father.

Law – Article 8: Depriving a person of his or her parental rights was a particularly far-reaching measure which deprived a parent of his or her family life with the child, and was inconsistent with the aim of reuniting them. On the other hand, the existing family ties between the spouses and the children they actually cared for warranted protection under the Convention. Moreover, if a considerable period of time had passed since the child had lived with one of his or her natural parents, the interest of the child not to have his or her *de facto* family situation changed again might override the interest of the parent to re-establish family life with his/her child.

Although the child had spent the first two years of his life with the applicant, by the time the decision to deprive the applicant of his parental authority had been taken, he had not lived with the child for eight years and had had no contact with him for seven of those years. Throughout that period, the applicant had made no attempt to have access to his son and to resume contact with him. The Court did not find any of the applicant's explanations convincing in that respect. On the assumption that the applicant had willingly withdrawn from his child's life to let the child adapt to his mother's new husband, it was unclear why that "adaptation" period needed to last for seven years. In the Court's view, the applicant could and should have realised that such a long and complete separation from his son – in particular given the latter's young age at the time contact had been broken – could only have, as a consequence, a significant weakening, if not a complete rupture, of the bond between them, leading to the child's estrangement from him. Indeed, it was established in the domestic proceedings that, although the applicant's son had been aware of the existence of his biological father, he had neither remembered him nor wanted to have contact with him. When they met, the child had not recognised the applicant and had felt scared when told that the applicant was his father. Furthermore, on the assumption that the child's mother had opposed contact with the applicant, the Court found it surprising that, as noted by the domestic courts, the applicant had never sought assistance from the childcare authorities or domestic courts in that respect.

In the present case, it was the applicant's own inaction that had led to the severance of ties between him and his child, and thus seemed to have prompted the outcome of the case against him. The removal of the applicant's parental authority had done no more than cancel the legal link between the applicant and his child. Given the absence of any personal relationship for a period of seven years prior to that decision, it could not be said to have adversely affected those relations.

The court decisions furthermore had made it clear that the child had been well integrated in his family and deeply attached to his mother, his half-brother and his mother's new husband (his step-father), with whom he had had a *de facto* family life for seven years. It was also relevant that his step-father had fully assumed the father's role and intended to adopt him; and that the boy had consistently expressed his wish to be adopted by him.

With that in mind, the national authorities had been faced with a difficult task of striking a fair balance between the competing interests – those of the applicant, his son, his mother and his *de facto* family members – in a complex case. In particular, they had been called upon to decide whether it had been in the boy's best interests to set in motion his bonding with the applicant – his natural father – contact with whom had been lost for the previous seven years, or rather to strengthen the existing ties between the boy and the family in which he had been living during that period.

The domestic courts had imposed on the applicant an obligation to pay a monthly amount in child support, starting from the date of the judgment until his son reached the age of majority, notwithstanding the fact that the applicant would no longer have parental authority over the child. This did not, however, mean that there had been no relevant and sufficient reasons for the decision to deprive the applicant of his parental authority. Indeed, that decision had not changed the fact that the applicant had continued to be the child's parent and thus to bear parental responsibility for him; moreover, he had not paid any child support for many years. In any event, the obligation to pay child maintenance had come to an end once the boy had been adopted by his step-father.

As regards the decision-making process, the decision in question had been reached following adversarial proceedings in which the applicant had been placed in a position enabling him to put forward all arguments in support of his position and to submit written and oral evidence. In their decisions the courts

had provided extensive reasons for their findings and addressed the arguments raised by him. A number of witnesses, including those who had supported the applicant's claim, had been heard, and a psychologist's assessment of the child's relationship with his parents had been obtained. The applicant had complained that the assessment in issue had been carried out in his absence and that the child had not been heard in court. However, there was no evidence that the applicant had ever sought to raise those questions before the courts at two levels of jurisdiction and to challenge the findings of the report and to seek another expert examination of the child. Overall, the Court was satisfied that the domestic decision-making process had been fair and had provided the applicant with the requisite protection of his rights.

In sum, the domestic courts had carried out a detailed and carefully balanced assessment of the entire situation and the needs of the child, in the light of the adduced evidence. They had thoroughly considered the pertinent facts and given due consideration to the child's best interests. Taking into account the fact that the domestic courts had had the benefit of contact with all those concerned, they had provided "relevant and sufficient" reasons for their decisions, which fell within their margin of appreciation.

Conclusion: no violation (five votes to two).

Respect for family life/Respect de la vie familiale
Expulsion

Refusal to allow reunion of father with his two small children, placed *de facto* in administrative detention by arbitrary association with an unrelated adult: *violation*

Refus de réunir, avec leur père venu à leur rencontre, deux enfants en bas âge placés en rétention administrative *de facto* par rattachement arbitraire à un tiers : *violation*

Moustahi – France, 9347/14, Judgment/Arrêt 25.6.2020 [Section V]

(See Article 4 of Protocol No. 4 below/Voir l'article 4 du Protocole n° 4 ci-dessous, page 48)

ARTICLE 9

Freedom of religion/Liberté de religion
Positives obligations/Obligations positives

Appropriate measures taken by prison authorities in the execution of a judgment recognising the right of Jewish prisoners to have kosher meals: *no violation*

Mesures adéquates des autorités pénitentiaires dans l'exécution d'un jugement reconnaissant le droit à des prisonniers de religion juive de manger des repas casher : *non-violation*

Erlich and/et Kastro – Romania/Roumanie, 23735/16, Judgment/Arrêt 9.6.2020 [Section IV]

English translation of the summary – Version imprimable

En fait – Les deux requérants sont des ressortissants israéliens de religion juive incarcérés en prison. Ils allèguent une atteinte à leur liberté de religion à raison d'un manquement des autorités pénitentiaires à leur fournir des repas conformes aux préceptes de leur religion.

En droit – Article 9 : Il convient d'examiner les griefs des requérants à la lumière des obligations positives qui découlent de l'article 9.

La religion juive figure parmi les cultes officiellement reconnus par l'État roumain. La législation nationale définit les modalités d'exercice du droit à la liberté religieuse en détention, y compris l'alimentation requise par l'observance des préceptes religieux. Elle pose un cadre normatif général, suffisamment prévisible et détaillé. Le choix d'adopter ou pas une réglementation détaillée relative aux modalités d'exercice d'une religion donnée en milieu pénitentiaire relève de la marge d'appréciation des autorités de l'État. Au moment des faits, seules huit personnes de confession juive étaient détenues dans les prisons roumaines.

Le tribunal de première instance (le tribunal) a tranché en faveur d'une solution sur mesure adaptée aux besoins particuliers des requérants et a permis ainsi de pallier l'absence d'un cadre réglementaire spécifique pour les détenus de confession juive et d'offrir une solution applicable sans délai. Il a ordonné à l'administration pénitentiaire de permettre aux requérants de recevoir quotidiennement des repas casher, en quantité nécessaire pour satisfaire leurs besoins personnels, de pourvoir à la distribution des repas dans les mêmes conditions que celles offertes aux autres personnes détenues, et d'assurer les facilités pour la conservation des repas les jours où ceux-ci ne pouvaient pas être livrés. Les juridictions nationales ont donc dûment examiné les demandes des requérants et ont rendu en temps utile une décision judiciaire en leur faveur. Et ce jugement a été mis en application par les autorités pénitentiaires.

La situation en l'espèce est différente de celle des affaires *Jakóbski* et *Vartic (n° 2)*, dans lesquelles les requérants demandaient des repas végétariens qui

ne nécessitaient pas d'être préparés, cuits ou servis d'une manière particulière et l'allocation de tels repas n'avait pas de conséquences négatives pour la gestion des établissements pénitentiaires ou pour la qualité des repas fournis aux autres détenus. Dans la présente espèce, les repas casher devaient contenir des ingrédients spécifiques obtenus en suivant des règles très précises et devaient être préparés à part, dans des contenants et avec des ustensiles séparés, de manière spéciale et sous la supervision d'un représentant religieux.

Les autorités pénitentiaires ont collaboré avec une fondation religieuse juive pour la mise en application du jugement. Avec son aval, un espace séparé a été aménagé dans la cuisine de la prison. Les détenus de confession juive participent à la préparation des repas. D'après les Règles pénitentiaires européennes, cela permet aux détenus d'avoir un aperçu des aspects positifs de la vie en communauté. La fondation a ensuite été présente dans la prison lors des fêtes religieuses juives et a fourni aux requérants des aliments spécifiques à ces occasions. L'implication de la fondation, même si non décisive, est un élément important à prendre en considération pour examiner la manière dont les autorités nationales ont rempli leurs obligations positives découlant de l'article 9.

Le tribunal a de plus permis aux requérants de se procurer, par dérogation aux normes en vigueur, des produits qui pouvaient être cuisinés et préparés sur place. Et ces derniers se les sont procurés par leurs propres moyens. Si un tel arrangement n'est pas en soi contraire aux Règles pénitentiaires européennes, il ne doit pas imposer aux requérants une charge qu'ils ne seraient pas en mesure d'assumer pour des raisons financières objectives. À cet égard, le tribunal leur a indiqué qu'ils pouvaient demander le remboursement des frais qu'ils avaient engagés par le biais d'une action civile séparée. Les intéressés ne semblent pas l'avoir fait sans donner des raisons objectives les en ayant empêchés. Et ils n'ont avancé aucun argument permettant de faire douter de l'effectivité d'une telle action civile. Les requérants n'ont pas non plus allégué avoir soumis aux autorités pénitentiaires une demande précise et détaillée de remboursement et s'être heurtés à un refus de donner suite à leur demande.

Un ensemble de mesures adéquates ont ainsi été mises en place par les autorités pénitentiaires et les autorités nationales ont fait tout ce qui pouvait être raisonnablement exigé d'elles pour respecter les convictions religieuses des requérants, d'autant que les repas casher doivent être préparés dans des conditions spéciales strictes.

Les autorités nationales ont ainsi satisfait, à un degré raisonnable dans les circonstances de l'espèce, à leurs obligations positives.

Conclusion : non-violation (unanimité).

(Voir aussi *X c. Royaume-Uni*, 5947/72, décision de la Commission du 5 mars 1976 ; *Cha'are Shalom Ve Tsedek c. France* [GC], 27417/95, 27 juin 2000, Note d'information 19 ; *Jakóbski c. Pologne*, 18429/06, 7 décembre 2010, Note d'information 136 ; et *Vartic c. Roumanie (n° 2)*, 14150/08, 17 décembre 2013)

Manifest religion or belief/Manifester sa religion ou sa conviction

Birth certificate revealing parents' choice not to christen their child: *violation*

Présence sur un certificat de naissance d'une mention faisant état de la décision des parents de ne pas faire baptiser leur enfant : *violation*

Stavropoulos and Others/et autres – Greece/Grèce, 52484/18, Judgment/Arrêt 25.6.2020 [Section I]

Traduction française du résumé – Printable version

Facts – The three applicants are parents and daughter. The daughter's forename was entered into the birth record with the handwritten addition, contained in brackets, of an abbreviation of the word "naming" (ονοματοδοσία). Moreover, the section concerning christening that is included in the birth registration act was left blank. The Supreme Administrative Court rejected the application for the annulment of the birth registration of the daughter as inadmissible.

Law – Article 9: The note "naming" next to the daughter's first name and the fact that the section concerning christening had been left blank implied that the parents had chosen not to have her christened. Such information appearing in a public document issued by the State constituted an interference with the right of all of the applicants not to be obliged to manifest their beliefs. Given the frequent use of the birth certificate, implying one's religious beliefs in it exposed the bearers to the risk of discriminatory situations in their dealings with administrative authorities.

This interference was not prescribed by law. Indeed, the relevant domestic-law provision provided that an individual acquired his or her first name by naming. Therefore, it did not follow, either from that law or from any other piece of domestic legislation brought to the attention of the Court, that registrars needed to write the word "naming" next to the first names of new-born children acquiring their names by the civil act of naming, as opposed

to by christening. The interference in issue had resulted from the widespread practice of the registry offices.

Conclusion: violation (unanimously).

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

ARTICLE 10

Freedom of expression/Liberté d'expression

Militant action to boycott products from Israel was considered as a discriminatory crime without relevant and sufficient reasons: *violation*

Action militante en faveur du boycott des produits en provenance d'Israël pénalement réprimée comme discriminatoire, sans motifs pertinents et suffisants : *violation*

Baldassi and Others/et autres – France, 15271/16, Judgment/Arrêt 11.6.2020 [Section V]

English translation of the summary – Version imprimable

En fait – Membres d'un collectif local de soutien à la cause palestinienne relayant la campagne internationale « Boycott, Désinvestissement et Sanctions » (BDS) lancée par des ONG en 2005 à la suite d'un avis de la Cour internationale de justice, les requérants furent pénalement poursuivis pour avoir appelé les clients d'un hypermarché à ne pas acheter de produits en provenance d'Israël, sur le fondement d'une disposition de la loi sur la liberté de la presse interdisant, dans l'alinéa visé, la provocation à la discrimination d'un groupe de personnes à raison, entre autres, de leur origine ou de leur appartenance à une nation déterminée. Relaxés en première instance – au motif que l'alinéa visé par la poursuite ne couvrait pas les faits de l'espèce –, les requérants furent condamnés en appel à une amende de mille euros avec sursis et au paiement de dommages-intérêts aux associations parties civiles.

En droit

Article 7 : Certes, l'alinéa législatif appliqué ne renvoie pas explicitement à la provocation à la discrimination économique ; celle-ci est expressément visée par un autre alinéa de l'article appliqué, mais uniquement pour la discrimination à raison du sexe, de l'orientation sexuelle ou du handicap, et non pas à raison de l'origine ou de l'appartenance à une nation.

Toutefois, en l'état de la jurisprudence à l'époque des faits de leur cause, les requérants pouvaient savoir qu'ils risquaient d'être condamnés sur ce fondement pour leur action d'appel au boycott de produits importés d'Israël, puisque la Cour de cassation s'était déjà prononcée en ce sens à l'occasion de l'affaire Willem.

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

Article 10 : Vu la conclusion ci-dessus au regard de l'article 7 de la Convention, l'ingérence était bien « prévue par la loi ». Il découle des motifs des arrêts rendus à l'encontre des requérants que leur condamnation visait à protéger le droit des producteurs ou fournisseurs de produits venant d'Israël d'accéder à un marché ; elle relevait donc de la protection des « droits d'autrui », but reconnu comme légitime par le second paragraphe de l'article 10. Reste à savoir si l'ingérence était « nécessaire, dans une société démocratique », à l'aune des principes exposés dans l'arrêt *Perinçek c. Suisse* [GC] (27510/08, 15 octobre 2015, Note d'information 189).

Considérations sur l'appel au boycott – Le boycott est avant tout une modalité d'expression d'opinions protestataires. L'appel au boycott, qui vise à communiquer ces opinions tout en appelant à des actions spécifiques qui leur sont liées, relève donc en principe de la protection de l'article 10 de la Convention.

L'appel au boycott constitue cependant une modalité particulière d'exercice de la liberté d'expression en ce qu'il combine l'expression d'une opinion protestataire et l'incitation à un traitement différencié ; de sorte que, selon les circonstances qui le caractérisent, il est susceptible de constituer un appel à la discrimination d'autrui.

Or l'appel à la discrimination relève de l'appel à l'intolérance, lequel, avec l'appel à la violence et l'appel à la haine, est l'une des limites à ne dépasser en aucun cas dans le cadre de l'exercice de la liberté d'expression. Toutefois, inciter à traiter différemment ne revient pas nécessairement à inciter à discriminer.

L'arrêt Willem c. France – La conclusion de la Cour dans cette affaire (10883/05, 16 juillet 2009, Note d'information 121) repose pour beaucoup sur les éléments suivants : le fait qu'en annonçant sa décision de demander aux services municipaux de restauration de boycotter les produits israéliens, le requérant Willem avait agi en sa qualité de maire et avait usé de pouvoirs attachés à celle-ci au mépris de la neutralité et du devoir de réserve qu'elle lui imposait ; ainsi que la circonstance qu'il avait fait cette annonce sans avoir ni ouvert le débat au sein du conseil municipal ni fait procéder à un vote, et qu'il ne pouvait donc prétendre avoir favorisé la libre discussion sur un sujet d'intérêt général.

Le cas d'espèce – La présente affaire est différente en ce que les requérants sont ici de simples citoyens, qui ne sont pas astreints aux devoirs et responsabilités rattachés au mandat de maire, et dont l'influence sur les consommateurs n'est pas comparable à celle d'un maire sur les services de sa commune. D'autre part, c'est manifestement pour provoquer ou stimuler le débat parmi les consommateurs des supermarchés que les requérants ont mené les actions d'appel au boycott qui leur ont valu les poursuites qu'ils dénoncent devant la Cour.

Par ailleurs, les requérants n'ont été condamnés ni pour avoir proféré des propos racistes ou antisémites ou pour avoir appelé à la haine ou à la violence, ni pour s'être montrés violents ou pour avoir causé des dégâts. L'hypermarché ne s'est d'ailleurs pas constitué partie civile devant les tribunaux internes.

La Cour n'entend pas mettre en cause l'interprétation de la loi sur laquelle repose la condamnation des requérants. Il reste cependant que, tel qu'interprété et appliqué en l'espèce, le droit français interdit tout appel au boycott de produits à raison de leur origine géographique, quels que soient la teneur de cet appel, ses motifs et les circonstances dans lesquelles il s'inscrit.

De fait, pour condamner les requérants, le juge interne n'a pas analysé les actes et propos poursuivis à la lumière de ces facteurs, mais a conclu de manière générale que l'appel au boycott constituait une provocation à la discrimination et qu'il « ne saurait entrer dans le droit à la liberté d'expression ». En d'autres termes, il n'a pas établi qu'au regard des circonstances de l'espèce, la condamnation des requérants était nécessaire, dans une société démocratique, pour atteindre le but légitime poursuivi.

Pourtant, une motivation circonstanciée était d'autant plus essentielle en l'espèce. Premièrement, en effet, les actions et les propos reprochés aux requérants concernaient un sujet d'intérêt général (celui du respect du droit international public par l'État d'Israël et de la situation des droits de l'homme dans les territoires palestiniens occupés), et s'inscrivaient dans un débat contemporain, ouvert en France comme dans toute la communauté internationale.

Deuxièmement, ces actions et ces propos relevaient de l'expression politique et militante. Par nature, le discours politique est source de polémiques et est souvent virulent. Il n'en demeure pas moins d'intérêt public, à moins qu'il ne dégénère en un appel à la violence, à la haine ou à l'intolérance. Là se trouve la limite à ne pas dépasser – c'est aussi, s'agissant de l'appel au boycott, ce qu'a souligné le rapporteur spécial sur la liberté de religion ou de conviction dans son rapport d'activité aux membres de l'Assemblée générale des Nations unies de 2019.

Ainsi, la condamnation des requérants ne repose pas sur des motifs pertinents et suffisants – faisant ressortir que le juge ait appliqué des règles conformes aux principes consacrés à l'article 10 et se soit fondé sur une appréciation acceptable des faits.

Conclusion : violation (unanimité).

Article 41 : La Cour octroie à chacun des requérants 380 EUR pour dommage matériel et 7 000 EUR pour préjudice moral.

Freedom of expression/Liberté d'expression

Lawyer suspended for public criticism of police brutality and later disbarred for disrespectful remarks about a judge made in courtroom when representing Ilgar Mammadov: *violation*

Avocat temporairement interdit d'exercice pour avoir lancé publiquement des accusations de violences policières, puis radié pour avoir fait dans une salle d'audience des remarques irrespectueuses concernant un juge alors qu'il représentait Ilgar Mammadov : *violation*

Bagirov – Azerbaijan/Azerbaïdjan, 81024/12 and/et 28198/15, Judgment/Arrêt 25.6.2020 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant was a lawyer and a member of the Azerbaijani Bar Association (ABA). In 2011 he was suspended from the practice of law for a period of one year on account of public criticism of police brutality. In 2015 he was disbarred on account of the following statements he had made in the courtroom when representing Mr Ilgar Mammadov during his trial: "Like State, like court ... If there were justice in Azerbaijan, Judge R.H. would not deliver unfair and partial judgments, nor would an individual like him be a judge". The domestic courts found that such statements had cast "a shadow over our State and statehood" and "tarnished the reputation of the judiciary".

Law

Article 10 (suspension): The applicant's suspension had amounted to an interference with the exercise of his right to freedom of expression. In so far as the relevant decision had referred to the applicant's intention to organise protests against police brutality, it had failed to specify which domestic-law provision had been breached in that respect. Nor did the Court see any provision preventing a lawyer from calling for peaceful protests.

The applicant's suspension had also been motivated by a breach of lawyer confidentiality. However, the applicant had not breached the secrecy of the judicial investigation by commenting on or disclosing any document relating to the investigation. He had been sanctioned merely for reiterating a mother's arguments concerning the circumstances of her son's death in police custody, which she had voiced at a press conference. It did not appear from the relevant law that the use of information available in the public domain fell under lawyer confidentiality. On the contrary, information falling under lawyer confidentiality must have been obtained by a lawyer in the furtherance of his or her professional activity. However, the applicant had become the mother's representative in the proceedings relating to her son's death only after having made his public statements. Therefore, when making those statements, the applicant could not have obtained the information in question in connection with carrying out his professional activity. In any event, the mother, who had subsequently become his client, had not complained about his action. The domestic courts, when confirming the applicant's suspension, had failed to address properly his arguments in that respect. The interference had therefore not been "prescribed by law".

Conclusion: violation (unanimously).

Article 10 (disbarment): The applicant's disbarment had amounted to an interference with the exercise of his right to freedom of expression. The interference had pursued the legitimate aim of "maintaining the authority of the judiciary". The question of its lawfulness was left open.

The remarks, accusing a judge of a lack of capacity to be a judge, had been disrespectful and possibly offensive. However, the domestic courts had not given any consideration to the fact that the applicant had made the impugned statements in a courtroom in the course of the criminal proceedings in his capacity as his client's lawyer. They had not been repeated outside the courtroom, for instance in the media. In the courtroom, the principle of fairness militated in favour of a free and even forceful exchange of arguments between parties. Moreover, those comments had mainly expressed the applicant's objections to the decisions made by the domestic courts in the criminal proceedings against Mr Ilgar Mammadov. When the impugned remarks were made, the Court had already ruled in the case of *Ilgar Mammadov v. Azerbaijan*, finding that there had been a breach of Articles 5 and 18 of the Convention. The Court subsequently found, in *Ilgar Mammadov v. Azerbaijan (no. 2)*, that there had been a number of serious shortcomings in the trial. The domestic court's finding that the applicant had misused his right to freedom of expression "with a view to casting a shadow over our State and statehood" had been irrelevant for the purposes of Article 10 and could not be considered as a reason for restricting the freedom of expression in a democratic society. The disbarment could not but be regarded as a harsh sanction, capable of having a chilling effect on the performance by lawyers of their duties as defence counsel. Furthermore, the existence of the previous disciplinary proceedings against the applicant could not justify his disbarment, as the applicant's suspension had not been prescribed by law and the Court had already found a breach of his right to freedom of expression on that account.

In sum, the reasons given by the domestic courts in support of the applicant's disbarment had not been relevant and sufficient and the sanction imposed on the applicant had been disproportionate to the legitimate aim pursued.

Conclusion: violation (unanimously).

The Court also unanimously found a violation of Article 8 on account of the applicant's suspension and subsequent disbarment. Noting a pattern of arbitrary arrest, detention and other measures taken in respect of government critics, civil society activists and human rights defenders, the Court underlined that an alleged need in a democratic society to sanction a lawyer by disbarment in circumstances such as the present would need to be supported by particularly weighty reasons.

Article 46: It was left to the Committee of Ministers to supervise the adoption of measures aimed, among others, at restoring the applicant's professional activities. Those measures should be feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violation found by the Court, and they should put the applicant, as far as possible, in the position in which he had been before his disbarment.

Article 41: EUR 18,000 all heads of damage combined.

(See also *Nikula v. Finland*, 31611/96, 21 March 2002, Information Note 40; *Saday v. Turkey*, 32458/96, 30 March 2006, Information Note 84; *Mor v. France*, 28198/09, 15 December 2011, Information Note 147; *Ilgar Mammadov v. Azerbaijan*, 15172/13, 22 May 2014, Information Note 174; *Morice v. France* [GC], 29369/10, 23 April 2015, Information Note 184; *Bono v. France*, 29024/11, 15 December 2015, Information Note 191; *Bédat v. Switzerland* [GC], 56925/08, 29 March 2016, Information Note 194; *Jankauskas v. Lithuania (no. 2)*, 50446/09, 27 June 2017, Information Note 208; *Ilgar Mammadov v.*

Azerbaijan (no. 2), 919/15, 16 November 2017; *Čeferin v. Slovenia*, 40975/08, 16 January 2018, Information Note 214; *Ottan v. France*, 41841/12, 19 April 2018, Information Note 217; *Aliyev v. Azerbaijan*, 68762/14 and 71200/14, 20 September 2018, Information Note 221; *Natig Jafarov v. Azerbaijan*, 64581/16, 7 November 2019; *Namazov v. Azerbaijan*, 74354/13, 30 January 2020; Recommendation No. R(2000)21 of the Council of Europe's Committee of Ministers to member States on the freedom of exercise of the profession of lawyer, adopted on 25 October 2000; Report of the Special Rapporteur of the Human Rights Council on the independence of judges and lawyers in the annual report (A/71/348) to the UN General Assembly (2016, 71st session of the General Assembly)

Freedom of expression/Liberté d'expression

Conviction for defamation on account of statements made in the context of defence in another set of criminal proceedings and accusing a third party of witness tampering: *violation*

Condamnation pour diffamation à raison d'accusations de subornation de témoin formulées contre un tiers par un accusé au cours de son procès : *violation*

Miljević – Croatia/Croatie, 68317/13, Judgment/Arrêt 25.6.2020 [Section I]

Traduction française du résumé – Printable version

Facts – During his trial for war crimes, the applicant made statements in his defence, accusing I.P., a third party not participating in the proceedings, of instigating his prosecution, witness tampering and leading a criminal enterprise aimed at his conviction. The applicant was acquitted of war crimes, but later convicted in criminal defamation proceedings taken against him by I.P. on account of the impugned statements.

Law – Article 10

(a) *Existence of an interference* – Having regard to the fact that the applicant had specifically complained about his criminal conviction for defamation of I.P., and that the domestic courts had considered the case from the perspective of an attack on I.P.'s honour and reputation, the Court addressed the applicant's conviction for defamation as an interference with his freedom of expression, having in mind the implications of his right to defend himself effectively in criminal proceedings.

(b) *Whether the interference was prescribed by law and pursued a legitimate aim* – The interference had been prescribed by law and had pursued the legitimate aims of the protection of the reputation or rights of others and the maintenance of the authority and impartiality of the judiciary.

(c) *Necessary in a democratic society* – The applicant had accused I.P. of witness tampering, punishable under domestic law, which had been clearly capable of tarnishing I.P.'s reputation and causing him prejudice in his social environment, particularly given his status as a military officer and a disabled war veteran. Moreover, I.P. had felt seriously affected by the statements made. Accordingly, the applicant's accusations had attained the requisite level of seriousness which could harm I.P.'s rights under Article 8. The Court had therefore to verify whether the domestic authorities had struck a fair balance between the applicant's freedom of expression and I.P.'s right to respect for his reputation. In the present case, however, the applicant's right to freedom of expression under Article 10 as an accused in criminal proceedings had also to be understood in the light of his right to a fair trial under Article 6. In such cases the margin of appreciation afforded to the domestic authorities under Article 10 ought to be narrower.

In particular, having regard to an accused's right to freedom of expression and the public interest involved in the proper administration of criminal justice, priority should be given to allowing the accused to speak freely without fear of being sued for defamation whenever his or her speech concerned the statements and arguments made in connection with his or her defence. On the other hand, the more an accused's statements were extraneous to the case and his or her defence, and included irrelevant or gratuitous attacks on a participant in the proceedings or any third party, the more it became legitimate to limit his or her freedom of expression by having regard to the third party's rights under Article 8. An accused's statements and arguments were protected in so far as they did not amount to malicious accusations against a participant in the proceedings or any third party. The defendant's freedom of expression existed to the extent that he or she did not make statements that intentionally gave rise to false suspicions of punishable behaviour concerning a participant in the proceedings or any third party). In practice, when making that assessment, the Court found it important to examine in particular the seriousness or gravity of the consequences for the person concerned by those statements The more severe the consequences were, the more solid the factual basis for the statements made had to be.

(i) *The nature and context of the impugned statements* – Although I.P. had not acted in any official capacity in the criminal proceedings against the applicant, nor had he assumed any formal role in

those proceedings, he had attended the public hearings in the applicant's case. Moreover, I.P. was a well-known public figure and activist as regards the discovery of crimes committed during the war. In that capacity, he had advised the editors of the television show, and some of the witnesses in the applicant's case had got in touch with him. Thus, he had entered the public scene in that field of social interest, and had therefore been in principle required to display a wider level of tolerance to acceptable criticism than another private individual.

The applicant's impugned statements had been made in his closing arguments to the trial court. They had concerned defence arguments which had been sufficiently linked to the applicant's case and worked in favour of his defence. If the applicant had succeeded in convincing the trial court of his arguments, this would have seriously called into question the credibility and reliability of the witness evidence and the overall nature and background of the prosecution's case.

As a matter of principle, the defendant had to have an opportunity to speak freely about his impression of a possible witness tampering and the improper motivation of the prosecution case without the fear of being later sued for defamation. In the present case, the applicant's statements had indeed concerned his impressions relating to I.P.'s behaviour. It was of little relevance that I.P. himself had not been heard as a witness in the criminal proceedings against the applicant.

In view of the above, the impugned statements had had a sufficiently relevant bearing on the applicant's defence and thus had deserved a heightened level of protection under the Convention.

(ii) *The consequences for I.P. and the factual basis for the statements* – In the defamation proceedings, the domestic courts had approached the applicant's allegations against I.P. as statements of fact and found that they had lacked sufficient basis and thus had amounted to a gratuitous and unsubstantiated attack. However, they had failed to appreciate sufficiently the fact that the applicant had seen I.P. attending the hearings in his case and that I.P. himself had accepted that he had met some of the witnesses. Moreover, they had failed to take into account the prominent activities of I.P. in that field and his engagement in the television show, although without direct involvement in the broadcast concerning the applicant. Thus, it could not be said that the impugned statements had lacked any factual basis for the applicant's arguments relating to I.P.'s involvement in his case. Taking also into consideration the context in which those statements had been made, namely as defence arguments during a criminal trial, although they had been excessive, they had not amounted to malicious accusations against I.P. Finally, the applicant's statements had objectively caused limited consequences for I.P, in particular because domestic authorities had never investigated I.P. for the criminal offence of witness tampering. Moreover, even accepting that I.P. had sought medical help in connection with the distress caused by the applicant's statements, there had been no conclusive evidence that he had suffered, or could have objectively suffered, any profound or long-lasting health or other consequences.

(iii) *Severity of the sanction imposed* – Although the applicant had been ordered to pay the minimum fine possible under the relevant domestic law, that sanction had nevertheless amounted to criminal conviction.

(iv) *Conclusion* – The domestic courts had not struck a fair balance between the applicant's freedom of expression as understood in the context of his right to defend himself, on the one hand, and I.P.'s interest in the protection of his reputation on the other. The domestic authorities had failed to take into consideration the heightened level of protection that the statements given by the defendant had deserved as part of his defence during a criminal trial.

Conclusion: violation (unanimously).

Article 41: EUR 2,281 for pecuniary damage; finding of a violation constituted in itself sufficient just satisfaction for non-pecuniary damage

(See also *Pfeifer v. Austria*, 12556/03, 15 November 2007, Information Note 102; *Erkapić v. Croatia*, 51198/08, 25 April 2013, Information Note 162; *Zdravko Stanev v. Bulgaria (no. 2)*, 18312/08, 12 July 2016; and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], 17224/11, 27 juin 2017, Information Note 208)

Freedom of expression/Liberté d'expression

Refusal to award title of court expert to applicant, who had succeeded in examination, on basis of his blog and complaints criticising State authorities: *violation*

Titre d'expert près le tribunal dénié à un candidat en raison de son blog et de ses critiques contre les autorités publiques, alors qu'il avait réussi l'examen : *violation*

Cimperšek – Slovenia/Slovénie, 58512/16, Judgment/Arrêt 30.6.2020 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant had applied for the title of court expert. He succeeded in the relevant examination and was invited to take the oath. However, his application was dismissed by the Minister of Justice on the basis that he was not a suitable candidate for the position. In making that decision, the Minister had relied upon the content of the applicant's blog and letters of complaint about delays in the Ministry's work and the postponement of the oath ceremony.

Law – Article 10: The applicant had not complained about the domestic authorities' refusal to appoint him as a court expert as such, but argued that the impugned decision had constituted a reprimand for the exercise of his freedom of expression as guaranteed by Article 10.

It followed from the Court's case-law that while the Contracting States had not wished to commit themselves to recognising, in the Convention or its Protocols, a right of access to public service, they were nonetheless bound not to impede that access on grounds protected by the Convention, by virtue of Article 1. In that connection, it was appropriate to draw parallels with the Court's case-law on applying the concept of "private life" to employment-related scenarios under Article 8, including restrictions on access to employment in the public service. Under Article 8, complaints concerning the exercise of professional functions had been found to fall within the ambit of "private life" when factors relating to private life had been regarded as qualifying criteria for the function in question, and when the impugned measure had been based on reasons encroaching upon the individual's freedom of choice in the sphere of private life.

The Court observed the following relevant elements: before the Minister had refused his application, the applicant had succeeded in the examination to become a court expert and had been invited to take the oath; and the Minister had based the impugned decision exclusively on the content of the applicant's blog and the emails in which he had criticised the Ministry's postponement of the oath ceremony. It followed that the essential elements of the decision related to the exercise of freedom of expression, even if that exercise had been qualified by the Minister as proof of the applicant not being a suitable candidate for the position of court expert. The Court could not accept the Government's argument that, in dismissing the application, the Minister had taken account of what the applicant had expressed merely in order to establish whether he had fulfilled the requirements for the title of court expert, since the disadvantage which the applicant had suffered had been directly related to his exercise of core elements of that right. The dismissal also had a potentially chilling effect on the exercise of freedom of expression of those wishing to perform the function of court experts. Whether such a measure and the related chilling effect had in fact been justified was a question to be answered in relation to the merits of the case. Accordingly, the measure complained of essentially related to freedom of expression, and not access to public service. The refusal of the applicant's application had constituted an interference with the exercise of his right to freedom of expression as guaranteed by Article 10 § 1.

The Minister had based his decision on the dismissal of the applicant's application on his emails and blog, both of which the Minister had considered to be offensive. The Minister had not relied on any particular blog post or email passage, nor had he in any other way specified the language used by the applicant in the blog and emails which he had considered to be offensive. The absence of such reasoning in the Minister's decision was particularly noteworthy, given that only days prior to that decision the Minister had considered that there was no obstacle to the applicant's appointment as a court expert.

The Administrative Court had also remained silent on the applicant's right to freedom of expression, and had not addressed the applicant's arguments made in that regard, relying exclusively on the reasoning of the Minister's contested decision. In particular, it had in no way balanced the applicant's right to freedom of expression under Article 10 against the public interest allegedly pursued by the impugned decision. Having regard to the above and the considerations that had led it to find a violation of Article 6 § 1 the Court considered that the impugned interference with the applicant's exercise of his right to freedom of expression had not been accompanied by an effective and adequate judicial review.

The behaviour of a candidate for the title of court expert could be such as to give rise to reasonable doubts as to whether the candidate would perform the work of an expert impartially and diligently. However, in the absence of a detailed statement of reasons in the Minister's decision and the Administrative Court's judgment as to why the applicant's exercise of his right to free expression had been offensive and as such incompatible with the work of a court expert, the Court could not subscribe to the Government's argument that dismissing the applicant's application had been indispensable for securing morals and the reputation of court experts and protecting the authority and impartiality of the judiciary.

The foregoing considerations, in particular the fact that neither the Minister nor the Administrative

Court had undertaken any assessment of whether a fair balance had been struck between the competing interests at stake, and that the Court was thereby prevented from effectively exercising its scrutiny as to whether the domestic authorities had implemented the standards established in its case-law on the balancing of such interests, were sufficient for the Court to conclude that, in the circumstances of the applicant's case, the interference with the applicant's freedom of expression had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation in respect of Article 6 § 1 on account of the lack of an oral hearing in the proceedings before the Administrative Court.

Article 41: EUR 15,600 in respect of non-pecuniary damage; claim for pecuniary damage dismissed.

(See also *Baka v. Hungary* [GC], 20261/12, 23 June 2016, Information Note 197, and *Fernández Martínez v. Spain* [GC], 56030/07, 12 June 2014, Information Note 175)

Freedom to receive information/Liberté de recevoir des informations
Freedom to impart information/Liberté de communiquer des informations

Access blocked to entire website because of one piece of prohibited material and continued blocking even after material had been removed: *violation*

Blocage de la totalité d'un site web en raison de la présence de contenu interdit et maintien du blocage en dépit de la suppression du contenu en question : *violation*

Bulgakov – Russia/Russie, 20159/15, Judgment/Arrêt 23.6.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, the owner and administrator of a website, had access to his entire website blocked by a local ISP (Internet service provider) pursuant to a judicial decision, because it contained an e-book previously categorised as extremist material. The blocking order was not lifted even after the e-book had been removed.

Law – Article 10: The impugned measure had amounted to "interference by a public authority" with the right to receive and impart information. As regards the scope of the interference, the applicant had not disputed that the e-book which had been available on his website had constituted prohibited material. He took issue, however, with the domestic courts' decisions to block access to his entire website because of one piece of prohibited material and to continue blocking access even after that material had been removed.

In so far as the District Court's decision targeted the e-book, the interference had had a legal basis in section 10(6) of the Information Act and could be said to have been "prescribed by law". However, the District Court had also determined the method of implementation of the blocking measure, ordering the blocking of access to the offending content by blocking access to the entire website. That blocking method, which prevented users from connecting to the website located at a specified numerical network address (IP address), had been widely used.

The wholesale blocking of access to an entire website was an extreme measure which had been compared to banning a newspaper or television station. Such a measure deliberately disregarded the distinction between the legal and illegal information the website might contain, and rendered inaccessible large amounts of content which had not been designated as illegal. Blocking access to a website's IP address had the practical effect of extending the scope of the blocking order far beyond the illegal content which had originally been targeted. Such an extension did not have a legal basis in the circumstances of the applicant's case. Section 10 of the Information Act allowed the authorities to target content that was proscribed under administrative or criminal law, rather than an entire website. The blocking formula employed by the District Court did not feature in any primary legislation or implementing regulations. The Government, in their observations, had not pointed to any legal provision on which the method of implementation chosen by the District Court could have been based.

Turning next to the issue of the safeguards which domestic legislation had to provide to protect individuals from the excessive and arbitrary effects of blocking measures, the Court noted that the Russian law did not require any form of involvement of the website owner, such as the applicant, in blocking proceedings conducted under section 10(6) of the Information Act. The prosecutor's application for a blocking order had been prepared without advance notification to the parties whose rights and interests were likely to be affected. The applicant had not been informed of the prosecutor's application or afforded the opportunity to remove the illegal content before the application was lodged with the court. The District Court had not invited him to intervene in the proceedings or to make submissions, treating the matter as being between the prosecutor and the local ISP.

The participation of a local ISP as the designated defendant was not sufficient to bestow an adversarial character on the proceedings. The ISP provided technology enabling users to access millions of websites it knew nothing about. It did not have the same detailed knowledge of their contents as their owners did; nor did it have the legal resources required to mount a vigorous defence of every targeted website. The ISP had no vested interest in the outcome of the proceedings. Blocking orders had no incidence on its connectivity business; they were enforceable not just against the defendant ISP but, once final, they acquired universal effect requiring all Russian ISPs to implement blocking measures. The blocking proceedings which had been conducted in the applicant's absence had not been adversarial in nature and had not provided a forum in which the interested parties could have been heard.

In the proceedings which the applicant had instituted to challenge the blocking measure, the domestic courts had not applied the Plenary Supreme Court's Ruling no. 21 of 27 June 2013, which required them to have regard to the criteria established in the Convention in its interpretation by the Court. Nor had they considered whether the same result could be achieved with less intrusive means or carry out an impact assessment of the blocking measure to ensure that it strictly targets the illegal content and has no arbitrary or excessive effects, including those resulting from the method chosen to implement it. As regards the transparency requirement, the Information Act made no provision for communicating the decision taken under section 10(6) to the owner of the targeted website. The applicant had been unaware of the blocking order until he discovered that access to his website had been blocked.

The second aspect of the interference which the applicant had complained of was the refusal to lift the blocking order after the unlawful content had been removed. The Court had found above that there was no legal basis for blocking access to the applicant's entire website when it contained one page of extremist material. That finding of unlawfulness applied *a fortiori* to the continued blocking of the website after that material had been removed.

The Court concluded that the interference resulting from the application of the procedure under section 10(6) of the Information Act had had excessive and arbitrary effects and that the Russian legislation had not afforded the applicant the degree of protection from abuse to which he was entitled by the rule of law in a democratic society. Accordingly, the interference had not been "prescribed by law".

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 13 taken in conjunction with Article 10 as the appellate court had not considered the substance of his grievance and had not examined the necessity or proportionality of the blocking measure.

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

(See *Ahmet Yıldırım v. Turkey*, 3111/10, 18 December 2012, Information Note 158)

Freedom to receive information/Liberté de recevoir des informations
Freedom to impart information/Liberté de communiquer des informations

Website owner compelled to remove information on filter-bypassing tools, which was arbitrarily banned by court, in order to avoid blocking of his entire website: *violation*

Propriétaire d'un site web contraint, pour éviter le blocage de la totalité de son site, de retirer des informations arbitrairement interdites par les juridictions internes concernant des outils de contournement de filtres : *violation*

Engels – Russia/Russie, 61919/16, Judgment/Arrêt 23.6.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, the owner and administrator of a website dedicated to the protection of freedom of expression online and digital privacy, was confronted with the choice of removing allegedly illegal content and having access to his entire website blocked following a decision by a Russian court, determining that a section of his website constituted banned information and requiring the telecoms regulator to immediately block access. He removed the content in issue.

Law – Article 10: The court's decision that the content of one of the applicant's webpages was illegal had caused the applicant to take it down in order to avoid the blocking measure and had also prevented visitors to the website from accessing that content. It had amounted therefore to "interference by a public authority" with the right to receive and impart information. The statutory basis for the interference had been section 15.1 of the Information Act. Subsection (5) of that provision listed three types of decisions by which the Russian authorities might categorise online content as illegal. In the applicant's case, the decision had been made by a court of general jurisdiction in accordance with the second part of subsection (5). Unlike the first part of that subsection, which defined seven particular

categories of online content susceptible to blocking, or the third part, which referred expressly to libellous content, the second part allowed websites to be blocked on the basis of a "judicial decision which identified particular Internet content as constituting information the dissemination of which should be prohibited in Russia".

The breadth of that provision was exceptional and unparalleled. It did not give the courts or website owners any indication as to the nature or categories of online content that was susceptible to be banned. Nor did it refer to any secondary legislation, by-laws or regulations which could have circumscribed its scope of application. Such a vague and overly broad legal provision failed to satisfy the foreseeability requirement. It did not afford website owners, such as the applicant, the opportunity to regulate their conduct, as they could not know in advance what content was susceptible to be banned and could lead to a blocking measure against their entire website.

The applicant's case illustrated the manner in which that legal provision was capable of producing arbitrary effects in practice. Following an application lodged by a town prosecutor, a Russian court had held that the information about filter-bypassing tools and software available on the applicant's website had constituted "information the dissemination of which should be prohibited in Russia". It had not established that filter-bypassing technologies were illegal in Russia or that providing information about them was contrary to any Russian law. Nor had it found any extremist speech, calls for violence or unlawful activities, child pornography, or any other prohibited content on the applicant's webpage. The only basis for its decision was the fact that filter-bypassing technologies might enable users to access extremist content on some other website which was not connected or affiliated with the applicant and the content of which he had no control over.

The utility of filter-bypassing technologies could not be reduced to a tool for malevolently seeking to obtain extremist content. The Russian Court had not considered the multitude of legitimate purposes before issuing the blocking order.

All information technologies, from the printing press to the Internet, had been developed to store, retrieve and process information and information technologies were content-neutral. They were a means of storing and accessing content and could not be equated with content itself, whatever its legal status happened to be. Just as a printing press could be used to print anything from a school textbook to an extremist pamphlet, the Internet preserved and made available a wealth of information, some portions of which might be proscribed for a variety of reasons particular to specific jurisdictions. Suppressing information about the technologies for accessing information online on the grounds they might incidentally facilitate access to extremist material was no different from seeking to restrict access to printers and photocopiers because they could be used for reproducing such material. The blocking of information about such technologies interfered with access to all content which might be accessed using those technologies. In the absence of a specific legal basis in domestic law, such a sweeping measure was arbitrary.

Turning next to the issue of the safeguards which domestic legislation had to provide to protect individuals from the excessive and arbitrary effects of blocking measures, the Court considered that the breadth of the discretion afforded by subsection (5) (2) of section 15.1 of the Information Act was such that it was likely to be difficult, if not impossible, to challenge the court's decision on appeal. Russian law did not provide website owners, such as the applicant, with any procedural safeguards capable of protecting them against arbitrary interference. It did not require any form of involvement of the website owners in the blocking proceedings conducted under section 15.1 of the Information Act. The prosecutor's application for a blocking order had been prepared without advance notification to the parties whose rights and interests were likely to be affected. Even though the applicant's contact details had featured prominently on the website, he had not been informed or invited to explain the purpose of the information about unfiltered browsing technologies. The Town Court had not invited him to intervene in the proceedings or to make submissions, treating the matter as being between the prosecutor and the local Internet service provider (ISP).

The participation of a local ISP as the designated defendant was not sufficient to endow the proceedings with an adversarial character. The ISP provided a connectivity technology enabling users to access millions of websites which it knew nothing about. It did not have the same detailed knowledge of their contents as their owners did; nor did it have the legal resources required to mount a vigorous defence of every targeted website. The ISP had no vested interest in the outcome of the proceedings. Blocking orders had no incidence on its connectivity business; they were enforceable not just against the defendant ISP but, once final, acquired universal effect requiring all Russian ISPs to implement blocking measures. The blocking proceedings which had been conducted in the applicant's absence had not been adversarial in nature and had not provided a forum in which the interested

parties could have been heard. Neither the prosecutor nor the Town Court had made any assessment of the impact of the blocking measure prior to its implementation; nor had they explained the urgency of enforcing it immediately without giving the interested parties the opportunity to lodge an appeal.

Lastly, as regards the proceedings which the applicant had instituted to challenge the blocking order, the domestic courts had not applied the Plenary Supreme Court's Ruling no. 21 of 27 June 2013, which required them to have regard to the criteria established in the Convention in its interpretation by the Court. In reaching that decision, the Regional Court had not sought to weigh up the various interests at stake. It had confined its scrutiny to establishing formal compliance with the letter of the law. However a Convention compliant review should have taken into consideration, among other elements, the fact that a blocking measure, by rendering large quantities of legitimate information inaccessible, substantially restricted the rights of the website owner and of Internet users, and had a significant collateral effect.

It was incompatible with the rule of law if the legal framework failed to establish safeguards capable of protecting individuals from excessive and arbitrary effects of sweeping blocking measures, such as those in issue in the applicant's case. In the light of its examination of the Russian legislation as applied in the case, the Court concluded that the interference resulted from the application of the procedure under subsection (5)(2) of section 15.1 of the Information Act which did not satisfy the foreseeability requirement under the Convention and did not afford the applicant the degree of protection from abuse to which he was entitled by the rule of law in a democratic society. Accordingly, the interference was not "prescribed by law".

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 13 in conjunction with Article 10 on the basis that the Russian courts had not considered the substance of the grievance and had not examined the necessity or the proportionality of the effects of the blocking order.

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

(See *Ahmet Yıldırım v. Turkey*, 3111/10, 18 December 2012, Information Note 158)

Freedom to receive information/Liberté de recevoir des informations
Freedom to impart information/Liberté de communiquer des informations

Unjustified wholesale blocking of opposition online media outlets in breach of requirement to specify offending content: *violation*

Blocage généralisé non justifié de l'accès à des médias d'opposition en ligne, en dépit de l'obligation faite aux autorités d'indiquer précisément le contenu litigieux : *violation*

OOO Flavus and Others/et autres – Russia/Russie, 12468/15 et al., Judgment/Arrêt 23.6.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants, owners of online media outlets which published articles, opinion pieces and research by opposition politicians, journalists and experts, many of which were critical of the Russian Government, had their websites blocked on the grounds that some of their webpages featured unlawful content.

Law – Article 10: The measure amounted to "interference by a public authority" with the right to receive and impart information. In the applicants' case the questions of compliance with the law and of the existence of a legitimate aim could not be dissociated from the question of whether the interference had been "necessary in a democratic society". The Court would therefore examine them together.

Access to the applicants' online media had been blocked in accordance with section 15.3 of the Information Act. That provision allowed the Prosecutor General or his deputies to request the blocking of three categories of content, including calls for mass disorder or for participation in public events held in breach of the established procedure. Subsection (2) of section 15.3 set out requirements in respect of the contents of Roskomnadzor's notification, which had to specify, in particular, the URL of the web page permitting illegal content to be identified. The actual notices which Roskomnadzor had despatched had deviated from that requirement in that they had listed the website's entire domain, rather than a particular problematic webpage. Not only had that failure run counter to the requirement that the information provided by Roskomnadzor should permit identification of the content to be taken down, but it had also deprived the applicants of the opportunity to remedy the supposed breach by removing the offending content. By failing to specify the URL of the webpages they had considered problematic, the Russian authorities had acted in an arbitrary manner which had prevented the applicants from making an informed choice between taking down or modifying the specific content and formulating a legal objection to the Prosecutor General's demand by reference to particular webpages.

Two of the websites had been held liable for writing approvingly of protests and public performances

in support of the defendants in the Bolotnaya case. The Prosecutor General had interpreted those articles as amounting to calls for participation in unauthorised public events. The Court had previously found that the concept of "public events held in breach of the established procedure" in section 15.3 was excessively broad and that the Prosecutor General had invoked that particular ground to target content which did not feature any such calls.

The applicants' media outlets had reported on the developments in the proceedings in relation to the Bolotnaya case and the arrests made by the police, consistent with their journalistic duty to keep the public informed on issues of general interest and to offer different perspectives, including those which might be critical of official policy. The Prosecutor General's blocking request had failed to identify any parts of the publications mentioning planned public events, whether authorised or otherwise, or inviting the public to participate in them. Voicing support for people who had been put on trial in connection with the Bolotnaya events or for those who had found ways of showing their solidarity with the defendants could not be treated as calls for unauthorised public events. Reiterating that expression on matters of public interest was entitled to strong protection, the Court found that the interpretation adopted by the Prosecutor General had had no basis in fact and was therefore arbitrary and manifestly unreasonable.

The Prosecutor General had also claimed that another website had reproduced an image of a pamphlet inciting Crimeans to commit "unlawful actions". The Prosecutor General's decision had not specified the nature of the allegedly unlawful actions, the elements which rendered them unlawful or the authority that allowed a Russian prosecutor to determine which conduct by non-Russian nationals living outside the Russian jurisdiction should be considered unlawful. In any event, the generic term of "unlawful actions" did not fall within any of the three categories of prohibited content defined in section 15.3. It followed that the Prosecutor General's decision regarding that content had not had a legal basis.

To the extent that the interference had targeted the content which was considered illegal under section 15.3, it had not followed the procedure established in the domestic law and had fallen foul of the lawfulness requirement. In so far, however, as the Prosecutor General had requested, and Roskomnadzor had implemented, a blocking order against the applicants' entire websites, the Court continued its examination to establish whether the blocking of access to the entire websites had pursued a legitimate aim and could be considered "necessary in a democratic society".

The wholesale blocking of access to a website was an extreme measure which had been compared to banning a newspaper or television station. Such a measure deliberately disregarded the distinction between the legal and illegal information the website might contain, and rendered inaccessible large amounts of content which had not been identified as illegal. Blocking access to the entire website had the practical effect of extending the scope of the blocking order far beyond the illegal content which had been originally targeted.

The decision on the illegal nature of the websites' content had been made in the applicants' case on spurious grounds or outright arbitrarily. However, even if there had been exceptional circumstances justifying the blocking of illegal content, a measure blocking access to an entire website had to be justified on its own, separately and distinctly from the justification underlying the initial order targeting illegal content, and by reference to the criteria established and applied by the Court under Article 10. Blocking access to legitimate content could never be an automatic consequence of another, more restricted blocking measure in the way in which section 15.3 allowed the authorities to extend a limited blocking request to encompass an entire website. Any indiscriminate blocking measure which interfered with lawful content or websites as a collateral effect of a measure aimed at illegal content or websites amounted to arbitrary interference with the rights of the owners of such websites. The Government had not put forward any justification for the wholesale blocking order. They had not explained what legitimate aim or pressing social need the Russian authorities had sought to achieve by blocking access to the applicants' online media. The applicants' claim that the true objective of the Russian authorities had been to suppress access to the opposition media outlets gave rise to serious concern. Lacking any justification for the wholesale blocking orders targeting the applicants' websites, the Court found that they did not pursue any legitimate aim.

The blocking measures taken before a judicial decision had been issued on the illegality of the published content had amounted to a prior restraint on publications. The dangers inherent in prior restraints were such that they called for the most careful scrutiny on the part of the Court and were justified only in exceptional circumstances. That was especially so as far as the press was concerned, for news was a perishable commodity and to delay its publication, even for a short period, might well deprive it of all its value and interest. In cases of prior restraints on the operation of media outlets, a legal framework was required to ensure both tight

control over the scope of bans and an effective Convention-compliant judicial review.

Russian law did not provide owners of online media, such as the applicants, with any procedural safeguards capable of protecting them against arbitrary interference under section 15.3 of the Information Act. It did not require any form of involvement on the part of the website owners in the blocking proceedings. Both the Prosecutor General's original decision and Roskomnadzor's implementing orders had been made without advance notification to the parties whose rights and interests were likely to have been affected. The law did not require that authorities carried out an impact assessment of the blocking measures prior to their implementation or justify the urgency of their immediate enforcement without giving the interested parties the opportunity to remove the illegal content or apply for a judicial review. The blocking measures had not been sanctioned by a court or other independent adjudicatory body providing a forum in which the interested parties could have been heard.

The Information Act did not require the authorities to justify the necessity and proportionality of the interference with the freedom of expression online or consider the question whether the same result could be achieved by less intrusive means. Nor did it require them to ascertain that the blocking measure strictly targeted the illegal content and had no arbitrary or excessive effects, including those resulting from the blocking of access to the entire website.

As regards the transparency requirement, the Information Act made no provision for communicating the blocking request under section 15.3 to the owners of the targeted websites. The applicants had been unaware of the grounds for the blocking request until after access to their websites had been blocked and they had applied for a judicial review.

Lastly, as regards the proceedings which the applicants had instituted to challenge the blocking measures, the Court had previously found that the breadth of the executive's discretion under section 15.3 was such that it was likely to be difficult, if not impossible, to challenge the blocking measure on judicial review. There was no indication that the judges considering their complaints had sought to weigh up the various interests at stake, in particular by assessing the need to block access to the entire websites. That shortcoming was a consequence of the domestic courts' failure to apply the Plenary Supreme Court's Ruling no. 21 of 27 June 2013, which required them to have regard to the criteria established in the Convention in its interpretation by the Court. In reaching their decision, the courts had confined their scrutiny to establishing that the Prosecutor General and Roskomnadzor had exercised the discretion which the legislation had afforded them. However a Convention-compliant review should have taken into consideration, among other elements, the fact that such a measure, by rendering large quantities of information inaccessible, had substantially restricted the rights of Internet users and had a significant collateral effect.

The interference resulting from the application of the procedure under section 15.3 of the Information Act had had excessive and arbitrary effects and the Russian legislation had not afforded the applicants the degree of protection from abuse to which they had been entitled by the rule of law in a democratic society. In so far as the blocking measures had targeted the entire online media beyond the content originally identified as unlawful, the interference had had no justification under paragraph 2 of Article 10. It had not pursued any legitimate aim and had not been necessary in a democratic society.

Conclusion: violation (unanimously).

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

The Court also found a violation of Article 13 in conjunction with Article 10 on the basis that the Russian courts had refused to consider the substance of the grievance and had examined neither the lawfulness nor the proportionality of the effects of the blocking order on the applicants' websites.

(See also *Ahmet Yıldırım v. Turkey*, 3111/10, 18 December 2012, Information Note 158)

Freedom to receive information/Liberté de recevoir des informations
Freedom to impart information/Liberté de communiquer des informations

Website blocked as automatic consequence of blocking order against another with same IP address: *violation*

Site Internet bloqué automatiquement en conséquence de la décision de bloquer un autre site ayant la même adresse IP : *violation*

Vladimir Kharitonov – Russia/Russie, 10795/14, Judgment/Arrêt 23.6.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, the owner and administrator of a website featuring content relating to the production and distribution of electronic books, had

his website blocked as a consequence of a blocking order against another website, containing a collection of cannabis-themed stories, which had the same numerical network address ("IP address") as his.

Law – Article 10: The blocking measure in question amounted to "interference by a public authority" with the right to receive and impart information. The statutory basis for the interference was section 15.1 of the Information Act. That provision defined the categories of illegal web content susceptible to be blocked and laid down a step-by-step procedure for putting a blocking order in place. Section 15.1 allowed the authorities to target an entire website without distinguishing between the legal and illegal content it might contain. However, the wholesale blocking of access to an entire website was an extreme measure which had been compared to banning a newspaper or television station. While the offending website had featured at least some arguably illegal content, the applicant's website had not had any content falling within the scope of section 15.1. The applicant had in no way been affiliated with the owners of the offending website or responsible for the allegedly illegal content. The interference in issue could not therefore have been grounded on the provision that was supposed to have formed its legal basis.

The blocking of the applicant's website had been an automatic consequence of the Russian telecoms regulator, Roskomnadzor's, decision to add the IP address of the offending website to the register of blocked material. That decision had had the immediate effect of blocking access to an entire cluster of websites which had shared an IP address with the offending website. Section 15.1 of the Information Act conferred extensive powers on Roskomnadzor in the implementation of a blocking order issued in relation to a specific website. However, the law did not require it to check whether that address was used by more than one website or to establish the need for blocking by IP address. That manner of proceeding could, and did in the circumstances of the applicant's case, have the practical effect of extending the scope of the blocking order far beyond the illegal content which had been originally targeted.

Shared hosting was a common and accessible hosting arrangement for small to medium-sized websites. However, owners of individual sites, such as the applicant, might not be aware of the contents of co-hosted websites, while the hosting service provider – in this case a company outside the Russian jurisdiction – was not bound by Russian authorities' determination of illegal content. Whichever shared-hosting platform solution the applicant were to choose, he would incur the risk that the Russian authorities would declare illegal some content of co-hosted websites and that the owners of such websites and the hosting service provider would not heed their take down orders. Russian law did not require the applicant to control the content of co-hosted websites or the hosting service provider's compliance with take-down orders. Yet, because of the great latitude the law afforded to Roskomnadzor in blocking matters, the applicant had had to bear the consequences of the authorities' blocking decision merely on account of an incidental connection, at the infrastructure level, between his website and someone else's illegal content. In such circumstances, the Court could not find that the law was sufficiently foreseeable in its effects and afforded the applicant the opportunity to regulate his conduct.

The exercise of powers to interfere with the right to impart information had to be clearly circumscribed to minimise the impact of such measures on the accessibility of the Internet. In the applicant's case, Roskomnadzor had given effect to a decision by which a drug-control agency had determined the content of the offending website to be illegal. Both the original determination and Roskomnadzor's implementing orders had been made without any advance notification to the parties whose rights and interests were likely to have been affected. The blocking measures had not been sanctioned by a court or other independent adjudicatory body providing a forum in which the interested parties could have been heard. Nor did the Russian law call for any impact assessment of the blocking measure prior to its implementation. Roskomnadzor was not legally required to identify the potential collateral effects of blocking an IP address, even though commonly used Internet tools could have promptly supplied a list of websites hosted on the same server.

As regards the transparency of blocking measures, Roskomnadzor provided a web service which enabled anyone to find out whether a website had been blocked and indicated the legal basis, the date and number of the blocking decision and the issuing body. It did not, however, give access to the text of the blocking decision, any indication of the reasons for the measure or information about avenues of appeal. Nor did Russian legislation make any provision for third-party notification of blocking decisions in circumstances where they have a collateral effect on the rights of other website owners. The applicant had no access to the blocking decision: it had not been produced in the domestic proceedings and the Russian courts had rejected his disclosure request.

Lastly, as regards the proceedings which the applicant had instituted to challenge the incidental

effects of the blocking order, there was no indication that the judges considering his complaint had sought to weigh up the various interests at stake, in particular by assessing the need to block access to all websites sharing the same IP address. The domestic courts had not applied the Plenary Supreme Court's Ruling no. 21 of 27 June 2013, which required them to have regard to the criteria established in the Convention in its interpretation by the Court. In reaching their decision, the courts had confined their scrutiny to establishing that Roskomnadzor had acted in accordance with the letter of the law. However, a Convention-compliant review should have taken into consideration, among other elements, the fact that such a measure, by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect.

It was incompatible with the rule of law if the legal framework failed to establish safeguards capable of protecting individuals from excessive and arbitrary effects of blocking measures, such as those in issue in the applicant's case. When exceptional circumstances justified the blocking of illegal content, a State agency making the blocking order had to ensure that the measure strictly targeted the illegal content and had no arbitrary or excessive effects, irrespective of the manner of its implementation. Any indiscriminate blocking measure which interfered with lawful content or websites as a collateral effect of a measure aimed at illegal content or websites amounted to arbitrary interference with the rights of owners of such websites.

In the light of its examination of the Russian legislation as applied in the applicant's case, the Court concluded that the interference resulted from the application of the procedure under section 15.1 of the Information Act which did not satisfy the foreseeability requirement under the Convention and did not afford the applicant the degree of protection from abuse to which he was entitled by the rule of law in a democratic society. Accordingly, the interference was not "prescribed by law".

Conclusion: violation (unanimously).

The Court also unanimously found a violation of Article 13 in conjunction with Article 10 on the basis that the Russian courts had refused to consider the substance of the grievance and examined neither the lawfulness nor the proportionality of the effects of the blocking order on the applicant's website.

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

(See also *Ahmet Yıldırım v. Turkey*, 3111/10, 18 December 2012, Information Note 158)

ARTICLE 13

Effective remedy/Recours effectif

Requirement, not unreasonable, to establish serious negligence to engage the State's responsibility for shortcomings in the justice system: *no violation*

Nécessité non déraisonnable de caractériser une faute lourde pour pouvoir engager la responsabilité de l'État du fait du fonctionnement défectueux du service de la justice : *non-violation*

Association Innocence en Danger et Association Enfance et Partage – France, 15343/15 and/et 16806/15, Judgment/Arrêt 4.6.2020 [Section V]

(See Article 3 above/Voir l'article 3 ci-dessus, page 14)

Effective remedy/Recours effectif

Remedies against expulsion rendered ineffective by rapidity of enforcement: *violation*
No need for suspensive remedy in respect of mere practical arrangements for expulsion, a compensatory remedy being sufficient: *no violation*

Recours contre une expulsion rendus ineffectifs par sa rapidité d'exécution : *violation*
Absence de nécessité d'un recours suspensif contre les simples modalités pratiques d'une mesure d'expulsion, un recours indemnitaire suffisant : *non-violation*

Moustahi – France, 9347/14, Judgment/Arrêt 25.6.2020 [Section V]

(See Article 4 of Protocol No. 4 below/Voir l'article 4 du Protocole n° 4 ci-dessous, page 48)

ARTICLE 14

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

Alleged discrimination in provision of disability benefits to civilian as opposed to military beneficiaries: *no violation*

Discrimination alléguée entre bénéficiaires civils et militaires pour le versement de pensions d'invalidité : *non-violation*

Popović and Others/et autres – Serbia/Serbie, 26944/13 et al., Judgment/Arrêt 30.6.2020 [Section IV]

Traduction française du résumé – Printable version

Facts – The applications concern alleged discrimination by the respondent State in the provision of disability benefits. The applicants, civilian beneficiaries, maintain that they were awarded a lower amount than those classified as military beneficiaries, despite having exactly the same paraplegic disability. The applicants brought civil proceedings, but were ultimately unsuccessful, including before the Constitutional Court.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: In the specific context of the present case, the Court did not find it necessary to adopt a firm view on the question of whether the applicants (as disabled civilians) and disabled war veterans could be considered two groups in "analogous or relevantly similar situations" within the meaning of the Court's case-law. In any event, the impugned difference in treatment had an objective and reasonable justification. What, according to the Government, essentially justified the difference in treatment was the way in which the two groups had sustained their injuries. Indeed, one group was comprised of war veterans who had suffered injuries during their military service, in the course of which, by the nature of things, they had been exposed to a higher level of risk whilst engaged in the performance of State-imposed duties. Their injuries would also, because of the said risk, be otherwise difficult to insure and it would likewise be onerous, if at all possible, for them to obtain, by means of litigation, any redress for the injuries caused to them by, for example, the agents of an opposing State engaged in military confrontation. The other group, however, was comprised of civilians, including the applicants, who had sustained their injuries in situations unrelated to the performance of such duties, mostly involving accidents or illnesses or the actions of third parties. The relevant difference in treatment had been a consequence of their distinct positions and the corresponding undertakings on the part of the respondent State to provide them with benefits to a greater or lesser extent. That included a moral debt that States might feel obliged to honour in response to the service provided by their war veterans.

It also transpired from the respondent State's legislation that disabled civilians lacking means might have been entitled to a number of benefits to which certain war veterans might not, and taking that into account, the real difference in treatment between the two groups might have been lesser than alleged. In the circumstances of the present cases, the choices made by the Serbian legislator as concerns the differential treatment in pecuniary social benefits between disabled civilians and disabled war veterans had not been not lacking a reasonable foundation and had been based on relevant and sufficient grounds.

Lastly, as regards the Concluding Observations of the United Nations Committee on the Rights of Persons with Disabilities, the committee's views, despite a detailed analysis of the situations in Serbia, Bosnia and Herzegovina and Croatia, only identified potential issues in respect of the latter two countries and not Serbia, the respondent State in the present case.

Conclusion: no violation (five votes to two).

ARTICLE 41

Just satisfaction/Satisfaction équitable

Respondent State invited to guarantee applicant's ownership of property bequeathed to her in Greece, or else to compensate her for its value in proportion to the percentage of which she was deprived

No jurisdiction for the Court to determine the applicant's claims concerning property in Turkey

État défendeur invité à garantir à la requérante la propriété des biens légués situés en Grèce et à défaut l'indemniser de la valeur de ces biens au prorata du pourcentage retiré

Absence de compétence de la Cour pour se prononcer sur les prétentions de la requérante relatives aux biens situés en Turquie

Molla Sali – Greece/Grèce, 20452/14, Judgment/Arrêt (just satisfaction/satisfaction équitable) 18.6.2020 [GC]

English translation of the summary – Version imprimable

En fait – Au décès de son époux, la requérante hérita de toute la succession en vertu d'un testament qu'il avait fait établir devant notaire. Les deux sœurs du défunt contestèrent le testament parce que leur frère appartenait à la communauté musulmane et que toute question relative à sa succession était soumise non pas aux dispositions du code civil grec, mais au droit islamique et à la compétence du mufti. Après le renvoi de l'affaire par la Cour de cassation, la cour d'appel jugea que le droit applicable à la succession du défunt était le droit islamique et que le testament public en question serait dépourvu d'effet juridique. Par un arrêt du 6 avril 2017, la Cour de cassation rejeta le pourvoi formé par la requérante. Cette dernière a donc été privée de trois quarts des biens légués.

Par un arrêt au principal rendu le 19 décembre 2018 (voir la Note d'information 224), la Grande

Chambre a conclu à une violation de l'article 14 de la Convention combiné avec l'article 1 du Protocole nº 1. La Cour a considéré en particulier que la différence de traitement subie par la requérante en tant que bénéficiaire d'un testament établi conformément au code civil par un testateur de confession musulmane, par rapport au bénéficiaire d'un testament établi conformément au code civil par un testateur n'étant pas de confession musulmane, n'avait pas de justification objective et raisonnable. Puis la Cour a réservé la question de la satisfaction équitable.

En droit – Article 41

a) *Dommage matériel*

i. *Biens situés en Grèce* – À la suite de l'arrêt de la Cour de cassation du 6 avril 2017, les sœurs du mari défunt de la requérante avaient saisi, le 19 avril 2017, le tribunal de première instance, en demandant que le registre des biens auprès du bureau de cadastre soit corrigé afin qu'elles soient reconnues comme copropriétaires des biens du testateur. Le 20 novembre 2018, le tribunal de première instance a reconnu les deux sœurs comme copropriétaires et a ordonné qu'il soit procédé à la modification de l'enregistrement des biens. Enfin, le tribunal a considéré que la requérante demeurait copropriétaire à concurrence d'un quart des biens légués, pourcentage pour lequel elle devait aussi faire procéder à un nouvel enregistrement. Le 23 octobre 2019, la cour d'appel a confirmé ce jugement. Le 20 décembre 2019, la requérante s'est pourvue en cassation. Même si cette procédure est encore pendante, la Cour n'est pas tenue de surseoir à statuer en attendant l'issue de celle-ci.

Concernant les sœurs du défunt, le registre du cadastre n'a pas encore été corrigé. Une telle correction ne peut être effectuée que si celles-ci obtiennent gain de cause par un arrêt irrévocable. Dans ce cas uniquement elles pourraient être reconnues copropriétaires des biens du testateur.

Ainsi, en premier lieu, l'effet de la violation de la Convention constatée dans l'arrêt au principal ne s'est pas encore concrétisé. En deuxième lieu, il ne revient pas, en principe, à la Cour de prescrire à un État les moyens précis à employer pour mettre un terme à une violation de la Convention et en effacer les conséquences.

Pour autant, il paraît clair que le rétablissement de « la situation la plus proche possible de celle qui existerait si la violation constatée n'avait pas eu lieu » consisterait en la prise des mesures de nature à garantir que la requérante reste propriétaire des biens légués en Grèce par son mari ou, dans l'hypothèse d'une modification du registre du cadastre, qu'elle soit rétablie dans ses droits de propriété. À défaut pour l'État défendeur de prendre ces mesures, dans un délai d'un an à compter du prononcé du présent arrêt, l'État défendeur devra verser à la requérante une indemnisation qui prend en compte la valeur des biens légués à celle-ci au prorata du pourcentage qui lui a été retiré en application des règles de la charia, soit trois quarts. Toutefois, dans l'hypothèse où la procédure actuellement pendante en Grèce recevrait, postérieurement à ce versement, une issue conforme à l'arrêt au principal, la requérante devrait rembourser à l'État défendeur la somme ainsi versée.

ii. *Biens situés en Turquie* – La requête qui a donné lieu à l'arrêt au principal était dirigée uniquement contre la Grèce. La question des effets du testament du défunt, dans la mesure où ce testament vise les biens situés en Turquie, fait l'objet de procédures encore pendantes devant les juridictions turques. Le 18 janvier 2018, le tribunal de première instance a considéré qu'à la suite des arrêts des juridictions grecques, les tribunaux turcs n'avaient pas à réexaminer l'affaire. L'appel introduit tant par la requérante que par les sœurs du testateur contre ce jugement est actuellement pendant devant la cour d'appel en Turquie.

Dans ces conditions, la Cour ne décèle aucune circonstance particulière susceptible de s'analyser en un exercice par la Grèce de sa juridiction à l'égard des procédures qui se déroulent en Turquie.

Il convient par ailleurs de noter que si le mari défunt de la requérante a rédigé son testament de manière générale, sans distinguer spécifiquement entre les biens situés en Turquie et ceux qui sont situés en Grèce, le document établi par la requérante devant notaire et portant acceptation du testament ne vise et ne décrit que les biens du défunt situés en Grèce.

En tout état de cause, en concluant à l'applicabilité de l'article 1 du Protocole nº 1 dans son arrêt au principal, la Cour visait seulement les biens situés en Grèce. C'est sur ce fondement, et uniquement sur ce fondement, que la Cour a ensuite recherché, si l'article 14 de la Convention combiné avec l'article 1 du Protocole nº 1 avait été violé. Force est de constater que dans cet arrêt, la Cour n'a pas pris de position de principe sur les droits revendiqués par la requérante au titre de l'article 1 du Protocole nº 1 en ce qui concerne les biens situés en Turquie. Il s'ensuit que ces biens ne peuvent servir de base à une demande de satisfaction équitable dirigée contre l'État défendeur dans le cadre de la présente procédure portant sur la question réservée de l'application de l'article 41.

En outre, en vertu de l'article 46 de la Convention, les arrêts de la Cour ne lient que les États parties aux procédures qui y ont donné lieu, ce qui n'est pas le

cas de la Turquie s'agissant de l'arrêt au principal rendu en l'espèce. Cela étant, rien n'empêche les juridictions turques de statuer en tenant compte de l'arrêt au principal.

Par ailleurs la requérante aura la possibilité d'introduire, le cas échéant, une requête contre la Turquie au titre de la décision définitive qui sera rendue par les juridictions turques sur les effets du testament de son mari quant aux biens situés en Turquie au cas où cette décision ne tiendrait pas compte du fait que l'arrêt au principal rendu par la Cour a conclu à la violation, par la Grèce, de l'article 14 de la Convention combiné avec l'article 1 du Protocole n° 1 et n'en tirerait pas les conséquences qui s'imposent eu égard à la qualité d'État contractant de la Turquie.

Partant, dans les circonstances de l'espèce, la Cour n'a pas compétence pour se prononcer sur les prétentions de la requérante relatives aux biens de son mari situés en Turquie.

b) *Préjudice moral* – La Cour alloue à la requérante 10 000 EUR à ce titre.

(Voir aussi *De Wilde, Ooms et Versyp c. Belgique* (article 50), 2832/66 et al., 10 mars 1972 ; *Barberà, Messegué et Jabardo c. Espagne* (article 50), 10588/83 et al., 13 juillet 1994 ; *Papamichalopoulos et autres c. Grèce* (article 50), 14556/89, 31 octobre 1995 ; *Vistiņš et Perepjolkins c. Lettonie* (satisfaction équitable), 71243/01, 25 mars 2014, Note d'information 172 ; *Chiragov et autres c. Arménie* (satisfaction équitable) [GC], 13216/05, 12 décembre 2017, Note d'information 213)

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

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

Collective nature of expulsion stemming from failure to examine situation of unaccompanied minors, arbitrarily associated with unrelated adult for the purpose of being deported with him: *violation*

Caractère collectif découlant de l'absence d'examen de la situation de jeunes mineurs isolés, rattachés arbitrairement à un adulte tiers aux fins d'être renvoyés avec lui : *violation*

Moustahi – France, 9347/14, Judgment/Arrêt 25.6.2020 [Section V]

English translation of the summary – Version imprimable

En fait – Mayotte est un département français d'outre-mer, dans l'archipel des Comores. Les faits se passent en 2013, les requérants étant trois ressortissants comoriens : un père (le premier requérant) et ses deux enfants (alors âgés de 3 et 5 ans – sauf précision contraire ci-après, les griefs sont présentés au nom des enfants).

Les deux enfants partirent des Comores avec une quinzaine de personnes sur une embarcation de fortune pour rejoindre Mayotte, où leur père résidait légalement. Interpellés en mer à 9h00, ils virent leurs noms inscrits sur l'arrêté de reconduite à la frontière pris à l'encontre de l'un des adultes du groupe (M.A.). À 14h00, ils furent placés en rétention administrative dans l'enceinte d'un commissariat de police. Leur père vint sur place, mais ne fut pas autorisé à les rencontrer. À 16h30, les enfants furent mis avec M.A. sur un ferry à destination des Comores.

Une heure après, le père déposa un recours en référé-liberté devant le tribunal administratif. Tout en relevant que la décision en cause était « manifestement illégale », le juge des référés rejeta la demande pour défaut d'urgence. Le juge des référés du Conseil d'État rejeta l'appel, estimant qu'il appartenait à l'intéressé de suivre la procédure appropriée pour former une demande de regroupement familial. En 2014, les deux enfants se virent accorder dans ce cadre un visa de long séjour.

En droit – Article 3

a) *Question préliminaire sur l'accompagnement et le rattachement des enfants* – Confier de jeunes enfants à un adulte dans le contexte de la gestion des flux migratoires constitue une décision particulièrement importante au regard de leur intérêt (d'autant plus en droit français qu'un tel rattachement ouvre la perspective de procéder à leur placement en rétention administrative, puis à leur renvoi vers un État tiers).

Par conséquent, il appartient aux autorités nationales de déterminer, dans toute la mesure du possible, la nature des liens qui unissent les enfants à l'adulte auquel elles entendent les rattacher. Dans le cas précis où aucun document d'identification ne permet d'établir avec certitude l'existence de tels liens, elles se doivent de faire preuve d'une particulière vigilance, afin d'écarter autant que possible le risque de confier des enfants à une personne ne disposant d'aucune autorité sur eux.

Le droit français prévoit la désignation d'un administrateur *ad hoc* chargé d'assister les mineurs étrangers non accompagnés dont l'entrée sur le territoire français serait refusée. Toutefois, selon les tiers intervenants (dont le Défenseur des droits), il existe à Mayotte une pratique consistant à rattacher

arbitrairement des mineurs à des adultes inconnus d'eux afin de permettre leur placement en rétention puis leur renvoi vers les Comores. De fait, à une exception près, aucun des quarante-trois enfants renvoyés le même jour par le même bateau ne porte le même nom de famille que l'adulte auquel il était rattaché.

En l'espèce, rien ne suggère que les requérants et M.A. auraient été en relation auparavant. Même à supposer établi que M.A. ait déclaré accompagner les enfants, il reste que les autorités françaises n'ont entrepris aucune démarche pour s'assurer de la réalité de cette affirmation avant de lui rattacher les enfants et de les placer en rétention administrative, alors qu'ils portaient des noms de famille différents : les procès-verbaux ne mentionnent ni la nature de ces liens, ni les éventuelles questions qui lui auraient été posées à ce sujet. Qui plus est, ce rattachement n'a pas non plus été reconsidéré lorsque leur père s'est présenté au commissariat, en possession de leurs actes de naissance. On ne saurait ici admettre qu'il revenait au tiers se voyant confier des enfants de contester formellement un tel rattachement auprès des autorités.

La Cour conclut non seulement que les deux enfants constituaient bien des mineurs « non accompagnés », mais aussi que leur rattachement à M.A. était arbitraire, opéré non dans le but de préserver l'intérêt supérieur des enfants, mais dans celui de permettre leur expulsion rapide vers les Comores ; sans être déterminant en soi, ce dernier constat est un élément pertinent pour l'examen des autres griefs.

b) Sur les conditions de rétention – Les conditions de rétention des deux enfants étaient les mêmes que celles des adultes appréhendés en même temps qu'eux : dans un centre de rétention temporaire, créé dans l'enceinte d'un commissariat, alors qu'ils étaient séparés de tout membre de leur famille. Abstraction faite leur rattachement arbitraire à M.A., aucun adulte n'a été désigné pour s'en occuper.

Eu égard à la grande vulnérabilité qui découlait de l'âge des enfants et du fait qu'ils étaient ainsi livrés à eux-mêmes, ces constatations suffisent, indifféremment de la durée de leur placement en rétention, pour conclure que ce dernier n'a pu qu'engendrer pour eux une situation de stress et d'angoisse et avoir des conséquences particulièrement traumatisantes sur leur psychisme.

Conclusion : violation (unanimité).

c) Sur les conditions du renvoi vers les Comores

i. Pour les deux enfants renvoyés – Force est de constater le manque de préparation et l'absence de mesures d'encadrement et de garanties entourant le renvoi litigieux : les deux enfants ont effectué seuls le voyage vers les Comores, sans être accompagnés par une personne adulte, à qui cette mission aurait été confiée par les autorités françaises, autre que M.A. à qui ils avaient été arbitrairement rattachés ; et les autorités françaises n'ont pas entrepris la moindre démarche pour contacter leur famille aux Comores ou les autorités de cet État afin d'assurer leur accueil à destination. Les deux enfants sont en conséquence arrivés à destination de nuit, sans que personne ne les attende, et n'ont pu compter que sur l'action d'un tiers dépourvu de liens avec eux pour leur éviter d'être livrés à eux-mêmes.

Ainsi, les autorités françaises n'ont pas veillé à une prise en charge effective des enfants, ni tenu compte de la situation réelle qu'ils risquaient d'affronter à leur retour dans leur pays d'origine. Leur refoulement, dans de telles conditions, leur a nécessairement causé un sentiment d'extrême angoisse et a constitué un traitement inhumain, ainsi qu'un manquement de l'État défendeur à ses obligations positives.

Conclusion : violation (unanimité).

ii. Pour le père – La souffrance et l'inquiétude du requérant en tant que père de jeunes enfants non accompagnés – du fait, notamment, de s'être présenté au commissariat sans y être reconnu comme tel malgré les documents présentés, et d'avoir ainsi assisté impuissant à leur rétention puis leur renvoi malgré ses recours administratif puis juridictionnel – n'ont pas été exacerbées par un sentiment de péril à leur sujet. Plus particulièrement, les raisons suivantes permettent de considérer que le seuil de gravité requis n'a pas atteint.

Premièrement, le placement en rétention des enfants a été de faible durée. Deuxièmement, par contraste avec le voyage aller – traversée irrégulière et périlleuse sur une embarcation de fortune, commanditée par le père, et sans s'assurer que ses enfants soient accompagnés d'une personne ayant autorité sur eux –, le voyage de retour a été opéré dans des conditions de transport satisfaisantes, puisque les deux enfants ont voyagé à bord d'un ferry d'une compagnie assurant la liaison maritime avec les Comores. Troisièmement, le requérant pouvait compter sur sa propre mère pour de nouveau s'occuper des enfants à leur retour.

Conclusion : non-violation (unanimité).

Article 5 § 1 : Le placement en rétention administrative des deux enfants a constitué une privation de liberté. Or, on ne décèle aucun fondement juridique apte à justifier la privation de liberté subie.

Selon le droit interne applicable, l'étranger mineur de dix-huit ans ne pouvait pas faire l'objet d'une

obligation de quitter le territoire ni faire l'objet d'un arrêté de placement en rétention en vue de son éloignement. Cela explique qu'un tel arrêté n'a été pris qu'à l'encontre de l'adulte M.A.

Contrairement à d'autres affaires, le placement de facto en rétention des deux enfants ne reposait pas sur le souci d'éviter de les séparer de leur famille, mais seulement de permettre une expulsion que ne permettait pas le droit interne.

Conclusion : violation (unanimité).

Article 5 § 4 : Si brève qu'ait été leur privation de liberté, il n'est pas superflu de statuer sur le bien-fondé de ce grief, vu que les deux enfants ont été privés ab initio et définitivement de tout recours pour faire contrôler la légalité de leur détention.

En effet, les enfants n'ont pas été retenus en compagnie d'une personne disposant de l'autorité juridique pour agir en leur nom devant les tribunaux et ayant nécessairement leur intérêt à cœur. La possibilité d'un examen de la situation des enfants à l'occasion d'un hypothétique recours engagé par un tiers inconnu d'eux ne saurait suffire.

Conclusion : violation (six voix contre une).

Article 8 (pour l'ensemble des requérants) : Le caractère prétendument distendu des liens unissant les enfants à leur père au moment des faits ne saurait faire obstacle à l'application de l'article 8 au titre de la vie familiale, puisque c'est à ce titre qu'un visa de long séjour leur a par la suite été accordé.

Le fait d'enfermer certains membres d'une même famille dans un centre de rétention alors que d'autres membres de cette famille sont laissés en liberté peut s'analyser comme une ingérence dans l'exercice de leur vie familiale, quelle que soit la durée de la mesure en cause. Eu égard au constat de violation de l'article 5 § 1 ci-dessus, cette ingérence n'était pas « prévue par la loi ». Mais la violation de l'article 8 qui en découle déjà est encore aggravée par le facteur suivant.

Dans l'hypothèse où la séparation forcée des requérants aurait reposé sur une base légale, on peut concevoir qu'un État refuse de confier des enfants à une personne se présentant comme un membre de leur famille, ou d'organiser une rencontre entre eux, pour des motifs tenant à l'intérêt supérieur de l'enfant (tels que la précaution de s'assurer préalablement, au-delà de tout doute raisonnable, de la réalité des liens allégués).

Au contraire, le refus de réunir les requérants ne visait pas ici au respect de l'intérêt supérieur des enfants, mais seulement à assurer leur expulsion dans les meilleurs délais et de manière contraire au droit interne ; ce qu'on ne saurait admettre comme un but légitime.

Conclusion : violation (six voix contre une).

Article 4 du Protocole no 4 : Selon le droit interne applicable, les enfants mineurs ne peuvent pas faire individuellement et personnellement l'objet d'une mesure d'éloignement : leur situation suit nécessairement celle des parents ou, à défaut, de la personne qui les accompagne.

Lorsqu'un enfant est accompagné par un parent ou par un proche, les exigences de l'article 4 du Protocole no 4 peuvent être satisfaites si cette tierce personne est en mesure d'invoquer de manière réelle et effective les arguments s'opposant à leur expulsion commune.

Or, rien n'indique ici que M.A. avait une connaissance suffisante des raisons pouvant s'opposer au renvoi des enfants. En tout état de cause, rien ne montre que la moindre question lui ait été posée au sujet des enfants qui lui étaient rattachés, ou qu'il ait pris l'initiative d'évoquer le sujet.

Ainsi, l'éloignement de ces deux jeunes enfants de cinq ans et trois ans, qu'aucun adulte ne connaissait ni n'assistait, a été décidé et mis en œuvre sans leur accorder la garantie d'un examen raisonnable et objectif de leur situation particulière. L'expulsion doit donc être qualifiée de collective.

Conclusion : violation (unanimité).

Article 13 combiné avec l'article 3, à propos des modalités du renvoi : Aucun risque lié au choix du pays de destination n'étant allégué, seuls sont en cause ici l'absence d'accompagnement des enfants, le défaut d'organisation de leur arrivée et leur heure tardive de débarquement.

Or, d'une part, les modalités pratiques du renvoi des étrangers vers des pays tiers ne sont souvent connues de l'administration que dans les heures précédant l'exécution du renvoi ; d'autre part, il est rare qu'elles soient susceptibles d'être en soi contraires à l'article 3 de la Convention.

Partant, la Cour estime que l'article 13 de la Convention n'impose pas, en la matière, que les recours présentent un caractère suspensif. La possibilité d'un recours compensatoire, exercé a posteriori, suffit donc. En l'espèce, rien ne suggère qu'un tel recours n'ait pas été à la disposition effective des requérants.

La Cour précise cependant que ces conclusions ne remettent pas en cause l'obligation pesant sur

les États de s'assurer que les modalités des renvois soient compatibles avec la vulnérabilité particulière que peuvent présenter les étrangers objet de tels renvois, par exemple en raison de leur âge ou de leur état de santé.

Conclusion : non-violation (unanimité).

Article 13 combiné avec l'article 8 de la Convention et l'article 4 du Protocole no 4 : Si la procédure en référé pouvait en théorie permettre au juge d'examiner les arguments exposés pour les requérants ainsi que de prononcer, si nécessaire, la suspension de l'éloignement, tel n'a pas été le cas en pratique.

En effet, les deux enfants ont été éloignés de Mayotte moins de huit heures après leur interpellation. Malgré sa célérité à agir (moins de quatre heures après l'édiction de la mesure d'expulsion visant M.A. et mentionnant le nom des enfants), leur expulsion avait déjà été mise à exécution depuis une heure lorsque le père a déposé son recours en leur nom au tribunal.

Pareille brièveté du délai séparant l'adoption de la mesure de son exécution exclut toute possibilité pour un tribunal d'être effectivement saisi, et a fortiori d'examiner sérieusement les circonstances et arguments juridiques sous l'angle de la Convention « en cas » de mise à exécution de la décision d'éloignement. La délivrance ultérieure d'un titre de séjour ne répare pas cette carence.

Conclusion : violation (six voix contre une).

Article 46 : Des évolutions législatives et jurisprudentielles positives ont eu lieu depuis les faits de l'espèce. Le juge des référés du Conseil d'État a précisé que l'autorité administrative doit s'attacher à vérifier l'identité des étrangers mineurs placés en rétention, la nature exacte des liens qu'ils entretiennent avec tout tiers auxquels ils seraient rattachés aux fins d'éloignement, et les conditions de leur prise en charge à destination ; ces nouvelles exigences prétoriennes apparaissent de nature à prévenir la répétition de la plupart des constats de violation du présent arrêt. Quant aux nouvelles dispositions législatives applicables à Mayotte (qui laissent encore la possibilité de procéder à un rapatriement avant l'expiration d'un délai d'un jour franc), il appartiendra aux autorités de veiller à ce que leur application n'entraîne pas de nouvelles violations similaires de l'article 13.

Article 41 : 22 500 EUR pour préjudice moral, se décomposant en 2 500 EUR pour le père et 10 000 EUR pour chacun des deux enfants.

ARTICLE 2 OF PROTOCOL No. 7/ DU PROTOCOLE N° 7

Right of appeal in criminal matters/Droit à un double degré de juridiction en matière pénale

No appeal available against a heavy customs fine imposed without any consideration of proportionality: *violation*

Impossibilité de contester devant un « deuxième degré de juridiction » une amende douanière sévère sans contrôle de proportionnalité : *violation*

Saquetti Iglesias – Spain/Espagne, 50514/13, Judgment/Arrêt 30.6.2020 [Section III]

English translation of the summary – Version imprimable

En fait – Lors d'un contrôle douanier à la sortie du territoire espagnol en mars 2011, le requérant fut trouvé porteur d'une somme d'argent supérieure au seuil de déclaration obligatoire (fixé à 10 000 EUR), ce qui lui valut de se voir infliger par l'administration compétente une amende de 153 800 EUR, représentant la quasi-totalité de la somme en question – dont le requérant avait expliqué la provenance par des importations d'argent liquide au retour de ses voyages en Argentine, régulièrement déclarées pour un montant cumulé de plus de 300 000 EUR sur une dizaine d'années.

En octobre 2011, le requérant forma un recours de contentieux administratif. En 2013, le Tribunal supérieur de justice de Madrid le rejeta, et indiqua que son arrêt était insusceptible de recours, en vertu d'une modification législative, intervenue entre-temps, du seuil requis pour l'ouverture de la voie du recours en cassation sur la base sur la base de l'enjeu financier du litige (hors procédures spéciales pour la défense des droits fondamentaux) : antérieurement fixé à 150 000 EUR, ce seuil était désormais de 600 000 EUR. Selon une disposition transitoire, les recours pendants restaient régis par les règles procédurales anciennes jusqu'à ce que l'instance saisie rende son arrêt.

Se plaignant entre autres de l'application immédiate de cette loi dans son litige en cours, le requérant forma un recours en *amparo* devant le Tribunal constitutionnel, que ce dernier rejeta faute de justification suffisante par le requérant des enjeux constitutionnels de son recours.

En droit – Article 2 du Protocole n° 7

1. *Applicabilité : La sanction imposée au requérant avait-elle un caractère « pénal » ?* – La Cour répond par l'affirmative à l'aune des critères *Engel*.

Qualification en droit interne (critère non décisif) – La méconnaissance de l'obligation déclarative prévue par la loi sur la prévention du blanchiment de capitaux et le financement du terrorisme constituait une infraction « administrative ».

Nature même de l'infraction – La disposition pertinente de la loi en question a une portée générale, ses destinataires étant toute personne, physique ou juridique, traversant une frontière et exerçant les activités décrites en lien avec la circulation de capitaux. Et l''imposition de l'amende ne visait pas à protéger l'État contre une perte de capital mais poursuivait un objectif de dissuasion et de répression. Cette considération pourrait à elle seule suffire. L'espèce diffère ici de certaines affaires antérieurement examinées, notamment *Inocencio c. Portugal* (déc.) (43862/98, 11 janvier 2001, Note d'information 26), à propos d'une sanction de seulement 2 500 EUR, pour des travaux sans autorisation, et *Butler c. Royaume-Uni* (41661/98, 26 juin 2002, Note d'information 43), pour une sanction d'un montant plus élevé mais où les autorités avaient effectué un contrôle de proportionnalité et avaient des indices raisonnables que le requérant, qui avait un casier judiciaire, menait des activités de contrebande.

Sévérité de la sanction encourue – La loi interne qualifie l'infraction commise par le requérant de « grave » et prévoit une amende comprise entre 600 EUR et le double de la somme en cause.

2. *Exceptions au droit garanti* – Aucune des exceptions tirées par le Gouvernement du paragraphe 2 de l'article 2 du Protocole n° 7 n'est retenue par la Cour.

a) *Exception relative aux infractions « mineures »*

i. *Principes d'interprétation* – Selon le rapport explicatif au Protocole n° 7, pour décider si une infraction est de caractère mineur, un critère important est la question de savoir si l'infraction est passible d'une peine d'emprisonnement ou non. En l'occurrence, la sanction imposée au requérant ne pouvait être remplacée, en cas de non-paiement, par une telle peine. Cependant, cet élément n'est pas décisif. D'autres critères doivent être pris en compte.

Certes, une grande diversité est observable dans les législations des États contractants en matière de sanctions douanières pour absence de déclaration de sommes d'argent. Le respect du principe de subsidiarité et la marge d'appréciation dont bénéficient les États en la matière amènent la Cour à considérer que la pertinence et le poids devant être accordés à chaque élément doivent être appréciés selon les circonstances propres à chaque cas d'espèce.

Certes, il sera nécessaire que la mesure litigieuse atteigne un certain seuil de sévérité, mais il appartiendra aux autorités internes d'en examiner la proportionnalité ainsi que les conséquences particulièrement sérieuses en fonction de la situation personnelle du requérant. L'existence d'une peine de prison est un facteur important à considérer pour apprécier le caractère mineur d'une infraction, sans pour autant être décisif.

Cette interprétation cadre avec les règles générales d'interprétation des traités prévues par la Convention de Vienne sur le droit des traités.

ii. *Appréciation en l'espèce*

Sévérité – Le requérant s'est vu infliger une amende de 153 800 EUR, qui aurait pu aller encore jusqu'à plus du double de cette somme. Ce montant représentait la totalité de l'épargne personnelle que le requérant, dont le casier judiciaire est vierge, avait pu mettre de côté pendant ses séjours périodiques en Espagne.

Comme il n'a pas été prouvé que les fonds saisis étaient issus de pratiques liées au blanchiment de capitaux, la sévérité de la sanction doit correspondre à la gravité du seul manquement constaté – en l'occurrence, l'omission de déclarer la somme transportée – et non pas à la gravité du manquement éventuel, non constaté à ce stade, qui pourrait consister en la commission d'un délit tel que le blanchiment d'argent ou la fraude fiscale.

Pour ce qui est du comportement du requérant, il convient de noter que celui-ci s'est acquitté de l'obligation de déclarer les fonds à chacune de ses entrées sur le territoire espagnol.

Garanties procédurales – L'arrêt du Tribunal supérieur de justice de Madrid ne contient aucune analyse concernant la proportionnalité de la mesure litigieuse, comme le voudrait pourtant la loi en cause. En effet, l'arrêt n'a pris en compte ni les circonstances personnelles du requérant ni les documents ou éléments de preuve que celui-ci a apportés. Il s'agit là d'une exigence que la Cour a eu l'occasion de rappeler lorsqu'elle a examiné des sanctions douanières sous l'angle de l'article 1 du Protocole n° 1. Au demeurant, selon la loi en cause, la sortie légale de capitaux ne doit en principe faire l'objet que d'une déclaration, sans qu'une autorisation préalable soit nécessaire, aux fins de la conduite des vérifications pertinentes en vue de la prévention du blanchiment de capitaux ou du financement du terrorisme.

L'exception relative aux infractions « mineures » n'est donc pas applicable en l'espèce.

b) *Exception relative aux litiges directement portés devant la « plus haute juridiction »* – En matière de contentieux administratif, le Tribunal suprême fait partie de la hiérarchie des juridictions ordinaires

pouvant être saisies après le Tribunal supérieur de justice, lorsque l'enjeu financier du litige atteint le seuil requis (fixé par la loi à 600 000 EUR). Le Tribunal supérieur de justice n'avait donc pas lieu d'être considéré comme la plus haute juridiction.

3. *Respect du droit garanti : le requérant a-t-il bénéficié d'un double degré de juridiction ?*

Instance à retenir comme premier degré de juridiction - Selon le rapport explicatif au Protocole n° 7 à la Convention, les autorités « qui ne sont pas des tribunaux au sens de l'article 6 de la Convention » ne peuvent être prises en compte en tant que « juridictions ». Tel est le cas de l'entité responsable de l'imposition de l'amende en l'espèce, à savoir la Direction générale de la trésorerie et de la politique financière, qui dépend directement du ministère de l'Économie. Le premier degré de juridiction offert au requérant était donc le Tribunal supérieur de justice.

Inadéquation du rôle du Tribunal constitutionnel pour former le deuxième degré de juridiction requis – Selon le rapport explicatif, les cours d'appel ou de cassation peuvent être considérées comme remplissant les exigences d'un « double degré de juridiction ». En revanche, nulle mention n'est faite des tribunaux constitutionnels. À la lumière des compétences attribuées au Tribunal constitutionnel espagnol dans le cadre du recours en *amparo*, détaillées ci-après, la Cour est d'avis que celui-ci n'offre pas la « deuxième instance » voulue.

En droit espagnol la compétence pour examiner la légalité ordinaire est réservée aux tribunaux faisant partie du pouvoir judiciaire (parmi lesquels les cours d'appel ou de cassation). Pour ce qui est en particulier des *amparo* introduits à l'encontre d'une décision judiciaire, la loi organique sur le Tribunal constitutionnel limite sa fonction à celle d'évaluer si les droits ou libertés du requérant ont été enfreints et à préserver ou rétablir lesdits droits ou libertés ; il y est précisé que le Tribunal constitutionnel devra s'abstenir de toute autre considération portant sur les agissements des organes juridictionnels. Le Tribunal constitutionnel lui-même a souligné dans sa jurisprudence que le recours en *amparo* ne peut être assimilé à un pourvoi en cassation dans l'intérêt de la loi.

Bien que conforme aux dispositions transitoires prévues par la loi en cause, l'application au requérant de la limitation apportée par celle-ci a porté atteinte à la substance même du droit garanti par l'article 2 du Protocole n° 7, outrepassant la marge d'appréciation de l'État défendeur.

Conclusion : violation (unanimité).

Article 41 : 9 600 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

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

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

Deprivation of nationality of respondent State on the basis of old terrorism conviction: *inadmissible*

Déchéance de la nationalité de l'État défendeur en considération d'une condamnation ancienne pour une infraction à caractère terroriste : *irrecevable*

Ghoumid and Others/et autres – France, 52273/16 et al., Judgment/Arrêt 25.6.2020 [Section V]

(See Article 8 above/Voir l'article 8 ci-dessus, page 24)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

Imposition of the death penalty/reparation – applicant no longer victim of specific violation

Condamnation à la peine de mort/réparation – perte de la qualité de victime de la violation en cause

Rodríguez Revolorio et al./et autres – Guatemala, Series C No. 387/Série C n° 387, Judgment/Arrêt 14.10.2019

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

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

In May 1996 the Court for Criminal Sentence, Drug Trafficking and Environmental Cases issued a judgment sentencing Mr Rodríguez Revolorio, Mr López Calo and Mr Archila Pérez to death penalty for the crime of murder. Pursuant to Article 132 of the Criminal Code in force at the time, capital punishment was to be imposed "if the facts and context, the method used, and the motives indicate that

the offender is highly and particularly dangerous". The three applicants lodged several appeals, but to no avail. Mr Archila Pérez died on 16 July 1999. Years later, the two remaining applicants lodged an appeal for review ("*recurso de revisión*"). In July 2012 the Supreme Court of Justice ruled in favour of the appellants, annulled the death penalty and imposed an alternative sentence of thirty years' imprisonment. Both applicants were finally released in 2016.

Merits

(a) Article 4 (right to life) of the American Convention on Human Rights (ACHR): As regards Mr Rodríguez Revolorio and Mr López Calo, the Inter-American Court of Human Rights (hereafter "the Court") observed that the ruling of the Supreme Court of Justice recognised the violations caused by the imposition of the death penalty and adequately repaired the damage in that the death penalty was substituted by thirty years' imprisonment in application of the international standards set forth by the Court in the previous case of *Fermín Ramírez v. Guatemala* (judgment of 20 June 2005, Series C No. 126). The Supreme Court's decision constituted a timely and adequate "control of conventionality" by which the case-law of the Inter-American Court was correctly applied. Therefore, the Court declared that the State had not violated these applicants' right to life. However, as regards Mr Archila Pérez, who died without a review of his sentence, the Court held Guatemala internationally responsible for the violation of Article 2 of the ACHR for the imposition of the death penalty. In this regard the Court observed that the use of the perpetrator's criterion of danger was incompatible with the principle of legality provided for in the ACHR.

(b) Article 5 (right to humane treatment) of the ACHR: The Court also concluded that the conditions of detention in the prison in which the three applicants were detained ("El Infiernito" penitentiary centre) did not meet the minimum requirements under international human rights standards and constituted cruel, inhuman and degrading treatment in violation of Article 5 of the ACHR, as well as Article 6 of the Inter-American Convention to Prevent and Punish Torture. In addition, the Court considered that the three applicants experienced serious psychological suffering from the anguish of being subjected to the "death row" after criminal proceedings that had numerous shortcomings, in prison conditions incompatible with the standards of the ACHR, which violated their right to physical integrity and also constituted cruel, inhuman and degrading treatment.

Reparations – The Court determined the following measures of reparation: (i) *rehabilitation*: immediately provide medical and psychological treatment free of charge for as long as necessary; (ii) *satisfaction*: publish the judgment and its official summary; (iii) *guarantees of non-repetition*: adopt, within a reasonable period of time, the necessary measures so that the conditions of detention of "El Infiernito" penitentiary centre meet international human rights standards, and, in particular, remedy the deficiencies detected in the judgment; (iv) *compensation*: pay the monetary sums established in the judgment for non-pecuniary damage and for the reimbursement to the Victims' Legal Assistance Fund.

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

Arbitrary transfers of prisoners to distant prisons without consideration of personal circumstances, family life and access to a lawyer

Transferts arbitraires de détenus dans des établissements éloignés sans égard pour leur situation personnelle, leur vie familiale ou la possibilité d'accès à un avocat

López et al./et autres – Argentina/Argentine, Series C No. 396/Série C n° 396, Judgment/Arrêt 25.11.2019

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

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Messrs. Néstor López, Hugo Blanco, José Muñoz and Miguel González were sentenced to prison terms by the Neuquén Court of Justice, Argentina. Due to an agreement between the National Penitentiary Service and the Province of Neuquén, the custody of persons convicted in Neuquén would be provided by the federal agency until the Province had resources to build and run its own prison establishments. The four applicants were repeatedly transferred to prisons located between 800 and 2,000 kilometres away from their families, lawyers and judges overseeing their sentence. These transfers were determined by the Federal Penitentiary Service and were not subject to prior judicial control. The applicants filed *habeas corpus* remedies and requests to return to detention centres closer to their families, to no avail.

Merits

(a) Articles 5(1) and 5(6) (right to humane treatment), 11(2) (right to privacy) and 17(1) (rights of the family) in conjunction with Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects) of the American Convention on Human Rights (ACHR): The Inter-American Court of Human Rights (hereafter "the Court") considered that Article 5(6) of the ACHR – establishing that "punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners" –, was applicable to this case. This resulted in the right of the person deprived of liberty to be in touch with their family, lawyers and the outside world. The Court stressed that this was not an absolute right, yet the administrative or judicial decision assigning the place of deprivation of liberty following a judgment or the transfer of any person deprived of liberty had to take into consideration, among other factors, that: (i) the main aim of a punishment is the readaptation or social reform of the prisoner; (ii) contact with one's family and the outside world is essential to achieve that aim; (iii) restrictions on visits may affect the personal integrity of the prisoner and their family; (iv) the separation of persons deprived of liberty from their family in an unjustified manner implies a violation of Article 17(1) and possibly also to Article 11(2) of the ACHR; (v) in the event that the transfer has not been requested by the person deprived of liberty, he/she should, as far as possible, be consulted on each transfer, and be allowed to challenge said decision, if necessary before a court. The Court referred to the case-law of the European Court of Human Rights concerning transfer of prisoners, family contact, restrictions on prisoners' rights and inherent restrictions of prison sentences, such as the cases of *Messina v. Italy (no. 2)* (no. 25498/94, 28 September 2000), *Kurkowski v. Poland* (no. 36228/06, 9 April 2013), *Vintman v. Ukraine* (no. 28403/05, 23 October 2014), *Khoroshenko v. Russia* [GC] (no. 41418/04, 30 June 2015), *Polyakova and Others v. Russia* (nos. 35090/09 and 3 others, 7 March 2017) and *Khodorkovskiy and Lebedev v. Russia* (nos. 11082/06 and 13772/05, 25 July 2013).

Conclusion: violation (five votes to one).

(b) Articles 5(1), 5(3), 11(2), 17(1) and 19 (rights of the child) in conjunction with Articles 1(1) and 2 (domestic legal effects) of the ACHR: With regard to the next of kin of Mr López and Mr Blanco, the Court recalled that interference with the right to family life is more serious when it affects the rights of children. In the present case, it concluded that the transfers of both applicants to prisons far from the Province of Neuquén also affected their families. This resulted in the punishment extending to their relatives, causing them harm and suffering higher to that implied in the deprivation of liberty. Thus, the Court concluded that Argentina was responsible for the violation of the rights to personal integrity, the prohibition that the punishment extends to anyone other than the criminal, and not to interfere with family life and the right to family, provided for in Articles 5(1), 5(3), 11(2) and 17(1) of the ACHR.

Conclusion: violation (five votes to one).

(c) Article 8(1) (right to a fair trial) in conjunction with Article 1(1) of the ACHR: In addition to the finding that the multiple transfers made the applicants unable to contact their defence lawyers in an appropriate and timely manner, the Court observed that the transfers took place unexpectedly, without allowing the prisoners to contact or inform their relatives or counsel about it. Likewise, given that the applicants were not consulted prior to the transfers and there was no substantive judicial control, the Court noted that the applicants were not granted the possibility to defend themselves or object to their transfers. The contact and the consequent intervention of a lawyer were decisive to protect the rights at stake in each transfer. The Court concluded that Argentina violated the right to be assisted by a defender of their choice and to communicate freely and privately with him/her, provided for in Article 8(2)(d) of the ACHR.

Conclusion: violation (five votes to one).

(d) Article 25(1) (right to judicial protection) in conjunction with Article 1(1) of the ACHR: The Court also concluded that the motivation or rationale set forth by the domestic courts denying the applicants' requests to be transferred to a closer penitentiary centre was insufficient. Likewise, with respect to the appeals filed by Mr Blanco, it noted that they had been ineffective, since the court had not responded to his specific allegations regarding the violation, among others, of his right to maintain contact with his family. The lack of reasoning was a sufficient element to declare the violation of Article 25 of the ACHR.

Conclusion: violation (five votes to one).

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) adopt all the necessary legislative, administrative or judicial measures to regulate the transfers of convicted persons; (ii) provide psychological and psychiatric treatment to the applicants; (iii) publish the judgment and its official summary; and (iv) pay pecuniary and non-pecuniary damages and costs and expenses.

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

State obligations concerning the rights to community property, cultural identity, a healthy environment, adequate food and water for indigenous communities

Obligations de l'État quant aux droits des communautés indigènes à leurs biens communautaires, à leur identité culturelle, à un environnement sain et à des ressources en eau et en nourriture adéquates

Indigenous Communities of the Lhaka Honhat Association (Our Land) – Argentina/Argentine, Series C No. 400/Série C n° 400, Judgment/Arrêt 6.2.2020

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

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

In 1991 several indigenous communities of the Wichí (Mataco), Iyjwaja (Chorote), Komlek (Toba), Niwackle (Chulupí) and Tapy'y (Tapiete) peoples demanded that the Government of Salta, a province of the Argentine Republic, recognise the ownership of their ancestral territory, located within "lots 14 and 55" and covering 643,000 hectares of land, which they had occupied since 1629. Due to their cultural patterns and their nomadic lifestyle, the number of indigenous communities which inhabit that land has been changing over time. When the judgment of the Inter-American Court of Human Rights (hereafter "the Court") was delivered, there were 132 of them. Numerous non-indigenous peasants and their families have also lived in the area since the beginning of the 20th century. In 1991 the province of Salta's obligation to unify lots 14 and 55 and to allocate an area without subdivisions through a single property title to the indigenous communities was established by decree. In 1992 the indigenous communities formed the Lhaka Honhat (Our Land) Association. In 1999 the province of Salta granted fractions of land to some individuals or communities, a policy rejected by Lhaka Honhat. In 2007, Lhaka Honhat, the State and non-indigenous families agreed that 400,000 hectares of land would be allocated to indigenous communities. Non-indigenous peasants and their families should move, with the help of the State, to the remaining land. The latter was further ratified by decree. In 2014 the province of Salta issued another decree, recognising the "community property" of the indigenous communities but also of a condominium of non-indigenous families on the same land. The decree ordered several actions to be adopted in order to determine in more precise terms the land corresponding respectively to indigenous and non-indigenous people. Until the delivery of the present judgment, the implementation of these actions had not been completed and only few non-indigenous families had been relocated. Also, illegal logging activities had taken place in the claimed territory. In 1995 the construction of an international bridge began, without prior consultation with indigenous communities, which was completed in 1996. Additionally, non-indigenous families raised livestock and had installed fences. These actions generated a decrease in forest resources and biodiversity and had affected the way in which indigenous communities traditionally sought their access to water and food.

Merits

(a) Articles 21 (right to property), 8(1) (right to a fair trial), 25(1) (right to judicial protection), 1(1) (obligation to respect rights) and 2 (domestic legal effects) of the American Convention on Human Rights (ACHR): The Court stated that the traditional possession of land by indigenous communities should be sufficient for official recognition of ownership. It also ruled that the State must give legal certainty to the right, giving a legal title that makes it opposable to the authorities themselves or third parties, so as to ensure the peaceful enjoyment of the property, without outside interference from third parties. The Court emphasised that the State must fulfil its obligations towards the indigenous communities, but in doing so it must also observe the rights of the non-indigenous families. The Court determined that the State violated the right to indigenous community property, because after 28 years the right had not been fully guaranteed, since no tittle of ownership had been granted to provide legal certainty, the territory had not been demarcated and third parties still remained there. The Court also noted that the State did not have legal procedures that enable indigenous communities to claim ownership of their lands.

Conclusion: violation (unanimously).

(b) Articles 21, 23(1) (right to participate in government) and 1(1) of the ACHR: The Court stated that the right to community property requires that indigenous communities have effective participation, based on adequate consultation processes, in the activities carried out by the State or third parties that may affect their lands and natural resources.

Despite this, the international bridge was built without prior consultation. Therefore, Argentina violated the property and participation rights of the communities.

Conclusion: violation (unanimously).

(c) Articles 26 (progressive development) and 1(1) of the ACHR: For the first time in a contentious case, the Court analysed the rights to a healthy environment, adequate food, water, and cultural identity in an autonomous manner. The Court understood that illegal logging, as well as the activities developed in the territory by non-indigenous families, especially cattle raising and the installation of fences, had damaged the environment, the traditional way of collecting food and the access to water of the indigenous communities. This altered the indigenous way of life, damaging their cultural identity. Although the culture has an evolutionary and dynamic character, the alterations to the indigenous way of life were not consented. The State was aware of the harmful activities and although it had adopted various measures, they had not been effective in stopping these activities. Therefore, it violated the aforementioned rights.

Conclusion: violation (majority).

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered that the State, among other measures: (i) grant a title recognising the ownership of the 132 indigenous communities over their territory; (ii) remove fences and livestock from the territory; (iii) move non-indigenous families out of the territory, respecting their rights; (iv) refrain from carrying out activities on indigenous territory without proper consultation; (v) identify serious situations of lack of access to water and food, and formulate a plan of action to address them and implement it; (vi) develop a plan for the conservation of water and for preventing and remedying its pollution; ensure permanent access to drinking water; prevent the depletion of forest resources and ensure their recovery; and enable access to nutritionally and culturally adequate food; (vii) create a community-development fund; and (viii) adopt legislative or other measures to give legal certainty to indigenous community property right.

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

Right to life, right not to be subject to inhumane treatment and rights of the child

Droit à la vie, droit de ne pas être soumis à des traitements inhumains et droits de l'enfant

Noguera et al./et autres – Paraguay, Series C No. 401/Série C n° 401, Judgment/Arrêt 9.3.2020

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

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

When the applicant was 16 years old, he was conscripted into the military service at the Centre for military instruction for students and training of reserve military. On 11 January 1996 the applicant, who at the time of the events was 17, was found dead in his bed at 5:00 am at the Centre facilities. According to the investigations, forensic examinations and autopsies that were performed, it was established that the cause of death was an interstitial pneumonitis infection. However, the applicant's mother maintained that he had been subjected to physical abuse and excessive exercises leading to his death. The authorities undertook several investigation proceedings. At first, summary proceedings were opened before the military criminal courts, which ended up in the dismissal of the proceedings on 21 October 1997. Additionally, another investigation was also carried out within the framework of the ordinary jurisdiction, which also resulted in the dismissal of the proceedings on 6 November 2002. On 28 May 2012 the investigation in the applicant's death was reopened by the ordinary courts and several investigation proceedings were carried out. On 10 March 2014 the file on the case was closed by the competent judicial authorities. On 13 December 2018 the Human Rights Prosecutor's Office re-opened the proceedings in order to address the allegations of torture allegedly committed against the applicant. These proceedings are still pending.

Merits

(a) Articles 4 (right to life), 5 (right to humane treatment) and 19 (rights of the child) of the American Convention on Human Rights (ACHR): The Inter-American Court of Human Rights (hereafter "the Court") noted that the State recognised its international responsibility for the violation of the applicant's rights to life, personal integrity and the rights of the child. It stressed that it had to be taken into consideration that the applicant's death took place in a military facility, under the guardianship of the State, when he was 17 years old. It also observed

that the circumstances surrounding his death had not been established by the State. Furthermore, the evidence suggesting the possibility of a violent death were not satisfactorily rebutted. Additionally, the Court noted that the State did not present information that could explain how the Paraguayan military authorities fulfilled their obligation to protect the applicant's life through routine medical examinations to determine his health condition and his fitness for duty. It therefore concluded that the lack of health checks capable of detecting a physical illness, as well as the intensive military trainings imposed on him which could have aggravated the applicant's health condition, were elements that reinforced the State responsibility.

Conclusion: violation (unanimously).

(b) Articles 8(1) (right to a fair trial) and 25 (right to judicial protection) of the ACHR: The Court found that the State was additionally responsible for not conducting an investigation into the applicant's death with due diligence and within a reasonable time, in view of: (i) the State's acknowledgment that, until now, it had not been able to clarify the circumstances surrounding the applicant's death and that the investigations that were carried out for such purposes were insufficient; (ii) the fact that this lack of certainty around the applicant's death had lasted more than twenty-three years; (iii) the fact that the circumstances surrounding the applicant's death were not complex enough to justify such a long delay; (iv) the procedural steps taken by that applicant's next-of-kin corresponded to what was reasonably required to them; and (v) the proceedings presented different periods of inactivity or delays that were not reasonable. As regards the principle of the natural judge, the Court observed that the domestic authorities had opened the case within the scope of the ordinary jurisdiction, and had carried out investigation proceedings, reaching to identical results to those that had been achieved before the military jurisdiction. Given the particularities of the case, the Court concluded that the principle of the natural judge as protected by Article 8(1) of the ACHR was not violated.

Conclusion: violation (unanimously).

(c) Article 5 of the ACHR: The Court accepted the acknowledgment of responsibility made by the State and considered that the applicant's death caused great suffering to his mother and therefore Article 5 was violated.

Conclusion: violation (unanimously).

Reparations – The Court recognised that the State had complied with several measures of reparation which had been established in a Friendly Settlement Agreement between the victim's representatives and the State, which was ultimately not approved by the Inter-American Commission. Notwithstanding this, the Court also ordered the following additional measures of reparation: (i) *satisfaction*: publish the judgment and its official summary; (ii) *guarantees of non-repetition*: demonstrate that, in the framework of the military academic training *curricula*, training programmes in Human Rights are established, specifically with regard to international standards on the special position of guarantor of the State *vis-à-vis* all those who render military service; and submit a report on the progress of the legislative process related to the reform of the military criminal jurisdiction; and (iii) *compensation*: pay the monetary sums established in the judgment for non-pecuniary damage as well as costs and expenses.

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

State responsibility for torture and rape of an LGBTI person

Torture et viol d'une personne LGBTI : responsabilité de l'État

Azul Rojas Marín et al./et autres – Peru/Pérou, Series C No. 402/Série C n° 402, Judgment/Arrêt 12.3.2020

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

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

On 25 February 2008 Peruvian police officers detained the applicant, Ms Azul Rojas Marín. At the time of her detention, the applicant identified herself as a gay man but currently identifies herself as a trans-woman. Following her detention, the applicant was taken to a police station where police officers raped her with a police truncheon and repeatedly humiliated her because of her sexual orientation. The applicant's mother deeply suffered for what had happened to her daughter. Following the applicant's complaint, the State conducted both administrative and criminal investigations into the rape of the applicant. In the criminal proceedings, the prosecution denied the applicant's request to investigate the facts under the crime of

torture. Both investigations were closed, acquitting the police officers that had been accused for the alleged crimes committed against the applicant. In 2018, authorities opened a new criminal investigation, to no avail.

Merits

(a) Article 7 (right to personal liberty) in conjunction with Article 1(1) (obligation to respect rights) of the American Convention on Human Rights (ACHR): The State argued that the applicant was detained for not carrying her identity documents. However, the Inter-American Court of Human Rights (hereafter "the Court") determined that the applicant was unlawfully detained, since the authorities did not comply with the requirements set for a detention for identification purposes, as established by Peruvian law. Moreover, given the absence of a legal reason for which the applicant was subjected to an identity control and the existence of elements that pointed towards a discriminatory treatment, the Court determined that the applicant was detained for discriminatory reasons and thus her detention was manifestly arbitrary. Lastly, the Court also noted that the applicant was not informed of the reasons for her arrest. The Court concluded that the State violated Articles 7(1), 7(2), 7(3) and 7(4) of the ACHR.

Conclusion: violation (unanimously).

(b) Articles 5 (right to humane treatment) and 11 (right to privacy) of the ACHR, in conjunction with Article 1(1) of the same convention and with Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture: The Court found that the State agents made derogatory comments and remarks about the applicant's sexual orientation, forcibly stripped her, repeatedly beat her, and raped her. It examined the intentionality, the severity of the suffering and the purpose of the act, and concluded that the set of abuses and attacks suffered by the applicant, including rape, constituted an act of torture committed by State agents. It therefore concluded that what had occurred to the applicant constituted a "hate crime", given that the attack on the applicant was based on her sexual orientation, which constituted a message to all LGBTI people, as a threat to freedom and dignity of this entire social group.

Conclusion: violation (unanimously).

(c) Articles 8(1) (right to a fair trial) and 25 (right to judicial protection) of the ACHR, in conjunction with Article 1(1) of the same convention and with Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture: The Court considered that the standards regarding how to investigate sexual violence previously applied in cases of sexual violence against women were applicable to this case, regardless of the applicant's gender. Taking into account those standards, the Court determined that the State did not act with due diligence in the investigation of the sexual torture given that: (i) the applicant had to declare about the facts on several occasions, which constituted an act of revictimisation; (ii) the medical examination was not performed with due diligence; (iii) the police truncheon and the applicant's clothing were not immediately seized for their examination; and (iv) during the investigation several State agents used stereotypes that prevented an objective examination of the facts. In addition, the Court noted that the criminal investigation did not examine possible discriminatory motives. Following the reasoning of the European Court of Human Rights in the cases of *Nachova et al. v. Bulgaria* ([GC], nos. 43577/98 and 43579/98, 6 July 2005) and *Identoba and Others v. Georgia* (no. 73235/12, 12 May 2015), as well as its own jurisprudence, the Court considered that, in the framework of investigations of violent acts such as torture, State authorities have a duty to take all reasonable measures to reveal whether there are possible discriminatory reasons for these acts. Said obligations imply that, when there are suspicions of discrimination-based violence, States must do what is reasonable according to the circumstances, for the sake of collecting and securing evidence, exploring all means to discover the truth, and issuing fully reasoned, impartial and objective decisions, without omitting facts that may be indicative of violence based on discrimination. Thus, the Court concluded that the lack of investigation by the authorities of possible discriminatory motives constituted itself a form of discrimination, contrary to the prohibition established in article 1(1) of the ACHR.

Conclusion: violation (unanimously).

(d) Article 5(1) (right to humane treatment) of the ACHR: The Court considered that personal integrity of the applicant's mother was significantly affected because of her daughter's torture.

Conclusion: violation (unanimously).

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) promote and continue the investigations necessary to determine, judge, and, where appropriate, punish those responsible for the acts of torture committed against the applicant; (ii) publish the judgment and its official summary; (iii) carry out an act of public acknowledgment of international responsibility; (iv) provide medical and psychological and/or psychiatric treatment to the applicant; (v) adopt a protocol for the investigation and administration of justice

in criminal proceedings of violence against LGBTI people; (vi) create and implement an awareness and training plan for violence against LGBTI people; (vii) design and implement a system to gather data regarding violence against LGBTI people; (viii) eliminate the indicator of "eradication of homosexuals and transvestites" from the Citizen Security Plans of the Regions and Districts of Peru; and (ix) pay the monetary sums established in the judgment for pecuniary and non-pecuniary damages and for the reimbursement to the Victims' Legal Assistance Fund.

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Request for an advisory opinion/Demande d'avis consultatif

The Court has received, for the first time, a request for an advisory opinion from the Council of Europe's Committee on Bioethics under Article 29 of the Oviedo Convention. The questions posed by the Bioethics Committee are intended to obtain clarity on certain aspects of the legal interpretation of Article 7 of the Oviedo Convention. The request for interpretation will be examined by the Grand Chamber.

More information on the advisory opinions of the Court

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La Cour a reçu, pour la première fois, une demande d'avis consultatif soumise par le Comité de bioéthique du Conseil de l'Europe, en vertu de l'article 29 de la Convention d'Oviedo. Les questions posées par le Comité de bioéthique visent à clarifier certains aspects de l'interprétation juridique de l'article 7 de la Convention d'Oviedo. La demande d'interprétation sera examinée par la Grande Chambre.

Plus d'informations sur les avis consultatifs de la Cour

First ECHR hearing by videoconference/ Première audience de la CEDH en visioconférence

On 10 June 2020, for the first time in its history the Court held a hearing by videolink, in line with the special measures adopted due to the global health crisis. The hearing in M.A. v. Denmark took place without an audience and the parties' oral argument was transmitted by videolink.

Le 10 juin 2020, pour la première fois depuis sa création la Cour a tenu une audience en visioconférence en application des mesures spéciales qu'elle a adoptées en raison de la crise sanitaire mondiale. L'audience M.A. c. Danemark s'est déroulée sans public, et c'est par visioconférence que les parties ont plaidé.

Human Rights Building/Palais des droits de l'homme

Twenty-five years ago, on 29 June 1995 to be precise, the new Human Rights Building was inaugurated in the presence of Václav Havel (President of the Czech Republic), Jacques Toubon (French Justice Minister) and a number of international figures.

Here is a chance to discover, or rediscover, the exhibition concerning the building which was mounted in 2015 for the visit to the Court by Ivan Harbour, one of the designers of the Human Rights Building.

Exhibition on HRB – Video

Il y a 25 ans, précisément le 29 juin 1995, le nouveau Palais des droits de l'homme était inauguré en présence notamment de Václav Havel (président de la République tchèque), Jacques Toubon (ministre de la Justice français) et de personnalités internationales.

L'occasion de découvrir, ou redécouvrir l'exposition qui avait été consacrée au bâtiment en 2015, lors de la visite à la CEDH d'Ivan Harbour, l'un des concepteurs du PDH.

Exposition PDH – Vidéo

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

New Case-Law Guides/Nouveaux Guides sur la jurisprudence

As part of its series on the case-law relating to particular Convention Articles, the Court has recently published a Guide on Article 10 (freedom of expression) and a Guide on Article 46 (binding force and execution of judgments) of the Convention. Translations respectively into English and French of these guides are pending. All Case-Law Guides can be downloaded from the Court's website.

Guide sur l'article 10 de la Convention (fre)

Guide on Article 46 of the Convention (eng)

Dans le cadre de sa série sur la jurisprudence par article de la Convention, la C our vient de publier un Guide sur l'article 10 (liberté d'expression) et un Guide sur l'article 46 (force obligatoire et exécution des arrêts) de la Convention. Des traductions de ces guides vers l'anglais et le français respectivement sont en cours. Tous les guides sur la jurisprudence peuvent être téléchargés à partir du site web de la Cour.

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

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

Article 1 – A State's "jurisdiction" for the acts of its diplomatic and consular agents (eng)

Article 1 – La « juridiction » de l'État du fait des actes de ses agents diplomatiques et consulaires (fre)

Articles 2, 3, 8 and 13 – The concept of a "safe third country" in the case-law of the Court (eng)

Article 7 – The "quality of law" requirements and the principle of (non-)retrospectiveness of the criminal law under Article 7 of the Convention (eng)

Article 9 – Application of Islamic law in the domestic legal order (eng)

Article 1 of Protocol No. 1 – Victim status of company shareholders in relation to measures affecting their companies or their shares (eng)

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

Case-Law Guides: new translations/Guides sur la jurisprudence : nouvelles traductions

The Court has recently published translations into Bulgarian, Georgian, Macedonian and Polish of some Case-Law Guides. All Case-Law Guides can be downloaded from the Court's website.

Ръководство по член 18 от Конвенцията – Обхват на допустимите ограничения на правата (bul)

კონვენციური სასამართლო პრაქტიკის გზამკვლევი - იმიგრაცია (geo)

Водич за Член 17 од Конвенцијата – Забрана на злоупотреба на правата (mac)

Przewodnik w zakresie stosowania art. 6 – Prawo do rzetelnego procesu (aspekt karny) (pol)

La Cour vient de publier des traductions en bulgare, géorgien, macédonien et polonais de certains Guides sur la jurisprudence. Tous les guides sur la jurisprudence peuvent être téléchargés à partir du site web de la Cour.

Finding and understanding the case-law of the ECHR: new translations/Rechercher et comprendre la jurisprudence de la CEDH : nouvelles traductions

The Court has recently published translations into Albanian and Serbian of this document which explains where you can find the Court's case-law on its website

Gjetja dhe të kuptuarit e praktikës gjyqësore të Gjykatës Evropiane për të Drejtat e Njeriut (alb)

Pronalaženje i razumevanje sudske prakse Evropskog suda za ljudska prava (scc)

La Cour vient de publier des traductions en albanais et en serbe de ce document, qui explique où trouver la jurisprudence de la Cour sur son site web.

OTHER INFORMATION/AUTRES INFORMATIONS

European Union Agency for Fundamental Rights (FRA)/ Agence des droits fondamentaux de l'Union européenne (FRA)

Fundamental Rights Report 2020/Rapport sur les droits fondamentaux 2020

The Fundamental Rights Report reviews major developments in the field in 2019, identifying both achievements and areas of concern. It also presents FRA's opinions on the main developments in the

thematic areas covered, and a synopsis of the evidence supporting these opinions.

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Le Rapport sur les droits fondamentaux (en anglais uniquement) examine les principales évolutions dans ce domaine en 2019, en recensant les progrès accomplis et les sujets de préoccupation persistants. Il expose aussi les avis de la FRA sur les principales évolutions dans les domaines thématiques couverts ainsi qu'un résumé des éléments factuels qui étayent ces avis.

Consolidated Annual Activity Report 2019/ Rapport d'activité annuel consolidé 2019

The Consolidated Annual Activity Report 2019 provides an overview of the activities and achievements of the FRA in that year. It follows the guidelines established by the European Commission.

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Le Rapport d'activité annuel consolidé 2019 fournit une vue d'ensemble des activités et des réalisations de la FRA au cours de cette année. Il respecte les lignes directrices établies par la Commission européenne.

Joint FRA/ECHR publications: new translations/ Publications conjointes FRA/CEDH : nouvelles traductions

New translations of the Handbook on European non-discrimination law and on the European data protection law, both updated in 2018, have just been published. All the handbooks can be downloaded from the Court's website.

Příručka evropského antidiskriminačního práva (cze)

Priručnik o europskom zakonodavstvu o zaštiti podataka (hrv)

Kézikönyv az európai megkülönböztetésmentességi jogról (hun)

Handboek over het Europese non-discriminatierecht (nld)

De nouvelles traductions du Manuel de droit européen en matière de non-discrimination et du Manuel de droit européen en matière de protection des données, tous les deux mis à jour en 2018, viennent d'être publiées. Tous les manuels peuvent être téléchargés à partir du site web de la Cour.

Unmasking bias motives in crimes: selected cases of the ECHR/Démasquer les motifs de partialité dans les crimes : sélection d'affaires de la CEDH

This FRA paper discusses the evolution of European Court of Human Rights case-law relating to hate crime, providing an update on the most recent rulings. A translation into Ukrainian has recently been published on the Court's website.

Unmasking bias motives in crimes: selected cases of the European Court of Human Rights (eng)

Викриття мотивів упередженості в злочинах: підбірка справ Європейського суду з прав людини (ukr)

Cette publication de la FRA (non traduite vers le français) examine l'évolution de la jurisprudence de la Cour européenne des droits de l'homme relative aux crimes de haine, en fournissant une mise à jour sur les décisions les plus récentes. Une traduction en ukrainien a récemment été publiée sur le site web de la Cour.