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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

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

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

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

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

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Duarte Agostinho and Others/et autres – Portugal and 32 others/et 32 autres, 39371/20 [Section IV]

English translation – Version imprimable

L'affaire porte sur les émissions de gaz à effet de serre émanant de 33 États contractants qui participeraient au réchauffement climatique et se manifestant, entre autres, par des pics de chaleurs qui impacteraient les conditions de vie et la santé des requérants.

Les requérants se plaignent entre autres du non-respect par ces 33 États de leurs engagements pris dans le cadre de l'Accord de Paris sur le climat de 2015 (COP21) de contenir l'élévation de la température moyenne de la planète nettement en dessous de 2°C par rapport aux niveaux préindustriels et de poursuivre l'action menée pour limiter l'élévation de la température à 1,5°C par rapport aux niveaux préindustriels, étant entendu que cela réduirait sensiblement les risques et les effets du changement climatique. Les requérants mettent à la charge des États signataires l'obligation d'adopter des mesures pour réglementer d'une manière adéquate leurs contributions au changement climatique.

Les requérants estiment que les États membres se partagent la responsabilité présumée en matière de changement climatique et que l'incertitude quant au « partage équitable » de cette contribution entre les États membres ne peut jouer qu'en faveur des requérants.

Ils soulignent l'urgence absolue pour agir en faveur du climat et estiment qu'il est urgent dans ce contexte que la Cour reconnaisse la responsabilité partagée des États et absolve les requérants de l'obligation d'épuiser les voies de recours internes dans chaque État membre.

En novembre 2021, la requête a été communiquée aux gouvernements défendeurs sous l'angle des articles 1, 34, 2, 3, 8 et 14 de la Convention et de l'article 1 du Protocole n° 1.

Le 29 juin 2022, la chambre à laquelle la requête avait été attribuée a décidé de se dessaisir au profit de la Grande Chambre.

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Carême – France, 7189/21 [Section V]

English translation – Version imprimable

Le 19 novembre 2018, agissant en son nom propre, d'une part, et, en sa qualité de maire d'une commune, située sur le littoral de la Manche, au nom et pour le compte de celle-ci, d'autre part, le requérant a demandé au Président de la République, au Premier ministre et au ministre de la transition écologique et solidaire de : prendre toutes mesures utile permettant d'infléchir la courbe des émissions de gaz à effet de serre produites sur le territoire national de manière à respecter les engagements consentis par la France ; prendre toutes dispositions d'initiatives législative ou règlementaire utiles visant à rendre obligatoire la priorité climatique et interdisant toutes mesures susceptibles d'augmenter les émissions de gaz à effet de serre ; prendre des mesures immédiates d'adaptation au changement climatique de la France.

Le 23 janvier 2019, le requérant et la commune ont saisi le Conseil d'État d'une requête en d'annulation pour excès de pouvoir des décisions implicites de rejet résultant de l'absence de réponse aux demandes de novembre 2018.

Le 19 novembre 2020, le Conseil d'État a jugé que le requérant ne justifiait pas d'un intérêt lui donnant qualité pour demander l'annulation de ces décisions implicites mais que la commune avait un tel intérêt, « eu égard à son niveau d'exposition aux risques découlant du phénomène de changement climatique et à une incidence directe et certaine sur sa situation et les intérêts propres dont elle a la charge ». Il a rejeté les conclusions de la requête, sauf en ce qu'elles visaient le refus implicite de prendre toute mesure utile permettant d'infléchir la courbe des émissions de gaz à effet de serre pro-

duites sur le territoire national, ordonnant à cet égard un supplément d'instruction.

Le 11 juillet 2021, le Conseil d'État a annulé ce refus implicite du gouvernement, observant, d'une part, que la baisse des émissions en 2019 était faible et que celle de 2020 n'était pas significative car l'activité économique avait été réduite par la crise sanitaire et, d'autre part, que le respect de la trajectoire fixée afin d'atteindre les objectifs de réduction des émissions, qui prévoit notamment une baisse de 12 % pour la période 2024-2028, n'apparaissait pas atteignable si de nouvelles mesures n'étaient pas adoptées rapidement. Il a enjoint au gouvernement de prendre des mesures supplémentaires d'ici le 31 mars 2022 pour atteindre l'objectif, issu de l'Accord de Paris, de réduction des émissions de gaz à effet de serre de 40 % d'ici 2030.

Invoquant les articles 2 et 8 de la Convention, le requérant dénonce l'insuffisance de l'action de la France face au réchauffement climatique dont la carence des autorités à prendre toutes mesures utiles permettant à l'État de respecter les niveaux maximums d'émissions de gaz à effet de serre qu'il s'est lui-même fixée.

Le 31 mai 2022, une chambre de la Cour s'est dessaisie en faveur de la Grande Chambre.

(Voir aussi les affaires pendantes devant la Grande Chambre *Verein KlimaSeniorinnen Schweiz et autres c. Suisse*, 53600/20, et *Duarte Agostinho et autres c. Portugal et 32 autres*, 39371/20)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention / Arrestation ou détention régulières

Lawful pre-trial detention of high-ranking official relating to parallel pending criminal cases, no evidence of procedural manipulation: *inadmissible*

Détention provisoire régulière d'un haut fonctionnaire dans le contexte de poursuites pénales parallèles, absence d'indice de manœuvre procédurale : *irrecevable*

Akhalaia – Georgia/Géorgie, 30464/13 and/et 19068/14, Decision/Décision 7.6.2022 [Section V]

Traduction française – Printable version

Facts – The applicant held various high-ranking posts in the government of Georgia under former President Mikheil Saakashvili. He was arrested in November 2012 and placed under pre-trial detention for the duration of the relevant statutory time-limit of 9 months, in relation to charges of false arrest and misuse of official authority (criminal case no. 1). The applicant appealed unsuccessfully against his pre-trial detention. In August 2013, he was acquitted of all charges made in that case.

In the meantime, however, two further criminal cases (criminal cases nos. 2 and 3) had been instituted against the applicant in March 2013, on charges of inhuman treatment and misuse of power, and abuse of official authority, respectively. In both cases the domestic courts authorised, and upheld on appeal, the applicant's pre-trial detention by issuing a new detention order under the relevant provision of the Code of Criminal Procedure, for the duration of the statutory period. The applicant was respectively convicted (criminal case no. 2) and acquitted (criminal case no. 3) of the charges in October 2013.

Finally, new charges of abuse of official authority were brought against the applicant in October 2013 (criminal case no. 4). The applicant's pre-trial detention was authorised for the duration of the statutory time-limit and upheld on appeal. In October 2014 he was convicted of all the charges against him in that case. The conviction became final as it was not appealed against and the applicant effectively started serving his prison sentence.

Law

Article 5 § 1 (c): The applicant argued that it had been contrary to domestic law and practice to impose the measure of pre-trial detention upon him in relation to parallel pending criminal cases nos. 2 and 4 because that measure had already been used against him once, in criminal case no. 1.

However, nothing in the parties' submissions and the information available to the Court regarding the relevant domestic law and practice appeared to support that claim. Indeed, whenever an accused had been detained under the relevant provision of the Code of Criminal Procedure, it appeared that the measure had always been considered to have been imposed in connection with the particular charges brought against him or her in the given criminal case and the period of detention had been set by default at the statutory time-limit of nine months. The judicial practice under the relevant domestic law provision at the time of the applicant's pre-trial detention had made it clear that when a person had been subject to criminal prosecution in several distinct parallel pending criminal cases, and irrespective of whether those separate sets of criminal proceedings had been initiated concurrently or consequently to each other, it had been possible to impose pre-trial detention for the statutory duration

of nine months separately for each of the parallel pending sets of proceedings.

The applicant had relied on the Constitutional Court's decision in September 2015 which had revised certain aspects of the above-mentioned judicial practice. However, leaving aside the fact that the decision in question had been adopted well after the applicant's pre-trial detention had come to an end, and thus could not retroactively taint the legitimacy of the already terminated pre-trial detention measure, there was no incompatibility of the applicant's individual situation with the Constitutional Court's decision. Indeed, the Constitutional Court had stated that there could be nothing inappropriate or arbitrary in repeatedly employing the measure of pre-trial detention against the same person when parallel pending criminal cases had been opened consecutively, and that was exactly what had happened in criminal cases nos. 2 to 4.

While the applicant had referred to the judgment in *Šebalj v Croatia*, the facts of that case differed in many important respects from those in the present case. The issue in the former case had been that the legal effect of one of the two detention orders had been suspended pending the duration of the parallel detention order and had come into force only after the latter had expired. More importantly, unlike in the present case, the belated entry into force of the parallel detention order had occurred in the absence of any statutory regulation or judicial practice at least arguably supporting such a course of action.

There was also nothing to support the applicant's allegation that the criminal cases against him had been separated on purpose in order to keep him in pre-trial detention artificially for a long period of time. All four sets of criminal proceedings had concerned different factual circumstances and it had not been shown that the authorities' decision to investigate distinct criminal offences in separate proceedings had disclosed an element of arbitrariness. The Court saw no reason to doubt either the authorities' good faith or the fact that the applicant's arrest and detention, which had been fully consistent with domestic law, had not involved the alleged procedural manipulation.

In view of the above considerations, the applicant's pre-trial detention imposed in criminal cases nos. 2 to 4 and extending beyond August 2013, that is when the measure imposed in criminal case no. 1 had expired, could not be viewed as "unlawful". The applicant had not substantiated his allegation about arbitrariness or the circumvention of the principle of legal certainty in the way the pre-trial detention proceedings had been conducted by the competent domestic authorities, and the Court was unable to discern any indication of such arbitrariness on its own.

Conclusion: inadmissible (manifestly ill-founded).

Article 5 § 3: The applicant further complained that his pre-trial detention had been unreasonably long. For the purposes of Article 5 § 3, it had lasted for just over twenty-three months.

The reasons given by the domestic court in its detention orders to place the applicant in pre-trial detention – the risks that he would flee and would try to influence witnesses – had been relevant. The Court had to determine whether they had also been sufficient.

The domestic court had not set out all the arguments cited by the prosecution in relation to those matters, especially to the risk of flight. It had, however, expressly referred to the prosecution's pleadings in its decisions. By doing so, it had made clear that it had taken into account the specific points put forward by the prosecution and had found them sufficient to justify placing the applicant in pre-trial detention. While more detailed reasoning would have been desirable, it had been enough in the circumstances, and the Court could have regard to those specific points.

The domestic court's findings regarding the risk of the applicant influencing witnesses had been sufficiently substantiated. In particular, it had been significant that many witnesses in the case against him had been former subordinates of his, and that he had wielded considerable influence in some sectors of Georgian society. The domestic court had further referred to two specific incidents when the applicant had tried, after the initiation of the relevant investigations, to influence the witnesses in the relevant proceedings.

The risk of flight had also been established in concrete terms. In particular, the domestic authorities had referred to the applicant's wide network of domestic and international contacts and the fact that he had already managed, apparently owing to is connections in law-enforcement circles, to cross the State border without his international passport being recorded. Those facts, not challenged by the applicant at domestic level, as well as the seriousness of the punishment which had awaited him if convicted, suggested that the domestic court had established convincingly that at the time, the risk of the applicant's fleeing abroad could be seen as sufficiently real and incapable of being averted by a less restrictive measure.

The domestic authorities had also acted with special diligence. While the overall period of pre-trial detention had been lengthy, the fact that its length had been the aggregate effect of the applicant being the subject of four distinct sets of criminal proceedings could not be underestimated. Furthermore, the investigations in all four criminal cases had been complex tasks for the domestic authorities, owing,

inter alia, to the passage of time between the occurrence of the acts in issue and the start of the investigation, the large number of witnesses and co-accused to be examined in each case and the difficulties inherent in the prosecution of criminal offences allegedly committed by high-ranking officials, which the applicant had been at the time. The applicant had not claimed that there had been significant periods of inactivity on the part of the domestic authorities and had not brought up relevant arguments pointing to such delays.

In those circumstances, the applicant's right to have his cases examined with particular expedition could not unduly hinder the domestic authorities' conscientious efforts to carry out their investigative tasks with proper care.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared the complaint under Article 18 taken in conjunction with Article 5 § 1 (c) inadmissible (manifestly ill-founded): since no arguable issue under the latter substantive provision could be said to exist, Article 18 could not be relied upon.

(See also *Šebalj v. Croatia*, 4429/09, 28 June 2011; *Merabishvili v. Georgia* [GC], 72508/13, 28 November 2017, Legal Summary)

Article 5 § 1 (e)

Persons of unsound mind / Aliéné

Compulsory confinement for about 3 years warranted by applicant's persisting mental disorder verified on the basis of objective medical expertise: *no violation*

Internement d'une requérante pendant près de trois ans justifié par la persistance de ses troubles mentaux démontrée au moyen d'une expertise médicale objective : *non-violation*

P.W. – Austria/Autriche, 10425/19,
Judgment/Arrêt 21.6.2022 [Section IV]

Traduction française – Printable version

Facts – In August 2017 the Linz Regional Court ordered the confinement of the applicant, who suffers from a schizophrenic disorder, in an institution for mentally ill offenders as a preventive measure following criminal proceedings relating to charges of having attempted to resist arrest by the police in May 2016. The applicant had also been the subject of two earlier civil placement proceedings held in 2016-2017. Both her nullity plea and her challenge against the constitutionality of the relevant domestic law were unsuccessful. Her case was referred for a decision on appeal and in August 2018 the Court of Appeal confirmed her continued confinement. In October 2020 the Linz Regional Court ordered her conditional release.

Law

Article 5 § 1 (e): The applicant had mainly contended that her confinement had been disproportionate to the underlying minor offence, and that there had been differing conclusions by the experts and therefore another, decisive, expert opinion had been called for. Three psychiatric experts, who were all medical specialists in psychiatry and neurology, had given their opinion concerning the applicant: two during the criminal proceedings and one in both the civil placement proceedings. Their opinions had thus been sufficiently recent in the circumstances of this case. The applicant had been diagnosed by all three experts, two of whom had been able to conduct face-to-face examinations of her, with a type of schizophrenic disorder. This was undoubtedly serious enough to be considered as a "true" mental disorder which might render treatment in an institution necessary. She had thus been reliably shown to be of unsound mind. Further, the applicant's mental disorder had been established before a competent authority on the basis of objective medical expertise and had been of a kind or degree warranting compulsory confinement. The applicant's deprivation of liberty had therefore been shown to have been necessary in the circumstances of her case. In this connection, the Court highlighted the Regional Court's reliance above all on the detailed and lengthy opinion of one of the experts, who had conducted a face-to-face examination of the applicant, and his assessment of the danger she represented to others. During the trial that expert had discussed the other expert opinions and had explained the differences between them. Moreover, when deciding on the applicant's confinement as opposed to outpatient treatment, the domestic courts had taken into account that the applicant had been described as lacking awareness of the fact that she suffered from a disorder, as displaying a negative attitude towards treatment, and as sometimes having refused to take medication in the past.

Furthermore, the Court of Appeal before confirming her continued confinement one year later, had reliably verified the persistence of her mental disorder on the basis of objective medical evidence. In particular, because of the lapse of time, it had sought a supplementary opinion from the expert whose report the Regional Court had relied on and who then held another face-to-face examination of the applicant. About two years later, the same regional court had ordered her conditional release from confinement.

While the Court was mindful of the fact that the applicant had been accused of attempted resistance to State authority, which the applicant considered an offence of a minor character and therefore not

proportionate to the sanction of confinement as preventive measure imposed on her, it had already held that whether or not an offence was minor was not decisive when examining the compliance of a person's deprivation of liberty with Article 5 § 1 (e). Indeed, the authorities were not required to take into account the nature of the acts committed by the individual concerned which gave rise to his or her compulsory confinement. Nonetheless, the Court took note of the currently ongoing discussion on a comprehensive reform of the system of preventive measures in Austria, in particular its aim to achieve compliance with the Court´s case-law, to strengthen the principle of proportionality in the system of preventive detention and to improve considerably the quality of the risk prognoses. This encompassed the aim of improving the quality of expert opinions produced in this context by, for example, establishing (minimum) quality standards for such expert opinions.

Conclusion: no violation (unanimously).

Article 14: It was evident from the definition in the Criminal Code of the offence of resistance to State authority that, while the use of "force" was a necessary requirement to establish that offence, its purpose was not to punish the fact that the applicant had hit a police officer but rather to punish (in this case) the attempt to prevent the police officer from performing an official act when the latter had been arresting her, contrary to the special protection the Austrian legislator had intended to confer on the enforcement and the exercise of State authority. The same provision could not come into play when the same action was done *vis-à-vis* a private citizen, so far as the latter were not entitled to perform an official act in the exercise of State authority. The applicant was therefore not in a relevantly similar situation with someone who had hit a private person.

Conclusion: manifestly ill-founded.

(See *Denis and Irvine v. Belgium* [GC], 62819/17 and 63921/17, 1 June 2021, Legal Summary)

Article 5 § 3

Reasonableness of pre-trial detention / Caractère raisonnable de la détention provisoire

Relevant and sufficient reasons for lengthy pre-trial detention (nearly two years) of high-ranking official relating to four criminal cases, with authorities exercising special diligence: *inadmissible*

Motifs pertinents et suffisants justifiant la longue détention provisoire (près de deux ans) d'un haut fonctionnaire dans le contexte de quatre procédures pénales, les autorités ayant agi avec une diligence particulière : *irrecevable*

Akhalaia – Georgia/Géorgie, 30464/13 and/et 19068/14, Decision/Décision 7.6.2022 [Section V]

See under Article 5 § 1 – Voir sous l'article 5 § 1

ARTICLE 6

Article 6 § 1 (civil)

Access to court / Accès à un tribunal

Overly formalistic decision finding a legal challenge barred for failure to e-file, practical hurdles notwithstanding: *violation*

Formalisme excessif entachant la décision d'irrecevabilité d'un recours, faute d'avoir été remis par voie électronique, et ce en dépit d'obstacles pratiques : *violation*

Xavier Lucas – France, 15567/20, Judgment/Arrêt 9.6.2022 [Section V]

English translation – Version imprimable

En fait – La Cour de cassation a jugé que le recours en annulation à l'encontre d'une sentence arbitrale formé par le requérant aurait dû être remis par voie électronique en application des articles 1495 et 930-1 du code de procédure civile (CPC). En conséquence, elle a prononcé une cassation sans renvoi de l'arrêt par lequel la cour d'appel avait admis la recevabilité du recours en annulation et annulé, par voie de conséquence, l'arrêt de cette même juridiction ayant statué sur le bien-fondé de ce recours. Ce faisant, le requérant a été privé de la possibilité d'obtenir que soit exercé par le juge en charge du recours en annulation un contrôle de la légalité de la sentence arbitrale litigieuse.

En droit – Article 6 § 1

1. *Applicabilité* – Les contestations soumises à l'arbitrage litigieux portent indiscutablement sur des droits et obligations de caractère civil. Le requérant a librement consenti à leur règlement par la voie de l'arbitrage : il se plaint uniquement d'avoir été privé d'accès au juge en charge du recours en annulation de la sentence arbitrale.

En droit interne, la sentence arbitrale acquiert l'autorité de chose jugée et dessaisit le tribunal arbitral dès qu'elle est rendue. Par ailleurs, le recours en annulation peut conduire la cour d'appel à statuer à nouveau sur le fond. Or, selon une juris-

prudence ancienne et constante, la Convention ne garantit pas un droit à la réouverture d'une procédure terminée. Quant aux procédures extraordinaires permettant de solliciter pareille réouverture en matière civile, elles ne statuent en principe pas sur des « contestations » relatives à des « droits ou obligations de caractère civil », de sorte que l'article 6 § 1 leur est inapplicable. Il appartient donc à la Cour de déterminer si le recours en annulation d'une sentence arbitrale prévu par le droit français tend à la réouverture d'une affaire définitivement tranchée.

À cet égard, la sentence arbitrale est en principe insusceptible d'appel et elle peut, dans ce cas, faire l'objet d'un recours en annulation. Celui-ci permet que soit exercé un contrôle juridictionnel de la légalité de la sentence arbitrale limité, en première intention, au respect de certaines règles de droit essentielles. Ce recours est ouvert de plein droit, il doit être exercé dans un délai qui suit la notification de la sentence arbitrale et il a un effet suspensif à moins que l'exécution provisoire ait été ordonnée.

Conclusion : article 6 § 1 applicable *ratione materiae*.

2. *Fond* – Consciente de l'essor de la dématérialisation de la justice au sein des États membres et de ses enjeux, la Cour est convaincue que les technologies numériques peuvent contribuer à une meilleure administration de la justice et être mises au service des droits garantis par l'article 6 § 1. Elle convient donc de la légitimité d'un tel but.

a) *Sur la prévisibilité de la restriction* – L'article 1495 du CPC prévoit que les recours contre une sentence arbitrale doivent être formés conformément aux exigences de l'article 930-1 du même code, qui est une disposition commune à l'ensemble des procédures avec représentation obligatoire devant la cour d'appel. Or celle-ci impose explicitement une transmission des actes de procédure par voie électronique.

Il est vrai que ni l'arrêté de mars 2011, ayant défini les modalités techniques applicables à la communication électronique devant la cour d'appel, ni la convention locale de procédure de janvier 2013 entre la cour d'appel et les barreaux de son ressort n'ont expressément prévu l'application de la communication électronique au recours en annulation contre une sentence arbitrale. L'article 930-1 alinéa 5 ne renvoie à un arrêté d'application que pour la définition des modalités techniques des échanges électroniques. Et en tout état de cause, ni cet arrêté d'application ni la convention locale de procédure ne pouvaient modifier ou restreindre le champ d'application de la communication électronique devant les cours d'appel tel qu'il est défini par les dispositions du CPC.

La Cour de cassation a motivé son raisonnement avec clarté. La circonstance qu'il s'agisse de la première application, par cette juridiction, de cette combinaison de textes n'entache la restriction litigieuse d'aucune imprévisibilité ni d'aucun arbitraire à l'égard du requérant, dont la Cour rappelle qu'il était représenté par un avocat.

b) *Sur la détermination de la personne à la charge de laquelle doivent être mises les erreurs commises en cours de procédure* – L'obligation de recourir à la communication électronique en cause concerne des procédures avec représentation obligatoire. En pratique, elle s'exerce au moyen d'un service numérique commun aux juridictions judiciaires et commerciales du premier et du second degré, accessible aux seuls avocats. Il n'est ni irréaliste ni déraisonnable d'exiger l'utilisation d'un tel service par les professionnels du droit, qui utilisent largement et de longue date l'outil informatique.

Le requérant n'a pas présenté son recours en annulation contre la sentence arbitrale par voie électronique en le saisissant sur la plateforme e-barreau alors qu'il a admis son fonctionnement.

Pour autant, ce mode opératoire supposait que son avocat complète un formulaire en utilisant des notions juridiques impropres. En effet, il n'existe d'« appelant » et d'« intimé » qu'en matière d'appel. Si le Gouvernement soutient qu'un message d'avertissement invitait les utilisateurs d'e-barreau à procéder ainsi, il ne l'établit pas, alors même que le constat d'huissier fourni par le requérant tend à démontrer le contraire. Plus largement, le Gouvernement ne démontre pas que des informations précises relatives aux modalités d'introduction du recours litigieux se trouvaient à la disposition des utilisateurs. De plus, la jurisprudence était alors inexistante, y compris devant les cours d'appel.

Au vu de ces éléments, l'avocat du requérant n'a pas agi avec une particulière imprudence en présentant son recours sur papier alors même que l'article 930-1 alinéa 2 du CPC pouvait sembler l'autoriser à titre exceptionnel. En conséquence, le requérant ne peut pas être tenu pour responsable de l'erreur procédurale en cause. Il serait donc excessif de la mettre à sa charge.

c) *Sur l'excès de formalisme* – Les conséquences concrètes qui s'attachent au raisonnement tenu par la Cour de cassation apparaissent particulièrement rigoureuses. En faisant prévaloir le principe de l'obligation de communiquer par voie électronique pour saisir la cour d'appel sans prendre en compte les obstacles pratiques auxquels s'était heurté le requérant pour la respecter, la Cour de cassation a fait preuve d'un formalisme que la garantie de la sécurité juridique et de la bonne administration de la justice n'imposait pas et qui doit, dès lors, être regardé comme excessif.

d) *Sur la proportionnalité* – Le requérant s'est ainsi vu imposer une charge disproportionnée qui rompt

le juste équilibre entre, d'une part, le souci légitime d'assurer le respect des conditions formelles pour saisir les juridictions et d'autre part le droit d'accès au juge.

Conclusion : violation (unanimité).

Article 41 : 3 000 EUR pour préjudice moral ; demande rejetée pour le dommage matériel.

(Voir aussi *Stichting Landgoed Steenbergen et autres c. Pays-Bas*, 19732/17, 16 février 2021, Résumé juridique)

Access to court / Accès à un tribunal

Foreign State's jurisdictional immunity recognised in allegedly "commercial" dispute concerning public education: *communicated*

Immunité de juridiction reconnue à un État étranger dans un litige prétendument « commercial », touchant à l'enseignement public : *affaire communiquée*

Renouard – France, 46911/21, Communication [Section V]

English translation – Version imprimable

Le requérant entra en litige avec les Émirats arabes unis (EAU) concernant le paiement d'honoraires au titre de son rôle d'intermédiation dans le projet de création d'une université française.

La cour d'appel admit l'immunité de juridiction des EAU aux motifs : qu'il s'agissait de la création d'un établissement participant au service public de l'éducation ; et que le risque allégué de déni de justice devant les tribunaux émiriens ne pouvait pas être présumé. En 2021, la Cour de cassation rejeta son pourvoi.

La Convention des Nations unies sur l'immunité juridictionnelle des États et de leurs biens (adoptée en 2004) consacre le principe d'une immunité atténuée dans le cas où le litige porte sur une « transaction commerciale », notion dont elle fournit divers critères.

Le requérant fait valoir que sa mission ne comportait pas d'éléments exorbitants du droit commun. Devoir saisir les tribunaux émiriens pour prouver leur manque d'impartialité lui paraît également excessif.

Affaire communiquée sous l'angle de l'article 6 § 1 de la Convention.

Fair hearing / Procès équitable

Authorities' refusal to reimburse costs of approved medical treatment in USA as required advance payment was made by a charitable organisation and not the applicant: *communicated*

Refus des autorités de rembourser les frais afférents à un traitement médical pris en charge administré aux États-Unis au motif que l'avance de frais exigée avait été payée non par le requérant mais par une organisation caritative : *affaire communiquée*

Kotar – Slovenia/Slovénie, 18047/22 and/et 18056/22, Communication [Section I]

See under Article 14 – Voir sous l'article 14

Independent and impartial tribunal / Tribunal indépendant et impartial

Insufficient procedural guarantees in appointment of lay members of disciplinary court and in their protection from outside pressure: *violation*

Garanties procédurales insuffisantes concernant la désignation de juges non professionnels d'une juridiction disciplinaire et leur protection contre les pressions extérieures : *violation*

Grosam – Czech Republic/République tchèque, 19750/13, Judgment/Arrêt 23.6.2022 [Section I]

Traduction française – Printable version

Facts – The applicant was an enforcement officer who, as a member of a liberal profession, was, on the State's behalf, in charge of performing enforced execution of enforceable titles, such as final civil court decisions, arbitration awards, or an enforceable notarial or enforcement officer's record.

The Minister of Justice, in the capacity of a disciplinary petitioner, lodged a disciplinary action against the applicant with the disciplinary chamber of the Supreme Administrative Court, acting as the disciplinary court, for two alleged acts of misconduct. The disciplinary court found the applicant guilty and fined him. The applicant lodged an unsuccessful constitutional appeal, alleging violations of several principles of criminal procedural law.

Law – Article 6 § 1: The applicant had objected to the composition of the disciplinary chamber of the Supreme Administrative Court, namely how it had been designated by law and the consequences for the case at hand. In particular, he had complained that the professional judges had been in a minority (comprising two out of six members) and that the procedure for selecting the other four members (lay assessors) had lacked adequate safeguards to guarantee their independence and professional expertise, which in turn had cast doubt on the independence and impartiality of the disciplinary chamber as

a whole. Accordingly, there was no issue concerning the judges of the disciplinary chamber or their appointment process. Moreover, the Court was only concerned with objective impartiality.

(a) *The requirement of an "independent tribunal"* – Firstly, the Court had to assess whether the manner in which the disciplinary chamber had been set up as to its membership (and most notably as to its members' independence) might have produced results that had been incompatible with the object and purpose of the right to an "independent tribunal". As noted, two-thirds of the chamber's members had been "lay assessors", members of specifically chosen legal professions.

The procedure seemed reasonable insofar as the members had been appointed by the chair of the disciplinary court by drawing lots from the lists of lay assessors. However, the key issue in the present case had been the transparency of the procedure by which the lay assessors of the disciplinary court had been appointed, in particular the system of nomination of the persons to the lists from which lay assessors had been drawn. The chair of the disciplinary court had kept several lists of lay assessors. The list of lay assessors who had been enforcement officers had included ten enforcement officers nominated by the President of the Chamber of Enforcement Officers, without any predetermined selection criteria or otherwise transparent process. The only objective condition had been that the candidates had to have held office for three years and satisfied the subjective condition of good moral character. Otherwise, the President had been allowed full discretion in his selection.

The Court also observed that until the end of 2012, at the time when the applicant's case had been examined by the disciplinary court, the list of lay assessors had comprised candidates nominated by the same persons as for proceedings in matters concerning judges, namely the President of the Czech Bar Association and deans of faculties of law of the public universities. Like the President of the Chamber of Enforcement Officers, none of them had had to apply any specific criteria or pre-established legitimate selection process, having full discretion in their choice of candidates. Although the rules of nomination had since changed, involving the President of the Czech Bar Association and the Ombudsperson, the selection practice had remained the same.

Next, the Court considered the existence of guarantees against outside pressure. Two-thirds of the chamber's members, the lay assessors, had worked and received their salaries externally, which had inevitably involved their material, hierarchical and administrative dependence on their primary employers and thereby could have endangered both their independence and impartiality. The Minister of Justice had broad powers over enforcement officers, and had been entitled to bring disciplinary action against any enforcement officer and become a party to the disciplinary proceedings. The Minister of Justice was placed at the top of the hierarchy and supervised all enforcement officers, including two lay members of the disciplinary court. In that connection, the enforcement officers' remuneration (including that of those sitting in the disciplinary chamber in the case at hand) had been based on the Ministry of Justice's regulation. Accordingly, the renumeration of two members of the disciplinary chamber had depended directly on the Ministry of Justice, whose head had also been the disciplinary petitioner in the present case.

Moreover, the General Prosecutor might have nominated ten candidates from among public prosecutors to the list from which the other two lay assessors were to be dawn. Public prosecutors had been systematically considered under Czech law as a part of the executive and received their salary from the Ministry of Justice. Its head, the Minister of Justice, however, might act as the disciplinary petitioner in proceedings against public prosecutors, that is against members of the disciplinary chamber. At the same time, the Minister of Justice had also been the disciplinary petitioner in the case at hand. Thus, in a situation when the Minister of Justice brought a disciplinary action against an enforcement officer, as in the instant case, it created a risk that at least two (the enforcement officer lay assessors only) or even three members of the disciplinary chamber (when a public prosecutor had been drawn by lots to sit in the chamber as a lay assessor) might not be wholly impartial towards the enforcement officer the Minister of Justice wished to discipline.

The foregoing might of itself be seen to raise doubt as to the necessary personal and institutional independence required for impartial decision-making, which was also a prerequisite for impartiality. That was increased by the lack of procedural guarantees concerning how the lists of the lay assessors had been put together and, seemingly also, a lack of guarantees against outside pressure once appointed to sit on a concrete case.

Finally, concerning the appearance of independence, for the reasons set out above, the Court could not regard the pre-selection process as transparent and clear, giving sufficient procedural guarantees of independence. In addition, it was concerning that the manner of the appointment of lay assessors in the present case had completely differed from the general arrangements for the appointment of lay assessors in the Czech legal system, as they had not been elected or selected following an established procedure, and the selection process had been entirely in the hands of the nominating persons. Moreover, the appearance of independence had also been

affected by the lack of guarantees against outside pressure and the close proximity to the Minister of Justice of at least some of the lay assessors.

(b) *The requirement of an "impartial tribunal"* – The issues of independence and impartiality were closely linked and the concerns regarding both of them had already been jointly examined above.

The Court further observed that there had been no territorial jurisdiction to perform the enforcement officer's activities under domestic law, that is to say, whoever had wanted to make use of an enforcement officer's services could approach any enforcement officer of his or her choosing. Accordingly, the two enforcement officers who had been sitting as lay assessors in the disciplinary chamber and hearing the applicant's case, namely one-third of the chamber's members, had been his direct competitors.

Overall, in the light of the foregoing, the legal regulation concerning the establishment of the disciplinary chamber for enforcement officers which had heard and decided the applicant's case had not offered sufficient safeguards guaranteeing the independence and impartiality of lay assessors, and, thus, of the disciplinary chamber as a whole.

(c) *Whether the allegations regarding the right to an "independent and impartial tribunal" had been effectively reviewed and remedied by the domestic courts* – No appeal had lain against the disciplinary court's decision. The applicant had thus only had a constitutional appeal at his disposal. The subsequent control by the Constitutional Court had not provided full jurisdiction since it had reviewed the applicant's case only in terms of compliance of the impugned decision with the constitutional law, which had made it impossible for it to examine the relevant facts in full. Such limited judicial power did not allow the Constitutional Court to examine the case and to provide reasons for its decision to the same extent as a court with full jurisdiction.

Thus, the Constitutional Court could not have conducted a full rehearing, and therefore, in the case of enforcement officers, it could not have remedied the shortcomings of the disciplinary chamber.

Conclusion: violation (four votes to three).

Article 41: EUR 4,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Article 46: It fell upon the respondent State to take any general measures as appropriate in order to solve the problems that had led to the Court's findings and to prevent similar violations from taking place in the future. That being said, the finding of a violation in the present case could not as such be taken to impose on the respondent State an obligation under the Convention to reopen all similar cases that had since become *res judicata* in accordance with Czech law.

(See also *H. v. Belgium*, 8950/80, 30 November 1987; *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], 2312/08 and 34179/08, 18 July 2013, Legal Summary; and *Guðmundur Andri Ástráðsson v. Iceland* [GC], 26374/18, 1 December 2020, Legal Summary)

Article 6 § 1 (criminal / pénal)

Fair hearing / Procès équitable

Pre-trial judge proceedings confirming indictment decision not weakening applicant's position so as to render subsequent criminal trial against him unfair *ab initio*: *no violation*

La confirmation par le juge de la mise en état d'une décision de mise en accusation n'a pas affaibli la position du requérant de manière à rendre le procès pénal dirigé contre lui inéquitable *ab initio* : *non-violation*

Alexandru-Radu Luca – Romania/Roumanie, 20837/18, Judgment/Arrêt 14.6.2022 [Section IV]

See under Article 6 § 3 – Voir sous l'article 6 § 3

Fair hearing / Procès équitable

Applicant convicted for acts of resistance to police based only on statements of officers including those who inflicted degrading treatment on him, as acknowledged by Government: *violation*

Condamnation du requérant pour rébellion fondée seulement sur les déclarations des policiers, y compris ceux lui ayant infligé un traitement dégradant reconnu par le Gouvernement : *violation*

Boutaffala – Belgium/Belgique, 20762/19, Judgment/Arrêt 28.6.2022 [Section III]

English translation – Version imprimable

En fait – Le requérant a été arrêté par la police à la suite d'incidents sur la voie publique. Il a toujours soutenu que lors de son interpellation il avait fait l'objet de violences injustifiées par les policiers et que durant le trajet vers le commissariat, il a été injurié et frappé par eux. Le requérant a intenté une action contre la police sans succès et a porté plainte devant la Cour en vertu de l'article 3 de la Convention. Le Gouvernement a soumis une déclaration unilatérale reconnaissant des traitements dégradants lors de l'interpellation du requérant et octroyant

une somme au titre du dommage moral subi de ce chef. Le requérant ayant marqué son accord, la Cour a pris acte du règlement amiable implicite entre les parties et a rayé la requête du rôle (*Boutaffala c. Belgique* (déc.), 48302/15, 27 juin 2017).

Des poursuites ont été engagées contre le requérant pour avoir agressé la police au cours de son arrestation. Il fût condamné du chef de rébellion. Les tribunaux nationaux se sont fortement appuyés sur les déclarations des policiers ayant procédé à son interpellation reconnue par le Gouvernement comme ayant été contraire à l'article 3.

Invoquant l'article 6 de la Convention, le requérant se plaint qu'il n'a pas bénéficié d'une procédure équitable. Invoquant l'article 46 de la Convention combiné au volet procédural de l'article 3, il se plaint que les autorités ont dénaturé la portée de la décision de radiation de juin 2017 par laquelle la Cour a constaté la reconnaissance par le Gouvernement d'une violation de l'article 3 non seulement en raison des injures mais également de l'usage illégitime de la force par les policiers. Il en résulte, selon lui, une violation de l'obligation d'exécution de bonne foi de cette décision de la Cour.

En droit

Article 46 combiné avec l'article 3 : Il est très douteux que l'article 46 puisse être considéré comme conférant à un requérant un droit pouvant être revendiqué devant la Cour dans le cadre d'une requête individuelle. Certes, la Cour a déjà pu examiner, à plusieurs reprises, des requêtes portant sur des mesures prises par un État défendeur en exécution de l'un de ses arrêts lorsque ces requêtes soulevaient un problème nouveau non tranché par l'arrêt initial. Il reste qu'en dehors du cadre de la « procédure en manquement » prévue à l'article 46 §§ 4 et 5 de la Convention, la Cour n'est pas compétente pour vérifier si un État partie s'est conformé aux obligations dictées par l'un de ses arrêts.

En toute hypothèse, à supposer même que le requérant puisse invoquer la violation de l'article 46 en combinaison avec l'article 3, il suffit de constater en l'espèce que la décision de radiation de juin 2017 ne constitue pas un arrêt constatant une violation de la Convention. Dans cette décision, la Cour s'est bornée à prendre acte de la déclaration unilatérale du Gouvernement et de l'accord du requérant sur les termes de celle-ci pour rayer ensuite la requête du rôle. La Cour n'a pas examiné la recevabilité des griefs du requérant ni a fortiori leur bien-fondé. Par conséquent, la décision de radiation ne tombe pas sous l'empire de l'article 46, lequel ne vise que les seuls arrêts définitifs rendus par la Cour. Dans ces circonstances, le requérant ne pourrait dès lors alléguer la violation de cette disposition devant la Cour.

Par ailleurs, lorsqu'un règlement amiable est intervenu entre les parties et a entraîné la radiation de la requête par la Cour, la surveillance de l'exécution de ce règlement incombe non pas à la Cour mais au Comité des Ministres conformément à l'article 39 § 4 de la Convention. À cet égard, le Comité des Ministres a pris acte de l'exécution des termes du règlement amiable par le Gouvernement.

Néanmoins, il est important de souligner que, dans l'esprit d'une responsabilité partagée des États et de la Cour pour le respect des droits de la Convention, les requérants sont en droit d'attendre des autorités nationales, y compris des juridictions nationales, qu'elles tirent loyalement les conséquences d'une déclaration unilatérale du Gouvernement reconnaissant la violation de l'article 3 et ayant conduit à une décision de la Cour qui en a pris acte.

Cette attente était d'autant plus forte que les questions en jeu touchaient l'article 3, qui consacre l'une des valeurs fondamentales des sociétés démocratiques et qui garantit le droit à ne pas être soumis à la torture ou à un traitement inhumain ou dégradant.

En l'occurrence, la question des conséquences tirées par les juridictions internes de la déclaration unilatérale du Gouvernement et de la décision subséquente de radiation de la Cour sera examinée ci-après dans le cadre de l'examen du grief tiré de la violation de l'article 6.

Conclusion : irrecevable (incompatibilité *ratione materiae*).

Article 6 § 1

1. *Sur la portée et l'étendue du contrôle de la Cour* – Conformément à l'article 19 de la Convention, il appartient uniquement à la Cour de vérifier lorsqu'elle est saisie d'un grief pris de l'article 6 si la conduite de la procédure nationale dans son ensemble a garanti au requérant un procès équitable.

2. *Sur la déclaration unilatérale du Gouvernement quant aux violences policières* – La particularité de la présente affaire tient au fait que l'État belge a préalablement et expressément reconnu devant la Cour que l'interpellation du requérant s'était déroulée dans des conditions contraires à son droit à l'absence de traitement dégradant garanti par l'article 3.

La cour d'appel a limité la portée de cette déclaration unilatérale aux seules injures proférées par les policiers lors du transfert du requérant vers le commissariat, postérieurement à son arrestation. Elle a estimé que celle-ci n'était pas de nature à remettre en cause le non-lieu prononcé en faveur des policiers par la chambre des mises en accusation.

Toutefois, les termes de la déclaration unilatérale ne sont pas limités au seul transfert du requérant vers le commissariat après son arrestation. Le Gouvernement avait expressément reconnu la violation de

l'article 3 s'agissant des conditions de l'interpellation du requérant et ce, dans le cadre d'une requête portée devant la Cour dénonçant tant une violence excessive de la part des policiers que des motivations fondées sur des préjugés racistes.

Certes, cette reconnaissance n'implique aucunement que le requérant n'a pu être coupable de rébellion. Néanmoins, il en découlait l'obligation pour les juridictions nationales d'examiner avec une extrême prudence les allégations de faits de rébellion et d'établir ces faits de manière certaine.

Une violation de l'article 3 constitue une atteinte aux valeurs les plus fondamentales de la Convention. Sa gravité ne pourrait être banalisée. En outre, les allégations de violences policières et celles de rébellion commise par le requérant s'inscrivaient dans le cadre de son interpellation.

3. *Sur l'appréciation de l'équité de la procédure quant à l'accusation de rébellion*

a) *La phase préliminaire du procès pénal* – Le requérant se plaint de n'avoir pas été interrogé par le magistrat instructeur lors des deux procédures. Il a été auditionné le soir de son arrestation par un collègue des policiers qui l'avaient interpellé et ensuite par les services de l'Inspection générale dans le cadre de sa plainte relative aux violences policières.

Aucun élément ne permet de mettre en doute la probité de ces interrogateurs ni leur indépendance. Les instructions relatives aux faits de rébellion et de violences policières se sont déroulées sous l'autorité d'un juge d'instruction dont l'indépendance et l'impartialité n'ont pas été remises en cause par le requérant. La seule absence d'audition d'un inculpé par le juge d'instruction n'est pas de nature à emporter une violation de l'article 6 § 1 lorsque l'intéressé s'est vu, comme en l'espèce, offrir la possibilité de défendre sa cause devant les juridictions de jugement et de contester, à cette occasion, l'ensemble des éléments à charge.

b) *La phase de jugement* – La cour d'appel a justifié son refus de mettre en doute les déclarations à charge faites par les policiers au motif qu'elles étaient confirmées par celles, convergentes et détaillées, d'autres policiers présents lors des faits mais étrangers à ceux-ci.

Or, ces policiers étaient eux-mêmes mis en cause dans la procédure pour violences policières initiée par le requérant et la reconnaissance de la violation de l'article 3 par le Gouvernement portait sur les « conditions » de son interpellation. En outre, il ne pouvait être exclu que lesdits policiers aient pu être réticents à témoigner contre des collègues directs, de même qu'ils pouvaient être considérés par le requérant insuffisamment indépendants à leur égard.

Par contraste, la cour d'appel a relativisé la valeur probante des déclarations des quatre témoins à décharge au motif que connaissant le requérant, ils ne présentaient pas des garanties suffisantes d'indépendance.

Et aucun autre témoignage ni aucun autre élément de preuve obtenu dans le cadre des procédures internes ne vient conforter la version de la rébellion présentée par les policiers. Ceci s'avère particulièrement problématique dans les circonstances spécifiques de l'espèce où l'interpellation du requérant a été reconnue contraire à l'article 3.

La cour d'appel a accordé un poids décisif dans la condamnation du requérant aux dépositions à charge des policiers ayant procédé à l'interpellation du requérant et aux témoignages des autres policiers présents sur les lieux de cette interpellation pourtant reconnue contraire à l'article 3.

La Cour ne peut suivre le Gouvernement lorsqu'il soutient que les éléments produits devant les juridictions internes n'ont pas permis d'établir « au-delà de tout doute raisonnable » l'absence de rébellion dans le chef du requérant. Ceci reviendrait à inverser la charge de la preuve en matière pénale. En effet, l'équité de la procédure prescrite par l'article 6 ne peut être dissociée du respect dû à la présomption d'innocence telle que celle-ci est garantie par l'article 6 § 2 de la Convention. Or, en vertu du principe « *in dubio pro reo* », la charge de la preuve incombe à l'accusation et une personne poursuivie ne pourrait être contrainte de prouver son innocence.

Compte tenu de ce qui précède, les juridictions internes n'ont pas assuré au requérant une procédure équitable compatible avec les exigences de l'article 6 § 1.

Conclusion : violation (unanimité).

Article 41 : 7 500 EUR pour préjudice moral.

(Voir aussi *Sidabras et Džiautas c. Lituanie*, 55480/00 et 59330/00, 27 juillet 2004, Résumé juridique, et *Willems et Gorjon c. Belgique*, 74209/16 et al., 21 septembre 2021, Résumé juridique)

Article 6 § 1 (enforcement / exécution)

Access to court / Accès à un tribunal
Equality of arms / Égalité des armes

Immunity of a foreign central bank from post-judgment restraining measures: *communicated*

Immunité d'une banque centrale étrangère contre les mesures de contrainte postérieures au jugement : *affaire communiquée*

Novoparc Healthcare International Limited – France, 33015/18, Communication [Section V]

English translation – Version imprimable

En 2003, un tribunal des Pays-Bas condamna la banque centrale d'Irak (Central Bank of Iraq) à payer à la société requérante différentes sommes, équivalant à plusieurs millions d'euros. En 2007, ce jugement fut confirmé en appel. La requérante fit ensuite procéder, en France, à une saisie conservatoire de certains avoirs de la banque centrale d'Irak qui se trouvaient entre les mains d'un tiers. Après obtention de l'exéquatur du jugement néerlandais, cette saisie conservatoire fut transformée en saisie-attribution.

La banque centrale d'Irak engagea alors une action en nullité de ces mesures d'exécution, en se fondant sur l'article L.153-1 du code monétaire et financier, aux termes duquel : (i) « ne peuvent être saisis » les biens que les banques centrales étrangères « détiennent ou gèrent pour leur compte ou celui de l'État étranger » dont elles relèvent ; (ii) par exception, le créancier peut solliciter du juge « l'autorisation de poursuivre l'exécution forcée », s'il établit que les biens visés « font partie d'un patrimoine que la banque centrale étrangère affecte à une activité principale relevant du droit privé ».

Devant le juge de l'exécution, la requérante posa une question prioritaire de constitutionnalité (QPC) au sujet de ces dispositions. Toutefois, la Cour de cassation estima qu'il n'y avait pas lieu de la transmettre au Conseil constitutionnel. En 2014, le juge de l'exécution déclara nulles la saisie conservatoire et sa conversion en saisie-attribution. La cour d'appel confirma cette nullité. En 2018, la Cour de cassation rejeta le pourvoi de la requérante.

La requérante dénonce une atteinte à son droit à l'exécution des décisions de justice, reprochant à la loi française appliquée d'imposer au créancier de saisir le juge de l'exécution préalablement à toutes mesures d'exécution en apportant la preuve de l'affectation des fonds, alors que seule la banque centrale étrangère est en mesure de préciser l'utilisation réelle des fonds litigieux. À ses yeux, ces restrictions vont au-delà des exigences du droit international, telles qu'exprimées notamment par la Convention des Nations unies sur l'immunité juridictionnelle des États et de leurs biens (adoptée en 2004).

La requérante critique également le refus de la Cour de cassation de renvoyer sa QPC au Conseil constitutionnel, au motif que celui-ci s'était déjà prononcé sur la constitutionnalité des dispositions visées. Selon elle, le Conseil constitutionnel ne s'était auparavant prononcé que sur la question de la légitimité de l'objectif poursuivi, tandis que sa propre question était posée en termes de proportionnalité.

Affaire communiquée sous l'angle des articles 6 § 1 et 13 de la Convention.

Article 6 § 3 (c)

Defence through legal assistance / Se défendre avec l'assistance d'un défenseur

Pre-trial judge proceedings confirming indictment decision not weakening applicant's position so as to render subsequent criminal trial against him unfair *ab initio*: *no violation*

La confirmation par le juge de la mise en état d'une décision de mise en accusation n'a pas affaibli la position du requérant de manière à rendre le procès pénal dirigé contre lui inéquitable *ab initio* : *non-violation*

Alexandru-Radu Luca – Romania/Roumanie, 20837/18, Judgment/Arrêt 14.6.2022 [Section IV]

Traduction française – Printable version

Facts – Criminal proceedings were brought against, *inter alia*, the applicant for being an accessory to fraud when working as a loans broker and assisting private persons to obtain loans from a bank. The case became the subject of proceedings before a pre-trial judge who confirmed the indictment decision and sent the case to trial. The applicant appealed unsuccessfully. He was eventually found guilty of the charges brought against him and received a sentence of imprisonment. The relevant provisions for pre-trial proceedings have since been amended, following a Constitutional Court finding that they were unconstitutional.

The applicant complained that the criminal proceedings against him had been unfair because of procedural shortcomings in the pre-trial judge proceedings (notably, the alleged lack of their adversarial character) and because he had been deprived of the opportunity to challenge the pre-trial judge's decision.

Law – Article 6 §§ 1 and 3 (c): It was not for the Court to seek to impose any particular model on the Contracting Parties concerning the procedures, competences and role of investigating or pre-trial judges. These issues might involve important and sensitive questions about fairness and how to strike an appropriate balance between the parties to the proceedings, and the solutions to be adopted were linked with complex procedural matters specific to each constitutional order. Rather, the Court's task was to conduct a review of the specific circumstances of the case, on the basis of the complaints brought before it.

In the instant case, the proceedings before a pre-trial judge had concerned the preliminary stage of criminal proceedings. Their main purpose had been to decide whether to commence a criminal trial in a case or whether to end a criminal-law dispute.

Among other things, the pre-trial judge had been called upon to examine the lawfulness of the bill of indictment. The judge's activities had not concerned the merits of the case, and his or her decisions had neither been aimed at determining the essential elements of the alleged criminal offence, namely the act in question, the person who had committed it, and that person's guilt, nor any civil claim lodged by a civil party within criminal proceedings. These points could have been determined by the criminal court only at the trial stage of the proceedings.

Given that under the national legal framework the applicant could have had the merits of the criminal charges brought against him determined only within the context of the criminal trial, the Court had regard to the proceedings as a whole, assessing the handling of the case by the pre-trial judge in light of the subsequent trial, when determining whether the applicant's rights had been prejudiced.

In line with the relevant legal framework in place at the time, the proceedings before the pre-trial judge had been conducted in chambers and in the absence of the parties. The applicant could make only written submissions before the pre-trial judge concerning the competence of the court charged with the examination of the case and the lawfulness of the bill of indictment, the criminal investigation authorities' actions and the manner in which evidence had been gathered by them. He could not rely on any legal provision expressly giving him the opportunity to ask for a public and oral hearing to be held by the pre-trial judge and could not ask that judge to administer again the available evidence. In addition, there was no procedural requirement to be notified either of the objections raised *ex officio* by the pre-trial judge or about the response of the prosecutor's office to such objections, and any possible challenge against the pre-trial judge's decision was examined under similar circumstances.

The Constitutional Court's decision and the subsequent legislative changes had had no impact on the proceedings in the applicant's case; they had only come into force after those proceedings and had no retroactive effect. That being said, as pointed out by the Constitutional Court, the pre-trial judge proceedings could have had an impact on the subsequent criminal trial as once the pre-trial judge had decided to actually exclude evidence from the case file or to accept it, the criminal trial court determining the merits of the case was no longer able to take into account during the trial the excluded evidence or decide on the lawfulness of the manner in which the accepted evidence had been gathered. Nevertheless, nothing in the Constitutional Court's judgment suggested that the pre-trial judge's decision imposed any pre-determined weight on the probative value of the evidence that he or she deemed lawful, prevented the trial court from administering directly the evidence in question, and prevented the parties from contesting the weight or probative value of such evidence or from asking for new evidence to be adduced to the case file.

There had been no reason to doubt that the applicant and his legal representative could have actively participated in the proceedings at the criminal investigation stage, asked for evidence to be adduced to the case file and submitted comments, applications and challenges. Moreover, he had had access to the case file and the evidence therein and before each round of trial court proceedings he had been given a copy of the bill of indictment and duly informed of his rights, including those concerning the pre-trial judge proceedings. The applicant had taken advantage of his rights and had submitted written comments and objections before the pre-trial judge as had his co-defendants.

Certain of the arguments of the applicant and his co-defendants had been dismissed by the pre-trial judge on the basis of the relevant criminal procedural rules; indeed, it had been possible to adequately resolve those issues of interpretation of the national law on the basis of the case file alone. In so far as their comments and objections as to the available evidence had been dismissed, the pre-trial judge had been of the view that they had been within the scope of the examination and review of the available evidence that had to be conducted by the trial court and outside the scope of the examination that could be conducted by a pre-trial judge. The applicant had not argued that he had been estopped from reiterating those arguments before the trial court. In any event, it appeared that in so far as both he and his co-defendants had done so, the trial court had examined them and allowed or dismissed them by reasoned decisions. It had not treated the points in question as having been settled by the pre-trial judge decision with *res judicata* effect or as not being within the scope of its the examination. Therefore, the pre-trial judge's decision had been of little consequence for the manner the criminal trial court could examine the case. Further, the pre-trial judge had not raised any arguments or objections concerning the applicant's case *ex officio* and therefore neither party could have been placed at a disadvantage *vis-à-vis* the other party by being denied the opportunity to comment on those objections.

Although the reasons for the applicant's inability to submit arguments supporting his challenge against the pre-trial judge's decision had been somewhat unclear, his challenge lodged before the pre-trial judge attached to the Court of Appeal would have been examined under the same conditions as those applicable to the proceedings before the lower pre-trial judge and therefore would not have been able to remedy his alleged procedural shortcomings of the proceedings. Moreover, the applicant had not

pointed to any evidence suggesting that the arguments supporting his challenge would have rested on different grounds than those he had already raised before the lower pre-trial judge.

In this context – also taking into account that the applicant had been able to reiterate his arguments concerning the available evidence before the trial courts and that nothing indicated that those proceedings had failed to comply with all the guarantees set out in Article 6 – the Court was not prepared to attach any weight to the impossibility alleged by the applicant to have the pre-trial judge's decision properly challenged before the Court of Appeal.

Overall, the measures and decisions taken during the pre-trial judge proceedings had not weakened the applicant's position to such an extent that the subsequent proceedings aimed at determining the merits of the criminal charge against him had been rendered unfair. These findings were without prejudice to the domestic authorities' actions to set up a domestic legal framework in order to ensure a heightened level of protection compared with the Convention as regards proceedings before a pre-trial judge.

Conclusion: no violation (unanimously).

(See also *Haarde v. Iceland*, 66847/12, 23 November 2017, Legal Summary, and *Mihail Mihăilescu v. Romania*, 3795/15, 12 January 2021, Legal Summary)

ARTICLE 8

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

Alleged inadequacy of action to prevent global warming: *relinquishment in favour of the Grand Chamber*

Insuffisance alléguée de l'action dans la lutte contre le réchauffement climatique : *dessaisissement au profit de la Grande Chambre*

Carême – France, 7189/21 [Section V]

See under Article 2 – Voir sous l'article 2

Respect for private life / Respect de la vie privée
Respect for correspondence / Respect de la correspondance

Lawful and proportionate disclosure of intercepted conversation by Prime Minister on public interest matter, despite reputational impact: *no violation*

La divulgation d'une conversation du Premier ministre portant sur un sujet d'intérêt général était prévue par la loi et proportionnée en dépit de l'atteinte à la réputation qui en a découlé : *non-violation*

Algirdas Butkevičius – Lithuania/Lituanie, 70489/17, Judgment/Arrêt 14.6.2022 [Section II]

Traduction française – Printable version

Facts – The applicant is the former Prime Minister of the Republic of Lithuania. During a pre-trial investigation into allegations of corruption relating to a Government resolution, and carried out by a regional prosecutor's office and the Special Investigations Service, the recording of telephone conversations by a town mayor (R.M.) was authorised. A telephone conversation between the applicant and R.M. was intercepted, in which a Government resolution was discussed. The prosecutor later discontinued the pre-trial investigation on the basis that no crimes had been committed. His decision contained transcripts of, *inter alia*, the telephone conversation between the applicant and R.M.

Separately, the Seimas Anti-Corruption Commission ("the Commission") was instructed to conduct a parliamentary inquiry into the circumstances in which the relevant Government resolution had been adopted. The prosecutor sent the Commission, and the Chief Official Ethical Commission, a copy of the decision to discontinue criminal proceedings. The former Commission held a public hearing on the matter, with a number of journalists present and in which the pre-trial investigation materials were discussed. One of those journalists then published an online article making public extracts from the transcripts of the telephone conversation between the applicant and R.M. The information was subsequently widely reported on.

The applicant unsuccessfully complained to the General Prosecutor's Office, and on appeal to the domestic courts, as to the disclosure of the telephone conversation to the public.

Law – Article 8: The Special Investigation Service's transmission of data concerning the intercepted phone conversation to other State authorities, and the authorities' use of that data and its release into the public domain, including the public scrutiny of the telephone transcript at the Anti-Corruption Commission's hearing, had constituted an interference with the applicant's rights under Article 8.

(a) *Whether the interference was "in accordance with the law"* – As to whether the interference had been "in accordance with the law", the applicant

had contended that the State authorities had not properly protected the information, as they had been required to by law:

Firstly, the applicant complained as to prosecutor's transfer of pre-trial investigation materials to the Anti-Corruption Commission. When requested to do so by the Chairman of the Anti-Corruption Commission, who had acted in compliance with domestic law, the prosecutor had sent on to that commission his decision to terminate the pre-trial investigation. Having considered that the materials gathered had had elements demonstrating possible breach of other laws, the prosecutor had also sent a copy of his decision to the Chief Official Ethics Commission, which was the prosecutor's right and obligation under domestic law. The Lithuanian authorities had subsequently concluded that, by transferring the material to the Commission and by not warning it that the material should not be made public, the prosecutor had not breached the rules of criminal proceedings. The prosecutor's findings had also never been quashed by the domestic courts. Accordingly, the Court could not but reject the applicant's argument that the information gathered during the pre-trial investigation had not been protected by the prosecutor.

Secondly, the content of the applicant's conversation had been disclosed in the framework of the Anti-Corruption Commission's proceedings regulated by the domestic law, having obtained authorisation for use of that material from a prosecutor. The prosecutor had not imposed any restriction on the disclosure of the pre-trial investigation decision and had not requested that the Commission's hearing, which as a rule was public, be closed. The prosecutor and the domestic court had pointed out that neither the members of the Commission nor the journalist had been participants in the criminal proceedings, to be liable for disclosure of the content of the telephone conversation. In the absence of any clear evidence of arbitrariness, the Court did not see any reason to depart from the domestic authorities' conclusions. The interpretation of the relevant legislation by the prosecutor and the domestic court had not been such as to render the contested action unlawful in Convention terms.

Finally, the interference had had a basis in law, which had been accessible and foreseeable. The applicant should have been able to foresee that his actions could be scrutinised, given his professional occupation, and the legal regulation on the publicity and transparency of public service.

The interference had therefore been "in accordance with the law", and had pursued the legitimate aims of protecting the rights and freedoms of others and preventing disorder and crime. The Court next had to determine whether the interception and disclosure of the conversation had been necessary in a democratic society.

(b) *Whether the interference was "necessary in a democratic society"* – The conversation at issue had undoubtedly concerned the matter of the adoption of the relevant Government resolution. As concluded by the prosecutor and domestic courts, it had contained no elements related to the applicant's private life, except for the question of reputation, reverted to below.

When examining the applicant's complaint of breach of privacy, the domestic court had referred to the Court's case-law on the protection of private life and had carefully balanced the competing interests in question, namely the applicant's reputation and honour on the one hand, and the right of the press to report on matters of public interest on the other. The Court also had regard to the Constitutional Court's practice, relied upon by the prosecutor in dismissing the applicant's complaint, whereby the activities of State and municipal officials linked to the implementation of functions of the State or municipal authorities and administrations were always of a public nature. Furthermore, actions of a public nature did not enjoy protection under Article 8, and a person might not expect privacy. In the Court's view, the matter of the adoption of the Government resolution had been precisely the implementation of State powers to adopt legal acts, and thus the circumstances surrounding the adoption of that resolution had fallen squarely within the notion of actions of a public nature. Moreover, even if the applicant had complained that the disclosure of the conversation had had an impact on his reputation, the personal characteristics and behaviour of persons participating in social and political activities, in addition to certain circumstances of their private life, might be of importance to public matters.

The Court acknowledged the applicant's argument that the release into the public domain of his telephone conversation had had an impact on his reputation. He had suffered negative experiences when communicating with others after the transcript of the conversation had been disclosed by the media. In addition, he had been a professional politician for decades, it going without saying that reputation-related criteria played an important role in a politician's life. Nevertheless, the applicant had not pointed to any concrete and tangible repercussions which the media's disclosure of the telephone conversation had had on his private life. Therefore, his situation had to be contrasted with those that the Court had examined in other cases, such as *Oleksandr Volkov v. Ukraine* (dismissal from judicial office) or *Polyakh and Others v. Ukraine* (dismissal and exclusion from the civil service). In the instant case, the disclosure had not resulted in, for example, the applicant's dismissal from the post of Prime

Minister, or any other sanctions against him. He had not been convicted and the Chief Official Ethics Commission had established nothing unethical in the actions of the persons mentioned in the prosecutor's decision to discontinue the criminal proceedings. Those facts and findings had alleviated the applicant's situation to a certain extent. Besides, the relevant Government resolution had been annulled, so that any associated flaws had been eliminated from the domestic legal system. That gave weight to the Government's argument that the press had had a right to learn of and report a possible wrongdoing. At that juncture, it was noted that the applicant had laid the blame for the disclosure not on the press, but on the State authorities.

In the light of the above, even if the applicant's reputation among his colleagues had been affected by the disclosure of the conversation, there were no factual grounds, let alone evidence, indicating that such an effect was so substantial as to have constituted a disproportionate interference with his Article 8 rights.

Conclusion: no violation (unanimously).

(See also *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013, Legal Summary; *J.B. and Others v. Hungary* (dec.), 45434/12 et al., 27 November 2018, Legal Summary; and *Polyakh and Others v. Ukraine*, 58812/15 et al., 17 October 2019, Legal Summary)

Respect for private life / Respect de la vie privée

Practically unfettered power exercised by the national intelligence service implementing surveillance operation, without adequate safeguards or protection to those randomly affected: *violation*

Pouvoir presque illimité exercé par le service national de renseignements lors d'une opération de surveillance, sans garantie ni protection adéquate pour les personnes touchées de manière aléatoire : *violation*

Haščák – Slovakia/Slovaquie, 58359/12 et al., Judgment/Arrêt 23.6.2022 [Section I]

Traduction française – Printable version

Facts – The applicant is the business partner of the applicant in the case of *Zoltán Varga v. Slovakia*. In 2005 and 2006 the Slovak Intelligence Service ("the SIS") carried out a surveillance operation ("the Gorilla operation") which had been authorised by warrants issued by the Bratislava Regional Court ("Regional Court") and had the aim of monitoring Mr Varga and one other person. The applicant submits that the other person was him. The warrants allowed the bugging of Mr Varga's resulting among others in audio recordings and transcribed analytical summaries of the activity there. The warrants were subsequently annulled by the Constitutional Court following proceedings by Mr Varga. Meanwhile, some of the material allegedly linked to the operation was anonymously posted on the internet. A number of investigations were pursued into various matters concerning the operation, including an investigation into suspected corruption (the "Gorilla investigation") which was still ongoing. The applicant attempted numerous legal avenues before judicial, executive as well as parliamentary authorities, *inter alia*, to have the surveillance material destroyed. Amongst other things, his constitutional complaints brought between 2012 and 2015 which were similar to those of Mr Varga were all dismissed as either being belated (initial complaint) or on other grounds. The Constitutional Court also referred to the conclusions reached in its decision on the admissibility of Mr Varga's constitutional complaint to the effect that, *inter alia*, it did not have jurisdiction in relation to supervising the implementation of surveillance warrants by the SIS. Proceedings brought by the applicant before the ordinary courts for the protection of personal integrity against the State and the SIS respectively were still ongoing; the latter having been stayed pending the outcome of the appeal on points of law by the SIS in a similar action by Mr Varga, in which the ordinary courts had found the implementation of the warrants had violated his right to the protection of his personal integrity.

Law – Article 8

(a) *Exhaustion of domestic remedies* – The Court reiterated its findings in *Zoltán Varga* in this respect. More specifically, as in this case, where the continued existence of the impugned material was in itself alleged to constitute a violation of the applicant's rights, for a remedy to be effective for Convention purposes it must in principle be capable of leading to the destruction of that material. The remedy advanced by the Government, namely an action for protection of personal integrity, was not.

(b) *Interference* – Noting that to a significant extent, the applicant's Article 8 complaints were identical and arose from an identical factual and procedural background to that examined in *Zoltán Varga*, the Court found that the case-law cited and applied in that case was applicable in the present case. Consequently, the implementation of the two warrants and the retention of the resulting material resulting from it fell within the ambit of Article 8 and had constituted an interference with the applicant's right to respect for his private life.

(c) *Whether the interference was justified* – As in *Zoltán Varga* the Court considered whether the interference had been "in accordance with the law".

(i) *Implementation of the warrants* – The Court found in *Zoltán Varga* that the implementation of the warrants had in principle a statutory basis but, as found by the Constitutional Court when examining the individual complaints lodged by Mr Varga, it had inherently been tainted by serious deficiencies in those warrants and in the associated procedures. As these deficiencies had been attributable to the issuing court and in essence of an objective nature, the fact that the applicant's similar constitutional complaint in respect of the issuing court had been rejected as belated did not prevent the Court from taking those deficiencies into account in the assessment of what was at stake in the instant case namely the implementation of the warrants by the SIS, in respect of which the Constitutional Court had declined to issue a decision for want of jurisdiction. Likewise, although, unlike Mr Varga's case, in the present case there had been no finding by the ordinary courts of a violation of the applicant's right to the protection of his personal integrity, the Court was of the view that if this factual distinction made any difference at all to the assessment of the present case, it was to the benefit of the applicant.

The Court reiterated that, as in *Zoltán Varga*, in view of the lack of clarity of the applicable jurisdictional rules and the lack of procedures for the implementation of the existing rules and flaws in their application, when implementing the surveillance warrants the SIS had practically enjoyed discretion amounting to unfettered power, which had not been accompanied by a measure of protection against arbitrary interference, as required by the rule of law. It had accordingly not been "in accordance with the law" for the purposes of Article 8 § 2. Furthermore, the situation in the present case had been aggravated by two additional factors. Firstly, the uncontested fact that the applicant had himself not been the target of the surveillance under the first of the two warrants, in the light of his unchallenged argument that the law provided no protection to persons randomly affected by surveillance measures. Secondly, the protracted fundamental uncertainty in the applicable legal framework as to the practical and procedural status of the presumably leaked primary material from the implementation of the two warrants.

(ii) *Storing of the derivative material from the implementation of the warrants* – The Court had held in *Zoltán Varga* that the storing of the derivative material obtained from the implementation of the two warrants had been subject to confidential rules which had been adopted and applied by the SIS, with no element of external control. Such rules had clearly been lacking in accessibility and had provided Mr Varga with no protection against arbitrary interference with his right to respect for his private life. The retention had therefore not been in accordance with the law. This finding also applied in the present case.

Conclusion: violation (unanimously).

Article 6 §§ 1 and 2: the applicant's complaints which concerned the Gorilla investigation did not fall under Article 6 as he had never been charged with a criminal offence nor had any public statements by officials indicated that he had been.

Conclusion: inadmissible (incompatible *ratione materiae*).

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

(See also *Zoltán Varga v. Slovakia*, 58361/12 et al., 20 July 2021, Legal Summary)

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

Police report on judges who signed a manifesto on the Catalan people's "right to decide" and insufficient inquiry into data leak to press: *violation*

Rapport de police sur des juges signataires d'un manifeste sur le « droit de décider » de la population catalane et enquête insuffisante sur la fuite des informations y figurant dans la presse : *violation*

M.D. – Spain/Espagne, 36584/17, Judgment/Arrêt 28.6.2022 [Section III]

Traduction française – Printable version

Facts – In February 2014, the applicants, twenty serving judges and magistrates who worked in Catalonia, signed a manifesto in which they set out their legal opinion in favour of the possibility of exercising the Catalan people's so-called "right to decide", within the framework of the Spanish Constitution and international law.

A national newspaper subsequently published an article under the headline "The conspiracy of thirty-three separatist judges", featuring photographs and personal details of all the applicants (such as their names and surnames, the courts in which they were working, and comments on their political beliefs). In the applicants' opinion, that data had been extracted from their respective entries in the database of the Spanish police ("the police ID database"), which had contained the identification of all Spanish citizens necessary for the issuance and management of Spanish identity documents.

The applicants lodged a complaint, leading to the initiation of criminal proceedings before an Investigating Judge. The complaint was dismissed on the basis that, although the facts constituted a criminal offence, there were insufficient grounds for attrib-

uting them to a particular person. The applicants appealed successfully to the *Audencia Provincial*, which stated *inter alia* that not all necessary efforts had been taken to clarify the facts. The *Audencia Provincial* noted the existence of a police report ("the report"), directed to the Senior Chief of Police of Barcelona and regarding the applicants' identities and personal and professional details, together with the applicants' photographs (taken from the police ID database). The report began by referring to a previous information note, in respect of the leaking of the applicants' data to the newspaper, which stated: "[A]t the beginning of February, a group of some twenty-five serving judges in Catalonia will publish a manifesto in defence of the legality of the sovereignty consultation (…)".

Following the *Audiencia Provincial*'s decision, the Investigating Judge closed the proceedings once again on the same grounds. The applicants lodged another appeal, this time without success.

Finally, disciplinary proceedings were brought against the applicants by the General Council of the Judiciary ("the Council"). No sanctions were issued and the proceedings were closed.

Law – Article 8

(a) *Negative obligations: as regards the existence of a police report* – The impugned report had referred to a group of serving judges in Catalonia who were going to publish a manifesto in defence of the legality of the sovereignty consultation. The data included in the report had consisted of personal data, photographs and certain professional information (partially extracted from the police ID database). Moreover, data pertaining to some of the applicants had concerned their political views.

The interference with the applicants' private life had not been in accordance with any domestic law, and the public authorities had used the personal data for a purpose other than that which had justified their collection. In view of the foregoing, the mere existence of the police report in issue, which had been drafted in respect of individuals whose behaviour had not implied any criminal activity, amounted to a violation of Article 8.

Conclusion: violation (unanimously).

(b) *Positive obligations: as regards the leak to the press and ensuing investigation* – The photographs of the applicants that had been published in the newspaper had originated in the police database, to which only the authorities had had access. Even though the way in which those photographs had been leaked had not been determined by the domestic investigation, there was no explanation other than that the authorities had permitted such a leak to be possible, thus engaging the responsibility of the respondent State. When such an unlawful disclosure had taken place, the positive obligation inherent in the effective respect for private life implied an obligation to carry out effective inquiries in order to rectify the matter to the extent possible.

In an initial investigation of the case, the Investigating Judge had closed the proceedings because it had not been possible to identify the perpetrator(s). Following the appeal lodged by the applicants, the *Audiencia Provincial* had ruled that not all the necessary steps had been taken for it to be acceptable to close the proceedings on grounds that it had not been possible to identify the person who had committed the crime. Therefore, it had considered it "relevant" to carry out further investigative measures, such as hearing the Senior Chief of Police of Barcelona, who had ordered the report on the applicants and who had been the addressee of the report, the contents of which had later been leaked to the press.

The Investigating Judge had reopened the investigation and taken statements from more witnesses but it had not considered it appropriate to call the Senior Chief of Police of Barcelona to testify, and he had closed the proceedings on the same grounds as previously. After the applicants had appealed, the *Audiencia Provincial* had upheld the decision of the investigating body and ruled that the testimony of the Senior Chief of Police could not have been relevant as there had been no evidence of his having participated in the criminal acts under investigation and that his conduct, in any event, would have at the most constituted only an administrative offence.

The data protection Agency, at the request of the applicants, had carried out a technical investigation into the use of their data after the criminal proceedings had ended. However, it did not appear that the Investigating Judge, during the criminal investigation, had availed himself of the possibility of seeking the Agency to establish the relevant facts.

In view of the circumstances of the case, for a sufficient investigation to be carried out, it had been necessary for the investigators to have obtained a statement from the person who had been the direct addressee of the report and who had been responsible for the persons who had accessed the police ID database and collected the data and photographs of the applicants. Regardless of his criminal or disciplinary responsibility, his testimony would have aided the identification of those responsible for the criminal acts in question.

Accordingly, the Court was not satisfied that an effective inquiry had been carried out in order to determine the circumstances in which the journalists had gained access to the photographs of the applicants and, if necessary, to sanction the persons responsible for the shortcomings that had occurred. The failure of the judicial bodies involved to carry

out certain investigative measures which would most likely have been useful for the investigation into the facts of the case, and which had been susceptible of remedying the interference with the applicants' rights, constituted a failure by the respondent State to comply with its positive obligations under Article 8.

Conclusion: violation (unanimously).

Article 10: The Court could not accept the argument according to which the applicants had suffered reprisals for signing the manifesto, and that their freedom of expression had thereby been infringed.

Disciplinary proceedings had been brought against the applicants. However, the proceedings had been the result of a complaint by a trade union, and had not been opened *ex officio* by any public authority. Only when a legitimate third party had denounced the applicants' actions had the Council, by legal imperative, agreed to open disciplinary proceedings. Even more importantly, it had been concluded that the disciplinary proceedings should be closed, as the applicants had signed the manifesto in the legitimate exercise of their freedom of expression and therefore no sanctions should be imposed. Following that initial decision, the trade union had lodged an appeal to the standing committee of the Council, which had been dismissed on the same grounds.

The applicants had continued their professional careers and had been promoted under usual procedure by the Council, without any prejudice resulting from their participation in the aforementioned manifesto.

Therefore, no type of chilling effect could be discerned from the mere fact that disciplinary proceedings had taken place.

Conclusion: inadmissible (manifestly ill-founded).

Article 41: EUR 4,200 each in respect of non-pecuniary damage.

(See also *Craxi v. Italy (no. 2)*, 25337/94, 17 July 2003, Legal Summary)

ARTICLE 9

Manifest religion or belief / Manifester sa religion ou sa conviction

Unjustified refusal to allocate room in high-security prison to Muslim prisoner for congregational Friday prayers: *violation*

Refus injustifié d'affecter une salle d'une prison de haute sécurité à un détenu musulman pour la prière collective du vendredi : *violation*

Abdullah Yalçın– Turkey/Turquie (no. 2/n° 2), 34417/10, Judgment/Arrêt 14.6.2022 [Section II]

Traduction française – Printable version

Facts – When the present application was lodged, the applicant was a convicted person who had been in detention for more than eleven years and was serving his sentence in high-security prison. The prison's administration refused his request to allocate a room so he could offer congregational Friday prayers and his challenges thereto were unsuccessful.

Law – Article 9

(a) *Applicability* – It was common ground that congregational Friday prayers were one of the precepts of Islam and there was no reason to doubt that the applicant's wish to offer them had been genuine, reasonable and sufficiently connected to his right to manifest his religion. Although not decisive, it was also relevant that the domestic authorities had at no point during the domestic proceedings given any consideration to the question of whether the applicant had (or had not) been required to offer Friday prayers owing to his being deprived of his liberty. Accordingly, the applicant was entitled to lay claim to the protection afforded by Article 9.

(b) *Merits* – The applicant had been able to perform individual acts of worship in his cell and to obtain and possess books or other written material relating to his religious beliefs. Given that he had been sharing his cell with other inmates and there had been no indication that his cell mates had also been willing to offer congregational Friday prayers, the Court could not subscribe to the Government's argument that the applicant could have practised those prayers in his cell. Furthermore, as his complaint centred on the authorities' refusal to make the necessary arrangements enabling him to offer congregational Friday prayers with other inmates in a separate place allocated for that purpose, the Court had to determine whether the State in this case had been compliant with its positive obligations under Article 9. It found that it had not, the domestic authorities not having struck a fair balance between the competing rights and interests at stake, that is, the applicant's freedom of collective worship in the prison and the public order interests (security and order in prison), by adducing relevant and sufficient reasons for their refusal. In particular, the reasons adduced by the prison authorities had been essentially based on three grounds:

(i) The institution in which he had been held was a high-security prison: although such prisons were subjected to a stricter set of rules, which might call for a higher degree of restrictions on the exercise of rights under Article 9, that fact alone should not be construed as excluding any real weighing of the competing individual and public interests but should

rather be interpreted in the light of the circumstances of each individual case. On this point, the Court attached importance to the fact that it did not appear that the domestic authorities had carried out an individualised risk assessment in respect of the applicant; they had not considered whether he had been classified as a dangerous or high-risk inmate or had otherwise acted violently, attempted to escape from prison or failed to abide by the disciplinary rules relating to prison order.

(ii) Collective gatherings posed a risk to prison security: the domestic authorities had not sufficiently assessed whether the gathering of a certain number of inmates for Friday prayers might, in the individual circumstances of the case, had generated a security risk that they should have been treated differently from the collective gatherings of inmates for cultural or rehabilitative purposes, which were permitted by domestic law.

(iii) Absence of appropriate premises for Friday prayers in the prison: the domestic authorities had not explored any other modalities, including those which were less restrictive of the applicant's rights under Article 9. Accordingly, the Court was not convinced by the Government's argument that realising the applicant's request could only have been possible by opening the doors of all the cells.

Conclusion: violation (unanimously).

(See also *Abdullah Yalçın v. Turkey*, 2723/07, 21 April 2009)

ARTICLE 10

Freedom of expression / Liberté d'expression

Criminal fine for defamation of an elected representative, imposed on a political opponent for publishing political cartoons on his blog targeting the members of the local council as a whole: *violation*

Amende pénale pour diffamation d'une élue, imposée à un opposant pour avoir diffusé sur son blog des caricatures politiques visant l'ensemble des élus locaux : *violation*

Patrício Monteiro Telo de Abreu – Portugal, 42713/15, Judgment/Arrêt 7.6.2022 [Section IV]

English translation – Version imprimable

En fait – Le requérant a été condamné pénalement à une peine d'amende du chef de diffamation aggravée pour avoir porté atteinte à l'honneur et à la réputation de M^me^ E.G., le bras droit du maire d'une commune, en raison de la diffusion, sur le blog qu'il administrait, de trois caricatures signées par le peintre A.C.

En droit – Article 10 : Les juridictions internes ont reconnu que le requérant était un opposant politique de M^me^ E.G. et que les caricatures litigieuses relevaient de la satire politique. Néanmoins, les limites de la critique admissible avaient été dépassées car M^me^ E.G. y étant représentée sous l'apparence d'une truie dotée d'attributs sensuels. L'auteur des caricatures avait voulu insinuer qu'elle était une femme débauchée et qu'elle entretenait une liaison avec le maire de la commune, lequel était représenté sous les traits d'un âne et était toujours à ses côtés sur ces dessins. Le requérant avait conscience de l'image péjorative de M^me^ E.G. véhiculée par ces caricatures mais il les avait malgré tout publiées sur son blog, contribuant ainsi à porter atteinte à l'honneur et à la réputation de l'intéressée.

La Cour ne saurait souscrire à cette analyse. En effet, si les juridictions internes ont bien saisi que l'affaire appelait à une mise en balance de deux droits concurrents, à savoir, d'une part, la liberté d'expression du requérant et, d'autre part, le droit de M^me^ E.G. au respect de sa vie privée, elles ont omis de prendre en considération le contexte dans lequel s'inscrivaient ces caricatures.

En premier lieu, les trois caricatures litigieuses provenaient d'une série de caricatures déjà publiées du peintre A.C. qui proposait une satire de la vie politique locale de la commune.

En deuxième lieu, l'auteur des caricatures n'avait pas voulu insinuer l'existence d'une relation intime entre M^me^ E.G. et le maire de la commune en les représentant côte à côte car dans aucun de ces dessins, ils ne s'embrassent, ne se touchent ou ne communiquent l'un avec l'autre.

Il est vrai que les caricatures reproduisent certains stéréotypes regrettables visant les femmes de pouvoir. Toutefois, les commentaires du requérant qui les accompagnaient montrent que sa véritable intention, en diffusant ces dessins, était de mettre à l'honneur la satire politique qui s'exprime au travers de la caricature et, indirectement, de critiquer l'équipe dirigeante de la commune, en sa qualité d'adversaire politique et membre de l'assemblée municipale. Il ne ressortait de ces commentaires aucune référence particulière à M^me^ E.G., à son action politique ou à sa vie privée, et encore moins à sa vie sexuelle. Ceux-ci ne contenaient en outre aucun propos insultant ou infamant à l'égard de cette dernière.

En concentrant de manière excessive leur examen sur l'atteinte au droit à la réputation de M^me^ E.G., les juridictions internes ont fini par décontextualiser les caricatures et par en faire une interprétation qui ne tient pas suffisamment compte du débat politique qui était en cours. En outre, elles n'ont pas

accordé suffisamment d'importance au fait que tout élu s'expose nécessairement à ce type de satire et de caricature et qu'il doit par conséquent montrer une plus grande tolérance à cet égard, d'autant que, en l'occurrence, en dépit des stéréotypes utilisés, les caricatures restaient dans les limites de l'exagération et de la provocation, propres à la satire. M^me^ E.G. n'était d'ailleurs pas la seule à y être représentée dénudée, puisque tous les cochons l'étaient également ; le maire de la commune était représenté sous les traits d'un âne, une image clairement péjorative. C'est donc l'ensemble des élus locaux qui étaient ciblés par les caricatures. En bref, les juridictions internes n'ont pas suffisamment tenu compte du contexte dans lequel le requérant avait diffusé ces caricatures sur son blog. Elles n'ont donc pas procédé à une mise en balance circonstanciée des droits qui étaient en jeu. En outre, elles n'ont ni tenu compte des éléments de la satire politique qui se dégagent de la jurisprudence de la Cour, ni fait aucune référence à la jurisprudence de la Cour en matière de liberté d'expression.

Par ailleurs, elles ont considéré que, en utilisant Internet pour diffuser ces caricatures, le requérant les avait fait connaître à un public plus large. Toutefois, elles n'ont analysé de manière plus approfondie ni l'ampleur ni l'accessibilité des trois caricatures, ni même le point de savoir si le requérant était un blogueur connu ou un utilisateur populaire des médias sociaux, ce qui aurait pu attirer l'attention du public et accroître l'impact éventuel des caricatures litigieuses. Au demeurant, lorsqu'il a appris que M^me^ E.G. avait porté plainte contre lui à ce sujet, le requérant a immédiatement retiré les caricatures litigieuses de son blog, ce qui tend à indiquer qu'il était de bonne foi.

La condamnation du requérant à une peine d'amende de 1 800 EUR, assortie du paiement conjoint de dommages et intérêts au bénéfice de M^me^ E.G., était manifestement disproportionnée, d'autant que le droit portugais prévoit un remède spécifique pour la protection de l'honneur et de la réputation.

Eu égard à ce qui précède, nonobstant la marge d'appréciation dont bénéficiaient les autorités nationales, la condamnation du requérant n'a pas ménagé un juste équilibre entre la protection de son droit à la liberté d'expression et le droit de M^me^ E.G. à la protection de sa réputation. Les motifs fournis par les juridictions nationales pour justifier la condamnation du requérant ne pouvaient passer pour pertinents et suffisants. Sanctionner pénalement des comportements comme celui qu'a eu le requérant en l'espèce est susceptible d'avoir un effet dissuasif sur les modes d'expression satiriques concernant des questions politiques. La condamnation du requérant n'était donc pas nécessaire dans une société démocratique.

Conclusion : violation (unanimité).

Article 41 : 3 466 EUR pour dommage matériel ; constat de violation suffisant pour le préjudice moral.

(Voir aussi *Grebneva et Alisimchik c. Russie*, 8918/05, 22 novembre 2016, Résumé juridique, et *Gheorghe-Florin Popescu c. Roumanie*, 79671/13, 12 janvier 2021, Résumé juridique)

Freedom of expression / Liberté d'expression

Disproportionate prison sentence imposed on former terrorist for praising perpetrators of 2015 Paris attacks, after comments on radio and Internet made a few months after event: *violation*

Disproportion de la peine d'emprisonnement à un ancien terroriste pour son éloge des auteurs des attentats de Paris de 2015, diffusée à la radio et sur internet quelques mois après : *violation*

Rouillan – France, 28000/19, Judgment/Arrêt 23.6.2022 [Section V]

English translation – Version imprimable

En fait – Le requérant est un ancien membre d'Action directe, groupe terroriste d'extrême gauche actif en France dans les années 1980, qui fut condamné à la réclusion criminelle à perpétuité et passa vingt-cinq ans en prison jusqu'à sa libération conditionnelle en 2012.

En février 2016, il qualifia les auteurs des attentats terroristes perpétrés à Paris et en Seine-Saint-Denis en 2015 de « courageux » et affirma qu'ils s'étaient « battus courageusement » lors d'une émission de radio, dont l'enregistrement a ensuite été publié sur le site internet d'un journal.

En septembre 2016, le tribunal correctionnel déclara le requérant coupable d'apologie publique d'un acte de terrorisme au moyen d'un service de communication accessible au public en ligne, sur le fondement de l'article 421-2-5 du code pénal, et le condamna entre autres à une peine de huit mois d'emprisonnement ferme.

En mai 2017, la cour d'appel infirma ce jugement et déclara le requérant coupable de complicité du délit. Elle fixa par ailleurs sa peine à dix-huit mois d'emprisonnement, dont dix mois de sursis probatoire.

Lors du pourvoi en cassation du requérant, il posa une question prioritaire de constitutionnalité (« QPC ») portant sur l'article 421-2-5 du code pénal et le Conseil constitutionnel déclara ces dispositions conformes à la Constitution lors de sa décision de mai 2018.

En novembre 2018, la Cour de cassation rejeta le pourvoi du requérant.

Le requérant exécuta la peine d'emprisonnement à son domicile durant six mois et trois jours entre juillet 2020 et janvier 2021.

En droit – Article 10 : La condamnation pénale du requérant a constitué une ingérence dans l'exercice de son droit à la liberté d'expression.

a) *Prévue par la loi* – Il est vrai que l'article 421-2-5 du code pénal ne définit pas la notion d'apologie et qu'à la date des propos litigieux du requérant, la jurisprudence de la Cour de cassation relative à l'application de cette disposition était encore relativement limitée, compte tenu de sa récente entrée en vigueur.

Toutefois, la notion d'apologie figure dans le droit interne depuis 1893 et elle est interprétée, en vertu d'une jurisprudence constante de la Cour de cassation, comme consistant en la « glorification d'un ou plusieurs actes ou celle de leur auteur » ou en « l'incitation à porter un jugement de valeur morale favorable » sur ces actes ou leurs auteurs.

Le Conseil constitutionnel a confirmé cette interprétation dans sa décision de mai 2018.

La Cour considère qu'au regard de l'énoncé de l'article 421-2-5 du code pénal et de la jurisprudence constante des juridictions internes relative à la notion d'apologie, le requérant pouvait raisonnablement prévoir que ses propos étaient susceptibles d'engager sa responsabilité pénale.

L'ingérence dans l'exercice par le requérant du droit à la liberté d'expression était suffisamment prévisible et « prévue par la loi ».

b) *But légitime* – Eu égard au caractère sensible de la lutte contre le terrorisme ainsi qu'à la nécessité pour les autorités d'exercer leur vigilance face à des actes susceptibles d'accroître la violence, la condamnation du requérant pour complicité d'apologie d'actes de terrorisme avait pour but la défense de l'ordre et la prévention des infractions pénales.

c) *Nécessité dans une société démocratique* – En premier lieu, le requérant a été condamné pour avoir qualifié les auteurs des attentats terroristes perpétrés à Paris et en Seine-Saint-Denis en 2015 de « courageux » et affirmé qu'ils s'étaient « battus courageusement » lors d'une émission de radio, dont l'enregistrement a ensuite été publié sur le site internet d'un journal. Le requérant a été invité à cette émission en tant qu'ancien membre d'une organisation terroriste active en France dans les années 1980, auteur de plusieurs livres ainsi qu'au titre de la promotion d'un film dans lequel il avait joué son propre rôle. Le requérant jouissait donc d'une certaine médiatisation. Lors de cette émission, il a été interrogé sur divers sujets annoncés par les journalistes dès le début de l'entretien, notamment sur l'état d'urgence instauré en France après les attentats terroristes de novembre 2015, les libertés publiques et la sécurité. Ces questions étaient, dans le contexte de l'époque, susceptibles d'intéresser le public, d'éveiller son attention ou de le préoccuper sensiblement et les propos du requérant ont ainsi été tenus dans le cadre d'un débat d'intérêt général.

En deuxième lieu, par des décisions concordantes, le tribunal correctionnel, la cour d'appel et la Cour de cassation ont estimé que les qualificatifs employés par le requérant constituaient une incitation à porter un jugement favorable sur les auteurs d'infractions terroristes. Le tribunal correctionnel, dont les motifs de la décision ont été repris par la cour d'appel et la Cour de cassation, a apprécié ces propos à la lumière de la tonalité générale de l'entretien, de la personnalité du requérant et du contexte prévalant en France à la période des faits, après les attentats terroristes perpétrés en janvier puis en novembre 2015.

Pour le tribunal correctionnel, même s'il n'a pas exprimé d'adhésion pour l'idéologie islamiste, le requérant a présenté le mode d'action terroriste, pour lequel il a lui-même été condamné à deux reprises à la réclusion à perpétuité, sous un jour romanesque en utilisant des images positives et glorieuses à l'égard des auteurs des attentats de Paris. Ses propos avaient été tenus environ un an après les attentats commis à Paris en janvier 2015 et moins de quatre mois après ceux perpétrés à Paris et en Seine-Saint-Denis en novembre 2015. En outre, le tribunal a estimé qu'au regard de son engagement passé au sein d'une organisation terroriste, de ses condamnations et de sa médiatisation, le requérant ne pouvait ignorer que la façon dont il s'exprimerait au sujet des attentats terroristes serait analysée minutieusement. Enfin, il avait lui-même reconnu que la radio diffusant son entretien était écoutée par beaucoup de jeunes de quartiers populaires de Marseille et que même si son intention était de provoquer des adhésions vers les cercles d'extrême gauche, il admettait que ces auditeurs constituaient un public fragile facilement séduit par le discours de partisans d'un islamisme radical pouvant dériver vers des actions terroristes.

La Cour reconnaît que même si les propos du requérant ne constituaient pas une incitation directe à la violence, ils véhiculaient une image positive des auteurs d'attentats terroristes et ont été prononcés alors que l'émoi provoqué par les attentats meurtriers de 2015 était encore présent dans la société française et que le niveau de la menace terroriste demeurait élevé, comme en témoignent plusieurs autres attaques terroristes survenues en France en juin et juillet 2016. En outre, la diffusion de ces pro-

pos par le biais de la radio et d'internet était susceptible de toucher un large public.

Dans ces conditions, la Cour, qui admet que les propos litigieux doivent être regardés, eu égard à leur caractère laudatif, comme une incitation indirecte à l'usage de la violence terroriste, n'aperçoit aucune raison sérieuse de s'écarter du sens et de la portée qu'en a retenus le tribunal correctionnel dans le cadre d'une décision dûment motivée, dont les motifs ont été repris par la cour d'appel et la Cour de cassation. Il s'ensuit que les autorités nationales bénéficiaient, au cas d'espèce, d'une large marge d'appréciation dans leur examen de la nécessité de l'ingérence litigieuse.

En troisième lieu, le requérant a été condamné en première instance à une peine d'emprisonnement de huit mois, qui a été aggravée en appel à dix-huit mois d'emprisonnement, dont dix mois de sursis avec mise à l'épreuve afin de mieux tenir compte des circonstances de la cause.

Dans sa décision de mai 2018, le Conseil constitutionnel a estimé, après avoir rappelé qu'elles étaient « prononcées en fonction des circonstances de l'infraction et de la personnalité de son auteur », que les peines instituées par l'article 421-2-5 du code pénal n'étaient pas, « au regard de la nature des comportements réprimés », « manifestement disproportionnées ». La Cour ne voit en l'espèce aucun motif sérieux de s'écarter de l'appréciation retenue par les juridictions internes s'agissant du principe de la sanction. Les motifs qu'elles ont retenus pour justifier la sanction du requérant, reposant sur la lutte contre l'apologie du terrorisme et sur la prise en considération de la personnalité de l'intéressé, apparaissent, dans les circonstances spécifiques de la présente affaire, à la fois « pertinents » et « suffisants » pour fonder l'ingérence litigieuse qui doit ainsi être regardée comme répondant, dans son principe, à un besoin social impérieux.

Les juridictions internes se sont efforcées avec soin, d'une part, de motiver non seulement le principe de la sanction infligée mais aussi sa nature et son quantum et, d'autre part, d'en justifier son aggravation en appel. Le contexte, marqué par des attentats terroristes récemment commis et particulièrement meurtriers, dans lequel le requérant a prononcé, en toute connaissance de cause, les propos litigieux justifiaient une réponse, de la part des autorités nationales, à la hauteur des menaces qu'ils étaient susceptibles de faire peser tant sur la cohésion nationale que sur la sécurité publique du pays. Toutefois, la sanction infligée au requérant est une peine privative de liberté. Alors même qu'il a été sursis à l'exécution de la peine de dix-huit mois d'emprisonnement prononcée à son encontre, pour une durée de dix mois, le requérant a en effet été placé sous le régime de la surveillance électronique pendant six mois et trois jours. Dans les circonstances particulières de l'espèce, les motifs retenus par les juridictions internes dans la mise en balance qu'il leur appartenait d'exercer ne suffisent pas à la mettre en mesure de considérer qu'une telle peine était, en dépit de sa nature ainsi que de sa lourdeur et de la gravité de ses effets, proportionnée au but légitime poursuivi.

Dans ces conditions, l'ingérence dans la liberté d'expression du requérant que constitue la peine d'emprisonnement qui lui a été infligée n'était pas « nécessaire dans une société démocratique ».

Conclusion : violation (unanimité).

Article 41 : constat de violation suffisant pour le préjudice moral ; demande de dommage matériel rejetée.

Freedom of expression / Liberté d'expression

No reprisals against judges for signing manifesto on the Catalan people's "right to decide" or chilling effect: *inadmissible*

Absence de mesures punitives ou dissuasives à l'encontre de juges signataires d'un manifeste sur le « droit de décider » de la population catalane : *irrecevable*

M.D. – Spain/Espagne, 36584/17, Judgment/Arrêt 28.6.2022 [Section III]

See under Article 8 – Voir sous l'article 8

Freedom of expression / Liberté d'expression

Insufficient reasons for awarding seemingly disproportionate compensation in respect of defamatory articles published by a newspaper: *violation*

Motivation insuffisante d'une condamnation à une indemnité visiblement disproportionnée sanctionnant la publication d'articles diffamatoires dans un journal : *violation*

Azadliq and/et Zayidov – Azerbaijan/Azerbaïdjan, 20755/08, Judgment/Arrêt 30.6.2022 [Section V]

Traduction française – Printable version

Facts – The applicants, a newspaper and its chief editor, published two articles about a former aid to the President (T.A.) and his relatives, accusing them of corruption. T.A. lodged a successful civil defamation claim against both applicants, who were ordered to pay approximately EUR 36,000 and EUR 22,500 respectively to T.A., in respect of non-pecuniary damage. The applicants appealed unsuccessfully up to the Supreme Court.

Law – Article 10: The domestic courts' rulings against the applicants and the sanctions imposed had constituted an interference by the State with the applicants' right to freedom of expression. It had been prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others, in this case T.A. The Court therefore had to determine whether the interference had been "necessary in a democratic society":

The articles in issue had concerned a matter of public interest, namely the general issue of alleged corrupt practices among government officials and persons connected to them. However, the article, having specifically named T.A., had directly accused him of having built or operated a "corruption machine" and having engaged in a certain "scale of corruption". It had been repeatedly stated and insinuated throughout both articles that T.A., by means of corrupt practices, had either helped his relatives obtain various assets or engage in questionable business activities or had obtained such assets for himself by formally registering them in the name of other persons or had engaged in questionable business activities himself, again formally through other persons. The articles had mentioned many very specifically described properties and assets.

The statements found to have been defamatory had amounted largely to factual statements. Even if some of the expressions used in the article could qualify as "value judgments", if assessed on their own and out of context, in the particular context of the articles in question, those phrases had merely been figures of speech constituting part of the very specific factual allegations (for example, referring to T.A. and his relatives as "blue whales" to describe the scale of alleged corruption). Those factual allegations had amounted to an assertion that T.A. had committed serious criminal offences, including embezzlement and corruption. Therefore, the applicants had been required under the Convention to provide a sufficient factual basis for such an assertion.

However, the articles had made no references to any sources of the factual information given. During the domestic court proceedings, the applicants had been unable to present any elements supporting their factual assertions or to demonstrate that they had had any reliable sources that had constituted a basis for them. It had neither been demonstrated nor alleged that any independent research had been conducted or that any attempts had been made to check any official records. While, in respect of one particular allegation relating to an alleged joint business, the applicants had noted that they had relied on "rumours", they had not even attempted to take any steps to independently verify the reliability of those "rumours". Neither had the text of the first article contained any proviso that the information given had been based on mere rumours: instead, the article had stated it unequivocally as a fact.

It had not been shown that even a minimal amount of fact-checking had been done in respect of any information given in the articles. It therefore could not be said that the applicants had complied with the relevant standards of due diligence and had acted in good faith in order to provide "reliable and precise" information. Such conduct by the applicants could not be considered compatible with the tenets of responsible journalism, especially considering the gravity of the factual assertions made in the articles. Those assertions had attained the level of seriousness capable of bringing into play T.A.'s rights under Article 8 and they had been damaging to his reputation. It had also not been shown that there had existed any special grounds in the present case dispensing the applicants from their obligation to verify those factual grounds.

The Court next turned to the manner in which the domestic courts, which had been called upon to strike a fair balance between the applicants' Article 10 rights and T.A.'s Article 8 rights, had assessed the content and consequences of the publication and the veracity of the information provided. The reasoning had been quite brief and had not analysed various statements made in the articles separately and in extensive detail. Moreover, the relevant domestic law as it had stood at the material time had not distinguished between statements of fact and value judgments. However, in the particular circumstances of the present case, the courts' reasoning, albeit brief, had been "relevant", in that the courts had convincingly identified the impugned statements as factual assertions, and had found that the arguments adduced by the applicants had not demonstrated that they had acted with due diligence with those assertions, which had been damaging to T.A.'s reputation. The courts thus had provided certain reasons showing that there had been a pressing social need to take measures to protect T.A.'s reputation.

However, no reasoning had been given by the courts to justify the proportionality of the measures taken against the applicants, despite the issue being repeatedly raised by them.

In addition to ordering a retraction and apology, the domestic courts had ordered the applicant newspaper to pay approximately EUR 36,000 in compensation. Before the domestic courts, the newspaper had argued that the amount had been too high given the newspaper's low circulation and low profits and its dire financial situation at that point in time. The second applicant had also been personally ordered to pay approximately EUR 22,500 in compensation. That sum had amounted at the relevant time to over nine times the average yearly salary and to more than forty times the minimum yearly

salary in the country. In such circumstances, despite inconsistent submissions by the second applicant concerning his personal income, the Court accepted that the amount he had been ordered to pay in damages had been disproportionately high in relation to the average income in the country and to his personal income. The applicants had additionally argued that the total amount awarded to T.A. had in any event been too high in relation to T.A.'s own official income as a government official and, as such, disproportionate in relation to any potential damage caused to his reputation.

On the whole, the applicants had raised relevant arguments showing *prima facie* that the amounts awarded had been disproportionately high in the circumstances of the case. It had therefore been of the utmost importance for the domestic courts to examine whether sanctions of that severity could have a chilling effect on the exercise of freedom of expression by the press, which was called upon to participate in discussions of matters of general public interest. However, the domestic courts' judgments had remained silent on the arguments raised by the applicants in that respect.

The domestic courts therefore had not provided reasons to justify the severity of the sanctions imposed on the applicants, which did not appear to have borne a reasonable relationship of proportionality to the legitimate aim pursued. They had thus failed to provide "sufficient" reasons to justify the interference with the applicants' right to freedom of expression, which had accordingly not been "necessary in a democratic society".

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage; claim in respect of pecuniary damage dismissed (the amounts due to T.A. had not yet been paid by the applicants and the domestic law provided for a possibility of reopening domestic proceedings following a finding by the Court of a violation).

ARTICLE 11

Freedom of association / Liberté d'association

Domestic court failure to apply convention standards and acceptably assess employee sanctions, in response to a complaint by a trade union, imposed on its representative: *violation*

Juridictions internes n'ayant ni appliqué les normes de la Convention ni correctement apprécié les sanctions imposées à une salariée qui était, en sa qualité de représentante d'un syndicat, signataire d'une lettre de réclamations : *violation*

Straume – Latvia/Lettonie, 59402/14, Judgment/Arrêt 2.6.2022 [Section V]

Traduction française – Printable version

Facts – The applicant worked as an air traffic control officer ("ATCO") for the State-owned company, Latvijas Gaisa Satiksme ("LGS"), which is overseen by the Ministry of Transport, and was a chairperson of the relevant Trade Union ("the Trade Union"). A letter of complaint was sent to the Minister of Transport and the person representing the State as the sole shareholder of LGS, which was signed by all three Trade Union board members, including the applicant, and which raised grievances and concerns relating to the work of ATCOs. In response, a number of actions were taken against the applicant, including a medical check, a disciplinary investigation, suspension from work, a prohibition to attend the workplace, revocation of pay, and imposition of an obligation to stand idle. Other actions included steps to compromise the applicant's status as the chairperson of the Trade Union board and the pressuring of colleagues who did not distance themselves from her.

The applicant brought unsuccessful civil proceedings against LGS, challenging the measures taken against her. At first instance LGS lodged a successful counterclaim seeking the termination of her employment. The proceedings were heard in closed sessions and the summary judgment was pronounced in a closed hearing. The applicant appealed without success up to the Supreme Court.

Law – Article 11

(a) *The applicable provision* – The main focus of the applicant's complaint was that she had been penalised for carrying out a trade union activity and that the domestic courts had arbitrarily denied the trade union element of the dispute. In view of the circumstances of the case and the nature of the applicant's complaint, the question of whether the negative consequences suffered by the applicant had indeed been the result of her acting as a trade union representative had to be examined under Article 11, interpreted in the light of Article 10.

(b) *Whether there was an interference* – When sending the Trade Union letter, the applicant had acted as its representative and had thereby exercised her right to freedom of association. Further, the majority of the detriments imposed on the applicant had been put in place expressly as a sanction for having sent the latter, had been closely connected to the aforementioned measures, or, in view of the context, could only be understood as a rection to the applicant's

trade union activities. There had therefore been an interference with her freedom of association.

(c) *Whether the interference was justified* – The Court proceeded on the assumption that the interference had had a legal basis and accepted that it had aimed at protecting the rights and freedoms of others, namely the employer. The Government's argument that they had also been aimed at protecting the rights and freedoms of the wider public and public safety were analysed under the question of whether the interference had been necessary in a democratic society.

As to the necessity of the interference, the Court had to determine, in particular, whether the domestic courts had struck a fair balance between the applicant's right to freedom of association on the one hand and protection of the employer's interests on the other hand.

The Court did not find it necessary to inquire into the kind of issues that had been central to its case-law on whistle-blowing, as the present case concerned the context of the freedom of expression of a trade union representative. Here, the aim of the expression had not been to raise the public awareness of unlawful conduct but to advocate for the socio-economic interests of the Trade Union's members and certain safety concerns. It was worth recalling that the impugned letter had been addressed to the State officials overseeing LGS, a State-owned company, and not disseminated publicly. The case also had to be distinguished from situations in which employees expressed their own personal opinions, as actions and statements aimed at furthering the interests of trade union members as a whole called for a particularly high level of protection.

(i) *The context in which the statements were made* – The letter had addressed various socio-economic issues and practices that had been considered to negatively affect LGS' employees and the performance of their tasks as ATCOs and that had already been raised with the employer. By the letter, those labour-related concerns had been relayed to the State institution that had owned and overseen the employer. The writing of the letter had formed part of the Trade Union's efforts to express the demands by which it had sought to improve the situation of its members and safeguard the performance of their duties. Accordingly, the applicant had been representing the Trade Union in its exercise of a legitimate trade union activity. Moreover, it had concerned an essential element of trade union freedom – seeking to persuade the employer to hear what it had had to say on behalf of its members.

(ii) *The nature of the statements* – Aside from disregarding the fact that the letter had been written by a trade union representative, the domestic courts had also paid no attention to the trade union context when analysing its contents. That had prevented the domestic courts from applying the relevant standards and appropriately assessing the pertinent facts, which had led to contradictory conclusions.

The Government had argued that the letter had contained statements about threats to aeronavigation safety, which had gone beyond the scope of legitimate trade union interests. However, after describing various shortcomings in the organisation of ATCO work, including unregistered overtime work, the letter had submitted that those deficiencies could fatigue the employees, demoralise them, cause senior staff to leave and reduce the quality of the training. It had further inferred that tat, in turn, could lower flight safety and the sustainability of LGS.

Drawing inferences from existing facts is generally intended to convey opinions and is thus more akin to value judgments. Moreover, in the present case, those inferences could be regarded as a professional assessment of the potential impact of the identified deficiencies. However, the domestic courts, in finding that the applicant had distributed "untruthful information" and "untruthful opinion", had looked at the statements concerning the potential consequences and verified only whether those potential consequences had already occurred. At the same time, they had not verified the statements of facts that had formed the basis for those inferences and had not analysed whether the deficiencies alleged had indeed existed, most notably whether ATCO training had taken place on the basis of unregistered overtime work. Accordingly, the domestic courts had failed to carry out a proper assessment of whether the existence of facts stated in the letter had been demonstrated and whether the opinions expressed therein had had a sufficient factual basis.

The statements made in the letter had not been devoid of factual grounds and had not amounted to a gratuitous attack on the LGS board. They had constituted a description of labour-related concerns and had been made within the legitimate aim of protecting the labour-related interests of the Trade Union members and the effective performance of their work. They had not exceeded the limits of acceptable criticism. While employees have a duty of loyalty, reserve and discretion to their employer, that duty could not be relied upon to deprive trade unions and their representatives of the very essence of their right to defend their members' interests.

(iii) *The damage suffered by the employer or other persons* – The letter had only been sent to the State officials that had overseen the employer – a State-owned company – and had not been published or otherwise distributed to the wider public. The public shareholder in a State-owned company such as LGS had a right to be informed of matters affecting the socio-economic circumstances and well-being of the staff and potentially influencing the quality and

safety of the service provided. In fact, addressing the issues raised in the letter could only have served the interests of the employer and the public, particularly given the potential breaches of safety and health regulations in a "safety critical" environment.

The ATCOs' work, by its very essence, was therefore related to public safety. However, it could not be concluded that the detriments imposed on the applicant for seeking to protect the labour-related interests of the Trade Union members and safeguard the performance of their duties had pursued the legitimate aim of protecting the rights and freedoms of the wider public or public safety, as argued by the government.

(iv) *The nature and severity of the sanctions or other repercussions* – The repercussions had been exceptionally harsh and clearly incompatible with the exercise of a legitimate trade union activity. By disregarding the trade union context, the domestic courts had ignored the applicant's position as a trade union representative and had made her individually responsible for the Trade Union's decision to communicate the grievances of its members to the employer's owner. Furthermore, those sanctions had been particularly punitive given the sector the applicant had been employed in – LGS was the sole employer of civilian ATCOs in Latvia and her dismissal meant that her career as an ATCO in Latvia had been terminated, with undeniable consequences for her private and professional life.

The detriments imposed on the applicant had in themselves been capable of having a chilling effect on the Trade Union's members. However, there had been still further actions taken by the LGS board that had been directed at the Trade Union's members, such as requiring them to sign statements under the threat of suspension, pressuring them to distance themselves from the Trade Union letter and the applicant, and calling for the Trade Union's leadership to be changed, that had clearly aimed at exerting pressure on them.

Overall, the domestic courts could not be said to have applied standards in conformity with the principles deriving from Article 11, read in the light of Article 10, or to have based themselves on an acceptable assessment of the relevant facts. Accordingly, the detriments imposed on the applicant had not been necessary in a democratic society.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 6 in relation to the civil proceedings brought by the applicant, in that there had been a failure to ensure the rights to both a public hearing and the public delivery of the judgments.

Article 41: EUR 25,000 in respect of pecuniary and non-pecuniary damage.

(See also *Palomo Sánchez and Others v. Spain* [GC], 28955/06 et al., 12 September 2011, Legal Summary; *Szima v. Hungary*, 29723/11, 9 October 2012, Legal Summary; *Vellutini and Michel v. France*, 32820/09, 6 October 2011, Legal Summary)

Freedom of association/Liberté d'association

Application of Foreign Agents Act to non-governmental organisations and their directors neither prescribed by law nor necessary in a democratic society: *violation*

L'application de la loi sur les agents étrangers à des organisations non gouvernementales et à leurs dirigeants n'était ni prévue par la loi ni nécessaire dans une société démocratique : *violation*

Ecodefence and Others/et autres – Russia/Russie, 9988/13 et al., Judgment/Arrêt 14.6.2022 [Section III]

Traduction française – Printable version

Facts – The applicants are Russian non-governmental organisations (NGOs) and, in some cases, their directors. Most of them have been placed on a register of "foreign agents" funded by "foreign sources" and exercising "political activity" under the Foreign Agents Act (since updated several times). The relevant applicants unsuccessfully challenged the decisions categorising them as "foreign agents" before the domestic courts.

The application of the Act has resulted in the imposition of administrative fines, financial expenditure, restrictions on the applicant organisations' activities and the institution of criminal proceedings against the director of one organisation. Many applicant organisations were liquidated for violating the requirements applicable to "foreign agents", or had to take decisions on self-liquidation because they were unable to pay the fines, or in order to avoid new sanctions.

Law – Article 11

(a) *Interference* – The applicant organisations and their directors had been directly affected by a combination of inspections, new registration requirements, sanctions and restrictions on sources of funding and the nature of the activities which had been imposed by the Foreign Agents Act. They had had to alter their conduct significantly to reduce the risk of facing further penalties under the Act, which, however, had not stopped the authorities from issuing further fines while they had been on the register of "foreign agents". Those measures had resulted in the dissolution of some applicant organisations. Dissolution of an association, whether ef-

fected by its members under duress or ordered by the domestic authorities, amounted to an interference with the right to freedom of association.

There had therefore been an interference with the applicants' right to freedom of association under Article 11, interpreted in the light of Article 10.

(b) *"Prescribed by law"* – The Court had to determine whether the relevant law had been sufficiently clear and foreseeable in its terms and whether domestic law had afforded a measure of legal protection against arbitrary interference:

(i) *The interpretation of the term "political activity"* – The Russian authorities had applied an extensive and unforeseeable interpretation of the term "political activities" which had been used in the Foreign Agents Act, to include even activities which had been specifically listed as being excluded from its scope, and they had treated indiscriminately the activities of organisations themselves, those of their directors or members who had been acting in a personal capacity, and those that had lacked the requisite finality to influence State decisions and policy. Whereas the Foreign Agents Act had required the purpose of influencing State policy in order to qualify as political activity, the practice of executive and other authorities had extended the concept of "political activity" to any form of public advocacy on an extremely wide set of issues, without establishing whether the organisation had pursued its activities with the aim of influencing State policy. The classification of NGOs' activities based on this criterion – whether they had constituted "political activities" – had produced incoherent results and engendered uncertainty among NGOs wishing to engage in civil society activities relating to, in particular, human rights or the protection of the environment or charity work. That was so especially as the domestic courts had failed to provide consistent guidance as to what actions did or did not constitute "political activity".

(ii) *The provisions on "foreign funding"* – The Act had not contained any rules as to the purpose of "foreign funding" and did not require the authorities to establish any link between such funding and the alleged "political activities" of the organisation. The term "foreign funding" had also been used indiscriminately by the authorities to include disbursements paid to applicant organisations' members or directors, even where they had acted in a personal capacity without involving the organisation. Further, the Act defined the term "foreign source" as one including both proper foreign sources, such as foreign States, institutions, associations and individuals, and any Russian entities "receiving funds and other property from those sources". The law did not specify any criteria in accordance with which a Russian entity might be deemed to fall into that category, which created a situation of uncertainty. The absence of clear and foreseeable criteria had given the authorities unfettered discretion to assert that the applicant organisations had been in receipt of "foreign funding", no matter how remote or tenuous their association with a purported "foreign source" had been. The circumstances in which a refusal of foreign funding could be considered valid were also neither clear nor foreseeable.

Accordingly, the applicants had been unable to envisage with a sufficient degree of foreseeability what funding and what sources of funding would qualify as "foreign funding" for the purposes of registration as a "foreign agent". The legal norm on foreign funding which allowed for its overbroad and unpredictable interpretation did not meet the "quality of law" requirement and deprived the applicants of the possibility to regulate their financial situation.

Overall, two key concepts of the Act ("political activity", "foreign funding") had fallen short of the foreseeability requirement and judicial review had failed to provide adequate and effective safeguards against the arbitrary and discriminatory exercise of the wide discretion left to the executive. That would be sufficient for a finding of a violation of Article 11, interpreted in the light of Article 10. Nevertheless, the questions in the case were closely related to the broader issue of whether the interference had been "necessary in a democratic society":

(c) *Legitimate aim* – The Court accepted in principle that the objective of increasing transparency with regard to the funding of civil society organisations might correspond to the legitimate aim of the protection of public order.

(d) *"Necessary in a democratic society"*

(i) *Creating a special status of "foreign agents"* – Attaching the label of a "foreign agent" to any applicant organisations which had received any funds from foreign entities had been unjustified and prejudicial and also liable to have a strong deterrent and stigmatising effect on their operations. That label had coloured them as being under foreign control in disregard of the fact that they had seen themselves as members of national civil society working to uphold respect for human rights, the rule of law, and human development for the benefit of Russian society and democratic system.

The creation of the new status had severely restricted the ability of the applicant organisations to continue their activities, because of the negative attitude of their target groups and because of the regulatory and legislative restrictions on involving "foreign-agent" organisations in cooperation and monitoring projects. Their registration as "foreign agents" had restricted their ability to participate in public life and engage in activities which they had been carrying out prior to the creation of the new category of "foreign agents". The Government had

not been able to adduce "relevant and sufficient" reasons for creating that new category, or show that those measures had furthered the declared goal of increasing transparency. The creation of that status as defined in domestic law had therefore not been "necessary in a democratic society".

(ii) *The additional auditing and reporting requirements* – The Government had also failed to put forward "relevant and sufficient" reasons for imposing additional requirements on the applicant organisations purely on account of their inclusion on the register of "foreign agents". Those requirements had included the increased frequency of reporting and inspections, the obligation on "foreign-agent" organisations to undergo a mandatory audit and publish it on a dedicated website, and such organisations being denied the benefit of simplified bookkeeping. The Court was unable to find that those measures could substantially facilitate the provision of more transparent and complete information to the public, as the Government had claimed it should. In any event, those additional measures had imposed a significant and excessive financial and organisational burden on the applicant organisations and their staff, and had undermined their capacity to engage in their core activities. Such additional requirements as provided for in domestic law had not been "necessary in a democratic society" or proportionate to the declared aims.

(iii) *Restricting access to sources of funding* – In the absence of clear conditions for the applicability of the Foreign Agents Act, the only way for the applicant organisations to avoid the application of the "foreign-agent" label and restrictions, and continue their activities, had been to forego "foreign funding" altogether. The applicants had thus been confronted with a choice between either refusing all "foreign funding" in the widest possible interpretation of the term, or incurring additional expenses and abiding by the other requirements. By imposing that choice on the applicant organisations, the Act had made them opt for either exclusively domestic or foreign funding, thereby effectively restricting the available funding options.

An enforced choice between accepting foreign funding and soliciting domestic State funding represented a false alternative. In order to ensure that NGOs were able to perform their role as the "watchdogs of society", they had to be free to solicit and receive funding from a variety of sources. The diversity of those sources might enhance the independence of the recipients of such funding in a democratic society. Furthermore, the Court was not convinced by the assertion that the domestic grants and subsidies for non-commercial organisations implementing "projects of social importance" could have adequately compensated for the previously available foreign and international funding.

The Government had been unable to show that the applicant organisations which had been forced to refuse foreign funding under the threat of being included on the register of "foreign agents" could have secured access to domestic funding on a transparent and non-discriminatory basis. Nor had the Government put forward "relevant and sufficient" reasons for causing the applicant organisations to choose between continuing their work while accepting foreign funding and the burdensome requirements of "foreign-agent" status, and significantly reducing their activities on account of insufficient domestic funding or a complete lack thereof. Without proper financing, the applicant organisations had been unable to carry out activities constituting the main objective of their existence, and some of them had had to be wound up. Neither the executive authorities nor the domestic courts had considered the consequences of the "foreign-funding" provisions for the work of those organisations, or the accessibility of alternative funding in Russia. It followed that the restrictions on access to funding had not been necessary in a democratic society.

(iv) *Nature and severity of the penalties* – The Foreign Agents Act had introduced fines for continuing the activities of an organisation without registering as a "foreign agent", failing to comply with additional accounting or reporting requirements, and failing to label publications as originating from a "foreign-agent" organisation. It had also introduced criminal liability for individuals who had deliberately omitted to provide documents for registration of an organisation as a "foreign agent". Even the minimum amount of the relevant fine had been set at a level exceeding the monthly minimum salary by a factor of between thirty (in 2013) and thirteen (in 2019), or, in other words, it had been approximately equivalent to one to three years' subsistence income. Further, the sanctions applicable to "foreign-agent" organisations had been many times higher than the sanctions for analogous offences committed by non-commercial organisations which did not have the status of a "foreign agent".

While sanctions of that magnitude triggered heightened scrutiny of their proportionality, the Government had not put forward any relevant and sufficient reasons for setting the fines at such a high level. The fines had been unaffordable for many of the applicant organisations. Some had had to significantly scale down their activities or be wound up, as they had been unable to pay the fines already imposed or face further fines.

The domestic courts had also failed to provide "relevant and sufficient reasons" for their choice of sanctions. They had not considered the proportionality of a fine, in particular in relation to its impact on the organisation's ability to continue its work. The domestic case-law presented to the Court also

indicted that the sanctions had been unpredictable. The Act had not provided for any guidance as to what would amount to a more or less serious offence, and had left room for arbitrariness as to the amounts of the fines.

Taking into account the essentially regulatory nature of the offences, the substantial amounts of the administrative fines imposed and their frequent accumulation, and the fact that the applicants had been not for profit civil society organisations which had suffered a reduction in their budgets due to restrictions on foreign funding, the fines provided for by the Foreign Agents Act could not be regarded as being proportionate to the legitimate aim pursued. That finding was applicable *a fortiori* to criminal sanctions, since a failure to comply with formal requirements relating to the re-registration of an NGO could hardly warrant a criminal conviction and was disproportionate to the legitimate aim pursued.

Overall, the Government had not shown relevant and sufficient reasons for creating a special status of "foreign agents", imposing additional reporting and accounting requirements on organisations registered as "foreign agents", restricting their access to funding options, and punishing any breaches of the Foreign Agents Act in an unforeseeable and disproportionately severe manner. The cumulative effect of those restrictions – whether by design or effect – was a legal regime that placed a significant "chilling effect" on the choice to seek or accept any amount of foreign funding, however insignificant, in a context where opportunities for domestic funding were rather limited, especially in respect of politically or socially sensitive topics or domestically unpopular causes. The measures accordingly could not be considered "necessary in a democratic society".

Conclusion: violation in respect of each applicant (unanimously).

The Court also held, unanimously, that there had been a violation of Article 34, in that the enforcement of a dissolution order against International Memorial had disclosed a failure to comply with an interim measure indicated by the Court under Rule 39 and violated its right of individual application.

Article 41: sums ranging between EUR 60 and EUR 21,430 in respect of pecuniary damage; EUR 10,000 to each applicant NGO and their directors, in respect of non-pecuniary damage.

ARTICLE 14

Discrimination (Article 2)

Homophobic motives underlying a murder not constituting a statutory aggravating factor and having no measurable effect on sentencing: *violation*

Mobile homophobe d'un meurtre ne constituant pas une circonstance aggravante et n'ayant aucune incidence notable sur la peine fixée : *violation*

Stoyanova – Bulgaria/Bulgarie, 56070/18, Judgment/Arrêt 14.6.2022 [Section IV]

Traduction française – Printable version

Facts – In 2008 three men attacked the applicant's son because they thought that he looked like a homosexual and beat and choked him to death. They had on several previous occasions assaulted other people for the same reason. Two of the attackers were tried and found guilty of aggravated murder - the only statutory aggravating factor accepted by the courts being that they had killed the victim in a particularly painful way - and sentenced to, respectively, ten and four-and-a-half years' imprisonment. These sentences were below the statutory minimum and the lower sentence of the second attacker was due to his being below eighteen at the time of the offence. The third attacker retained the status of a witness. Albeit establishing the gratuitously homophobic motives for the attack, the domestic courts could not explicitly treat them as a further statutory aggravating factor, since the Bulgarian Criminal Code did not provide for that.

Law – Article 14 taken in conjunction with Article 2: The core issue was whether Bulgarian criminal law and its application by the domestic courts in this case had made it possible to respond appropriately to those motives.

Under the Bulgarian Criminal Code murder motivated by hostility towards the victim on account of his or her actual or presumed sexual orientation was not as such "aggravated" or otherwise treated as a more serious offence on account of the special discriminatory motive that underlay it. The authorities perceived this as a lacuna which they had unsuccessfully sought to fill. In particular, the argument made both by the prosecution and the applicant, who had joined the proceedings as a private prosecutor, to characterise those motives as hooligan ones which were a statutory aggravating factor under the Criminal Code, was dismissed by the courts on the basis that homophobic and hooligan motives differed. Although it was not for the Court to say whether that ruling was correct in terms of domestic law, and without intending to express any approval or disapproval of it, the national courts could not be expected to discharge their positive obligations under Article 14 taken together with Article 2 by breaching the requirements of Article 7, one of which was that the criminal law was not to

be construed extensively to the detriment of the accused.

Although the first-instance court and the court of appeal had taken the homophobic motives as an individual aggravating factor when fixing the sentences within the statutory range, it had not been clear from their reasoning what weight they had ascribed to that factor in their overall assessment of the mitigating and aggravating factors pertaining to each of the two offenders. Further, the Supreme Court of Cassation in its assessment of those factors, in contrast to both of the lower courts, had not even mentioned the homophobic motives for the attack, even though they had plainly been a key feature of the case, and had focussed on other factors when fixing the sentences, chiefly mitigating ones. It could not therefore be said that the homophobic motives for the attack had any measurable effect at that level of the analysis. Indeed, in view of the usual approach of the Bulgarian courts to the assessment of the interplay between mitigating and aggravating factors for the purpose of fixing a sentence within the prescribed statutory range, it was normally not possible to attribute specific weight to any one such factor.

Without opining on the fairness of the sentences, and although ultimately, it could not be said that the sentences had been manifestly disproportionate to the seriousness of the attackers' act, as that notion was understood in the Court's case-law, it was concerning that, in spite of the particular gravity and viciousness of the attack on the applicant's son, the Supreme Court of Cassation (as the first instance court but in contrast to the court of appeal) had considered that the attackers deserved special leniency, and had chosen to fix their sentences well below the statutory minimum, especially since under Bulgarian criminal law that was a possibility reserved only for situations in which even a sentence fixed at that minimum would be unduly harsh.

In sum, while the courts had clearly established that the attack on the applicant's son had been motivated by the attackers' hostility towards people whom they had perceived to be homosexuals, they had not attached to that finding any tangible legal consequences. This omission had been chiefly due to the fact that the criminal law had not properly equipped those courts to do so rather than to the manner in which they had dealt with the case. It followed that the State's response to the attack against the applicant's son had not in sufficient measure discharged its duty to ensure that deadly attacks motivated by hostility towards victims' actual or presumed sexual orientation did not remain without an appropriate response.

Conclusion: violation (unanimously).

Article 46: The breach found in this case appeared to be of a systemic character; it had resulted, depending in how the matter was seen, either from a lacuna in the Bulgarian Criminal Code or from the way in which the Bulgarian courts had construed and applied the relevant provisions of that Code. Although it was not for the Court to say whether one or the other had to change to avoid future breaches of this kind, Bulgaria had to ensure that violent attacks (in particular, those resulting in the victim's death) motivated by hostility towards the victim's actual or presumed sexual orientation were in some way treated as aggravated in criminal-law terms, in full compliance with the requirement that criminal law was not to be construed extensively to the detriment of the accused.

Article 41: EUR 7,000 in respect of non-pecuniary damage.

(See also *Myumyun v. Bulgaria*, 67258/13, 3 November 2015, *S.M. v. Croatia* [GC], 60561/14, 25 June 2020, Legal Summary; *Sabalić v. Croatia*, 50231/13, 14 January 2021, Legal Summary; and *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], P16-2021-001, Armenian Court of Cassation, 26 April 2022, Legal Summary)

Discrimination (Article 5)

Applicant resisting police not in a relevantly similar situation with an individual who has hit a private person: *inadmissible*

La situation d'une requérante ayant résisté à la police n'est pas comparable à celle d'un individu ayant frappé un particulier : *irrecevable*

P.W. – Austria/Autriche, 10425/19, Judgment/Arrêt 21.6.2022 [Section IV]

See under Article 5 § 1 (e) – Voir sous l'article 5 § 1 e)

Discrimination (Article 8)

Father of child born out of wedlock unable to exercise parental authority without mother's consent, in spite of parentage established by DNA test: *violation*

Impossibilité pour le père d'une enfant née hors mariage d'exercer l'autorité parentale sans le consentement de la mère, malgré la filiation établie par un test ADN : *violation*

Paparrigopoulos – Greece/Grèce, 61657/16, Judgment/Arrêt 30.6.2022 [Section I]

English translation – Version imprimable

En fait – En 2007, E.K. introduisit une action en recherche de paternité. Elle affirmait que le requérant était le père de sa fille, A.K., née en 2002.

En 2008, suite au test ADN ordonné par le tribunal de première instance, le lien de filiation entre A.K. et le requérant fut établie. Par une mise en demeure, le requérant invita E.K. à se présenter devant notaire afin de procéder à la reconnaissance de A.K. Mais E.K. ne s'y est pas présentée.

Les juridictions nationales déboutèrent le requérant de sa volonté de reconnaitre volontairement sa fille devant notaire. En 2016, la Cour de cassation mentionna que lorsque la mère de l'enfant est en vie et jouit de sa capacité juridique, et qu'elle refuse de consentir, la seule possibilité pour le père est d'introduire une action en reconnaissance de paternité.

En droit – Article 14 combiné avec l'article 8 : La législation interne a soumis le père célibataire d'un enfant naturel à une différence de traitement vis-à-vis tant de la mère que du père marié ou divorcé. En particulier, conformément à l'article 1515 du code civil, en cas de reconnaissance judiciaire, un accord des parents est exigé pour que les pères célibataires puissent exercer l'autorité parentale. Le tribunal peut, si l'intérêt de l'enfant l'impose, en décider autrement à la demande du père, mais seulement si l'autorité parentale de la mère a cessé ou si elle n'est pas en mesure de l'exercer pour des raisons légales ou concrètes ou s'il existe un accord entre les parents.

En l'espèce, une fois la filiation avec A.K. établie par un test ADN, le requérant a cherché à faire reconnaître sa paternité. Or, la législation interne ne lui permettait pas d'exercer l'autorité parentale, même dans le cas où cela aurait été conforme à l'intérêt supérieur de l'enfant. En même temps, il n'a pas pu obtenir une décision judiciaire susceptible de pallier un refus de la mère de consentir au partage de l'autorité parentale, alors même que cette dernière ne niait pas le lien de filiation entre le requérant et A.K.

La Cour n'est pas convaincue par la thèse du Gouvernement selon laquelle le lien entre la mère et l'enfant n'est pas le même que celui qui unit le père à l'enfant. Si tel peut bien évidemment être parfois le cas, en l'espèce, cet argument ne permet pas de priver, de manière automatique, le requérant de l'exercice de l'autorité parentale. À ce propos, l'article 1515 du code civil a été modifié en 2021 et prévoit dorénavant la possibilité pour les tribunaux d'attribuer l'exercice de l'autorité parentale également au père d'un enfant né hors mariage, à la demande de celui-ci et si l'intérêt de l'enfant l'impose. Ainsi, l'autorité parentale n'est plus attribuée, de manière automatique, uniquement à la mère.

Tout en gardant à l'esprit que les autorités jouissent d'une grande latitude en matière d'autorité parentale, la Cour rappelle qu'elle a déjà constaté que la majorité des États membres semblent partir du principe que l'attribution de l'autorité parentale doit reposer sur l'intérêt supérieur de l'enfant et qu'elle doit être soumise au contrôle des juridictions internes en cas de conflit entre les parents.

Le Gouvernement n'a pas suffisamment expliqué pourquoi, à l'époque des faits, il était nécessaire que le droit interne prévoie cette différence de traitement entre les pères et les mères d'enfants nés hors mariage et d'enfants nés d'un mariage.

En ce qui concerne la discrimination alléguée, il n'y a pas de rapport raisonnable de proportionnalité entre l'absence de possibilité pour le requérant d'exercer l'autorité parentale et le but poursuivi, à savoir la protection de l'intérêt supérieur des enfants naturels.

Conclusion : violation (unanimité).

La Cour a aussi conclu à l'unanimité à la violation de l'article 8 car eu égard à l'obligation positive de faire preuve de diligence exceptionnelle dans des affaires similaires, le laps de temps écoulé de neuf ans et quatre mois, pour trois instances, ne peut pas être considéré comme raisonnable.

Article 41 : 9 800 EUR pour préjudice moral.

(Voir aussi *Zaunegger c. Allemagne*, 22028/04, 3 décembre 2009, Résumé juridique)

Discrimination (Article 8)

Exclusion of non-members of Orthodox Jewish Community from social housing owned by a charity catering for that community, within State's wide margin of appreciation: *inadmissible*

La décision d'exclure des personnes ne faisant pas partie de la communauté juive orthodoxe de logements sociaux détenus par une association caritative œuvrant en faveur des membres de cette communauté relevait de l'ample marge d'appréciation de l'État : *irrecevable*

L.F. – United Kingdom/Royaume-Uni, 19839/21, Decision/Décision 24.5.2022 [Section IV]

Traduction française – Printable version

Facts – The applicant is a single mother of four children, who lived in social rented accommodation, provided to her by her local authority. While in temporary accommodation, the applicant became aware of several four-bedroom properties owned by a charity that provided housing for members of the Orthodox Jewish Community ("OJC"). As part of the local authority's arrangements for allocating accommodation, the charity would make some of its housing available to individuals who had applied for social housing. However, in line with its agreements

with the charity, the local authority would in practice only "nominate" potential tenants for those properties if they were members of the OJC. The applicant therefore was not put forward for consideration by the charity.

The applicant lodged judicial review proceedings against the local authority and the charity, challenging the latter's housing criteria and the agreement with the local authority, on grounds that they amounted to unlawful direct discrimination. She appealed unsuccessfully up to the Supreme Court.

Law – Article 14 taken in conjunction with Article 8: The arrangement between the local authority and the charity in the case had impacted upon the eligibility of the applicant and her family for assistance in finding suitable accommodation. The Court therefore accepted that the facts of the case fell within the ambit of Article 8. The applicant had also been treated differently from members of the OJC on account of her non-membership of a religious community, insofar as she had been denied access to accommodation which, pursuant to the arrangement, had to be accorded to families belonging to the OJC. Further, the applicant, having a large family, had been in a comparable situation to members of the OJC who had likewise been seeking accommodation capable of catering to similar family sizes.

Nonetheless, the difference in treatment had been objectively and reasonably justified:

Article 14 did not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them, as had been at issue in the present case. The domestic court had addressed in great detail the significant hardship faced by the OJC in the private rental sector. In particular, members faced high levels of poverty, prejudice and an exponential increase in anti-Semitic hate crime. They also constituted a significant portion of those on the waiting list for larger accommodation, owing to their family sizes, and thus had a pressing need for properties that would reduce the particular and intensified risk of eviction from overcrowded accommodation.

Unlike in other case-law before the court (see, for example, *Ivanova and Cherkezov v. Bulgaria*, 46577/15, 21 April 2016, Legal Summary), the interference did not consist in the loss of a person's only home; the applicant had been housed in temporary accommodation and complained about a restriction on the properties available to her for longer-term rehousing. Rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community, which might lead to a narrower margin of appreciation being afforded to the State, had therefore not been concerned.

Further, in the present case, the domestic courts had carefully considered whether there had been a reasonable relationship of proportionality between the means employed and the aim sought to be realised by the arrangement, and at each level of jurisdiction they had agreed that it had been objectively and reasonably justified. Among other things, the courts had noted that the effect of the charity's allocation policy had been to withdraw 1% of units from the pool of potentially available properties for letting. Consequently, the disadvantage to persons who had not been members of the OJC had been miniscule.

In the light of the foregoing, the arrangement between the local authority and the charity had not exceeded the wide margin of appreciation afforded to the national authorities in such cases.

Conclusion: inadmissible (manifestly ill-founded).

Discrimination (Article 9)

Ban on full body swimsuit (burkini) in municipal swimming-pool: *communicated*

Interdiction du maillot de bain intégral (burkini) dans une piscine municipale : *affaire communiquée*

Missaoui and/et Akhandaf – Belgium/Belgique, 54795/21, Communication [Section III]

English translation – Version imprimable

Les requérantes sont deux femmes musulmanes se plaignant du l'interdiction du maillot de bain intégral dans une piscine publique. Y voyant une discrimination au regard de leur religion, elles engagèrent en 2017 une action en justice tendant la cessation de celle-ci, dirigée notamment contre le règlement municipal en cause. En 2020, leurs griefs furent rejetés en appel.

Affaire communiquée sous l'angle de l'article 14 combiné avec l'article 9 de la Convention.

(Voir aussi *S.A.S. c. France* [GC], 43835/11, 1er juillet 2014, Résumé juridique ; *Dakir c. Belgique*, 4619/12, 11 juillet 2017, Résumé juridique ; et *Osmanoğlu et Kocabaş c. Suisse* (déc.), 29086/12, 10 janvier 2017, Résumé juridique)

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

Very weighty reasons for exclusion of employment periods accrued in other former USSR states in state pension calculation for permanently resident non-citizens, in contrast to Latvian citizens: *no violation*

Exclusion des périodes de travail accumulées dans d'autres États de l'ex-URSS du calcul des pensions des non-citoyens résidents permanents, non applicable aux citoyens lettons, justifiée par des considérations très fortes : *non-violation*

Savickis and Others/et autres – Latvia/Lettonie, 49270/11, Judgment/Arrêt 9.6.2022 [GC]

Traduction française – Printable version

Facts – The applicants were born in different territories of the Soviet Union and came to Latvia at a later date, when it was one of the Soviet Socialist Republics of the Soviet Union. Following the restoration of Latvia's independence, they became "permanently resident non-citizens". Upon their retirement, the applicants' years of service outside Latvia during the Soviet era were not included in the overall period of employment, for the purpose of calculating their pensions, pursuant to Paragraph 1 of the transitional provisions of the State Pensions Act of 1996. In contrast, pensions for people with Latvian citizenship were awarded on the basis of work done anywhere in the former USSR. In *Andrejeva v. Latvia* [GC], the Court found this difference of treatment to amount to a breach of Article 14 taken in conjunction with Article 1 of Protocol No.1. Following this judgment, several of the applicants applied to have their pensions re-calculated but their requests were dismissed. Eventually all five applicants complained to the Constitutional Court, arguing that the law on state pensions was incompatible with the prohibition of discrimination. In February 2011 the Constitutional Court declared the impugned provision compatible with the Constitution and the Convention. It admitted that the legislator had established different principles in respect of Latvian nationals and "non-citizens", and that these two groups were treated differently when calculating the overall period of employment. However, it drew a clear distinction between *Andrejeva* and the present case, as Ms Andrejeva had resided in the territory of Latvia over the disputed periods. In contrast, the applicants had worked outside the territory of Latvia for various periods and could not have acquired legal ties with Latvia. Having examined, *inter alia*, the question of State continuity, and noting that Latvia was not the successor of the rights and obligations of the Soviet Union, it found that the difference had objective and reasonable grounds.

Law – Article 14 in conjunction with Article 1 of Protocol No. 1: The Court found no reason to depart from the relevant findings made in the Andrejeva case, namely that Article 14 read in conjunction with Article 1 of Protocol No. 1 was applicable and that "nationality", or rather the absence of Latvian citizenship on the applicants' part, had been the sole criterion for the distinction complained of. Accordingly, very weighty reasons had to be adduced to justify a difference in treatment in such cases, taking into account, however, the specific circumstances of the case in determining the scope of the respondent State's margin of appreciation. Further, the applicants could be considered to have been in a relevantly similar situation to persons with the same employment history but possessing Latvian citizenship.

The impugned difference of treatment, as ruled by the Constitutional Court, had pursued two legitimate aims. The first and most important one was safeguarding the constitutional identity of the State by implementing the *doctrine of State continuity*. According to this doctrine, Latvia (as well as Lithuania and Estonia) had been a victim of aggression, unlawful occupation and annexation on the part of the former Soviet Union, starting from 1940. It was not thus a successor state to the USSR; it retained the statehood that existed when its independence had been lost *de facto* in 1940 as a result of a blatant breach of international law but which nevertheless had remained in place *de jure* throughout the entire Cold War period. The underlying arguments for this doctrine had informed the setting up of the impugned system of retirement pensions following the restoration of Latvia's independence. The Court acknowledged that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In this specific historical context, such an aim, as pursued by the Latvian legislature when establishing the system of retirement pensions, had been consistent with the efforts to rebuild the nation's life following the restoration of independence. The second aim, as the Court established in the *Andrejeva* case, was the protection of the country's economic system.

The core issue in the present case was whether the legitimate aims pursued by Latvia could justify the difference made between those holding Latvian citizenship and those holding the status of "permanently resident non-citizens", and whether there was sufficient justification for this difference in treatment in the light of all the circumstances of the case. The Court had thus to determine whether there were any good reasons in the instant case, especially in the light of the expanded reasoning adduced by the Constitutional Court in its judgment of 17 February 2011, to depart from its findings in the case of *Andrejeva.*

Having undergone unlawful occupation and subsequent annexation, a State was not required to assume the public-law obligations accrued by the illegally established public authorities of the occupying or annexing power. Latvia had thus been neither automatically bound by such obligations based on the Soviet period nor obliged to undertake obliga-

tions emanating from obligations of the occupying or annexing State. Once, however, it had put in place a system of occupational retirement pensions in 1996 which allowed for periods of employment accrued outside its territory to be counted towards the pension for Latvian nationals, it had been bound, as from the date on which the Convention entered into force in respect of Latvia (that is, 27 June 1997), to comply with Article 14 taken in conjunction with Article 1 of Protocol No. 1.

The Court first determined that a wide margin of appreciation applied in the specific circumstances of the present case, having regard to the following considerations derived from its case-law:

– While the scope of the margin of appreciation could not be the same as regards the adoption of general measures of economic and social policy and as regards the introduction, in that context, of differences in treatment based solely on criteria such as nationality, it was reasonable to consider that in a field where a wide margin was, and must be, granted to the State in formulating general measures, even the assessment of what might constitute "very weighty reasons" for the purposes of the application of Article 14 might have to vary in degree depending on the context and circumstances. The Court had previously acknowledged that there might be valid reasons for giving special treatment to those whose link with a country stemmed from birth within it or who otherwise had a special link with a country. In the present case, the special status of "permanently resident non-citizens" had been created by the Latvian legislature following the restoration of Latvia's independence with a view to addressing the consequences of a situation which had arisen from an occupation and subsequent annexation in breach of international law.

– The specific temporal scope and context of the impugned measure was a factor to be taken into account. The present case concerned past periods of employment, completed outside the respondent State before the introduction of the occupational pension scheme. The Court had previously accepted a difference in treatment based on nationality for reasons relating to the date from which the applicants had developed ties with the respondent State.

– The present case was characterised by the specific background to the impugned transitory measure concerning this pension system. The choices made by the Latvian legislature when setting up the employment-based retirement pension system and determining the criteria for entitlement therein had been directly linked to the particular historical and demographic circumstances of Latvia's situation at the relevant time, together with the constraints imposed by the severe economic difficulties prevailing at the time. The Court had already acknowledged the need for a wide margin of appreciation in the context of such fundamental changes to a country's system as the transition from a totalitarian regime to a democratic form of government and the reform of the State's political, legal and economic structure, phenomena which inevitably involved the enactment of large-scale economic and social legislation. Furthermore, it could have regard to facts prior to the ratification of the Convention by the respondent State where such circumstances could be considered to have created a situation extending beyond that date or might be relevant for the understanding of facts occurring after that date.

– The margin of appreciation might also depend on whether the impugned measure entailed a loss of individual contributions paid by or on behalf of the individual affected by the measure.

– Lastly, it was relevant whether the lack of entitlement had left the individual in question without social cover.

The Court then proceeded to carry out the proportionality assessment against the background of the wide margin of appreciation applicable in this case. In particular it found as follows:

Firstly, the ground for the impugned difference in treatment which had been introduced in the transitional provisions of the occupational pension system set up by the Latvian legislature was directly linked with the primary aim relied on by the Latvian Constitutional Court. The preferential treatment accorded to those possessing Latvian citizenship in respect of past periods of employment performed outside Latvia had therefore been in line with that legitimate aim.

Secondly, the difference in treatment depended on the possession or, rather the lack, of Latvian citizenship, a legal status distinct from the national origin of the persons concerned and available to the applicants as "permanently resident non-citizens". This status had been devised as a temporary instrument so that the individuals concerned could obtain Latvian citizenship or choose another State with which to establish legal ties. In this respect, the Court could accept that in the context of difference in treatment based on nationality there might be certain situations where the element of personal choice linked with the legal status in question might be of significance with a view to determining the margin of appreciation left to the domestic authorities, especially in so far as privileges, entitlements and financial benefits were at stake. It did not appear from the case file that any of the applicants had ever tried to obtain citizenship of or that they had done so but had been met with obstacles. Naturalisation depended on the fulfilment of certain conditions and might require certain efforts. This did not, however, alter the fact that the question of legal status, namely the choice between remaining a

"permanently resident non-citizen" and acceding to citizenship, was largely a matter of personal aspiration rather than an immutable situation, especially in the light of the considerable time-frame available to the applicants to exercise that option.

Thirdly, the difference in treatment only concerned past periods of employment, completed prior to the introduction of the pension scheme in question. The choices made by the Latvian legislature when determining the criteria for entitlements in the employment-based retirement pension system had been directly linked to the particular historical, economic and demographic circumstances, notably five decades of unlawful occupation and annexation. In contrast to the case of *Andrejeva*, the difference in treatment had been limited to periods of employment completed by the applicants outside Latvia, before they had settled in Latvia or had any other links with that country.

Fourthly, the impugned difference in treatment had neither concerned the applicants' entitlement to basic pension benefits, accorded under Latvian law irrespective of the individual's employment history, nor had it entailed any deprivation, or other loss, of benefits based on financial contributions made by the applicants in respect of the employment periods in question.

Lastly, with particular regard to the second legitimate aim pursued (the protection of the economic system), the Latvian system of employment pensions at issue was based on social insurance contributions and functioned according to the principle of solidarity, in the sense that the total amount of contributions collected was used to fund the current disbursement of pensions, payable to all the beneficiaries at a given time. Thus, determining the scope of eligible periods of employment inevitably had had an impact on the level of the benefits and the contributions required to fund them. These types of trade-offs in social welfare systems generally called for a wide margin of appreciation. Given the particular difficulties and the complex policy choices facing the Latvian authorities after the restoration of independence, the Court could not but recognise, in its overall assessment, a substantial degree of deference to be afforded to the Government.

In sum, in the light of all the above circumstances and the respective margin of appreciation, the impugned difference in treatment had been consistent with the legitimate aims pursued and the grounds relied upon by the Latvian authorities to justify it could be deemed to amount to very weighty reasons. Accordingly, the respondent State had not overstepped its margin of appreciation with regard to the applicants and the Court had to reach a different conclusion from that of the *Andrejeva* case.

Conclusion: no violation (ten votes to seven).

(See *Andrejeva v. Latvia* [GC], 55707/00, 18 February 2009, Legal Summary; *Bah v. the United Kingdom*, 56328/07, 27 September 2011, Legal Summary; *British Gurkha Welfare Society and Others v. the United Kingdom*, 44818/11, 15 September 2016, Legal Summary)

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

Authorities' refusal to reimburse costs of approved medical treatment in USA as required advance payment was made by a charitable organisation and not the applicant: *communicated*

Refus des autorités de rembourser les frais afférents à un traitement médical pris en charge administré aux États-Unis au motif que l'avance de frais exigée avait été payée non par le requérant mais par une organisation caritative : *affaire communiquée*

Kotar – Slovenia/Slovénie, 18047/22 and/et 18056/22, Communication [Section I]

Traduction française – Printable version

The applicant, a minor, underwent two surgeries in a hospital in the United States of America pursuant to a decision issued by the Slovenian Health Insurance Institute (the Institute) which also undertook to pay the associated costs. Since the costs of the treatment had to be paid in advance, the applicant's parents collected the funds with the help of a charitable organisation which opened a separate bank account for him. The organisation then paid for the treatment from that account.

After paying the applicant a part of the sum, the Institute refused his request for the reimbursement of the remaining sum on the grounds that both the medical procedures and flight tickets had been paid by the aforementioned organisation. The Institute also requested the applicant to return the sum which it had previously transferred to him. The applicant brought proceedings against that decision (application 18056/22) and the Institute also brought proceedings against the applicant claiming back the money it had "erroneously" transferred to him (application 18047/22). Although in both sets of proceedings the lower courts decided in favour of the applicant, the Institute's appeals before the Supreme Court were successful.

The applicant complains under Article 6 § 1 that the Supreme Court decided arbitrarily – its finding having no basis in the applicable legislation – and without giving any consideration to the argument that the funds collected by the charitable organisation had been donated to the applicant. Furthermore, he

complains under Article 1 of Protocol No. 1 and Article 14 that the Supreme Court's decisions amounted to an unreasonable interpretation of the relevant legislation as a result of which he was unable to receive the reimbursement of medical costs based on his health insurance just because he had been unable to make an advance payment himself. He alleges that he was discriminated against on the basis of his economic situation.

Communicated under Articles 6 § 1 (civil limb) and Article 1 of Protocol No. 1 taken alone and in conjunction with Article 14.

(See also *Stopar v. Slovenia*, 1400/22, communicated case)

ARTICLE 34

Hinder the exercise of the right of application / Entraver l'exercice du droit de recours

Failure to comply with interim measure through enforcement of dissolution order against a non-governmental organisation: *violation*

Manquement à l'obligation de se conformer à une mesure provisoire à l'effet de suspendre l'exécution d'une ordonnance de dissolution prise contre une organisation non gouvernementale : *violation*

Ecodefence and Others/et autres – Russia/Russie, 9988/13 et al., Judgment/Arrêt 14.6.2022 [Section III]

See under Article 11 – Voir sous l'article 11

ARTICLE 46

Execution of judgment / Exécution de l'arrêt

Striking-out decision not falling within ambit of Art 46, which concerns only final judgments of the Court: *inadmissible*

Décision de radiation ne tombant pas sous l'empire de l'art 46 qui vise uniquement les arrêts définitifs de la Cour : *irrecevable*

Boutaffala – Belgium/Belgique, 20762/19, Judgment/Arrêt 28.6.2022 [Section III]

See under Article 6 § 1 (criminal) – Voir sous l'article 6 § 1 (pénal)

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

Peaceful enjoyment of possessions / Respect des biens

Unjustified refusal to enforce final and binding international arbitration award against National Property Fund after rescission of purchase agreement for State property being privatised: *violation*

Refus injustifié de faire exécuter une sentence arbitrale définitive et contraignante rendue contre le Fonds des biens nationaux après annulation d'un accord portant sur l'acquisition d'un bien de l'État en cours de privatisation : *violation*

BTS Holding, a.s. – Slovakia/Slovaquie, 55617/17, Judgment/Arrêt 30.6.2022 [Section I]

Traduction française – Printable version

Facts – The applicant company entered an agreement with the National Property Fund of Slovakia ("NPF"), the country's privatisation agency, for purchasing a majority share in Bratislava airport which was being privatised. Following the rescindment of the agreement by the NPF the applicant company requested arbitration before the International Chamber of Commerce in Paris ("ICC") of the International Court of Arbitration ("ICA") concerning the amounts to be paid back to it. The dispute was resolved in an award in favour of the applicant company. Under the ICC's terms of reference by submitting the dispute to it the parties undertook to abide by the award without delay, as provided for by the ICC Arbitration Rules and certified by the ICA Secretary General. Neither party objected to the ICC's jurisdiction in the course of the arbitration proceedings. The applicant company petitioned for enforcement of the award in Slovakia and the first instance court authorised a judicial enforcement officer to enforce the award. Following an objection to enforcement by the NPF, the domestic courts refused to enforce the award on public policy and formal procedural grounds.

Law – Article 1 of Protocol No. 1

(a) *Applicability* – The arbitration award had been sufficiently established to amount to a "possession" within the meaning of this provision. It was undisputed that it had become final and binding: while it could have been challenged by the procedures provided for this purpose in the jurisdiction of the seat of the arbitration, no such procedures had been made use of. Furthermore, foreign arbitration awards were in principle enforceable in Slovakia, by operation of the Convention on the Recognition and En-

forcement of Foreign Arbitral Awards ("New York Convention") and the respective provisions of the Slovakian Arbitration Proceedings Act. No separate decision had to be taken for the recognition of the award; by operation of law, its legal recognition had been implicit in the appointment of a judicial enforcement officer to enforce it. Beyond the question of such implicit recognition, the proceedings pursued by the applicant company at the domestic level had been purely enforcement proceedings. As it was likewise clear, the legal framework of those proceedings for the examination of the NPF's objection to the enforcement did not allow for any substantive review of the award itself, such examination being limited to any obstacles to the enforcement intervening after the award had been made.

(b) *Merits* – The non-enforcement of the award by the domestic courts had amounted to an interference with the applicant company's possessions which had to be examined under the general rule embodied in the first sentence of Article 1 of Protocol No. 1 as it did not constitute a deprivation of possessions or a measure of control of the use of property within the meaning of its second and third sentences respectively. The Court then expressed grave doubts as to the lawfulness of the interference. In particular, after a detailed examination of each of the grounds relied on by the domestic courts, it appeared that those grounds had not been given and/or fell outside the legal framework for denying enforcement of a foreign arbitration award allowed by the provisions of the domestic law and the New York Convention. Nevertheless, and even assuming that denying enforcement of the award on these grounds had served a general interest, it had not been shown that it was proportionate to that aim. The Government had not advanced any arguments on this aspect of the case. Moreover, while focusing on elements which purportedly precluded the enforcement by reason of public policy or procedural formalities, the domestic courts had taken no account of the requirements of the protection of the applicant company's fundamental rights and the need for a fair balance to be struck between them and the general interest of the community rights.

Conclusion: violation (unanimously).

Article 41: reserved.

(See also *Stran Greek Refineries and Stratis Andreadis v. Greece*, 13427/87, 9 December 1994, Legal Summary)

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

Article 2 § 2

Freedom to leave a country / Liberté de quitter un pays

Formalistic, non-individualised refusal to re-issue alien's passport to long-term resident of Chechen origin, ex-beneficiary of subsidiary protection and afraid to contact Russian authorities: *violation*

Refus formaliste et non individualisé de délivrer un nouveau passeport pour étranger à un résident de longue durée d'origine tchétchène qui avait précédemment bénéficié d'une protection subsidiaire et qui avait peur de contacter les autorités russes : *violation*

L.B. – Lithuania/Lituanie, 38121/20, Judgment/Arrêt 14.6.2022 [Section II]

Traduction française – Printable version

Facts – The applicant, a Russian national of Chechen origin, came to Lithuania in 2001 and was granted subsidiary protection on several occasions between 2004 and 2008, in view of the ongoing war and widespread human rights violations in the Chechen Republic. His applications for asylum were refused. In 2008 he obtained a permanent residence permit on the grounds of his uninterrupted lawful residence in Lithuania for five years. Earlier, in 2004, he was also issued with an alien's passport. Each time this expired he was issued with a new one until 2018. The Lithuanian authorities then rejected his requests for the issuance of a such a passport finding that he had not met one of the three conditions under the relevant law, namely that he had been unable, for objective reasons, to obtain a valid passport or equivalent travel document from the authorities of his country of origin. The applicant unsuccessfully challenged this decision before the domestic courts.

Law – Article 2 § 2 of Protocol No. 4

(a) *Applicability* – This was the first case in which the Court had examined the refusal to issue a travel document to a foreign national. In the Court's view, Article 2 of Protocol No. 4 to the Convention could not be considered to impose on Contracting States a general obligation to issue aliens residing on their territory with any particular document permitting them to travel abroad. At the same time, the Court emphasised that, under Article 2 § 2 of Protocol No. 4, the right to leave any country, including his own, was granted to "everyone". The applicant lawfully resided in Lithuania and did not have any

other valid identity documents than those that had been issued to him by the Lithuanian authorities. Further, as under domestic law the residence permit which he held did not give him the right to travel abroad, the applicant's right to leave Lithuania would not be practical and effective without him obtaining some type of travel document. Lastly, Lithuanian law entitled lawfully resident foreign nationals to obtain an alien's passport, provided that they met the relevant conditions. Article 2 of Protocol No. 4 was thus applicable.

(b) *Merits* – There had been an interference with the applicant's right to freedom of movement. In particular, even though according to the relevant EU law, the applicant, being a permanent resident of Lithuania, had had the right to cross the borders between EU Member States without a travel document, such a document might, under certain circumstances, be necessary even when travelling within the Schengen zone. Moreover, without a valid travel document he had been precluded from going to countries outside the Schengen zone and outside the EU, including the United Kingdom where his children lived. That interference had been in accordance with the relevant domestic law. It was not, however, necessary to decide whether the impugned interference had pursued a legitimate aim, because in any event it had not been "necessary in a democratic society", for the following reasons.

In the present case, unlike other cases examined to date by the Court under this provision which had concerned various measures aimed at precluding the applicants from leaving the country, the Lithuanian's authorities had not sought to restrict the applicant from going abroad; their refusal to issue him with an alien's passport had been based on the fact that he could have obtained a travel document from the Russian authorities.

The Court was unable to examine whether in the asylum proceedings the authorities had correctly assessed the risks allegedly faced by the applicant in his country of origin, as these proceedings, which had ended well over six months before this application had been lodged, were not the subject matter of case. Nor was it for the Court to decide on the correct interpretation or application of the domestic asylum law, assess its compatibility with the relevant EU directives or determine the status to which the applicant should have been entitled under domestic law. That being said, the Lithuanian authorities had acknowledged during a certain period of time and on a number of occasions, that the applicant could not safely return to his country of origin. Following the last such decision in 2008 the applicant had availed himself of the opportunity provided by law to obtain a more favourable residence permit. Therefore, the interruption in the regular granting of subsidiary protection to the applicant had resulted from circumstances unrelated to the situation in his country of origin or the reasons for which he had previously sought that status. Indeed, at no point had the domestic authorities decided, after assessing the situation in the applicant's country of origin and his individual circumstances, that he had no longer been in need of subsidiary protection and that he could have approached the Russian authorities without fear.

Further, significant importance had been given to the fact that the applicant's requests to grant him refugee status had been rejected and that he had not demonstrated any persecution directed at him personally. His claim, however, that he had been afraid to contact the Russian authorities, owing to the reasons for which he had previously been granted subsidiary protection, had not been adequately addressed in the domestic proceedings. Moreover, Lithuanian law had since acknowledged, albeit at a time when it no longer availed the applicant, that beneficiaries of subsidiary protection might have a well-founded fear to contact their national authorities; such fear was now considered an objective reason for not being able to obtain a travel document from those authorities.

In addition, for nearly ten years the Lithuanian authorities had accepted that the applicant had been unable to obtain a passport from the Russian authorities. Although the Government maintained that the subsequent refusal to issue him with a travel document had been based on the changed practice of the Russian authorities regarding the issuance of passports to Russian nationals residing abroad, there was no indication that the Lithuanian authorities had assessed whether that possibility had been accessible in practice to the applicant in the light of his individual circumstances, including the fact that he had lived in Lithuania for almost twenty years and had not had any valid Russian identity documents during that entire time.

Consequently, the refusal to issue the applicant with an alien's passport had been taken without carrying out a balancing exercise and without ensuring that such a measure had been justified and proportionate in his individual situation. That refusal had been based on formalistic grounds, namely that he had not demonstrated that he was personally at risk of persecution and that he was not considered a beneficiary of asylum at that time, without adequate examination of the situation in his country of origin, as well as on the purported possibility of obtaining a Russian passport, without any assessment of whether that possibility had been accessible to him in practice in view of his particular circumstances.

Conclusion: violation (unanimously).

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

(See also *Stamose v. Bulgaria*, 29713/05, 27 November 2012, Legal Summary, and *Khlyustov v. Russia*, 28975/05, 11 July 2013, Legal Summary)

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

Criminal proceedings duplicating administrative fine for unlawful construction, but not the annual fine for its preservation: *violation, no violation*

Procédure pénale ayant donné lieu à la duplication d'une amende administrative pour construction illégale mais pas à la duplication de l'amende annuelle due en cas de conservation de la construction en question : *violation, non-violation*

Goulandris and/et Vardinogianni – Greece/Grèce, 1735/13, Judgment/Arrêt 16.6.2022 [Section I]

Traduction française – Printable version

Facts – The applicants, who are husband and wife, constructed two stone walls on their property without the requisite building permit. An onsite inspection report declared the constructions unlawful and imposed a fine for their unlawful construction against the first applicant ("the construction fine") and an annual fine for each year that the wall was kept in place against both applicants ("the preservation fine"). No complaints were raised against the fines.

The on-site inspection report was sent to the public prosecutor's office and a bill of indictment was issued against the two applicants. They were sentenced to seven months' imprisonment on account of having jointly and intentionally constructed the walls in breach of the relevant building permit, which was converted to a pecuniary penalty. The applicants appealed unsuccessfully up to the Court of Cassation, arguing *inter alia* that they had been victims of duplication of proceedings in breach of the *ne bis in idem* principle.

The applicants' constructions at issue have subsequently been regularised by a regularisation scheme provided for in domestic law.

Law – Article 4 of Protocol No. 7

(a) *Whether the proceedings as regards the administrative fines were criminal in nature* – The administrative fines had been imposed on the owners or co-owners together with and independently from the obligation to demolish the unlawful constructions. The construction fine was payable even if the construction had thereafter been demolished or had been legalised and had therefore not been dependent on the restoration of lawfulness and of the *status quo ante*. It thus could not be intended as pecuniary compensation for the damage caused, but rather as a form of punishment of offenders. It had had a deterrent character as well as a punitive one. The preservation fine, calculated from the date of the construction until the date of any subsequent demolition or legalisation, would still be due: any eventual legalisation would only apply for the future and not *ex tunc.* The Court could not accept that it had involved only indirect enforcement or that it had been intended solely as pecuniary compensation: through its yearly imposition and its progressive increase every year, it had also been intended to punish those responsible for constructing without the required building permit and to deter others from doing likewise.

The fines had been directed at all citizens in their capacity as owners of unlawful buildings or constructions. Moreover, although urban-planning fines had not been classified as "criminal" under domestic law, they could be potentially severe, did not have an upper limit and they undoubtedly had included an element of punishment, which was sufficient to establish the criminal nature of the proceedings relating to the imposition of the fines at issue.

(b) *Whether the administrative fines constituted a "final conviction"* – The time-limit of thirty days for lodging a complaint had started from the day following the receipt of the report on the unlawful constructions and had ended on 4 December 2004. As the applicants had not contested the fines, the administrative decision imposing them had become "final" for the purposes of the Protocol on 5 December 2004, and not when the fines had been paid.

It followed that the "conviction" by way of the construction fine and the "conviction" by way of the preservation fine had become "final" before the institution of criminal proceedings in July 2006, when the bill of indictment had been issued.

(c) *Whether the offences were the same in nature (idem)* – The facts, which had given rise to the administrative *construction* fine and to the applicants' prosecution and criminal conviction, had been the construction of two surrounding stone walls contravening the relevant building permit. The facts of those two offences had to be regarded as substantially the same. The criminal offence had encompassed the elements of the construction fine in their entirety, and conversely, the imposition of the construction fine had not been based on any elements not contained in the criminal offence, for the purposes of the Protocol.

On the other hand, the facts underlying the criminal prosecution and conviction had not been the same or substantially the same as those which had led to the imposition of the *preservation* fine in administrative proceedings. The preservation fine had been imposed for preserving the unlawful constructions and continuing to infringe the urban-planning legislation, an important factual element of the administrative proceedings which had not formed part of the applicants' conviction for unlawful construction. The Court therefore considered that the criminal proceedings had not concerned the same offences and the same period of time as regards the imposition of the preservation fine; they had been sufficiently separate to conclude that there had been no violation of Article 4 of Protocol No. 7 in that respect.

The Court continued to examine whether there had been a duplication of proceedings as regards the administrative proceedings relating only to the construction fine and in respect of the first applicant:

(d) *Whether there was a duplication of proceedings (bis)* – Concerning the connection in substance between the construction fine and the criminal proceedings, as well as the different sanctions imposed on the first applicant, the objectives of both penalties had been deterrence and punishment. The urban-planning construction fine imposed in administrative proceedings, however, had been specific for the conduct in question and thus had differed from "the hard core of criminal law", as it had not had stigmatising features. The two sets of proceedings had therefore pursued complementary purposes in addressing the issue of unlawful construction and failure to comply with the statutory urban-planning requirements.

As regards the foreseeability of the consequences of the applicant's conduct, he should have been aware that the criminal prosecution and the imposition of a fine had been possible, or even likely, on the facts of the case, as that had formed part of the sanctions imposed under Greek law for failure to comply with urban-planning legislation.

As to the manner of conducting the proceedings, a hearing had taken place in the Criminal Court of First Instance and another one in the Criminal Court of Appeal, at which the prosecutor had made submissions and a witness had been examined. The criminal authorities and both sets of proceedings had followed their own separate course in the Greek legal system and had become final independently of each other. The criminal courts had collected and assessed evidence and criminal penalties had been decided independently of the imposition of the urban-planning fine.

The appellate court had had regard to the imposition of the previous fine not as a reason to lower the criminal penalty, but as an element which had confirmed the applicant's criminal liability. The Court of Cassation had also held a hearing in the case and had not recognised a binding effect of the administrative fines in relation to criminal proceedings.

As regards the proportionality of the overall punishment inflicted, the judgment of the Criminal Court of First Instance had not made any reference to the fact that the applicant had already been fined. The fact that the appellate court, in fixing the sentence, had taken into account, among other things, the applicants' financial situation in general, did not mean that the previous administrative fines had been taken into account for that purpose, and it was not sufficient to conclude that there had been a mechanism in criminal proceedings to ensure the proportionality of the overall penalties. Moreover, the decision to suspend the sentence had been a result of the applicants' not having been criminally convicted with final effect and given a custodial sentence of more than one year.

Assessing the connection in time between the proceedings, the overall length had been almost eight years. The bill of indictment had been issued more than one and a half years after the decision as to the administrative fine in the first set of proceedings had become final. The applicant had been convicted at first instance more than three years and nine months after the administrative fine had become "final" and criminal proceedings had been finally concluded by the Court of Cassation approximately seven years and nine months after the first set had become final. The criminal proceedings had thus not been pending concurrently with the administrative proceedings relating to the construction fine, but had been initiated a substantial amount of time after the administrative "conviction". This lapse of time could not be attributed to the applicant and it could not be considered that the connection in time between the two sets of proceedings had been sufficient to avoid a duplication of the proceedings.

Notwithstanding their complementary purposes and the foreseeability of the consequences of the applicant's conduct, the two sets of proceedings had therefore not been sufficiently linked in substance and in time to be considered to have formed part of an integrated scheme of sanctions in respect of unlawful construction in Greek law, as in force at the material time. On the contrary, having been punished twice for the same conduct, the first applicant had suffered disproportionate prejudice resulting from the duplication of proceedings and penalties, which had not formed part of a coherent and proportionate whole in his case.

Conclusion: no violation; violation in respect of the first applicant (unanimously).

Article 41: claim in respect of pecuniary damage dismissed.

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

Interim measures concerning concerning prisoners of war / Mesures provisoires concernant des prisonniers de guerre

Urgent measures in case of prisoner of war sentenced to death in the "Donetsk People's Republic"

Mesures urgentes s'agissant d'un prisonnier de guerre condamné à mort dans la « République populaire de Donetsk »

ECHR press release – Communiqué de presse CEDH

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Urgent measures regarding two British prisoners of war sentenced to death in the "Donetsk People's Republic"

Mesures urgentes s'agissant de deux prisonniers de guerre britanniques condamnés à mort dans la « République populaire de Donetsk »

ECHR press release – Communiqué de presse CEDH

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Interim measures concerning Ukrainian prisoners of war

Mesures provisoires concernant des prisonniers de guerre ukrainiens

ECHR press release – Communiqué de presse CEDH

Other interim measures / Autres mesures provisoires

Requests for interim measures in cases concerning asylum-seekers' imminent removal from the UK to Rwanda

Demandes de mesures provisoires dans des affaires portant sur le refoulement imminent de demandeurs d'asile du Royaume-Uni vers le Rwanda

ECHR press release – Communiqué de presse CEDH

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The Court refuses a request for an interim measure by a Romanian former minister for whom a European arrest warrant was issued

Rejet de la demande de mesure provisoire d'une ancienne ministre roumaine faisant l'objet d'un mandat d'arrêt européen

ECHR press release – Communiqué de presse CEDH

GRAND CHAMBER (PENDING) / GRANDE CHAMBRE (EN COURS)

Relinquishments / Dessaisissements

Duarte Agostinho and Others/et autres – Portugal and 32 others/et 32 autres, 39371/20 [Section IV]

See under Article 1 – Voir sous l'article 1

Carême – France, 7189/21 [Section V]

See under Article 3 – Voir sous l'article 3

OTHER JURISDICTIONS / AUTRES JURIDICTIONS

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

Freedom of the press: the disclosure by a journalist of inside information relating to the forthcoming publication of an article reporting rumours concerning companies listed on the stock exchange is lawful where it is necessary for the purpose of carrying out a journalistic activity and respects the principle of proportionality

Liberté de la presse : la divulgation par un journaliste d'une information privilégiée portant sur la publication prochaine d'un article relayant des rumeurs concernant des sociétés cotées en Bourse est licite lorsqu'elle est nécessaire pour mener à bien une activité de journalisme et respecte le principe de proportionnalité

CJEU press release – Communiqué de presse CJUE

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Duplication of proceedings and penalties of a criminal nature in competition law: the Court specifies the protection against double jeopardy provided by EU law

Cumul de poursuites et de sanctions de nature pénale en droit de la concurrence : la CJUE précise

la protection qu'offre le droit de l'Union contre la double incrimination

CJEU press release – Communiqué de presse CJUE

RECENT PUBLICATIONS / PUBLICATIONS RÉCENTES

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

Publications in English or French / Publications en anglais ou en français

French – Français

Guide sur l'article 2 du Protocole n°4 – Liberté de circulation

Guide sur le droit de l'Union européenne dans la jurisprudence de la Cour

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

Romanian – Roumain

Ghid privind jurisprudența derivata din Convenție – Drepturile persoanelor private de libertate

Ghid privind art. 12 – Dreptul la căsătorie

Ghid privind art. 3 din Protocolul nr. 4 – Interzicerea expulzării propriilor cetățeni

Ghid privind art. 4 din Protocolul nr. 4 – Interzicerea expulzărilor colective de străini

Ghid privind art. 1 din Protocolul nr. 7 – Garanții procedurale în cazul expulzărilor de străini