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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

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

European Court of Human Rights

Cour européenne des droits de l'homme

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

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

European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex – France
Tel: + 33 (0)3 88 41 20 18
Fax: + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
twitter.com/ECHR_CEDH
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Cour européenne des droits de l'homme
(Conseil de l'Europe)
67075 Strasbourg Cedex – France
Tél. : + 33 (0)3 88 41 20 18
Fax : + 33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int
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Usage excessif de la force létale pendant une opération anti-émeute menée en prison de manière non contrôlée et non systématique : *violation*

Kukhalashvili and Others/et autres – Georgia/Géorgie, 8938/07 and/et 41897/07, Judgment/Arrêt 2.4.2020 [Section V]

Traduction française du résumé – Printable version

Facts – In 2006, an anti-riot operation was conducted in a Tbilisi prison in which at least seven inmates, including members of the applicants' families, were killed by the anti-riot forces. Dozens of other inmates were seriously injured.

Law – Article 2 (procedural):

The investigation into the law-enforcement agents' use of force had been launched after a three-month delay by the same unit from the Ministry of Justice which had given the order to storm the prison and had been in direct command of the anti-riot squad. The investigation had not examined the planning of the anti-riot operation or the use of lethal or physical force. In addition, as evident from the statements of senior prosecution officials, the State authorities had been predisposed to discount any wrongdoing on the part of the law-enforcement agents. The investigation had therefore lacked independence and impartiality. The involvement of the deceased's next of kin and public scrutiny into the relevant investigation had been virtually non-existent. Lastly, the investigation had not produced any conclusive findings. The delays in proceedings had been prohibitive. In the light of the foregoing, the investigation had been ineffective.

Conclusion: violation (unanimously).

Article 2 (substantive aspect):

(a) Methodology of the Court's scrutiny:

The domestic courts had not been given a chance to establish the relevant facts because the proceedings regarding the alleged abuse of power by State agents during the anti-riot operation had still been ongoing. And there had been no parliamentary inquiry, even though such a massive incident had shaken the country and attracted significant international attention. In such circumstances, when the Court was prevented from having knowledge of the exact circumstances surrounding the anti-riot operation for the reasons objectively attributable to the State authorities, it was for the respondent Government to explain, in a satisfactory and convincing manner, the sequence of events and to exhibit solid evidence that could refute the applicants' allegations. If the Government failed to do so, the Court might then draw strong inferences. Since it was ultimately for the Court to make its own findings and reach its own conclusions on the applicants' allegations, it drew on all the material available, including the factual findings of the relevant domestic and international human rights observers and the results of the investigation launched against the six riot organisers.

(b) Whether the use of lethal force was legitimate: The use of lethal force for purely punitive, retaliatory purposes, even if those purposes targeted alleged members of the criminal underworld, could not be justified under Article 2 § 2.

The Government's argument that there had existed an imminent and real danger to the lives of prison guards as a result of the gunshots coming from some of the most aggressive prisoners behind the barricades had been sufficiently convincing. The law-enforcement officers could indeed have subjective good reasons to believe that the use of force had been necessary. The conduct of the inmates had shown certain signs of being an attempted uprising. In the light of the foregoing, the respondent State could resort to measures involving potentially lethal force.

(c) Whether the use of lethal force was proportionate:

The authorities had been aware of the criminal bosses' plans to instigate disobedience in prisons well before the incident. Nevertheless, the officers of the anti-riot squad had not received specific instructions and orders from their superiors regarding the requisite form and intensity of any use of lethal force in order to keep the likelihood of casualties to a minimum. Having recourse to automatic weapons within the close confines of the prison walls would necessarily have meant that the risk of causing fatalities had been inordinately high. The Government had failed to produce any evidence to show that the anti-riot squad had acted in a controlled and systematic manner, under a clear chain of command. According to the evidence collected by Human Rights Watch, the competent authorities had not even known exactly who had been in charge of the anti-riot operation.

The competent authorities had not even considered using alternative, less violent means of sup-

pressing the incident in the prison, such as teargas or water cannons. This had been apparently a consequence of the lack of any strategic planning as to how the anti-riot operation would be carried out. Moreover, as reported by Amnesty International and Human Rights Watch, the gunshots in the inmates' direction had come not just from the anti-riot squad inside the building, but also from shooters situated outside on the roofs of neighbouring buildings, with stray bullets entering prison cells through the windows. Those facts had shown that the use of lethal force by the anti-riot squad had been indiscriminate and excessive. Furthermore, as reported by Human Rights Watch, no serious attempts had been made to conduct negotiations with the prisoners behind the barricades, even though the latter had clearly shown readiness to enter into such negotiations. In this respect, it was appropriate to restate that a prison population was by its nature a vulnerable group, in need of the protection by the State.

According to the relevant international reports, the authorities had failed to provide adequate medical assistance to the prisoners after the termination of the anti-riot operation. Since the hazard had been predictable, the relevant authorities' obligation to come up with a proper medical evacuation plan had been even greater. Furthermore, according to credible reports, numerous detainees had been ill-treated and even shot in their cells, even though they were no longer putting up resistance. Lastly, neither the competent domestic authorities nor the respondent Government had provided information regarding the individual fates of the applicants' family members who had been killed during that operation. Having regard to the treatment to which the State agents subjected the detainees after the termination of the anti-riot operation, the Government's failure to account for each of the relevant deaths had appeared to be a particularly grave shortcoming, a consequence of the seriously defective domestic investigation.

Conclusion: violation (unanimously).

Article 41: EUR 40,000 for the first and second applicants jointly and EUR 32,000 for the third applicant in respect of non-pecuniary damage; claim for pecuniary damage dismissed

(See also concerning the effective investigation: *Kolevi v. Bulgaria*, 1108/02, 5 November 2009, Information Note 124; *Şandru and Others v. Romania*, 22465/03, 8 December 2009, Information Note 125; *Giuliani and Gaggio v. Italy* [GC], 23458/02, 24 March 2011, Information Note 139; *Enukidze and Girgvliani v. Georgia*, 25091/07, 26 April 2011, Information Note 140; *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], 24014/05, 14 April 2015, Information Note 184; concerning the use of force: *Mansuroğlu v. Turkey*, 43443/98, 26 February 2008, Information Note 105; *Finogenov and Others v. Russia*, 18299/03 and 27311/03, 20 December 2011, Information Note 147; *Kavaklıoğlu and Others v. Turkey*, 15397/02, 6 October 2015, Information Note 189; *Tagayeva and Others v. Russia*, 26562/07 and al., 13 April 2017, Information Note 206).

Effective investigation/Enquête effective

Failure to establish the causes of the uprooting of a tree which led to a fatal road accident, and any possible negligence on the part of the authorities: *violation*

Défaut d'établir les causes du déracinement de l'arbre à l'origine d'un accident de la route mortel et l'existence d'une éventuelle négligence des autorités : *violation*

Marius Alexandru et Marinela Ştefan – Romania/Roumanie, 78643/11, Judgment/Arrêt 24.3.2020 [Section IV]

English translation of the summary – Version imprimable

En fait – Les requérants en couple circulaient en voiture sur la voie publique lorsqu'un arbre bordant la route nationale a été déraciné et a heurté leur voiture. Ces derniers ont subi de multiples lésions et deux autres occupants de la voiture sont décédés. Les requérants se plaignent entre autres d'une absence d'effectivité de l'enquête menée pour identifier et punir les personnes responsables de l'accident, ainsi que de la durée de celle-ci.

En droit – Article 2 (volet procédural) :

Une enquête pénale a été ouverte le jour de l'accident par la police routière mais elle a de suite été entachée d'irrégularités. En effet, les autorités ont failli à leur obligation de saisir des preuves essentielles, s'agissant de l'arbre déraciné, ou de les conserver, s'agissant des échantillons prélevés sur le tronc et des racines de l'arbre. Cela a eu des conséquences importantes sur l'effectivité de l'enquête étant donné que les experts n'ont pas pu réaliser une expertise technique et tirer des conclusions formelles quant au déracinement de l'arbre. Le parquet n'a pas pu établir les causes du déracinement de l'arbre et l'existence d'une éventuelle négligence des autorités dans l'exercice de leurs activités.

Par ailleurs, pendant deux ans jusqu'au renvoi du dossier d'enquête au procureur, avec la proposition de non-lieu formulée par la police routière, très peu de mesures ont été prises par cette dernière. Et aucun responsable n'a été identifié, si ce n'est

le conducteur de la voiture accidentée. De nombreuses lacunes de l'enquête ont également été constatées, à plusieurs reprises, par les autorités judiciaires nationales. Le fait qu'elles n'avaient pas été comblées jette de forts doutes sur le sérieux de la démarche des enquêteurs.

Au cours de l'enquête pénale, les autorités judiciaires ont laissé persister des zones d'ombre en n'ayant pas cherché à établir avec précision le rôle joué par les différentes autorités publiques dans la sécurité routière et par leurs employés. Par la suite, ayant établi que les normes de sécurité routière n'avaient pas été méconnues en l'espèce, les autorités judiciaires ont conclu à un déracinement fortuit, qui n'aurait pas pu être prévu.

Enfin, l'enquête n'a été finalisée que huit ans et demi après l'accident, et ce alors que l'affaire ne présentait pas une complexité particulière. La durée en cause est déraisonnable et elle est imputable aux autorités qui n'ont pas pris les mesures nécessaires dès le début de l'enquête.

Quant à la possibilité pour les requérants d'exercer des voies de droit civiles pour voir la responsabilité dans l'accident des autorités publiques dans la sécurité routière ou de leurs employés être examinée et obtenir leur condamnation au versement de dommages et intérêts, une action en responsabilité civile délictuelle n'avait pas de réelles chances d'être examinée avant l'issue définitive de l'action pénale. Par ailleurs, compte tenu du délai de huit ans et six mois qui s'est écoulé entre l'ouverture de l'enquête et sa clôture définitive et du fait que des preuves essentielles pour l'établissement des responsabilités n'ont pas été recueillies et conservées par les autorités, il serait excessif de demander aux requérants d'intenter un nouveau recours pour obtenir l'établissement de l'éventuelle responsabilité des organismes publics en cause et de leurs employés dans l'accident.

Ainsi on ne saurait estimer que le système judiciaire a permis d'établir le rôle et la pleine responsabilité des agents ou des autorités de l'État dans l'accident en question.

Conclusion : violation (unanimité).

Article 2 (volet matériel) :

On ne saurait exclure que les actes et omissions des autorités dans le cadre des politiques de sécurité dans l'espace public puissent, dans certaines circonstances, engager leur responsabilité sous l'angle du volet matériel de l'article 2 de la Convention. Toutefois, dès lors qu'un État contractant a adopté, afin de protéger les personnes qui s'y trouvent, un cadre légal général et une législation adaptée aux différents contextes qu'offre l'espace public, la Cour ne peut admettre que des questions telles qu'une erreur de jugement de la part d'un intervenant ou une mauvaise coordination entre différents professionnels, qu'ils soient publics ou privés, suffisent en elles-mêmes à obliger cet État à rendre des comptes en vertu de l'obligation positive de protéger le droit à la vie qui lui incombait aux termes de l'article 2 de la Convention.

Les requérants ne dénoncent pas devant la Cour l'absence d'un cadre réglementaire en matière de sécurité sur la voie publique ou une défaillance systémique dans la protection des personnes se trouvant sur la voie publique en raison du défaut d'entretien des arbres : ils se bornent à reprocher aux autorités nationales compétentes de ne pas avoir pris les mesures adéquates afin de prévenir l'accident. En effet, il appartenait aux autorités nationales de déterminer les mesures appropriées à prendre et les inspections des arbres bordant la route nécessaires, afin d'assurer la sécurité des personnes sur la voie publique. À l'époque de l'accident, il existait au niveau national une législation concernant la sécurité des routes nationales et, en particulier, l'entretien et la surveillance des arbres les bordant afin de prévenir des accidents causés par ces plantations. Elle encadre l'inventaire, la surveillance ou la coupe des plantations, ainsi que sur les différents types d'inspections, leur fréquence ou les personnes chargées de les effectuer.

Lorsque la nécessité des mesures de sécurité pour prévenir les risques potentiels pour la vie a été établie par les autorités nationales, toute omission dans le maintien de l'efficacité de ces mesures devrait faire l'objet d'une surveillance étroite par les tribunaux nationaux, en particulier lorsqu'il est allégué que de telles omissions ont entraîné des blessures graves ou la mort. Dans cette hypothèse, la Cour doit rechercher si les mécanismes existants permettaient de faire la lumière sur les circonstances et les causes de l'accident. Cette question relève néanmoins de l'obligation procédurale de l'État exposée sous le volet procédural de l'article 2. Ainsi aucun manquement de la part de l'État à remplir l'obligation qui lui incombait de protéger le droit à la vie des requérants n'a été décelé en l'espèce.

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

Article 41 : 20 000 EUR pour le préjudice moral à la requérante ; 5 000 EUR pour le préjudice moral au requérant.

(Voir aussi *Nicolae Virgiliu Tănase c. Roumanie* [GC], 41720/13, 25 juin 2019, Note d'information 230)

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain ou dégradant Extradition

Risk of life imprisonment without parole and inadequate conditions of detention due to Covid-19 pandemic in case of extradition of an elderly person with health issues to the USA: *communicated*

Extradition aux USA exposant une personne âgée avec des problèmes de santé à une réclusion à perpétuité incompressible et à des conditions de détention inadéquates du fait de la pandémie de Covid-19 : *affaire communiquée*

Hafeez – United Kingdom/Royaume-Uni, 14198/20, Communication

Traduction française du résumé – Printable version

The applicant is a sixty year old man with "a number of health conditions", which include diabetes and asthma. In 2019 his extradition was ordered upon request of the Government of the United States of America, in respect of charges relating to drug-trafficking conspiracy. In January 2020 the applicant's appeal against this decision was dismissed. The court held that there would be no risk of a violation of Article 3 of the Convention on account of the possibility that the applicant would be sentenced to life imprisonment since any prisoner so sentenced would have two routes to seek a reduction of that sentence: compassionate release and Executive Clemency. Considering the risk the applicant would face on account of the likely pre- and post-conviction prison conditions, the court noted that the applicant's medical issues were not unusual for a man his age and in any event they appeared to be controllable.

Communicated under Article 3.

Extradition

Risks for ethnic Uzbeks in Kirghizstan and reliability of assurances given by Kirghiz authorities: *case referred to the Grand Chamber*

Risques pour les membres de la minorité ouzbèke au Kirghizstan et fiabilité des assurances des autorités kirghizes : *affaire renvoyée devant la Grande Chambre*

T.K. and/et S.R. – Russia/Russie, 28492/15, Judgment/Arrêt 19.11.2019 [Section III]

English translation of the summary – Version imprimable

Les requérants sont des ressortissants du Kirghizstan qui contestent la décision de les extrader vers ce pays, en faisant valoir en particulier le risque de mauvais traitements qui découlerait selon eux de leur appartenance à la minorité ethnique ouzbèke.

Par un arrêt du 19 novembre 2019, une chambre de la Cour a conclu, par cinq voix contre deux, que l'extradition des requérants vers le Kirghizstan n'emporterait pas violation de l'article 3 de la Convention.

Certes, après les affrontements interethniques en 2010, la Cour avait estimé que l'extradition d'Ouzbeks vers le Kirghizstan emporterait violation de l'article 3. Toutefois, la même conclusion ne s'impose pas dans la présente affaire, vu notamment la situation générale sur le plan des droits de l'homme au Kirghizstan, les circonstances personnelles des requérants et les assurances apportées par les autorités kirghizes. Ces assurances sont, par ailleurs, renforcées par un mécanisme de contrôle conjoint qui prévoit des visites du personnel diplomatique russe dans les centres de détention kirghizes où sont détenues des personnes extradées.

Le 15 avril 2020, l'affaire a été renvoyée devant la Grande Chambre, à la demande des requérants.

ARTICLE 5

Article 5 § 1

Procedure prescribed by law/Voies légales

Pre-trial detention of a judge on the basis of an unreasonable extension of the concept of *in flagrante delicto*: *violation*

Détention provisoire d'un juge par une extension déraisonnable de la notion de flagrant délit : *violation*

Baş – Turkey/Turquie, 66448/17, Judgment/Arrêt 3.3.2020 [Section II]

English translation of the summary – Version imprimable

En fait – Le requérant, magistrat, soupçonné d'être membre d'une organisation terroriste armée FETÖ/PDY ayant prémédité la tentative de coup d'État militaire du 15 juillet 2016, a été placé en détention provisoire le 20 juillet 2016 et inculpé le 9 juin 2017.

Puis il a comparu pour la première fois devant un juge appelé à se prononcer sur sa détention lors de la première audience, le 19 septembre 2017, soit après le début du procès dirigé contre lui.

Le 19 mars 2018, l'intéressé a été reconnu coupable et condamné par la cour d'assises.

En droit – Article 5 § 1

a) *Sur la légalité de la mise en détention provisoire*

i. *Sur l'article 5 § 1 en soi* – Dans la présente affaire, la Cour parvient à la même conclusion que celle de l'affaire *Alparslan Altan c. Turquie*.

Le principe de sécurité juridique peut se trouver compromis si les juridictions internes introduisent dans leur jurisprudence des exceptions allant à l'encontre du libellé des dispositions légales applicables. À cet égard, le code de procédure pénale turc donne une définition classique de la notion de flagrant délit liée à l'actualité de l'infraction ou à l'antériorité immédiate de l'infraction. Or, selon la nouvelle lecture jurisprudentielle de la Cour de cassation, un soupçon d'appartenance à une organisation criminelle peut suffire à caractériser la flagrance sans qu'il soit besoin de relever un élément de fait actuel ou un autre indice apparent révélant l'existence d'un acte délictueux actuel.

Il s'agit d'une interprétation extensive de la notion de flagrant délit, qui réduit à néant les garanties procédurales accordées au corps de la magistrature pour mettre le pouvoir judiciaire à l'abri des atteintes du pouvoir exécutif. Or cette protection judiciaire est accordée aux juges pour leur permettre d'assurer en toute indépendance l'exercice de leurs fonctions sans restrictions illégitimes de la part d'organes extérieurs à la magistrature, ou même de la part de magistrats exerçant des fonctions de contrôle ou de recours.

ii. *Sur l'incidence de l'article 15* – L'interprétation extensive de la notion de flagrant délit a des conséquences juridiques qui outrepassent largement le cadre légal de l'état d'urgence. Par conséquent, elle ne se justifie aucunement au regard des circonstances spéciales de l'état d'urgence.

À la lumière de ce qui précède, la mesure de détention provisoire du requérant, qui n'a pas été prise « selon les voies légales », ne peut pas être considérée comme ayant respecté la stricte mesure requise par la situation.

Conclusion : violation (unanimité).

b) *Sur l'absence alléguée de raisons plausibles de soupçonner le requérant d'avoir commis une infraction lors de la mise en détention provisoire*

i. *Sur l'article 5 § 1 c) en soi* – Le juge de paix a fondé l'existence de raisons plausibles de soupçonner le requérant d'avoir commis l'infraction d'appartenance à une organisation terroriste armée sur la décision du Conseil des juges et des procureurs (HSK) et sur la demande du parquet d'ouvrir une enquête contre l'intéressé en date du lendemain de l'événement en question. Le HSK a suspendu 2 735 magistrats, dont le requérant, de leurs fonctions, au motif qu'il existait de forts soupçons qu'ils étaient membres d'une organisation terroriste. Mais cette décision ne contient aucun fait ou renseignement qui se rapporte directement et personnellement au requérant. Et les références vagues et générales au code de procédure pénale et aux pièces du dossier du juge de paix ne sauraient être considérées comme suffisantes, en l'absence, d'une part, d'une appréciation individualisée et concrète des éléments du dossier et, d'autre part, d'informations pouvant justifier les soupçons pesant sur l'intéressé ou d'autres types d'éléments ou de faits vérifiables. De toute évidence, le requérant n'était pas soupçonné d'être impliqué dans la tentative de coup d'État. Et la directive du parquet ne se basait sur aucun « fait » ou « renseignement » susceptibles de servir de fondement factuel.

L'audition du requérant par le juge de paix, avant sa mise en détention provisoire, pour appartenance à une organisation illégale, démontre tout au plus que les autorités le soupçonnaient réellement d'avoir commis ladite infraction ; cette circonstance ne saurait, à elle seule, persuader un observateur objectif que l'intéressé pouvait avoir commis ladite infraction. De même, la condamnation ultérieure du requérant sur le fond n'a aucune incidence sur l'examen du présent grief.

Les pièces présentées à la Cour ne l'autorisent pas à conclure à l'existence de soupçons plausibles au moment de la mise en détention du requérant. Et le Gouvernement n'a pas fourni d'autres indices de l'existence de « motifs plausibles » de soupçonner le requérant.

ii. *Sur l'incidence de l'article 15* – La Cour doit tenir compte des difficultés auxquelles la Turquie devait faire face au lendemain de la tentative de coup d'État pour interpréter et appliquer l'article 5. Cependant, la nécessité de combattre la criminalité terroriste ne saurait justifier que l'on étende la notion de « plausibilité » des soupçons jusqu'à porter atteinte à la substance de la garantie assurée par l'article 5 § 1 c) de la Convention.

Les soupçons qui pesaient sur le requérant n'atteignaient pas le niveau minimum de plausibilité exigé. Dans ces circonstances, la mesure litigieuse ne peut pas être considérée comme ayant respecté la stricte mesure requise par la situation.

Conclusion : violation (unanimité).

Article 5 § 4

i. *Sur l'article 5 § 4 en soi* – Le requérant n'a pas comparu devant un juge appelé à juger de sa détention pendant une période d'un an et deux mois. Or l'écoulement d'un tel laps de temps ne permet pas de qualifier la durée en cause de « raisonnable ».

ii. *Sur l'incidence de l'article 15* – S'il est vrai que les difficultés auxquelles le système judiciaire a dû faire face dans les premiers mois ayant suivi la tentative de coup d'État étaient de nature à justifier une dérogation du droit de comparution des détenus devant les juges appelés à statuer sur la détention au titre de l'article 15, les mêmes considérations perdent de leur force et de leur pertinence au fur et à mesure que le danger public menaçant la vie de la nation, tout en perdurant, voit son intensité s'amoindrir. Il convient alors d'appliquer le critère d'exigence d'une manière plus stricte.

S'il est vrai que la tenue d'une audience ne paraissait pas possible lors de l'examen d'office de la détention et des demandes d'élargissement, un décret-loi n'écartait pas cette possibilité lors des oppositions. Or toutes celles formées par le requérant ont été examinées et rejetées sans audience. Le requérant n'a simplement pas comparu devant un juge pendant toute la durée de l'enquête, alors qu'il était détenu sans faire l'objet d'une inculpation.

Par ailleurs à peine quelques jours après la fin de l'état d'urgence, une loi a prévu une audition tous les quatre-vingt-dix jours pour les infractions relevant de la loi sur la lutte contre le terrorisme alors que le code de procédure pénale prévoit une audition tous les trente jours.

Les examens des décisions relatives à la détention du requérant, dont celui réalisé dans les premiers mois de celle-ci, ne permettent pas de penser que les juges se sont penchés sur le bien-fondé de la légalité de cette mesure. En effet, ils se sont prononcés sur la détention du requérant en même temps que pour plusieurs dizaines de détenus, sans individualiser les motifs de leurs décisions, et celles-ci ne dénotent pas une prise en considération des arguments avancés par l'intéressé dans le cadre de ses demandes d'élargissement et oppositions.

Quand un État lutte contre un danger public menaçant la vie de la nation, il serait désarmé s'il était tenu de tout faire à la fois, d'assortir d'emblée chacun des moyens d'action dont il se dote de chacune des sauvegardes conciliables avec les impératifs prioritaires du fonctionnement des pouvoirs publics et du rétablissement de la paix civile. En interprétant l'article 15, il faut laisser place à des adaptations progressives. Néanmoins, s'agissant d'une atteinte à un droit conventionnel fondamental, tel que le droit à la liberté, et compte tenu des effets potentiellement néfastes d'une détention sans inculpation, le défaut de comparution du requérant devant les juges appelés à se prononcer sur sa détention, pendant une période aussi longue, a porté atteinte à la substance même du droit garanti par l'article 5 § 4, et cette non-comparution ne saurait être raisonnablement considérée comme strictement requise pour la sauvegarde de la sécurité publique.

Conclusion : violation (six voix contre une).

En outre, la Cour a rejeté, pour défaut manifeste de fondement, le grief tiré du manque allégué d'indépendance et d'impartialité des juges de paix, soumis sous l'angle de l'article 5 § 4, eu égard, notamment, aux garanties constitutionnelles et légales dont ils jouissent, et en l'absence d'une argumentation pertinente qui rendrait sujettes à caution leur indépendance et leur impartialité dans le cas particulier du requérant.

(Voir aussi *Alparslan Altan c. Turquie*, 12778/17, 16 avril 2019, Note d'information 228)

Article 5 § 1 (c)

Reasonable suspicion/Raisons plausibles de soupçonner

Detention based on mere suspicion of membership of an illegal organisation, without any specific incriminating evidence: *violation*

Détention fondée sur le simple soupçon d'appartenance à une organisation illégale, sans aucun élément à charge concret : *violation*

Baş – Turkey/Turquie, 66448/17, Judgment/Arrêt 3.3.2020 [Section II]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 11)

Article 5 § 4

Speediness of review/Contrôle à bref délai

Detainee yet to be charged not given a hearing before a court throughout investigation lasting approximately one year and two months: *violation*

Absence de comparution devant un juge pendant la durée de l'enquête d'environ un an et deux mois, en étant détenu sans faire l'objet d'une inculpation : *violation*

Baş – Turkey/Turquie, 66448/17, Judgment/Arrêt 3.3.2020 [Section II]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 11)

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations/Droits et obligations de caractère civil

Dismissal on procedural grounds of request to reopen civil proceedings following European Court's judgment finding violation of the Convention: *inadmissible*

Refus, fondé sur des motifs procéduraux, de rouvrir une procédure civile après un arrêt de la Cour européenne ayant conclu à la violation de la Convention : *irrecevable*

Munteanu – Romania/Roumanie, 54640/13, Decision/Décision 11.2.2020 [Section IV]

Traduction française du résumé – Printable version

Facts

a) *Applicant's previous case* – The applicant challenged the termination of his employment. In July 2001 this decision was annulled by the appellate court, who ordered that he be reinstated in his position. This ruling was upheld by the High Court of Cassation and Justice in March 2003 ("the outstanding judgment"). Although final, this judgement was quashed in October 2004, upon an extraordinary appeal lodged by the Prosecutor General.

In March 2012 the European Court of Human Rights (*S.C. Aectra Agrochemicals S.A. and Munteanu v. Romania* [Committee], 18780/04 and 13111/05 – "the principal judgment") found that:

(i) the above-mentioned quashing constituted a violation of Article 6 of the Convention (as being in breach of the legal certainty principle) and Article 1 of Protocol No. 1 to the Convention;

(ii) given these findings, it was not necessary to examine whether there was also an issue under Article 6 on account of the non-enforcement of the outstanding judgment.

The European Court awarded the applicant compensation in respect of non-pecuniary damage, as well as of the pecuniary damage corresponding to the salary claims to which he would have been entitled, had the annulment by way of the extraordinary appeal not intervened.

In December 2012, the Committee of Ministers of the Council of Europe closed its examination of the execution of the Court's afore-mentioned judgment, noting that the legislative provisions concerning extraordinary appeal had been repealed and that domestic law allowed the applicants to lodge an extraordinary appeal following a European Court's judgment finding a violation of the Convention, in order to obtain *restitutio in integrum*.

b) *Applicant's present case* – Following the European Court's findings, the applicant lodged a request with the High Court for the reopening of the proceedings in order to have the quashing judgment set aside. He argued that he was still prevented from exercising his duties and enjoying his career as ordered in the outstanding judgment. In February 2013 this request was dismissed as inadmissible since not all the statutory conditions for reopening were fulfilled. In particular, the High Court held that:

(i) the fact that the European Court itself had decided that it was not necessary to examine the non-enforcement head of the claim lodged by the applicant proved that there were no severe consequences of the violation found by the Court which persisted and could not otherwise be remedied;

(ii) the outstanding judgment of 2003 had ordered the reinstatement of the applicant, without however granting him any amount for loss of salary; it followed that the awards made by the European Court already constituted fair and sufficient redress for the harm caused by the violations found.

Law

Article 46: In so far as they concerned the failure to remedy the original violation found of Article 6 of the Convention, the applicant's pleadings in the present case might be understood as complaining of an alleged lack of proper execution of the Court's principal judgment. This fell, however, outside the competence of the Court, rather being subject to the supervision of execution by the Committee of Ministers under Article 46 of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*)

Article 6 § 1 (access to court): In so far as the denial of access to reopening could be read as a new grievance, referring not so much to the February 2013 judgement outcome as to the conduct and fairness of the underlying proceedings before the High Court – chronologically subsequent to and distinct from the domestic proceedings impugned in the European Court's 2012 judgment – the Court reiterated that Article 6 § 1 of the Convention was, in principle, not applicable *ratione materiae* to proceedings concerning an application to reopen civil proceedings following the finding of a violation by the Court. Admittedly, there had been exceptions to this rule (see references hereafter). Those exceptions essentially referred to the situation where an extraordinary remedy led automatically or in the specific circumstances to a full reconsideration of

the case or, in certain instances, where the proceedings, although characterised as "extraordinary" or "exceptional" in domestic law, were deemed to be similar in nature and scope to ordinary appeal proceedings. However, no such exception had been revealed by the circumstances of the present case, as shown below.

The Romanian law provided at the material time for the right to request the reopening of a final court judgment following the Court's finding of a violation of a Convention right. While the proceedings in such a case had been to follow the rules for the examination of any court action, their subject matter had been expressly limited to the admissibility of the request to reopen the proceedings. This had been further reflected in the extent of the powers of the court examining the request for review under the relevant provision of the Code of civil procedure, which had been limited to either dismissing such a request as inadmissible or accepting it and amending the impugned judgment.

It follows that, unlike in *Bochan (no. 2)*, Romanian law did not treat review proceedings as a prolongation of the original (terminated) civil proceedings, but expressly limited their scope to verifying the grounds for reopening a case and to adopting a separate decision accepting or rejecting a request for reopening. In particular, the High Court had considered that the applicant's request for the review of the domestic decision did not meet all the admissibility criteria required by law and had dismissed it as inadmissible on procedural grounds, without carrying out a fresh consideration of the case.

From that respect, the present case had to be distinguished from the case of *Moreira Ferreira (no. 2)*, not only on account of the nature of the proceedings at stake – namely civil in the present case and respectively criminal in the latter, nature which impacted on the safeguards provided to the applicants on that account – but also because the Portuguese Supreme Court had assessed a substantive rather than a procedural issue – namely, the very validity of the applicant's conviction in the light of the finding of a violation of the right to a fair trial –, assessment which the Court had found, on account of its nature, to constitute a "new issue".

Therefore the High Court's refusal to reopen the applicant's civil case on account of admissibility criteria of a procedural nature had not been connected with relevant new grounds capable of giving rise to a fresh violation of Article 6 § 1 of the Convention. In view of the foregoing considerations, the High Court's refusal in the present case could not be regarded as constituting a relevant new fact.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 13: In view of the above conclusion under Article 6, the applicant had no arguable claim.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See also *Moreira Ferreira v. Portugal (no. 2)* ([GC], 19867/12, § 47, 11 July 2017, Information Note 209; *Bochan v. Ukraine (no. 2)* [GC], 22251/08, 5 February 2015, Information Note 182; *Egmez v. Cyprus* (dec.), 12214/07, 18 September2012, Information Note 155; *Steck-Risch and Others v. Liechtenstein* (dec.), 29061/08, 11 May 2010, Information Note 130; contrast *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], 32772/02, 4 October 2007, Information Note 101)

Article 6 § 1 (constitutional/ constitutionnel)

Impartial tribunal/Tribunal impartial

Presence, on the three-judge committee of the Constitutional Court examining an objection against an admissiblity decision, of the judge who had given the decision : *no violation*

Présence du juge ayant rendu la décision d'irrecevabilité, dans la composition du comité de trois juges du Tribunal constitutionnel traitant du recours en opposition contre celle-ci : *non-violation*

Dos Santos Calado and Others/ et autres – Portugal, 55997/14 and/ et al., Judgment/Arrêt 31.3.2020 [Section III]

(See Article 35 § 1 below/ Voir l'article 35 § 1 ci-dessous, page 32)

Article 6 § 3 (d)

Examination of witnesses/Interrogation des témoins

Conviction on retrial before new judge based decisively on testimony by absent witnesses, whom the applicant confronted before trial and one of whom was cross-examined at first trial: *violation*

Condamnation après un second procès devant un nouveau juge, fondée dans une mesure déterminante sur les dépositions de témoins absents ayant été confrontés au requérant avant le premier procès, au cours duquel l'un d'entre eux avait été contre-interrogé : *violation*

Chernika – Ukraine, 53791/11, Judgment/Arrêt 12.3.2020 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant was accused of stealing drugs he had had access to as a police officer and selling them to his friend, N.Sh., and her two acquaintances V.G. and I.G. All three witnesses gave incriminating statements during the pre-trial investigation. Pre-trial confrontations were held between them and the applicant. Only N.Sh. was heard and cross-examined at trial but, after the applicant's conviction had been quashed on appeal, she failed to appear at the retrial. The other two witnesses never appeared either in the course of the trial or retrial.

Law – Article 6 §§ 1 and 3 (d): The Court applied a combination of the two sets of principles developed in the Court's case-law regarding admission of evidence of witnesses absent from a trial and the principle of immediacy.

The first relevant question under both sets was what role the evidence of those absent witnesses had played in the applicant's conviction. The three witnesses had been the only other direct participants in the unlawful activity with which the applicant had been charged. All other evidence against the applicant had simply showed that he had had an opportunity to commit the crime because of his access to the drugs and had been in contact with the three absent witnesses. Therefore the evidence of the witnesses had been "decisive" in the sense that it had been likely determinative of the outcome of the applicant's case.

The second relevant question was how the composition of the court that had convicted the applicant had changed. It had changed entirely and the new composition had not examined any of the three witnesses.

The Court then examined whether there had been a good reason for the witnesses' absence at the retrial which led to the applicant's conviction and whether appropriate safeguards had been in place to ensure that, despite that absence, the court formation had nevertheless had an adequate understanding of the absent witnesses' evidence such that the fairness of proceedings had been preserved.

The Government had not shown that the authorities had displayed appropriate diligence in their efforts to ensure the witnesses' presence. Concerning N.Sh., the authorities had been unable to locate her. However, even though in the course of the retrial a witness had indicated that he had known where she had worked, there was no indication that the authorities had followed up on that information or attempted to find her. Accordingly, the Government had failed to show that there had been a good reason for her absence from the retrial. Concerning V.G. and I.S., there was no reason to doubt that their state of health indeed had prevented them from travelling the considerable distance where the retrial had been held. However, no reason had been given for their absence at the original trial.

The Court found that of considerable importance that the Government had failed to show there had been a good reason for the absence of the witness N.Sh. at the retrial. As the evidence of the other two witnesses was closely linked to that of N.Sh. and given centrality of the three witnesses' evidence, the Government, therefore, needed to show that particularly strong safeguards had been in place to ensure the proper understanding of these three witnesses' evidence by the new trial judge and the fairness of the proceedings.

There had been three potential alternative counterbalancing factors in the proceedings.

(i) The opportunity, which the applicant had enjoyed in the course of the domestic proceedings, to give his own version of the events in question and to cast doubt on the credibility of the absent witnesses and point out any incoherence in their statements: the applicant had had this opportunity but it could not, of itself, be regarded as a sufficient counterbalancing factor to compensate for the handicap for the defence created by their absence.

(ii) The availability of further corroborative evidence: while it had been available, it would have been of limited probative value in the absence of the evidence of the three witnesses in question.

(iii) The fact that the applicant had participated in confrontations with all three witnesses in the course of the pre-trial investigation and had been able to cross-examine N.Sh. in the course of the original trial.

Unlike in the cases *Famulyak* and *Palchik* (see below), the applicant had submitted that at the pre-trial stage the defence had not had access to the evidence in the domestic case file. This consideration had been relevant in assessing the fairness of the procedure but could not, in itself, be decisive since, where a confrontation had occurred before the completion of the pre-trial investigation, in many cases the evidence-gathering process had been likely to be, by the very nature of things, incomplete. This handicap had not been so severe as to render, on its own, the confrontations entirely inadequate as a procedural safeguard.

However, the trial judge, who eventually had convicted the applicant, had had no opportunity to examine personally any of the three key witnesses for the prosecution. Neither had he had at his disposal a video recording of their statements even though domestic law had envisaged such possibility and the latter might have provided an important additional safeguard. Therefore, the handicap of the limited knowledge of the case file at the time of the confrontations that the applicant had suffered at the pre-trial stage had been combined with his inability to confront the witnesses in the presence of the judge who had been trying his case.

The Government had thus failed to show that any particularly strong safeguards had been in place other than the fact that the transcripts of those witnesses' questioning in the course of the pre-trial investigation and (for N.Sh.) trial had been available to the new trial judge. The Government had failed to demonstrate that that sole safeguard had been sufficient under the circumstances. This combination of circumstances had been capable of prejudicing the overall fairness of the criminal proceedings against the applicant.

In that respect the applicant's case had to be distinguished from the case of *Famulyak v. Ukraine* (dec.), in which the Court had declared the relevant complaint manifestly ill-founded, even though the composition of the court had changed completely. That case had been characterised by the particular circumstances that the retrial judge had had an opportunity to examine the witness whose evidence had been decisive for the applicant's conviction, even though the latter had not had an opportunity to cross-examine the witness in that judge's presence.

Conclusion: violation (unanimously).

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

(See also *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Information Note 191; *Palchik v. Ukraine*, 16980/06, 2 March 2017; and *Famulyak v. Ukraine* (dec.), 30180/11, 26 March 2019, Information Note 229)

ARTICLE 8

Respect for private life/Respect de la vie privée

Annulment of State degrees in dentistry for administrative anomalies during first-year registration procedure: *violation*

Annulation de diplômes d'État de fin d'études de médecine pour des irrégularités administratives lors de la procédure d'inscription en première année : *violation*

Convertito and Others/ et autres – Romania/ Roumanie, 30547/14, Judgment/Arrêt 3.3.2020 [Section IV]

English translation of the summary – Version imprimable

En fait – En 2003 et 2004, les demandes d'inscription en première année de médecine dentaire des cinq requérants italiens furent acceptées et ils entamèrent leurs études. Les décisions d'inscription, délivrées au nom du président de l'université, comportaient la mention « en cours de traitement » dans l'attente des lettres d'approbation du ministère de l'Éducation. Et fin 2008, début 2009, les requérants furent soumis à des tests de maîtrise de la langue roumaine qu'ils réussirent.

En 2009, un échange entre le président de l'université et les représentants du ministère de l'Éducation fit apparaître que le premier requérant n'avait toujours pas reçu de lettre d'acceptation et que celles délivrées aux quatre autres requérants concernaient non pas l'année universitaire de leur inscription mais l'année suivante. Mais le sénat de l'université décida d'accepter la proposition du doyen de la faculté autorisant les cinq requérants à participer aux examens de fin d'études.

Ainsi à l'issue de six années d'études, les requérants participèrent aux examens, ils les réussirent et se virent délivrer des diplômes d'État en médecine dentaire. Puis ils firent les démarches pour les faire reconnaître par les autorités italiennes pour exercer leur métier dans leur pays d'origine.

En 2011, la situation des requérants fit l'objet d'un contrôle administratif qui conclut à des irrégularités concernant la délivrance tardive des lettres d'acceptation. Aussi leurs diplômes d'État furent annulés le sénat et le président de l'université sur demande du ministère de l'Éducation. Les recours des requérants contre ces décisions n'aboutirent pas.

En droit – Article 8 : L'annulation des diplômes d'État en médecine dentaire des requérants a eu des conséquences non seulement sur la façon dont ils avaient forgé leur identité sociale par le développement de relations avec autrui, mais aussi sur leur vie professionnelle dans la mesure où leur niveau de qualification a été remis en cause et leur intention d'entreprendre la carrière qu'ils envisageaient a été brusquement frustrée. Dans ces circonstances, la mesure litigieuse a entraîné des conséquences sur la jouissance par les requérants du droit au respect de la « vie privée ». Elle constitue

une ingérence dans leur exercice de ce droit, prévue par la loi et poursuivant les buts légitimes de la défense de l'ordre et de la protection des droits d'autrui.

Les décisions d'inscription des requérants ont été délivrées et signées par le doyen de la faculté avant l'obtention des lettres d'acceptation et des certificats de compétence linguistique. C'est en vertu de ces décisions que les requérants ont été autorisés à poursuivre un cycle complet de six années d'études universitaires et de participer aux examens de fin d'études. Les requérants n'auraient eu aucune raison apparente le faire si l'université avait *ab initio* refusé leur inscription administrative.

À ce titre, le sénat de l'université a confirmé la légalité de la situation administrative des requérants et validé leur participation aux examens de fin d'études. Mais il convient d'accorder une importance particulière au contexte ayant entouré l'adoption de ces décisions, caractérisé par l'existence d'une certaine divergence entre l'administration de l'université et le ministère de l'Éducation concernant la délivrance tardive des lettres d'acceptation des requérants. Or cette situation d'incertitude et d'incohérence ne saurait en aucun cas être reprochée à ces derniers.

Enfin en annulant les diplômes d'État des requérants, les autorités ont brusquement bouleversé leur situation professionnelle, alors qu'aucun manquement concernant leur niveau de qualification ne permettait de penser qu'ils n'étaient pas à la hauteur de leurs tâches.

Ainsi les mesures incriminées ne répondaient pas à un besoin social impérieux et elles n'étaient pas proportionnées aux buts légitimes visés. De ce fait, elles n'étaient pas nécessaires dans une société démocratique.

Conclusion : violation (unanimité).

Article 41 : 10 000 EUR pour préjudice moral.

(Voir aussi *Bigaeva c. Grèce,* 27613/05, 28 mai 2009, Note d'information 119 ; *Sahin Kus c. Turquie*, 33160/04, 7 juin 2016, Note d'information 197 ; *Denisov v. Ukraine* [GC], 76639/11, 25 septembre 2018, Note d'information 221).

Respect for private life/Respect de la vie privée

Insufficient foreseeability and safeguards of domestic law governing the taking of DNA samples through buccal swabs in the context of criminal investigation: *violation*

Garanties et prévisibilité insuffisantes des règles de droit interne encadrant les prélèvements buccaux d'ADN dans le cadre des enquêtes pénales : *violation*

Petrovic – Serbia/Serbie, 75229/10, Judgment/Arrêt 14.4.2020 [Section IV]

Traduction française du résumé – Printable version

Facts – In the context of a criminal investigation, a sample of the applicant's saliva was taken for the purposes of a DNA analysis.

Law – Article 8: The taking of a DNA sample from the applicant amounted to an interference with his "private life". The fact that the applicant had agreed to give a sample of his saliva to the police officers was, in that context, of no relevance, since he had only done so under the threat that either a saliva sample or a blood sample would otherwise be taken from him by force.

The interference had not been "in accordance with the law", since the domestic legal provisions in question should have been, inter alia, foreseeable as to their effects for the applicant. In particular, the order authorising the police to take a sample of the applicant's saliva had not referred to any specific legal provision and there was no specific reference to the taking of a DNA sample in the relevant provisions of the Code of Criminal Procedure. Moreover, when taking the sample, the authorities had not prepared an official record of the procedure, as required by domestic law.

Finally, the applicable domestic law did not include several safeguards laid down, for example, in the more recent Code of Criminal Procedure adopted in 2011. In particular, the new Code, inter alia, specifically: (i) referred to the taking of DNA samples by means of a "buccal swab"; (ii) stated that the procedural steps in question had to be carried out by an expert; and (iii) limited the circle of persons from whom a buccal swab sample might be taken without consent. Concerning that last point, under the provisions in force at the relevant time, a blood sample could be taken from, or "other medical procedures" undertaken in respect of, any given person if that was deemed medically necessary in order to establish facts "of importance" to the criminal investigation, which allowed such procedures in respect of a potentially very large group of persons. By contrast, the new Code of Criminal Procedure indicated that buccal swab samples might be taken only from a suspect or, in order to "eliminate a suspicion of being connected to a criminal offence", from the victim or another person found at the scene of the crime. In those circumstances, it would be reasonable to assume that by adopting the clearly more detailed provisions, the respondent State had it-

self implicitly acknowledged the need for a tighter regulation.

Conclusion: violation (six to one).

The Court also found unanimously no violation of Article 8 as regards the search of the applicant's home.

Article 41: EUR 1,500 in respect of non-pecuniary damage

Respect for private life/Respect de la vie privée

Arbitral decision resulting in disciplinary suspension in professional sports context, with adequate institutional and procedural safeguards: *inadmissible*

Sentence arbitrale entraînant une suspension d'activité à titre disciplinaire dans le domaine du sport professionnel, avec des garanties institutionnelles et procédurales suffisantes : *irrecevable*

Platini – Switzerland/Suisse, 526/18, Decision/Décision 11.2.2020 [Section III]

English translation of the summary – Version imprimable

En fait – Le requérant est un ancien joueur de football professionnel, capitaine et sélectionneur de l'équipe de France. Il fut conseiller de X.Y., alors président de la Fédération internationale de football association (FIFA), et fut élu à la présidence de l'Union européenne des associations de football (UEFA) et à la vice-présidence de la FIFA. En 2011, X.Y. approuva une facture de 2 000 000 francs suisses (CHF) se rapportant selon le requérant à un complément de salaire convenu dans le cadre d'un contrat oral. Le versement fut approuvé par la commission des finances de la FIFA. En 2015, à la suite de l'ouverture de poursuites pénales contre l'ancien président de la FIFA en rapport avec ce versement, la FIFA ouvrit contre le requérant une procédure disciplinaire pour manquement au code d'éthique. Le requérant se vit infliger une amende de 80 000 CHF accompagnée d'une interdiction d'exercer toute activité liée au football, aux niveaux national et international, pour une période de six ans. Le Tribunal arbitral du sport (TAS) réduisit l'amende à 60 000 CHF et la durée de l'interdiction d'activité à quatre ans. Le Tribunal fédéral suisse se déclara compétent pour connaître du recours et débouta le requérant de son recours.

En droit

a) Responsabilité internationale de la Suisse en vertu de la Convention/compétence *ratione personae* de la Cour

Certes, la sanction litigieuse a été infligée par la FIFA, une association de droit privé, et confirmée par un tribunal arbitral, le TAS, émanant d'une fondation de droit privé. Cela étant, la loi suisse prévoit les effets des sentences arbitrales du TAS ainsi que la compétence du Tribunal fédéral pour connaître de leur validité. Le rejet du recours du requérant par le Tribunal fédéral a donné force de chose jugée à la sentence arbitrale dans l'ordre juridique suisse. Dès lors, les actes ou omissions litigieux sont bien susceptibles d'engager la responsabilité de l'État défendeur en vertu de la Convention (*Mutu et Pechstein*, 40575/10 et 67474/10, 2 octobre 2018, Note d'information 222) et la Cour est compétente *ratione personae* pour connaître des griefs du requérant quant aux actes et omissions du TAS, entérinés par le Tribunal fédéral suisse.

b) Article 8

i. *Applicabilité (notion de « vie privée)* – Bien que les motifs à la base de la sanction touchent à la vie professionnelle du requérant, la Cour conclut que le seuil de gravité requis pour faire entrer en jeu cet article sous l'angle de la vie privée est atteint (voir *Denisov c. Ukraine* [GC] (n° 76639/11, §§ 115-117, 25 septembre 2018, Note d'information 221) en raison des conséquences sur la vie privée du requérant, en l'occurrence :

– l'interdiction de gagner sa vie dans le milieu du football, sa seule source de revenus pendant toute sa vie (situation aggravée par son âge et par la position dominante, voire de monopole, de la FIFA dans l'organisation mondiale du football) ;

– l'atteinte à la possibilité de nouer et développer des relations sociales avec autrui, eu égard à la nature très large de la sanction prononcée, qui s'étend à « toute » activité liée au football ; sachant que le requérant était communément, dans le public et les médias, identifié par rapport au football ;

– les effets négatifs sur sa réputation (du fait d'une certaine stigmatisation).

ii. *Existence de garanties institutionnelles et procédurales suffisantes pour protéger la vie privée du requérant* – Le grief ne pouvant être abordé sous l'angle d'une mesure étatique – puisque la sanction litigieuse a été imposée par une association de droit privé –, il convient de l'examiner sous l'angle des obligations positives de l'État et de sa marge d'appréciation.

La Cour tient compte de la spécificité de la situation du requérant, qui a librement choisi une carrière particulière dans le domaine du football, d'abord en tant que joueur et sélectionneur, puis dans des fonctions officielles au sein des organisations fédératives du football, qui sont des acteurs privés, en tant que tels non directement soumis à la

Convention. Si une telle carrière offre sans doute de nombreux privilèges et avantages, elle implique en même temps la renonciation à certains droits pourvu que de telles limitations contractuelles soient librement consenties (voir *Fernández Martínez* [GC], 56030/07, 12 juin 2014, Note d'information 175) – ce que le requérant ne nie pas ici.

La Cour examine ensuite les recours du requérant dans le litige l'opposant à la FIFA :

– *Juridiction arbitrale privée* : le TAS a répondu aux griefs du requérant de manière exhaustive et détaillée, dans le cadre d'une sentence suffisamment circonstanciée, qui a procédé à une mise en balance convaincante des intérêts en jeu en tenant compte de la spécificité de la procédure d'arbitrage sportif. Le TAS a notamment estimé que la durée de quatre ans était raisonnable au regard du but recherché : sanctionner de façon suffisamment sérieuse la violation, jugée grave, du code d'éthique, afin d'envoyer un « signal fort » pour rétablir la réputation du football et de la FIFA. Ni la situation actuelle du requérant, ni ses éminents services rendus à la cause du football, n'ont échappé aux arbitres ; au contraire, le TAS a tenu compte de la position élevée qu'occupait le requérant, au sein des plus hautes instances du football, au moment de la commission des infractions retenues contre lui, et de son absence de repentir.

– *Juridiction étatique* : Le Tribunal fédéral suisse, que le requérant a pu saisir sur recours, a ensuite entériné la sentence du TAS au terme d'un raisonnement plausible et convaincant. Il a considéré que la durée de la sanction prononcée n'apparaissait pas manifestement excessive eu égard aux critères énoncés par le tribunal arbitral, qui avait tenu compte de tous les éléments à charge et à décharge ressortant du dossier en sa possession, et n'avait négligé aucune circonstance importante pour en fixer la durée.

Le requérant a donc bien disposé des garanties institutionnelles et procédurales suffisantes, à travers un système de juridictions d'abord privée puis étatique, qui ont procédé à une véritable pesée des intérêts pertinents en jeu et ont répondu à tous les griefs du requérant dans le cadre de décisions dûment motivées.

Pour autant que la Cour est compétente à leur égard, ces conclusions ne paraissent ni arbitraires ni manifestement déraisonnables, et poursuivaient non seulement l'objectif légitime de punir les infractions d'un haut responsable de la FIFA aux règlements pertinents, mais également le but d'intérêt général consistant à rétablir la réputation du football et de la FIFA. Dès lors – et compte tenu notamment de la marge d'appréciation considérable dont il jouissait en l'espèce –, l'État défendeur n'a pas manqué à ses obligations positives.

Conclusion : irrecevable (défaut manifeste de fondement).

La Cour a également déclaré irrecevable (incompatibilité *ratione materiae*) le grief tiré de l'article 7 de la Convention, considérant que la mesure litigieuse ne sanctionnait pas une « infraction pénale » mais un manquement aux règles internes spécifiques visant un groupe restreint d'individus, dotés d'un statut particulier.

Respect for private life/Respect de la vie privée
Respect for home/Respect du domicile

Installation of an extra-high voltage power line in the neighbourhood of dwellings: *communicated*

Implantation d'une ligne électrique à très haute tension à proximité d'habitations : *affaire communiquée*

Thibaut and/et Thibaut – France, 41892/19 and/et 41893/19, Communication [Section V]

English translation of the summary – Version imprimable

Les requérants sont des riverains d'une future ligne électrique à très haute tension (400 000 volts) dont le tracé est distant d'un peu plus de 115 mètres de leur habitation. Invoquant les risques pour la santé liés aux champs électromagnétiques de très basse fréquence engendrés, ils critiquent le refus d'opter pour un enfouissement de la ligne, dans ce secteur habité. Quant à la possibilité d'échapper à ce risque angoissant en déménageant, elle est selon eux compromise par le fait que la présence de cette ligne rendra très difficile de revendre leur maison.

Tout en admettant que l'existence de risques pour la santé devait être regardée comme une hypothèse suffisamment plausible, en l'état des connaissances scientifiques, pour justifier l'application du principe de précaution, le Conseil d'État rejeta le recours contre la déclaration d'utilité publique du projet, considérant notamment que diverses mesures avaient été prises pour surveiller les ondes et champs électromagnétiques engendrés, et que l'adoption de certaines mesures techniques (double circuit électrique, de nature à abaisser les champs magnétiques induits), combinée à l'engagement de racheter les habitations situées à moins de 100 mètres, apportait à ces risques une réponse qu'on ne pouvait considérer comme manifestement insuffisante.

Affaire communiquée sous l'angle de l'article 8 de la Convention.

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

Allegedly insufficient measures to ensure access to safe drinking water and sanitation for Roma communities: *no violation*

Insuffisance alléguée des mesures prises pour garantir à des membres de la communauté rom l'accès à l'eau potable et à l'assainissement : *non-violation*

Hudorovič and Others/et autres – Slovenia/Slovénie, 24816/14 and/et 25140/14, Judgment/Arrêt 10.3.2020 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants belong to Roma communities residing in illegal and unserviced settlements. They complain that they were not provided with access to basic public utilities, notably, to safe drinking water and sanitation.

Law – Article 8

(a) *Applicability* – Access to safe drinking water was not, as such, a right protected by Article 8. However, the Court had to be mindful of the fact that without water the human person could not survive. A persistent and long-standing lack of access to safe drinking water could therefore, by its very nature, have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8. Therefore, when those stringent conditions were fulfilled, the Court was unable to exclude that a convincing allegation might trigger the State's positive obligations under that provision. Existence of any such positive obligation and its eventual content were necessarily determined by the specific circumstances of the persons affected, but also by the legal framework as well as by the economic and social situation of the State in question. In the present case, the Court decided to join the issue of applicability to the merits.

(b) *Merits* – The key consideration in the Court's assessment concerned the scope of the State's positive obligation to provide access to utilities, especially to a socially disadvantaged group. In that connection, a considerable part of the Roma population in Slovenia, who lived in illegally built settlements that were often removed from the densely populated areas with a public water-distribution system, faced greater obstacles than the majority in accessing basic utilities. Accordingly, those factors and the possible need for concrete measures tailored to the applicants' specific situation formed part of the Court's assessment of the circumstances of the present case.

That said, the level of realisation of access to water and sanitation would largely depend on a complex and country-specific assessment of various needs and priorities for which funds should be provided. In the Court's view, the States had to be accorded wide discretion in their assessment of those priorities and the legislative choices they made. That discretion had to apply also to the concrete steps aimed at ensuring everyone had adequate access to water.

In Slovenia spatial development and planning and public utility infrastructure were subject to a comprehensive regulatory framework. The Court considered it reasonable that the State, or its local authorities, assumed the responsibility for the provision of that service, while it was left to the owners to install individual house connections at their own expense. Likewise, given the inherently progressive nature of the development of a public water supply system, which was dependent on the financial resources of an individual State, it appeared reasonable that alternative solutions such as installation of individual water tanks or systems for harvesting rainwater were proposed in those areas that were not yet covered by a public water supply system.

The Court took note of all the affirmative action measures already taken by the domestic authorities with a view to improving the living conditions of the Roma community. In particular, they had adopted and financially supported a comprehensive strategy, and specific programmes and projects focused on the legalisation of the illegally constructed Roma settlements and on the provision of basic public utilities to their inhabitants. Furthermore, the municipal authorities had, in good faith, undertaken some concrete actions to provide the applicants with the opportunity to access safe drinking water. In one settlement, one or several water tanks co-financed by the municipality had been installed into which supplies of drinking water had been placed. In another settlement, the municipality had installed and financed a group water-distribution connection from which individual connections could be installed for supplying water to individual households.

As regards the applicants' personal situations, irrespective of whether public housing was available, the Court could only conclude that they had remained in their respective settlements by choice. Secondly, they were not living in a state of extreme poverty. Through their system of social benefits, the authorities had ensured that they were guaranteed a certain basic level of subsistence which was, or could have been, used, *inter alia*, for improving

their living conditions. The applicants had not asserted that their own investment in the solution provided by the municipality constituted a disproportionate financial burden. Nor had they requested any financial or other assistance for the purpose of acquiring a more regular water supply. In the Court's opinion, the applicants were themselves responsible for taking steps to ensure their individual connection to a public water point.

The applicants had failed to explicitly address the issue of what measures should have been adopted by the State to constitute compliance with its obligation to provide access to basic public utilities, or how such measures would impact their personal situation. Nor had they provided any information which would allow the Court to assess whether the municipal authorities had de-prioritised their interests in the regulation of their settlements and access to safe drinking water in favour of other, less urgent measures and projects aimed at improving the infrastructure of the majority population. Notably, a non-negligible proportion of the Slovenian population living in remote areas did not have access to the public water supply system and had to rely on alternative means of private water supply, such as water tanks.

While not being an ideal or permanent solution, the positive steps taken by the authorities demonstrated that they had acknowledged the disadvantages suffered by the applicants as members of a vulnerable community and shown a degree of active engagement with their specific needs. As regards the State's own legal and financial obligations in that regard, the Court took the view that, while it fell upon the State to address the inequalities in the provision of access to safe drinking water which disadvantaged Roma settlements, this could not be interpreted as including an obligation to bear the entire burden of providing running water to the applicants' homes. In that respect, the applicants had not been prevented from making use of their social benefits to employ alternative solutions such as installing private water tanks or systems for collecting rainwater.

Lastly, the measures taken by the municipalities had not included any steps to ensure sanitation for the applicants; however, a considerable part of the population in Slovenia did not as yet benefit from a public sewerage system. Considering the limited access to sanitation in the two relevant municipalities, it would be difficult, in the absence of proof to the contrary, to conclude that the applicants' respective situations had been accorded less importance than those of the majority population. Furthermore, taking account of the inherently progressive nature of the development of public infrastructure and the State's wide discretion in the prioritisation of resources for urban planning, only particularly convincing reasons such as a serious risk to health could justify imposing a burden on the State to take any steps with regard to the applicants' respective situations. However, while the applicants had complained of frequent diseases, they had neither made any concrete submissions to that effect nor presented evidence in support of their claims. In that connection, they had not argued that they had, in any way, financially or otherwise, been prevented from installing their own septic tanks or employing other solutions alternative to the public sewerage system.

Reiterating, firstly, that the applicants had received social benefits which could have been used towards improving their living conditions, secondly, that the States were accorded a wide margin of appreciation in housing matters, and thirdly, that the applicants had not convincingly demonstrated that the State's alleged failure to provide them with access to safe drinking water had resulted in adverse consequences for health and human dignity effectively eroding their core rights under Article 8, the Court found that the measures adopted by the State in order to ensure the applicants access to safe drinking water and sanitation had taken account of the applicants' vulnerable position and satisfied the requirements of Article 8. Even assuming that Article 8 was applicable in the instant case, there had been no violation of that provision.

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there had been no violation of Article 14 of the Convention in conjunction with Article 8 and no violation of Article 3, taken alone and in conjunction with Article 14, assuming those provisions were applicable.

ARTICLE 9

Freedom of conscience/Liberté de conscience

Dismissal of request for replacement of compulsory military service with its civilian alternative for lack of substantiation of the seriousness of the applicant's conscientious objection: *no violation*

Rejet d'une demande de remplacement du service militaire obligatoire par son alternative civile pour défaut de preuves suffisantes de l'authenticité de l'objection de conscience du requérant : *non-violation*

Dyagilev – Russia/Russie, 49972/16, Judgment/Arrêt 10.3.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The general right of conscientious objectors to have their obligatory military service replaced with its civilian alternative is expressly enshrined in the Constitution of the Russian Federation. Yet this replacement is not unconditional: applications are subject to the approval of a recruitment commission, in accordance with the provisions of the Civilian Service Act.

In 2014 the applicant graduated from university, which left him liable to be called up for military service. Soon afterwards – after attending a legal seminar organised by the "Committee of Soldiers' Mothers" which, he submitted, finally allowed him to understand his adherence to pacifism – he applied to be assigned to civilian service instead.

The military recruitment commission dismissed this request on the ground that the documents (a CV and a letter of recommendation from his place of work) and information provided were not sufficiently persuasive to conclude that he was a genuine pacifist. His appeals were dismissed for the same reason, as the applicant had not adduced any further evidence to substantiate his allegations.

Law – Article 9

(a) *Positive obligations (to establish an appropriate framework for conscientious objection)*

An effective and accessible procedure for determining whether an applicant was entitled to conscientious objector status must first be established. It transpired from the following reasons that the respondent State complied with this requirement.

(i) *Proceedings before a military commission* – The examination of an application for the replacement of compulsory military service with its civilian alternative is undertaken in the presence of the claimant, who is able to present evidence and witness testimony without any restrictions. A commission is also able to collect on its own motion any information that it deems necessary.

Admittedly, Russian military recruitment commissions are comprised of government officials (either military or civil): they do not comprise any civil society experts acting in a personal capacity or members of the public. While the Compulsory Military Service Act provides for the possibility to have representatives of other agencies and organisations in the composition of recruitment commissions, the parties had not provided examples of such cases.

Furthermore, under the Civilian Service Act, a commission can deliver decisions if no less than two thirds of its seven members are present. That could result in situations where the majority of its members are military officials. Therefore, in practice, the composition of a recruitment commission may vary not only from one region to another but also between sessions. Admittedly, such variability may be unfortunate.

However, the question was whether the independence requirement had been fulfilled in the specific circumstances of the present case. This was deemed to be the case, as none of the following arguments to the contrary convinced the Court.

Firstly, the provision of ordinary administrative support (such as proving premises for sessions) could not in itself be seen as affecting the independence of a commission's members: nothing suggested that individual members obtained any payments or incentives from the military authorities; they remained employed by their own State agencies and were not subject to any pressure or received any instructions from the Ministry of Defence;

Secondly, failing any credible evidence, the applicant's allegation that members of recruitment commissions did not have true voting powers and that all decisions were *de facto* made by the heads of the military commissariats was speculative.

(ii) *Proceedings before the domestic courts* – Firstly, all decisions adopted by a military recruitment commission were amenable to an appeal before the courts of general jurisdiction, who were vested with broad powers of review: judicial scrutiny covered all matters of fact and law as well as observance of the rights and freedoms of a claimant; courts were empowered to declare a contested decision unlawful, as well as to order measures to remedy breaches of the law and individual rights and freedoms.

Secondly, commissions' decisions were automatically suspended pending the adoption of a final judgment by a domestic court. While it was true that a subsequent two-tier review in cassation proceedings before the regional courts and the Supreme Court had no suspensive effect, this would not automatically render cassation proceedings ineffective (the applicant himself never alleged any ineffectiveness stemming therefrom).

(iii) *Statistical information* – Both parties and the intervener NGO had relied on statistical data. However, there was a significant discrepancy between the respective information submitted about the approval rate of applications for the replacement of military service with its civilian alternative (from

50% according to the NGO to 98% according to the Government).

The Court was not in a position to determine whether the reasons for such a significant discrepancy were due to the differences in statistical technology or to calculation errors. Nonetheless, all three approaches confirmed the absence of institutional bias against individuals seeking such replacement.

(iv) *Conclusion* – The existing mechanism in Russia for the examination of applications for the replacement of compulsory military service with its alternative civilian version provided wide scope for examination of individual circumstances and encompassed sufficient procedural guarantees for a fair procedure. While in practice, in certain circumstances, the composition of a commission might raise doubts as to its independence, the general rule, as could be seen from the regulatory framework and the examples provided by the parties, was that a recruitment commission, given the structural detachment of the majority of its members from the military authorities, satisfied the prima facie requirement of independence (see, *a contrario*, *Papavasilakis v. Greece*, 66899/14, 15 September 2016, Information Note 199). Furthermore, any procedural defects occurring at the commission level could be subsequently remedied during the judicial proceedings, given the scope of the judicial review process and the courts' wide powers.

(b) *Negative obligations*

Save for the instances of arbitrariness or manifest unreasonableness, the Court relied on the conclusions reached by an effective domestic mechanism after examination of an individual request. The military recruitment commission had sat in its standard composition, which (as seen above) afforded the requisite guarantees of independence. The applicant had not complained about scarcity of reasons for its decision. The domestic courts had not limited the scope of the review to the decision of the commission: the applicant's replacement application had been examined anew. While offered an opportunity thereto, he had not brought any new evidence or witnesses. No violation of fair-trial guarantees had been alleged; nor was there any indication that the courts had held any presumptions of facts or of law against the applicant.

Given that it is not its task to substitute its own assessment of factual evidence to that carried out by the domestic courts, the Court saw no reason to doubt the latter's conclusion: the applicant had failed to substantiate the existence of a serious and insurmountable conflict between the obligation to serve in the army and his convictions.

Conclusion: no violation (four votes to three).

(See also the Factsheet on Conscientious objection)

Freedom of religion/Liberté de religion

Midwife denied employment because of her religion-motivated refusal to assist in abortions: *inadmissible*

Sage-femme non embauchée en raison de son refus, pour des raisons religieuses, de prendre part à des avortements : *irrecevable*

Grimmark – Sweden/Suède, 43726/17, Decision/Décision 11.2.2020 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, a nurse employed by the local county council, was granted leave to train as a midwife. At the end of her training, she received her midwife's licence. During her studies, she applied for vacant positions in several hospitals but was not offered employment, as she refused to perform abortions. She brought unsuccessful compensation proceedings before the domestic courts.

Law

Article 9: The applicant's refusal to assist in abortions due to her religious faith and conscience constituted a manifestation of her religion. The interference was prescribed by law: under Swedish law, an employee was under a duty to perform all work duties given to him or her. It had pursued the legitimate aim of protecting the health of women seeking an abortion. It had also been necessary in a democratic society:

Sweden provided nationwide abortion services and therefore had a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context did not prevent the provision of such services.

The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified. Employers had, under Swedish law, great flexibility in deciding how work was to be organised and the right to request that employees performed all duties inherent to the post. When concluding an employment contract, employees inherently accepted those duties.

In the present case, the applicant had voluntarily chosen to become a midwife and apply for vacant posts while knowing that that would mean assisting also in abortion cases.

Moreover, as a result of the refusals, the applicant had not been left unemployed: she had been able to continue to work as a nurse at another hospital, where she had a post.

Furthermore, the domestic courts had carefully balanced the different rights against each other and provided detailed conclusions which were based on sufficient and relevant reasoning. A proper balance had thus been struck between the different, competing interests.

Conclusion: inadmissible (manifestly ill-founded).

Article 14 in conjuction with Article 9: The applicant had argued that because of her religious beliefs and her public stand on abortion, she had been treated less favourably than midwives who were willing to perform all duties inherent to the vacant posts, including abortions. In the eye of the Court, however, her situation and that of the latter were not sufficiently similar to be compared with each other.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Steen v. Sweden* (dec.), 62309/17, 11 Feburary 2020)

ARTICLE 10

Freedom of expression/Liberté d'expression

Withdrawal of a company's licence to operate a television channel for favouring main opposition political party: *relinquishment in favour of the Grand Chamber*

Retrait de la licence d'opérateur de chaîne de télévision d'une société pour favoritisme envers l'un des principaux partis politiques d'opposition : *dessaisissement au profit de la Grande Chambre*

NIT S.R.L. – Republic of Moldova/République de Moldova, 28470/12 [Section II]

Traduction française du résumé – Printable version

The applicant company's television channel was accused by the audiovisual national authority of (i) lack of pluralism, (ii) politically biased programmes, (iii) favouring of one political party from opposition, and (iv) placing of distorted news items. After the applicant company failed to comply with several official warnings by the audiovisual authority, its licence to operate was withdrawn. The applicant company's court action against the measure imposed on it was not successful.

The applicant company complains under Article 6 of the Convention that the proceedings were not fair and under Article 10 of the Convention that the withdrawal of its licence amounted to a breach of its right to freedom of expression. The applicant company also complains that the withdrawal of its licence amounted to a breach of its right of property as guaranteed by Article 1 of Protocol No. 1.

On 3 March 2020 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

Freedom of expression/Liberté d'expression

Limited functionality of applicant's cultural website due to unnecessary prolonged retention of his computer server in the context of criminal proceedings against third parties: *violation*

Fonctionnalité limitée du site web culturel du requérant en raison de la rétention inutilement prolongée de son serveur informatique dans le cadre d'une procédure pénale contre des tiers : *violation*

Pendov – Bulgaria/Bulgarie, 44229/11, Judgment/Arrêt 26.3.2020 [Section V]

Traduction française du résumé – Printable version

Facts – The computer server of the applicant was seized and retained by the local public prosecutor's office during about seven and a half months, in the context of criminal proceedings against third parties. It was established that the server partially hosted a website suspected of a copyright violation. The retention of the server and the information contained in it also led to the limited functionality for a significant period of time of a website run by the applicant himself and hosted on that server.

Law –

Article 1 Protocol No. 1:

The fact that the applicant's server had never been examined for the purposes of the criminal investigation which had not been directed against the applicant, but against third parties, the possibility of copying the necessary information, the importance of the server for the applicant's professional activity, as well as the partial inactivity of the local public prosecutor's office, meant that the retention of the applicant's server for seven and a half months had been disproportionate.

Conclusion: violation (unanimously).

Article 10:

The applicant's website dedicated to Japanese anime culture constituted a means of exercising his freedom of expression. The retention of the applicant's server and the information contained on it by the prosecution authorities, which had led to the initial unavailability of the applicant's website, followed by the site's heavily limited functionality for several months amounted to an interference with his right to freedom of expression. Even assuming that the recovery of the data would have allowed the full recovery of the website, the Court did not see on what basis the applicant would have been obliged to keep a full back-up of the data on his server at any moment.

The interference had a valid legal basis in the Criminal Code of Procedure and had served the legitimate aims of prevention of disorder and crime and the protection of the rights of others. However, while the retention of the applicant's server in criminal proceedings had proved to be unnecessary for the purposes of the investigation, the prosecution authorities had remained inactive for a lengthy period of time and made no effort to remedy the effects of their actions on the applicant's freedom of expression, despite having been informed of those effects on many occasions. In particular, the applicant had complained that many of his own website's features had stopped working and could not be restored, and that the site had been relatively popular and its unavailability had been causing him financial damage.

While the applicant had hosted on his server a website suspected of publishing contents in breach of copyright, at no point had the domestic authorities suggested that he bore any responsibility for the alleged copyright violations. The fact that no criminal, administrative or other sanctions had been imposed on him could therefore not be relevant for the proportionality analysis.

The expression engaged in by the applicant had been artistic, and as such did not enjoy the high level of protection attributed to political speech. Nevertheless, in the circumstances of the present case, that consideration had been insufficient to tip the balance in favour of the Government who had pointed out that the applicant had not been a journalist, a whistle-blower or another person needing enhanced protection.

The interference with the applicant's right to freedom of expression had not been necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: EUR 5,200 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

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

Freedom of expression/Liberté d'expression

TV company prohibited from describing political party as "far-right" on the basis of unforeseeable application of statutory ban on the communication of any "opinion" by a newsreader: *violation*

Interdiction légale pour les présentateurs de journaux d'exprimer une « opinion » appliquée de manière imprévisible à une entreprise de télévision qui avait qualifié un parti politique de parti « d'extrême droite » : *violation*

ATV ZRT v. Hungary – Hungary/Hongrie, 61178/14, Judgment/Arrêt 28.4.2020 [Section IV]

Traduction française du résumé – Printable version

Facts - Section 12 of the Media Act prohibited the communication of any "opinion" by a newsreader. The applicant company owned a television channel found to have infringed the Act by describing, in a news programme, the political party Jobbik as "far-right". It was prohibited from repeating the statement. The applicant company appealed unsuccessfully, arguing that the term "far-right" was widely used in relation to Jobbik, that it had a scientific basis in political and social science, and that it reflected Jobbik's position in Parliament.

Law - Article 10: The salient issue in the case was not whether section 12 of the Media Act was in principle sufficiently foreseeable, in particular in its use of the term "opinion", but whether, when publishing the statement containing the term "far-right", the applicant company knew or ought to have known that that expression would represent an "opinion" in the circumstances.

The question whether the domestic courts' approach could reasonably have been expected was closely related to the issue whether in a democratic society it was necessary to ban the term "far-right" in a news programme in the circumstances, and in the light of the legitimate aim pursued by the restriction.

The notion of "opinion" in section 12 of the Media Act appeared to be very broad, covering all kinds of adjectives. In view of the lack of precision in the legislation, the domestic courts were required to ensure that the contested provision concerned only expressions which were likely to upset balanced and impartial reporting on matters of public interest and which could arguably be restricted, and that it did not turn into a tool for the suppres-

sion of free speech, encompassing activities and ideas which were protected by Article 10.

Throughout the proceedings, the domestic courts had suggested different elements of analysis to decide on the nature of the impugned term. The Government had not demonstrated the existence of a common practice either. That state of affairs cast doubt on whether the interpretation given by the higher-level domestic courts in the applicant company's case – namely, that a statement containing the term "far-right" constituted an opinion – could reasonably have been expected.

More importantly, there was no indication that the domestic courts had sought to consider, when assessing the nature of the impugned notion that the legislation was supposed to promote balanced news reporting. Although the Constitutional Court had referred to the public's right to factual and unbiased information, in reaching its decision it had simply found that public opinion could be influenced by the use of an adjective, without demonstrating whether in the circumstances of the case the specific term in issue had been capable of upsetting the balanced presentation of a matter of public interest.

The Court found force in the applicant company's more general argument before the domestic courts that political parties were frequently defined with adjectives (green party, conservative party, and so on) that merely referred to their political objectives and programmes and did not constitute an opinion or value judgment about them, capable of creating bias in the audience.

The applicant company had also relied on the factual circumstances of the case, namely that the disputed term had been expressed in connection with a demonstration triggered by an anti-Semitic comment by a Jobbik member. In those circumstances, the Court found that such factual elements were relevant for the contention that the term "far-right" did not concern an assessment of someone's conduct in terms of its morality, or a personal feeling of the speaker, but the position of a party within the political spectrum in general and in Parliament in particular. However, the domestic courts had not considered the circumstances surrounding the information which formed the object of the reporting, but instead the Constitutional Court had held that the provisions of the Media Act did not require that an opinion had a factual basis, thus implicitly considering irrelevant any defence by the applicant company based on the veracity and factual accuracy of the term employed.

Having regard to the domestic courts' divergent approaches to distinguishing facts from opinions, to the aim of the relevant provisions of the Media Act and to the circumstances of the case, the applicant company could not have foreseen that the term "far-right" would qualify as an opinion. Nor could it have foreseen that the prohibition of its use in a news programme would be necessary in order to protect unbiased reporting. Therefore, the restriction placed on the applicant company in its use of the impugned term had been a disproportionate interference with its right to freedom of expression.

Conclusion: violation (unanimously).

Article 41: Finding of violation sufficient just satisfaction for non-pecuniary damage.

(See also: The Venice Commission's Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary (CDL-AD(2015)015).

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

NGO denied access to information about education and work history contained in CVs of political leaders running for parliamentary elections: *violation*

Refus de communiquer à une ONG les informations relatives au parcours académique et professionnel qui figuraient sur les CV de candidats aux élections législatives : *violation*

Centre for Democracy and the Rule of Law – Ukraine, 10090/16, Judgment/Arrêt 26.3.2020 [Section V]

Traduction française du résumé – Printable version

Facts – The Central Election Commission of Ukraine ("the CEC") refused to provide the applicant NGO with copies of full biographies of the heads of political parties running in parliamentary elections, stating that the requested information was confidential in nature and could be fully disclosed only with the consent of the persons concerned. The applicant NGO was provided only with certain data from the requested biographies, which had been published on the CEC web-site. It appealed unsuccessfully against the refusal.

Law – Article 10:

Applicability:

In the present case, the question of whether the grievance of which the applicant organisation had complained fell within the scope of Article 10 was closely linked to the merits of its complaint. The

present case also raised a novel issue at the domestic level and was one of the first cases following the judgment of the Grand Chamber in Magyar Helsinki Bizottság v. Hungary [GC] to examine the questions of applicability of Article 10 in the context of access to information and the circumstances in which refusal of access to certain information might be considered an interference with the right to freedom of expression guaranteed by that provision. Accordingly, the Court decided to join the question of Article 10's applicability to the merits of the complaint.

Merits:

(a) Existence of an interference, its lawfulness and legitimate aim: The applicant organisation had requested, not particular information contained in the CVs, but rather copies of the CVs themselves. However, it had conceded that the candidates' addresses and phone numbers could not be disclosed. As to the list of family members, the applicant organisation had failed to explain why it could not have obtained it from available alternative sources. It had therefore not made an arguable case that there had been an interference with its Article 10 rights on that account. Accordingly, the question which remained for the Court to resolve was whether the failure to disclose to the applicant organisation the information about the education and work history (including work at public institutions) which the political leaders had included in their official CVs submitted to the CEC as part of the election process involved an interference with and a breach of the applicant organisation's rights under Article 10. The Court examined the existence of an interference with reference to the four criteria set out in the Grand Chamber's judgment in Magyar Helsinki Bizottság v. Hungary [GC].

(i) The purpose of the information request: the applicant organisation had been concerned about the integrity of candidates for high office in light of previous controversies regarding the educational qualifications of senior officials. While considerable information about their education and work history was already in the public domain, the applicant NGO had explained, rather convincingly, that it specifically needed the information as presented first-hand by the candidates, particularly in order to match it with the information about their assets. It had not been argued that this specific information had been available from other sources at the time.

(ii) The nature of the information sought: the public had an interest in the candidates' background and integrity in the immediate post-election context. The information sought had therefore met the public-interest test.

(iii) The particular role of the seeker of the information in "receiving and imparting" it to the public: the applicant organisation had played an important "watchdog" function.

(iv) Whether the information sought is ready and available: this had been the case.

Therefore, by refusing to disclose to the applicant organisation the information on the top candidates' education and work history contained in their official CVs filed with the CEC in the framework of their candidature, the domestic authorities had impaired its exercise of its freedom to receive and impart information in a manner striking at the very substance of its Article 10 rights.

The interference had been prescribed by law and had pursued the legitimate aim of protecting the privacy rights of others.

(b) "Necessary in a democratic society": The individuals concerned, prominent public figures, had submitted their CVs in the context of putting their candidacies forward in a national parliamentary election. They had thus inevitably exposed their qualifications and record to close public scrutiny. Moreover, they had done so in the context where domestic law at the time designated the impugned information as "open". While that information constituted personal data, its disclosure would not have subjected the political leaders to public exposure to a degree surpassing that which they could possibly have foreseen when registering as candidates at the top of the lists of the parties contesting the parliamentary elections.

The domestic courts had failed to conduct an adequate balancing exercise, comparing the harm any potential disclosure could do to the politicians' interest in non-disclosure of this information with the consequences for effective exercise of the applicant organisation's freedom of expression. Concluding that the need for disclosure in terms of effective exercise of voting rights had not been shown, they had not attempted to assess the degree of potential harmful impact, if any, on the politicians' privacy.

While the applicant organisation had not cited any reasons for its initial request, it had explained them before the domestic courts. There was no indication that the latter had been prevented, by any rules of domestic law or other considerations, from taking that additional information into account and possibly reassessing the CEC's conclusions in that light.

Therefore, the decision to deny the applicant organisation access to the impugned information had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

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

(See also Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung -eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, 39534/07, 28 November 2013, Information Note 168; Magyar Helsinki Bizottság v. Hungary [GC], 18030/11, 8 November 2016, Information Note 201; *Bubon v. Russia*, 63898/09, 7 February 2017).

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

NGO denied access to academic opinions forming part of case-file and relied upon by the Constitutional Court, not instrumental for exercise of freedom-of-expression rights: *inadmissible*

Refus de donner à une ONG l'accès à des articles de doctrine versés au dossier et invoqués par la Cour constitutionnelle, accès jugé non déterminant pour l'exercice du droit à la liberté d'expression : *irrecevable*

Centre for Democracy and the Rule of Law – Ukraine, 75865/11, Decision/Décision 26.3.2020 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant NGO unsuccessfully tried to obtain from the Constitutional Court of Ukraine copies of legal opinions by several Ukrainian law schools, to which it had referred in its decision concerning the possibility of individual deputies taking part in the formation of a parliamentary coalition. Under the Ukrainian Constitution, the Government is nominated by a coalition of parliamentary groups and factions controlling an absolute majority of seats in the Parliament. The constitutional matter at issue was whether groups that did not in themselves control an absolute majority could also include in the coalition dissident MPs from political groups not supporting the coalition and non-affiliated MPs in order to gain an absolute majority.

Law – Article 10: Questions relating to the applicability of Article 10 and the existence of interferences, the latter forming part of the merits of the relevant complaints, had often been inextricably linked. In the case of *Magyar Helsinki Bizottság v. Hungary* [GC], the Court had decided to join the question of the applicability of this article to the merits in the circumstances of that novel case. At the same time, the Court had also held that the question of applicability was an issue of the Court's jurisdiction *ratione materiae* and the relevant analysis should be carried out at the admissibility stage unless there was a particular reason to join that question to the merits. No such particular reasons appeared to exist in the present case. The Court further examined the case against the criteria set out in the *Magyar Helsinki Bizottság* judgment.

First, the information the applicant organisation had sought from the Constitutional Court was ready and available. Second, regarding the particular role of the applicant organisation in "receiving and imparting" information to the public, it had been playing a "watchdog" function in Ukraine's public life with its expertise in the media sphere and, particularly, political influence on media.

Third, concerning the nature of the information sought, the legal opinions in question met the public-interest test. They concerned a constitutional issue that had important political implications. Moreover, it had been perceived that the Constitutional Court had changed its previous position on the important constitutional matter of coalition formation. In doing so, it had referred to the opinions without quoting them or even summarising their content. In such circumstances, it could perhaps be expected that public interest in the content of the legal opinions could be aroused. At the same time, since those opinions had been part of that court's case-file, their disclosure might have raised concerns related to the need to ensure the proper administration of justice. That information had been, according to the Constitutional Court procedural rules applicable at the relevant time, subject to restricted access and available only to the participants in the proceedings.

Transparency could help maintain the legitimacy of constitutional review jurisdictions. Where a court had the option to request such third party interventions and had exercised it, the public might have a legitimate interest in being informed not just of their reception, but also of their essential content. However, the Court was not called to examine whether, as a matter of principle, the documents of the type requested by the applicant organisation could or should have been disclosed. Rather, its task was to establish whether the applicant organisation had shown, at any stage in the proceedings, that the purpose of its information request had been to enable it effectively to exercise its freedom of expression and that access to the information requested had been instrumental for the exercise of the right conferred by Article 10 § 1.

Fourth, as regards the purpose of the information request, the gist of the applicant organisation's argument was that it had needed to know the rules

concerning the formation of the ruling coalition to help it produce quality analysis and be effective in its legislative advocacy in the field of media law. The applicant organisation had not submitted any information which would indicate that at the relevant time it had had any particular experience in or that it had pursued activities related to constitutional issues beyond matters concerning media and information or that it had specialised in the relevant constitutional law issues. However, the proceedings before the Constitutional Court had not concerned the media or freedom of expression but rather matters of constitutional interpretation. The applicant organisation had not alleged, for example, that the legal opinions had been necessary to interpret the Constitutional Court's decision in its impact on the media. Nor had it alleged that it had been interested for any specific reason in any particular aspect of the procedure before that court, its deliberations or its reasoning. The Constitutional Court had indicated to the applicant organisation that the legal opinions could be requested from the law schools which had produced them. The applicant organisation, however, had never attempted to ask the law schools directly and, most importantly, had not explained why it had failed to do so. It had not alleged, for example, that it had considered such a request doomed to fail for any specific reason.

The Convention does not allow for an *actio popularis*. It was not sufficient that an applicant made an abstract point to the effect that certain information should be made accessible as a matter of general principle of openness. The applicant had to be able to demonstrate that access to the information requested was instrumental for the exercise of his or her right to freedom of expression such that the denial of access to that specific information constituted an interference with that right.

While Article 10 does not confer on individuals a right to access State-held information, such a right might arise under certain conditions. However, neither of them had been present in the instant case: there had been no court-ordered disclosure and the applicant organisation had failed to demonstrate that access to the requested material had been instrumental for the exercise of its right to freedom of expression and, in particular its freedom to receive and impart information. The applicant organisation had therefore failed to show that the refusal of its requests to access the relevant information had impaired the exercise of its freedom to receive and impart information in a manner striking at the very substance of its Article 10 rights.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See also *Magyar Helsinki Bizottság v. Hungary* [GC], 18030/11, 8 November 2016, Information Note 201; *Bubon v. Russia*, 63898/09, 7 February 2017; *Studio Monitori and Others v. Georgia*, 44920/09 and 8942/10, 30 January 2020, Information Note 236).

ARTICLE 14

Discrimination (Article 9)

Midwife denied employment because of her religion-motivated refusal to assist in abortions: *inadmissible*

Sage-femme non embauchée en raison de son refus, pour des raisons religieuses, de prendre part à des avortements : *irrecevable*

Grimmark – Sweden/Suède, 43726/17, Decision/Décision 11.2.2020 [Section III]

(See Article 9 above/Voir l'article 9 ci-dessus, page 24)

Discrimination (Article 3 of Protocol No. 1/ Article 3 du Protocole n° 1)

Lack of judicial scrutiny to protect against arbitrariness regarding an eligibility requirement which disadvantaged national minority organisations not yet represented in Parliament: *violation*

Absence de contrôle judiciaire contre l'arbitraire quant au respect d'une condition d'éligibilité désavantageant les organisations de minorités nationales non encore représentées au Parlement : *violation*

Cegolea – Romania/Roumanie, 25560/13, Judgment/Arrêt 24.3.2020 [Section IV]

English translation of the summary | Version imprimable

En fait – Le parlement roumain comprend une représentation en tant que telles des minorités nationales, qui sont affranchies du seuil électoral applicable aux partis politiques.

Présidente d'une fondation représentant la minorité italienne, la requérante souhaita se présenter aux élections parlementaires de décembre 2012 au nom de ladite fondation.

En mai 2012, la requérante demanda au gouvernement la reconnaissance d'utilité publique de sa fondation. Le secrétariat général du gouvernement (SGG) renvoya simultanément la demande pour examen à deux autorités administratives dif-

férentes : la direction des relations interethniques (DRI) et le ministère de la Culture.

En juin 2012, la DRI notifia à la requérante une réponse négative (qu'elle confirma sur recours de la requérante, au motif que l'activité de sa fondation ne concernait pas les relations interethniques).

En juillet 2012 entra en vigueur une modification de la législation sur les associations et fondations durcissant les conditions requises pour la reconnaissance d'utilité publique.

En octobre 2012, le bureau électoral central (BEC) refusa d'enregistrer la candidature de la requérante, faute de reconnaissance d'utilité publique de sa fondation. Ses recours contre ce refus du BEC furent rejetés le même mois, au terme duquel se situait la date limite de dépôt des candidatures.

Postérieurement aux élections en cause, le ministère de la Culture fit savoir à la requérante que sa fondation remplissait certes les conditions à la date de la demande, mais pas les nouvelles conditions introduites par la réforme susmentionnée.

La requérante estime avoir été défavorisée par rapport au député sortant de la minorité italienne (qui appartenait à une autre organisation), en ce que ce dernier était dispensé de toutes ces démarches pour renouveler sa candidature.

En droit

Article 14, combiné avec l'article 3 du Protocole n° 1 :

Contrairement aux organisations déjà représentées au Parlement, la fondation dont la requérante était membre devait obtenir sa reconnaissance d'utilité publique pour que cette dernière puisse se présenter aux élections parlementaires sous son étiquette.

La présente affaire se distingue de l'affaire *Danis et Association des personnes d'origine turque* par un seul aspect formel, qui est l'étendue des conditions légales nécessaires pour acquérir le statut d'utilité publique puisque celles-ci ont été modifiées en 2012. Les conclusions auxquelles la Cour est parvenue dans cette affaire quant à l'existence d'un double système d'évaluation des candidatures des organisations des minorités nationales demeurent donc valables. Aussi à la différence de l'affaire *Danis et Association des personnes d'origine turque,* la présente requérante n'a pas été prise au dépourvu par une nouvelle condition. Dès lors, il est nécessaire de vérifier si la procédure de reconnaissance d'utilité publique, telle que régie par les modifications législatives subséquentes, a été transparente et dépourvue d'arbitraire et si la requérante pouvait utilement contester devant les tribunaux le refus auquel elle s'est heurtée.

Compétence décisionnelle – Selon le libellé de la loi, la compétence pour reconnaître d'utilité publique une association ou fondation relève du « gouvernement roumain », donc de l'exécutif. Le SGG a toutefois renvoyé la demande en cause à deux autorités administratives distinctes, qui l'ont chacune traitée de manière différente.

Délais de réponse – La loi prévoit des délais (60 et 90 jours respectivement) pour le traitement de la demande par l'autorité administrative compétente puis par le gouvernement. Leur caractère indicatif ou impératif n'a pas été clarifié devant la Cour. Pourtant, cette question était importante ici, puisque la reconnaissance d'utilité publique devait être obtenue avant la date limite de présentation des candidatures. Or, si la requérante a bien reçu la réponse de la DRI antérieurement à la date limite en question, la réponse du ministère ne lui a été communiquée que postérieurement aux élections.

Critères à remplir – Les réponses données à la requérante par les deux autorités administratives saisies ne sont pas uniformes à ce sujet. Le motif du refus de la DRI semblait suggérer que la requérante ne remplissait pas les critères légaux (même avant leur réforme). De son côté, le ministère a exprimé l'avis que la fondation remplissait toutes les conditions en vigueur lors du dépôt de sa demande, mais que celle-ci devait être traitée selon les critères nouvellement introduits, qu'elle ne remplissait plus. Par ailleurs, il n'apparaît pas que le ministère ait envisagé de donner à la requérante une occasion de compléter sa demande initiale en fonction des critères nouvellement introduits.

Nature juridique des réponses données – La loi dispose que l'autorité administrative communique au demandeur « une réponse motivée » dans un délai de trente jours calculé à compter de la date de « la prise de la décision ». Cependant, en l'espèce, le SGG a demandé à la DRI et au ministère de communiquer leurs « avis ». Ces éléments ne permettent pas de déterminer avec certitude si ces avis revêtaient la nature de simples actes préparatoires ou de véritables décisions administratives. Toutefois, la réponse de la DRI et celle du ministère ont bien marqué la fin de la procédure administrative en l'espèce. En effet, contrairement au cas où l'administration matériellement compétente propose la reconnaissance du statut d'utilité publique, en cas d'avis défavorable le libellé de la loi ne prévoyait aucune transmission au gouvernement pour décision formelle.

Contrôle des tribunaux – Compte tenu des éléments suivants, la requérante ne disposait d'une voie de recours effective ni contre la réponse de la DRI ni contre celle du ministère

La discrétion laissée à l'exécutif – Selon la jurisprudence de la Haute Cour de cassation et de justice, l'exécutif conservait le pouvoir de refuser la reconnaissance d'utilité publique même si l'entité concernée remplissait tous les critères prévus par la loi. Autrement dit, la décision finale était fondée sur des critères d'opportunité et non pas de légalité. Dès lors, l'éventuel contrôle juridictionnel de la décision de la DRI aurait été limité à vérifier si la fondation remplissait les conditions légales pour être reconnue d'utilité publique, sans possibilité pour les tribunaux de lui octroyer ce statut si tel était le cas.

L'absence de possibilité de contestation en temps utile – La réponse du ministère n'ayant été notifiée à la requérante que postérieurement aux élections en cause, un recours contre celle-ci n'aurait pas été en mesure de porter remède à son grief à temps pour lui permettre de présenter sa candidature.

Eu égard à ces lacunes du contrôle judiciaire, qui n'offrait pas de garanties suffisantes contre l'arbitraire, et nonobstant la large marge d'appréciation de l'État en la matière, cette différence de traitement par rapport aux organisations de minorités nationales déjà représentées au Parlement n'était pas suffisamment justifiée par rapport au but légitime poursuivi, à savoir celui de garantir une représentativité effective et d'éviter les candidatures dépourvues de sérieux.

Conclusion : violation (unanimité).

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

(Voir également Danis and Association des personnes d'origine turque c. Roumanie, 16632/09, 21 avril 2015, Note d'information 184 ; Grosaru c. Roumanie, 78039/01, 2 mars 2010, Note d'information 128).

ARTICLE 15

Derogation in time of emergency/ Dérogation en cas d'état d'urgence

Detention based on mere suspicion of membership of an illegal organisation, without any specific incriminating evidence: *not "strictly required"*

Détention fondée sur le simple soupçon d'appartenance à une organisation illégale, sans aucun élément à charge concret : *« stricte mesure » dépassée*

Baş – Turkey/Turquie, 66448/17, Judgment/Arrêt 3.3.2020 [Section II]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 11)

ARTICLE 35

Article 35 § 1

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

Requirement to lodge an appeal with the Constitutional Court in all cases raising an issue of unconstitutionality or interpretation of a substantive rule: *inadmissible*

Failure to lodge an objection before a three-judge committee of the Constitutional Court against a summary decision declaring a constitutional appeal inadmissible, given by a single judge: *inadmissible*

Dos Santos Calado and Others/ et autres – Portugal, 55997/14 and/ et al., Judgment/Arrêt 31.3.2020 [Section III]

English translation of the summary – Version imprimable

En fait – Les requérants des quatre requêtes ont formé quatre recours devant le Tribunal constitutionnel, qui les a déclarés irrecevables par le biais d'une décision sommaire rendue par un juge unique, au motif qu'ils ne remplissaient pas les conditions stipulées dans la loi sur l'organisation et le fonctionnement de ce Tribunal. Un des requérants n'a pas formé de recours en opposition contre cette décision devant un comité de trois juges.

Les requérants se plaignent d'une atteinte à leur droit d'accès à un tribunal et les requérants de deux requêtes se plaignent aussi du défaut d'impartialité du comité de trois juges.

En droit – Article 35 § 1 :

Tout recours formé par un justiciable, aux fins d'un contrôle concret de constitutionnalité, devant le Tribunal constitutionnel doit porter sur une question de constitutionnalité d'une norme ou de l'interprétation qui a été faite de celle-ci par un tribunal.

Dans toute affaire portée contre le Portugal soulevant une question tirée d'une inconstitutionnalité normative ou d'une interprétation normative, le requérant doit avoir introduit valablement un recours devant le Tribunal constitutionnel pour sa-

tisfaire à l'obligation d'épuiser les voies de recours internes posée par l'article 35 § 1 de la Convention. En revanche, un recours constitutionnel portant sur une décision judiciaire sera voué à l'échec et ne pourra être pris en compte pour le calcul du délai de six mois établi à ce même article 35 § 1.

En l'espèce, le recours formé par le requérant devant le Tribunal constitutionnel a été déclaré irrecevable par une décision sommaire adoptée par une formation de juge unique. Cette décision est devenue définitive faute pour le requérant de l'avoir contestée par voie d'opposition devant un comité de trois juges.

Certes l'opposition n'est pas un recours au sens strict du terme car c'est un moyen de contester les décisions prises par le rapporteur d'une formation judiciaire collégiale afin d'obtenir une reconsidération de la question. Cela dit, la Cour estime qu'un tel mécanisme aurait permis au requérant de réagir contre la décision litigieuse.

Premièrement, l'opposition est formée devant un comité de trois juges du Tribunal constitutionnel, composé du rapporteur ayant rendu la décision sommaire litigieuse et de deux autres juges dont le président ou le vice-président du Tribunal constitutionnel. Le juge rapporteur peut rendre cette décision sommaire sans consulter ses pairs. Ceux-ci ne seront donc consultés que si l'intéressé forme une opposition devant eux.

Deuxièmement, l'irrecevabilité du recours ne peut être confirmée que par un vote unanime du comité de trois juges et, en l'absence d'une telle unanimité, la question sera portée devant la chambre réunie en section plénière.

Ces constatations suffisent à la Cour pour considérer que l'opposition devant le comité de trois juges du Tribunal constitutionnel contre la décision sommaire litigieuse constituait un recours effectif au sens de l'article 35 § 1 de la Convention pour remédier au grief tiré du défaut d'accès à un tribunal soulevé devant elle. Le requérant ayant omis de former une opposition devant le comité de trois juges, il y a lieu de faire droit à l'exception soulevée par le Gouvernement.

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

Article 6 § 1 :

Les requérants ne mettent en doute que l'impartialité objective du comité de trois juges du Tribunal constitutionnel, en raison de la participation du juge rapporteur qui avait rendu la décision d'irrecevabilité de leur recours constitutionnel dans le cadre du comité de trois juges du Tribunal constitutionnel.

Les principes tirés de la jurisprudence de la Cour concernant l'impartialité objective ne sauraient être appliqués à la présente espèce étant donné la nature de l'intervention du comité de trois juges dans le cadre d'une opposition. En l'occurrence, ce comité est l'instance statuant définitivement sur la question de la recevabilité d'un recours constitutionnel, la décision sommaire adoptée par le juge rapporteur n'est donc qu'une étape préalable, celle-ci ne devient au demeurant définitive que si l'intéressé ne forme pas d'opposition contre elle, c'est-à-dire, s'il ne demande pas au rapporteur de reconsidérer sa décision avec, cette fois, l'assistance des deux autres juges du comité. La procédure devant le juge rapporteur fait ainsi entièrement partie de la procédure d'admissibilité des recours constitutionnels, le comité de trois juges n'est donc pas une entité à part entière et autonome appelée à se prononcer sur la question litigieuse.

Conclusion : irrecevable (manifestement mal fondé).

La Cour a aussi conclu à l'unanimité à la violation de l'article 6 § 1 pour défaut d'accès à un tribunal concernant deux requêtes étant donné que le Tribunal constitutionnel a fait preuve d'un formalisme excessif en déclarant irrecevables des recours constitutionnels pour non-respect des conditions légales.

La Cour a aussi conclu à l'unanimité à la non-violation de l'article 6 § 1 concernant une requête étant donné que l'irrecevabilité d'un recours, faute d'avoir soulevé une inconstitutionnalité tirée d'une interprétation normative, ne porte pas atteinte à la substance du droit d'accès à un tribunal.

Article 41 : 3 300 EUR pour préjudice moral aux requérants des deux requêtes

(Voir aussi concernant l'effectivité des recours, *Traina c. Portugal* (déc.), 59431/11, 21 mars 2017 ; *Mendrei c. Hongrie* (déc.), 54927/15, 19 juin 2018, Note d'information 220 et concernant l'impartialité du tribunal, *San Leonard Band Club c. Malte*, 77562/01, 29 juillet 2004, Note d'information 66 ; *Warsicka c. Pologne*, 2065/03, 16 janvier 2007, Note d'information 93 ; *Driza c. Albanie*, 33771/02, 13 novembre 2007, Note d'information 102 ; *Kayasu c. Turquie*, 64119/00 et 76292/01, 13 novembre 2008, Note d'information 113 ; *Pereira da Silva c. Portugal*, 77050/11, 22 mars 2016 ; *Ramos Nunes de Carvalho e Sá c. Portugal* [GC], 55391/13 et al., 6 novembre 2018, Note d'information 223).

Effective domestic remedy/Recours interne effectif – Russia/Russie

Failure to exhaust newly introduced compensatory remedy in respect of improper

conditions of past pre-trial and correctional detention in breach of domestic standards: *inadmissible*

Manquement à exercer un recours compensatoire nouvellement ouvert aux personnes estimant avoir été détenues avant leur procès ou dans le cadre de leur peine dans des conditions non conformes aux normes internes : *irrecevable*

Shmelev and Others/et autres – Russia/Russie, 41743/17 et al., Decision/Décision 9.4.2020 [Section III]

Traduction française du résumé – Printable version

Facts – All applicants were detained in various Russian detention facilities, before or after their conviction in criminal proceedings. When their complaints about breaches of Articles 3 and 13 due to the material conditions of detention were communicated to the respondent Government, the detention of some of the applicants had ended, while it continued for others.

On 27 January 2020, the Federal Law no. 494–FZ (hereinafter, the Compensation Act), adopted on 27 December 2019, entered into force. It provides that any detainee who alleges that his or her conditions of detention are in breach of the national legislation or international agreements of the Russian Federation can apply to a court. The detainee can seek a judicial finding of the violation in question and financial compensation for any such violations. The courts can consider complaints that raise various problems of detention, including overcrowding, and award compensation without the prerequisite of establishing any official's guilt or unlawful conduct. The claim should be lodged while the detention in question is ongoing or within three months of its termination. Persons whose detention has ended and had complaints pending before the European Court on the date when the Compensation Act entered into force, or whose complaints were dismissed for reasons of non-exhaustion, have 180 days to lodge their complaints.

A number of other developments occurred in the domestic legislation and practice since the Court's pilot judgment in *Ananyev and Others* and its *Sergey Babushkin* judgment.

Law – Article 35 § 1: The Court was satisfied that the procedural requirements of access to the compensatory scheme were simple and accessible and did not excessively burden claimants either procedurally or in terms of cost. The Court was also satisfied that the procedure was equipped with the requisite procedural guarantees associated with adversarial judicial proceedings, such as independence and impartiality and the right to legal assistance. There were safety measures to take into account the special situation of detainees. The courts were equipped with the ability to apply preliminary measures, such as ordering a detainee's transfer to other premises or a medical examination. Furthermore, the courts were reminded of the need to treat any motion for withdrawal of a complaint by a detainee with caution. The adjudication of administrative complaints was based on shifting the burden of proof to the administration. The courts were instructed to bear in mind the difficulties faced by detainees in collecting evidence and were encouraged to play an active role in identifying and obtaining evidence. A complaint had to be considered within a month or processed immediately, if there were special circumstances calling for urgency. There was thus no reason to assume that the claims would not be processed within a reasonable time, or that the compensation would not be paid promptly. The Court was also satisfied that the domestic authorities and competent courts had been sufficiently apprised of the Court's own practice and the criteria that needed to be taken into account when making a compensation award.

Where the detention is over, a compensatory remedy can suffice to provide applicants with fair redress for alleged breaches of Article 3. Therefore, in situations where the pre-trial or correctional detention was over, the new Compensation Act presented, in principle, an adequate and effective avenue for obtaining compensatory redress and offered reasonable prospects of success to applicants.

The applicable provisions of the Russian legislation set different standards of personal space for pre-trial detention (four square metres per detained person) and correctional detention for male convicts in colonies or prisons (two and two-and-a-half square metres). However, the Court's consistent practice has been to regard three square metres of floor surface per person as the relevant minimum standard under Article 3 (see *Muršić v. Croatia*). Therefore, the Court distinguished between cases where the applicants' conditions of detention had fallen below the national standards and those cases where the minimal available space was in line with the national standards but would still raise a prima facie issue under Article 3.

Accordingly, whenever a complaint was made about past breaches of Article 3 by inadequate conditions of pre-trial or correctional detention falling below domestic standards, actual or potential applicants were expected to exhaust the newly introduced compensatory remedy before lodging their complaints with the Court. Even though the domestic remedy had not been available to the applicants at the time when they had applied to the Court, the situation justified a departure from the

general rule on exhaustion and required the applicants in question to seek compensation under the Compensation Act. The Court was prepared to change its approach as to the effectiveness of the remedy in question, should the practice of the domestic courts show, in the long run, that complaints were being refused on formalistic grounds, that compensation proceedings were excessively long, that compensation awards were insufficient or were not paid promptly, or that domestic case-law was not in compliance with the requirements of the Convention and the Court's case-law.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

The Court invited the parties to submit further observations in order to clarify the effectiveness of the preventive remedies in respect of the pending pre-trial and correctional detention in conditions incompatible with Article 3, as well as the effectiveness of the newly introduced compensatory remedy in respect of past correctional detention in conditions complying with domestic standard, but falling below minimal Article 3 standard.

Pending its examination of the questions as outlined above, and the adoption by the domestic authorities, subject to supervision by the Committee of Ministers, of the necessary measures at national level, the Court decided not to deal with any applications of which the Government had not yet been given notice where the sole or main complaint concerned overcrowding and other aspects of poor material detention conditions in pre-trial and post-conviction detention facilities in Russia. The Court might nevertheless decide at any moment to declare any such case inadmissible or to strike it out, for example in the event of a friendly settlement between the parties or the resolution of the matter by other means, in accordance with Articles 37 or 39 of the Convention. However, the Court might continue its examination of applications of which notice had already been given to the respondent Government.

Effective domestic remedy/Recours interne effectif – Russia/Russie

Failure to lodge vicarious liability claim against authorities owning property used by institutions which had not paid judgment debts to applicants: *inadmissible*

Manquement des requérants à introduire une action en responsabilité civile du commettant contre les autorités détentrices des biens utilisés par les organismes débiteurs défaillants : *irrecevable*

Solonskiy and/Petrova – Russia/Russie, 3752/08 and 22723/09, Decision/Décision 9.4.2020 [Section III]

Traduction française du résumé – Printable version

Facts – On various dates the applicants obtained binding judicial decisions ordering municipal institutions to make certain payments in their favour. The judgments became final but remained unenforced.

Law – Article 35 § 1: the Government had claimed that the applicants had failed to follow the procedure for bringing a claim for vicarious liability against the relevant authority. While in previous cases the Court had rejected a similar objection by the Government, in the case at hand the latter had provided a number of relevant examples from national case-law.

As to the effectiveness of the remedy, domestic law provides for a rather straightforward procedure for applying the provisions concerning vicarious liability in cases similar to the present ones. The condition for holding an authority that owns the property assigned to an institution vicariously liable for the debts of that institution is a lack of funds on the part of the institution. Thus, any creditor who had unsuccessfully claimed the debt from the principal debtor institution could lodge a vicarious liability claim against the owner of the property used by that institution. In the examples of domestic practice provided by the Government, the claimants had not been required to prove that an institution's failure to fulfil an obligation or the non-enforcement of a judgment against an institution had been caused by the acts of the respective authority. In the given examples, the domestic courts had applied, *inter alia*, Articles 120 and 399 of the Civil Code and granted claims against the institutions. In the event of a lack of funds, they had held the owners of the property assigned to the institutions vicariously liable for debts incurred by the institutions stemming from various relationships. In cases concerning non-enforcement of a judicial decision against an institution, the national courts had granted claims against the relevant municipal or federal authorities, having established the fact of non-enforcement and that the authority was the owner of the property used by the institution.

The applicants had been informed that they were entitled to hold the authorities vicariously liable. They had not contested the availability of that remedy.

Consequently, the Court found no reason to consider that a claim for vicarious liability would not have reasonable prospects of success in the applicants' cases. In one application the reason for non-enforcement had clearly been lack of funds on the part of the debtor institution. In another applica-

tion it had been established during enforcement proceedings that the debtor institution had ceased its activities, since its accounts had been closed and there was no known successor. In those circumstances, obtaining judicial decisions finding the authorities directly liable for the relevant debts could have facilitated payment of the amounts awarded in the applicants' favour. Moreover, lodging a claim for vicarious liability would not have imposed an excessive burden on the applicants. In view of the foregoing, and in the absence of any arguments on behalf of the applicants, the latter had been required to pursue a vicarious liability claim prior to lodging their applications before the Court.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

ARTICLE 46

Execution of judgment /Exécution de l'arrêt

Dismissal on procedural grounds of request to reopen civil proceedings following European Court's judgment finding violation of the Convention: *inadmissible*

Refus, fondé sur des motifs procéduraux, de rouvrir une procédure civile après un arrêt de la Cour européenne ayant conclu à la violation de la Convention : *irrecevable*

Munteanu – Romania/Roumanie, 54640/13, Decision/Décision 11.2.2020 [Section IV]

(See Article 6 § 1 above/Voir ci-dessus l'article 6 § 1, page 14)

ARTICLE 1 OF PROTOCOL No. 1/ DU PROTOCOLE NO 1

Control of the use of property/Réglementer l'usage des biens

Unnecessary prolonged retention of the applicant's computer server in the context of criminal proceedings against third parties: *violation*

Rétention inutilement prolongée du serveur informatique du requérant dans le cadre d'une procédure pénale contre des tiers : *violation*

Pendov – Bulgaria/Bulgarie, 44229/11, Judgment/Arrêt 26.3.2020 [Section V]

(See Article 10 above / voir l'article 10 ci-dessus, page 25)

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

Referrals/Renvois

T.K. and/et S.R. – Russia/Russie, 28492/15, Judgment/Arrêt 19.11.2019 [Section III]

(See Article 3 above/Voir l'article 3 ci-dessus, page 11)

Relinquishments/Dessaisissements

NIT S.R.L. – Republic of Moldova/République de Moldova, 28470/12 [Section II]

(See Article 10 above/Voir l'article 10 ci-dessus, page 25)

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Election of new President/Election du nouveau Président

On 20 April 2020, the Court elected Robert Spano (Iceland) as its new President. He will take office on 18th May 2020. Robert Spano succeeds Linos-Alexandre Sicilianos (Greece).

Le 20 avril 2020, la Cour européenne des droits de l'homme a élu son nouveau président, Robert Spano (islandais). Son mandat débutera le 18 mai 2020. Robert Spano succèdera à Linos-Alexandre Sicilianos (grec).

Elections of Vice-President and Section President/Elections de la Vice-présidente et Président de Section

The Court also elected a new Vice-President - Judge Ksenija Turković (Croatia) and a new Section President – Judge Yonko Grozev (Bulgaria). They will take up their duties on 18 May 2020 respectively.

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La Cour a également élu la juge Ksenija Turković (Croatie) vice-présidente et le juge Yonko Grozev (Bulgarie) président de Section. Le mandat des nouveaux élus prendra effet le 18 mai 2020 respectivement.

New judge in respect of Portugal/Nouvelle juge au titre du Portugal

The newly elected judge in respect of Portugal, Ana Maria Guerra Martins, was sworn in on 1 April 2020.

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La nouvelle juge élue au titre du Portugal, Ana Maria Guerra Martins, a prêté serment le 1er avril 2020.

SCN: new members/RCS : nouveaux membres

In March 2020 the Superior Courts Network welcomed new members: the *Constitutional Court of Liechtenstein* and the *Supreme Administrative Court of Liechtenstein*, which brings the membership of the SCN to 89 courts from 40 States.

The SCN progress report published recently contains an overall assessment of the Network's activities, including its 2019 Forum, and future prospects.

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En mars 2020, le Réseau des cours supérieures a accueilli deux nouveaux membres : la *Cour constitutionnelle de Liechtenstein* et la *Cour suprême administrative de Liechtenstein*, faisant passer le nombre de membres actuels à 89 juridictions de 40 États.

Le rapport d'activité publié récemment comporte à la fois des éléments sur le bilan de l'activité du Réseau, sur le contenu du Forum de juin 2019, et sur les perspectives plus globales du Réseau.

ECHR Twitter account/Compte Twitter de la CEDH

With an eye to communication consistency and rationalisation, the ECHR_Press and ECHRPublication Twitter accounts have been merged into a single account entitled ECHR_CEDH.

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Dans un souci de cohérence en terme de communication et de rationalisation, les comptes Twitter ECHR_Press et ECHRPublication ont fusionné en un seul compte dénommé ECHR_CEDH.

COVID-19 AND THE ECHR/ COVID-19 ET LA CEDH

The functioning of the ECHR during the period of confinement/ Fonctionnement de la CEDH pendant la période de confinement

In order to comply with the measures adopted by the French authorities and with a view to pursuing its own policy and that of the Council of Europe of seeking to protect its staff from contracting and potentially spreading COVID-19, the Court has taken a number of steps designed to reduce to the minimum the physical presence of staff in the Human Rights Building.

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Conformément aux mesures adoptées par les autorités françaises et à la politique qu'elle-même et le Conseil de l'Europe appliquent pour protéger leur personnel contre le risque de contracter le COVID-19 et, potentiellement, de contribuer à sa propagation, la Cour a pris plusieurs mesures pour réduire autant que possible le nombre d'agents présents au Palais des Droits de l'Homme.

Extension of exceptional measures/ Prolongation des mesures exceptionnelles

The exceptional measures taken by the Court in the context of the global health crisis (the six-month time-limit for lodging an application and the time-limits allotted in pending proceedings) have been extended for a further two months from 16 April 2020 onwards.

The procedures introduced to enable the ongoing examination of requests for interim measures are also maintained.

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Les mesures exceptionnelles adoptées par la Cour dans le contexte de la crise sanitaire mondiale (le délai de six mois pour introduire une requête et les délais impartis dans les procédures pendantes) sont prolongées pour une nouvelle période de deux mois à compter du 16 avril 2020.

Les procédures mises en place pour que les demandes de mesures provisoires puissent être examinées sont également maintenues.

Derogations/Dérogations

Ten countries have already availed themselves of the right of derogation in time of emergency (Article 15 of the Convention): Albania, Armenia,

Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino and Serbia.

List of notifications

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Dix pays ont déjà exercé leur droit de dérogation en cas d'état d'urgence (article 15 de la Convention) : Albanie, Arménie, Estonie, Géorgie, Lettonie, Macédoine du Nord, République de Moldova, Roumanie, Saint-Marin et Serbie.

Liste de notifications

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

New case-law guide/ Nouveau guide sur la jurisprudence

As part of its series on the case-law by theme, the Court has recently published a Guide on Mass Protests. All case-law guides can be downloaded from the Court's website.

Guide on the case-law of the European Convention on Human Rights – Mass protests (eng)

Dans sa série sur la jurisprudence par thème, la Cour a publié un guide sur les portestations de masse, qui est disponible pour le moment en anglais et en turc. Tous les guides sur la jurisprudence peuvent être téléchargés à partir du site web de la Cour.

Supervision of the execution of judgments and decisions of the ECHR/Surveillance de l"exécution des arrêts et décisions de la CEDH

The 2019 Annual Report on the supervision of the execution of judgments and decisions of the ECHR has been published.

The Committee of Ministers' annual report presents the status of execution of the main judgments of the European Court of Human Rights by the member States of the Council of Europe. It also provides statistics and information on new cases, cases pending or closed during the year. See the Newsroom of the Department for the Execution of ECHR Judgments.

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Le Rapport annuel 2019 sur la surveillance de l'exécution des arrêts et décisions de la CEDH vient d'être publié.

Le rapport annuel du Comité des Ministres présente l'état d'exécution des principaux arrêts de la Cour européenne des droits de l'homme par les États membres du Conseil de l'Europe. Il contient des statistiques et des informations relatives aux affaires nouvelles, pendantes ou closes au cours de l'année. Voir la Salle de presse du Service de l'exécution des arrêts de la CEDH.

Individual application under the Convention/ La requête individuelle en vertu de la Convention

The Russian version of *The individual application under the European Convention on Human Rights* (2019) is available online. The English and French versions can be obtained from Council of Europe Publishing.

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La version russe de *La requête individuelle en vertu de la Convention européenne des droits de l'homme* (2019) est consultable en ligne. Les versions anglaise et française peuvent être obtenues auprès des éditions du Conseil de l'Europe.

New factsheet/Nouvelle fiche thématique

The Council of Europe's Department for the Execution of Judgments has published a new thematic factsheet highlighting the impact of the **European Convention on Human Rights** on constitutional matters across Europe over more than 50 years.

The factsheet summarises 117 relevant cases or groups of cases concerning 32 different Council of Europe member states, dating back to 1968.

It explains how judgments from the ECHR have led to important changes in national legislation or the way in which constitutions are interpreted by national courts.

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Le Service de l'exécution des arrêts du Conseil de l'Europe a publié une nouvelle fiche thématique qui met en évidence l'influence exercée par la Convention européenne des droits de l'homme sur les questions constitutionnelles en Europe depuis plus de 50 ans.

La fiche résume 117 affaires ou groupes d'affaires présentant un intérêt particulier, dont les plus anciennes datent de 1968 et qui concernent 32 États membres du Conseil de l'Europe.

Elle explique comment des arrêts de la CEDH ont fait évoluer de manière déterminante la législation nationale ou l'interprétation de la constitution par les juridictions nationales.