249

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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

COUNCIL OF EUROPE
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TABLE OF CONTENTS / TABLE DES MATIÈRES

ARTICLE 6

Article 6 § 1 (civil)

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

- Length of preliminary investigations prevented the applicant from joining criminal proceedings as a civil party claiming damages: *Article 6 applicable; violation*
- Durée des investigations préliminaires ayant empêché le requérant de se constituer partie civile dans une procédure pénale et de demander réparation du préjudice civil : *article 6 applicable ; violation*

Access to court/Accès à un tribunal

- Absence of absolute universal jurisdiction of the criminal courts with regard to torture in relation to civil-party applications, under a new retroactive law: *no violation*
- Absence de compétence universelle absolue des juridictions pénales en matière de torture concernant la constitution de parties civiles, en vertu d'une nouvelle loi à portée rétroactive : *non-violation*

Impartial tribunal/Tribunal impartial

- Lack of impartiality of Supreme Court judge who sat in a five-judge panel in criminal and closely related subsequent civil proceedings: *violation*
- Manque d'impartialité d'un membre de la Cour suprême qui a siégé dans une formation de cinq juges dans un procès pénal et dans un procès civil étroitement rattaché : *violation*

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

- Failure by a court of appeal to hear prosecution witnesses before overturning the acquittal verdict given at first instance under summary procedure: *no violation*
- Non-audition des témoins à charge par la cour d'appel avant de renverser le verdict d'acquittement prononcé en première instance lors d'une procédure abrégée : *non-violation*

Article 6 § 1 (administrative/administratif)

Access to court/Accès à un tribunal

- Inadmissibility of an application for judicial review of a temporary restriction linked to COVID-19, on the grounds that the decision was no longer in force when the application was examined: *communicated*
- Irrecevabilité d'un recours en annulation contre une restriction temporaire liée à la Covid-19 au motif que la décision n'est plus en vigueur à la date d'examen du recours : *affaire communiquée*

Fair hearing/Procès équitable

- Tax debt time-barred by retroactive effect of judicial decision but subsequently reinstated, while dispute still pending and with aim of providing legal certainty, by retrospective but foreseeable legislation: *case referred to the Grand Chamber*
- Dette fiscale éteinte par l'effet rétroactif d'une jurisprudence et ensuite rétablie, toujours en cours du litige et aux fins de la sécurité juridique, par une loi rétroactive mais prévisible : *affaire renvoyée devant la Grande Chambre*

ARTICLE 9

Freedom of religion/Liberté de religion
Manifest religion or belief/Manifester sa religion ou sa conviction

- Prohibition on collective worship in the context of COVID-19: *communicated*
- Interdiction de la pratique collective du culte dans le contexte de la Covid-19 : *affaire communiquée*

- *De facto* impossibility for a prisoner to attend church on account of his position at the bottom of the prisoners' informal hierarchy: *communicated*
- Détenu empêché *de facto* de se rendre à l'église par sa situation au plus bas de la hiérarchie informelle entre les détenus : *affaire communiquée*

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

- Justified conviction for assaulting police officer during proportionate dispersal of protest: *inadmissible*
- Condamnation justifiée pour l'agression d'un policier lors de la dispersion proportionnée d'une manifestation : *irrecevable*

ARTICLE 14

Discrimination (Article 3)

- Informal hierarchy among prisoners, giving rise to bullying and restrictions: *communicated*
- Hiérarchie informelle entre détenus entraînant brimades et restrictions : *affaire communiquée*

Discrimination (Article 8)

- Termination, when youngest child reaches adulthood, of pension entitlement for surviving parent with full-time childcare responsibilities where the beneficiary is a man: *case referred to the Grand Chamber*
- Cessation, à la majorité du dernier enfant, du paiement de la rente de parent veuf s'occupant à plein temps des enfants, lorsque le bénéficiaire est un homme : *affaire renvoyée devant a Grande Chambre*

ARTICLE 34

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

- Interference with Court-applicant correspondence and ineffective legal representation through legal aid system for Court proceedings: *violation*
- Ingérence dans l'exercice par le requérant de son droit au respect de sa correspondance avec la Cour et ineffectivité de l'assistance juridique offerte par le système d'aide judiciaire dans le cadre de la procédure devant la Cour : *violation*

ARTICLE 3 OF PROTOCOL No. 4/DU PROTOCOLE N° 4

Enter own country/Entrer dans son pays

- Refusal to repatriate a national who left the country for the former territory of "Islamic State", and her young children: *relinquishment in favour of the Grand Chamber*
- Refus d'organiser le rapatriement d'une ressortissante partie rejoindre l'ancien territoire de l'« État islamique », et de ses jeunes enfants : *dessaisissement au profit de la Grande Chambre*

ARTICLE 1

Responsibility of States/Responsabilité des États
Jurisdiction of States/Juridiction des États

Jurisdiction and responsibility for repatriating nationals from the Middle East following the fall of "Islamic State": *relinquishment in favour of the Grand Chamber*

Juridiction et responsabilité pour organiser le rapatriement de ressortissants depuis le Proche-Orient après la chute de l'« État islamique » : *dessaisissement au profit de la Grande Chambre*

H.F. and/et M.F. – France, 24384/19

English translation of the summary – Version imprimable

Les requérants sont les parents d'une ressortissante française qui a quitté la France en 2014 pour rejoindre, avec son compagnon, le territoire alors contrôlé par l'organisation dite État islamique, où elle eut par la suite des enfants. Ces enfants et leur mère – visée en France par un mandat d'arrêt pour association de malfaiteurs en lien avec une entreprise terroriste – se trouveraient détenus depuis février 2019 dans un camp du nord-est de la Syrie administré par les Forces démocratiques syriennes (FDS, coalition de milices kurdes et de combattants arabes opposés au gouvernement de Damas).

Les requérants demandèrent vainement aux autorités françaises, d'organiser, d'une façon ou d'une autre – la France n'ayant actuellement plus de relations diplomatiques avec la Syrie –, le rapatriement de leurs fille et petits-enfants. Leur recours en référé d'urgence fut rejeté aux motifs : que le rapatriement demandé supposait l'engagement de négociations avec des autorités étrangères, ou une intervention sur un territoire étranger ; et que pareilles mesures n'étaient pas détachables de la conduite des relations internationales de la France, dont aucun tribunal n'avait compétence pour connaître.

La politique de la France en la matière, telle qu'elle ressort de diverses prises de positions, est inspirée entre autres par la volonté de laisser d'abord les autorités des pays victimes de l'organisation susmentionnée se prononcer sur la responsabilité pénale de ses ressortissants majeurs, dans un double souci de non-ingérence et de sécurité.

Dans la procédure devant la Cour, les requérants agissent à la fois au nom et pour le compte de leur fille et de leurs petits-enfants, dans l'impossibilité de communiquer avec l'extérieur et de fournir une procuration à leur conseil pour les représenter devant la Cour, et en leur nom propre. Ils se plaignent de la décision de ne pas les rapatrier.

Le 16 mars 2021, une chambre de la Cour s'est dessaisie en faveur de la Grande Chambre.

ARTICLE 2

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

Ineffective implementation of road traffic regulations and judicial system response to repeat offender who caused a fatal collision: *violation*

Application du code de la route et réponse du système judiciaire ineffectives à l'égard d'un récidiviste ayant provoqué une collision mortelle : *violation*

Smiljanić – Croatia/Croatie, 35983/14, Judgment/ Arrêt 25.3.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicants' relative was killed in a road traffic collision caused by D.M., who had sped through a red light at a junction while under the influence of alcohol. He was convicted and sentenced to a period of imprisonment of two years, of which he served some fourteen months. D.M. had a history of road traffic regulations breaches and a set of minor offences proceedings for drink-driving were pending against him at about the same time as the incident.

The applicants complained that the domestic authorities had failed to enforce the domestic legal framework of road traffic regulations by taking adequate measures with respect to D.M.

Law – Article 2

(a) *A functioning road safety regulatory framework (substantive limb)* – The case concerned allegations of deficiencies in the implementation of the regulatory framework. There was a compelling reason to protect society against harm in road traffic, as recognised by relevant international materials and domestic law and policy, and as a matter also of common sense. The State had to seek to avert traffic accidents by enforcing, through adequate deterrence and preventive measures, compliance with the relevant rules aiming to reduce the risks of dangerously careless or reckless conduct in road traffic.

The relevant domestic legal framework had provided for appropriate preventive measures geared to ensuring public safety and minimising the number

of road accidents. The question was whether that regulatory framework had effectively operated in practice.

D.M.'s conduct in relation to the road traffic collision had been considered by the relevant authorities as involving reckless driving in wilful or wanton disregard for the safety of others which had gone beyond mere negligence. He had had a long history of breaches of the relevant road traffic regulations, including drink-driving, speeding and failing to obey road signs. In the twelve years preceding the incident, he had been registered thirty-two times in police records as a perpetrator of various traffic offences and he had last been convicted for an offence committed less than two years prior to the incident. The authorities therefore had had good reasons to consider him a repeat offender.

Nevertheless, his driving licence had temporarily been confiscated twice for only short periods of time. Indeed, at the time of the incident D.M. had had a valid driving licence allowing him to participate in road traffic. For other breaches, he had been punished by small fines or otherwise penalised by community service or merely a reprimand. Ten minor offences proceedings against him had been discontinued either due to prescription or improper processing of the case by the police. At about the time of the incident, he was being prosecuted in minor offence proceedings for an offence of drink-driving. An order for the confiscation of his driving licence had been made in the police penalty notice but, after he had challenged that notice in a domestic court, there was no indication that the court had considered seizing his licence pending the outcome of the trial. In the first-instance judgment in those proceedings, the court had erroneously established that D.M. had not been previously convicted and thus had considered that a fine was a sufficient sanction, without confiscation of his driving licence.

Although the domestic authorities had taken certain measures against D.M., they had failed to take a comprehensive and integrated approach of applying effective deterrent and preventive measures to put an end to his continuous serious breaches of road traffic regulations. Such an approach would have required taking measures with a primary function to reduce risk factors for road traffic safety by, for instance, annulling his driving licence or confiscating it for a longer period of time, imposing traffic re-education, substance abuse treatment and, where appropriate, applying more severe and dissuasive sanctions for his conduct. Taking such measures would have been in line with the mechanisms put in place in the relevant domestic regulatory framework and standards endorsed by the Government, as well as those set out in relevant international materials.

While the Court could not speculate whether the matter would have turned out differently if the authorities had acted otherwise, the relevant test under Article 2 could not require it to be shown that "but for" the failing or omission of the authorities, the death would not have occurred. Rather, it was sufficient to find that the multiple failures of the domestic authorities at different levels to take appropriate measures against D.M.'s continuous unlawful conduct, and thus to ensure the effective functioning in practice of the preventive measures geared to ensuring public safety and minimising the number of road accidents, had gone beyond mere negligent coordination or omission. The State's accountability from the standpoint of its positive obligation under Article 2 had therefore been engaged.

Conclusion: violation (six votes to one).

(b) *An effective judicial system for dealing with road safety regulation breaches (procedural limb)* – case also concerned the inadequacy of the sentence imposed on D.M. for causing the death of the applicants' relative and the delayed enforcement of that sentence.

The Criminal Code had given the domestic courts the possibility of handing down a prison sentence of between three and ten years. However, the Municipal Court had chosen to rely on the possibility provided under the relevant domestic law of imposing a penalty that was below the minimum allowed by law, sentencing him to two years' imprisonment. Without intending to interfere with the domestic courts' choice of punitive measures taken against D.M. and without intending to judge the proportionality of those measures to the offence, the Court could not but note that when making its assessment, the Municipal Court had not made reference to the fact that D.M. had been several times fined in minor offences proceedings. Moreover, the Municipal Court's reliance on the fact that before the offence in question, D.M.'s conduct had been in compliance with the law, stood in stark contrast to his previous conduct as a driver. In those circumstances, the mitigation of D.M.'s sentence to below the statutory minimum did not appear to have taken place upon careful scrutiny of all the relevant considerations related to the case.

The relevant domestic law had also provided that the imprisonment procedure be treated urgently, and that enforcement of the sentence could only be postponed in exceptional circumstances. It was not completely clear why the enforcement of D.M.'s sentence had been postponed for one year after it had become final, and it could not be regarded

as reasonable. In particular, the applicants had needed to complain several times of a failure to enforce D.M.'s sentence of imprisonment. Such an unjustified delay had not been in conformity with the State's obligation under Article 2 to execute the final criminal court's judgments without undue delay.

Taken jointly, the identified deficiencies in the domestic authorities' response suggested that the domestic regulatory framework of road safety, as implemented in the instant case, had been far from rigorous and had had little dissuasive effect capable of ensuring effective prevention of such unlawful acts. It also could not be said that the domestic authorities' conduct had been able to secure public confidence in their adherence to the rule of law and their ability to prevent any appearance of tolerating unlawful acts.

Conclusion: violation (six votes to one).

Article 41: EUR 26,000 jointly in respect of non-pecuniary damage.

(See also *Bljakaj and Others v. Croatia*, 74448/12, 18 September 2014, Legal Summary)

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

Authorities' precautions reasonable, despite some mistakes in planning and conduct of operation against a dangerous individual, who killed an officer while being arrested: *no violation*

Précautions raisonnables prises par les autorités malgré certaines erreurs dans la planification et la conduite d'une opération contre un individu dangereux qui a tué un policier au cours de son arrestation : *non-violation*

Ribcheva and Others/et autres – Bulgaria/Bulgarie, 37801/16 et al, Judgment/Arrêt 30.3.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants are the mother, widow and daughter of an officer of the Ministry of Internal Affairs' anti-terrorist squad, who was killed during an operation by the person the squad sought to arrest. Following criminal proceedings, the shooter was convicted of, *inter alia*, aggravated murder, sentenced to life imprisonment and ordered to pay the applicants damages. Notwithstanding, the applicants urged the authorities to also investigate whether officials had contributed to their relative's death by incorrectly ordering and planning the operation, but they refused to launch a separate criminal investigation. Although, in the end the matter was examined in two internal investigations by the above Ministry, the applicants raised issue of their effectiveness.

Law – Article 2

(a) *Procedural limb* – The Court held that the authorities had been required to investigate, in addition to the direct killer's responsibility, whether any officials had contributed to the officer's death through negligent acts or omissions in the planning and conduct of the operation. Indeed, there were no grounds to hold that this investigative duty, which arose when lives had been lost in circumstances potentially engaging the responsibility of the State due to alleged negligence, did not apply in relation to police officers killed by private persons while performing their duties. In the present case, however, the authorities had not properly discharged that duty failing thus to comply with their procedural obligation under Article 2. In particular, the two internal investigations by the Ministry of Internal Affairs, albeit adequate in most respects, suffered from two serious flaws preventing them from fully meeting the requirements of Article 2: the second investigation had not been launched of the authorities' own motion as required by this provision but upon the deceased's mother's complaint, and, more importantly, there had been a complete lack of publicity and involvement of the applicants in both investigations.

Conclusion: violation (unanimously).

(b) *Substantive limb* – The Court confirmed that the obligation under Article 2 to take preventive operational measures to protect life from lethal threats coming from other individuals was equally applicable to any activity in which the right to life was at stake. It was this obligation which had been at issue in the present case. The authorities had clearly known that the applicants' relative could be at risk from the target if he took part in an operation to arrest him - which could also be described a dangerous activity organised by the State - and had, therefore, a positive duty to do what could reasonably be expected from them to protect him from the risks in the context of that operation. It then went on to emphasise that the standard of reasonableness in relation to this *positive* obligation (Article 2 § 1) was not as stringent as that in respect to the *negative* obligation to refrain from using force which was "more than absolutely necessary" (Article 2 § 2). The authorities had a margin of appreciation and should not be subjected to an impossible or disproportionate burden, taking into account the operational choices they faced in terms of priorities and resources, and the unpredictability of human conduct – particularly when it came to active operations by the law-enforcement authorities against

armed and dangerous individuals. Nor should the scope and content of the State's positive obligation to protect its own law-enforcement personnel against risks to their life make it impossible to require them to engage in such operations or unduly onerous for the authorities to organise them. It had to be borne in mind in that connection that law-enforcement personnel who had freely engaged themselves to serve – especially in specialised units whose tasks included dealing with terrorists and other dangerous criminals – had to be surely aware that this might, on occasion, put them in situations where they would face lethal threats which might be difficult to contain. At the same time, however, the authorities had to ensure that such personnel was properly trained and prepared. The Court did not take issue with the equipment and firearms made available to the anti-terrorist squad, since it was for the national authorities, which were better placed to evaluate the relevant demands and take responsibility for the choices to be made between worthy needs, to decide how their limited resources should be allocated and that they were not manifestly ill-equipped for their task. Based on that standard, the Court held that although the authorities had made mistakes in the planning and execution of the operation, the steps they had taken to minimise the risk to the officer's life could be seen as reasonable and, thus, it could not be said that they had failed in their duty to take reasonable steps to protect him. In particular, while the operation had been unduly rushed and the likely degree of the target's resistance underestimated, the authorities had taken reasonable precautions: they had obtained intelligence about the target and drawn up plans on how to go about arresting him and seizing his firearms; they had deployed a number of specially trained officers, and acted in a coordinated manner, with an unbroken chain of command at all times. The Court had to be extremely cautious about revisiting any of the choices that the authorities had made in those respects with the wisdom of hindsight – something to be resisted even when examining whether the authorities had used force which was "more than absolutely necessary", where, as already noted, a much stricter standard applied.

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there was no need to examine the complaint under Article 13 in conjunction with Article 2.

Article 41: EUR 8,000 to each applicant in respect of non-pecuniary damage.

(See also *Osman v. the United Kingdom*, 1998, Legal Summary; *McKerr v. the United Kingdom*, 28883/95, 2001; *Paul and Audrey Edwards v. the United Kingdom*, 46477/99, 2002, Legal Summary; *Stoyanovi v. Bulgaria*, 42980/04, 2010; *Giuliani and Gaggio v. Italy* [GC], 23458/02, 2011, Legal Summary; and *Nicolae Virgiliu Tănase v. Romania* [GC], 41720/13, 2019, Legal Summary)

Effective investigation/Enquête effective

Ineffective investigation into allegedly negligent planning and conduct of operation against a dangerous individual, who killed an officer while being arrested: *violation*

Enquête ineffective sur la planification et la conduite, présentées comme négligentes, d'une opération contre un individu dangereux qui a tué un policier au cours de son arrestation : *violation*

Ribcheva and Others/et autres – Bulgaria/Bulgarie, 37801/16 et al, Judgment/Arrêt 30.3.2021 [Section IV]

(See above/Voir ci-dessus, page 10)

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain et dégradant

Refusal to repatriate a national who left the country for the former territory of "Islamic State", and her young children: *relinquishment in favour of the Grand Chamber*

Refus d'organiser le rapatriement d'une ressortissante partie rejoindre l'ancien territoire de l'« État islamique », et de ses jeunes enfants : *dessaisissement au profit de la Grande Chambre*

H.F. and/et M.F. – France, 24384/19

(See Article 1 above/Voir l'article 1 ci-dessus, page 8)

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Surrender of an applicant to the Romanian authorities under a European arrest warrant where there was a real risk of inadequate conditions of detention: *violation*

Surrender of an applicant, recognised as a refugee by the Swedish authorities, to the Romanian authorities under a European arrest warrant in the absence of a real risk of persecution or inadequate conditions of detention: *no violation*

Remise d'un requérant aux autorités roumaines en exécution d'un mandat d'arrêt européen en

présence d'un risque réel de mauvaises conditions de détention : *violation*

Remise d'un requérant, reconnu réfugié par les autorités suédoises, aux autorités roumaines en exécution d'un mandat d'arrêt européen en l'absence d'un risque réel de persécution et de mauvaises conditions de détention : *non-violation*

Bivolaru and/et Moldovan – France, 40324/16 and/et 12623/17, Judgment/Arrêt 25.3.2021 [Section V]

English translation of the summary – Version imprimable

En fait – L'autorité judiciaire d'exécution (AJE) française a exécuté deux mandats d'arrêt européen (MAE) et a remis, à ce titre, les requérants, les deux d'origine roumaine mais l'un réfugié suédois, aux autorités roumaines pour accomplir une peine de prison.

En droit – Article 3

1. *Second requérant (M. Moldovan)*

a) *Sur l'application de la présomption de protection équivalente* – L'application de la présomption de protection équivalente dans l'ordre juridique de l'Union européenne (UE) est soumise à deux conditions : l'absence de marge de manœuvre pour les autorités nationales et le déploiement de l'intégralité des potentialités du mécanisme de contrôle prévu par le droit de l'UE. Premièrement, l'atteinte alléguée à un droit protégé par la Convention doit découler d'une obligation juridique internationale qui pèse sur l'État défendeur et pour l'exécution de laquelle les autorités internes ne disposent ni d'un pouvoir d'appréciation ni d'une marge de manœuvre. Deuxièmement, il faut que l'intégralité des potentialités du mécanisme de contrôle des droits fondamentaux prévu par le droit de l'UE, que la Cour a reconnu comme assurant une protection des droits de l'homme équivalente à celle de la Convention, ait été déployée.

La seconde condition d'application de la présomption de protection équivalente doit être appliquée sans formalisme excessif et en tenant compte des particularités du mécanisme de contrôle en cause. Il n'est pas approprié de subordonner la mise en œuvre de cette présomption à la condition que la juridiction nationale s'adresse à la Cour de justice de l'Union européenne (CJUE) dans tous les cas sans exception, y compris ceux où aucune question réelle et sérieuse ne se poserait quant à la protection des droits fondamentaux par le droit de l'Union ou ceux dans lesquels la CJUE aurait déjà indiqué de façon précise l'interprétation, conforme aux droits fondamentaux, qu'il convient de donner aux dispositions du droit de l'Union applicable.

Concernant la première condition, la caractérisation d'un risque individuel réel exigée par la CJUE, pour que l'AJE puisse déroger aux principes de confiance et de reconnaissance mutuelle entre États membres en reportant voire en refusant l'exécution du MAE, converge avec la jurisprudence de la Cour. Cette dernière met à la charge des autorités nationales l'obligation de contrôler s'il existe un risque réel et individualisable, apprécié de manière concrète, que la personne soit, en raison des conditions de sa détention dans l'État d'émission, soumise à un traitement contraire à l'article 3. Pour autant, ce pouvoir d'appréciation des faits et des circonstances ainsi que des conséquences juridiques devant y être attachées dont dispose l'autorité judiciaire est exercé dans le cadre strictement défini par la jurisprudence de la CJUE et pour assurer l'exécution d'une obligation juridique dans le plein respect du droit de l'UE, à savoir l'article 4 de la charte des droits fondamentaux qui assure une protection équivalente à celle qui résulte de l'article 3 de la Convention. Dans ces conditions, l'AJE ne saurait être regardée comme disposant, pour assurer ou refuser l'exécution du MAE, d'une marge de manœuvre autonome de nature à entraîner la non-application de la présomption de protection équivalente.

S'agissant de la seconde condition, il n'y a pas, eu égard à la jurisprudence de la CJUE, de difficulté sérieuse liée à l'interprétation de la décision-cadre de 2002 relative aux MAE (décision-cadre) et à la question de sa compatibilité avec les droits fondamentaux qui permettrait de considérer qu'il aurait été nécessaire de procéder à un renvoi préjudiciel à la CJUE. Cette condition est donc remplie.

Ainsi, la présomption de protection équivalente trouve à s'appliquer au cas d'espèce.

b) *Sur l'allégation d'insuffisance manifeste de protection des droits garantis par la Convention* – La Cour a reconnu, dans l'arrêt *Romeo Castaño c. Belgique*, qu'un risque réel de traitement inhumain et dégradant de la personne dont la remise est demandée, en raison de ses conditions de détention dans l'État d'émission, appréciées sur des bases factuelles suffisantes, constitue un motif légitime pour refuser l'exécution du MAE, et donc la coopération avec cet État.

Le requérant a produit des éléments sérieux et précis attestant des défaillances systémiques ou généralisées au sein des établissements pénitentiaires de l'État d'émission. Mais au vu des précisions des autorités roumaines, l'AJE a écarté l'existence d'un risque de violation de l'article 3 à son encontre.

Cependant, i) les informations fournies par la Roumanie n'ont pas été suffisamment mises en perspective avec la jurisprudence de la Cour concernant la surpopulation carcérale endémique de l'établissement pénitentiaire envisagé pour l'incarcération

du requérant, qui aurait disposé de 2 à 3 m^2 ; ii) les autres aspects, tels la liberté de circulation et les activités hors cellule, étaient formulés de manière stéréotypée et n'ont pas été pris en compte dans l'évaluation du risque ; iii) la recommandation de l'AJE que le requérant soit détenu dans un établissement offrant des conditions identiques sinon meilleures, n'est pas suffisante pour écarter un risque réel de traitement inhumain et dégradant car elle ne permettait pas de procéder à l'évaluation d'un tel risque s'agissant d'un établissement déterminé et beaucoup de prisons n'offraient pas des conditions de détention conformes aux standards de la Cour.

Dès lors, l'AJE disposait de bases factuelles suffisamment solides, provenant en particulier de la jurisprudence de la Cour, pour caractériser l'existence d'un risque réel que le requérant soit exposé à des traitements inhumains et dégradants en raison de ses conditions de détention en Roumanie et ne pouvait dès lors s'en remettre exclusivement aux déclarations des autorités roumaines. Il existe donc une insuffisance manifeste de protection des droits fondamentaux de nature à renverser la présomption de protection équivalente.

Conclusion : violation (unanimité).

2. *Premier requérant (M. Bivolaru)*

a) *Statut de réfugié du requérant*

i. *Sur l'application de la présomption de protection équivalente* – Concernant la seconde condition, la Cour de cassation a écarté la demande du requérant de saisir la CJUE d'une question préjudicielle sur les conséquences à tirer sur l'exécution d'un MAE de l'octroi du statut de réfugié par un État membre à un ressortissant d'un État tiers devenu par la suite également État membre. Il s'agit d'une question réelle et sérieuse quant à la protection des droits fondamentaux par le droit de l'UE et son articulation avec la protection issue de la Convention de Genève de 1951 sur laquelle la CJUE ne s'est jamais prononcée. Dans ces conditions, la Cour de cassation a statué sans que le mécanisme international pertinent de contrôle du respect des droits fondamentaux, en principe équivalent à celui de la Convention, ait pu déployer l'intégralité de ses potentialités. La présomption de protection équivalente ne trouve donc pas à s'appliquer sans qu'il soit besoin de se prononcer sur la première condition.

ii. *Sur le point de savoir si la remise du requérant était contraire à l'article 3* – Il n'appartient pas à la Cour de se prononcer sur l'articulation entre la protection des réfugiés par la Convention de Genève et les règles du droit de l'UE, en particulier la décision-cadre. Son contrôle se limite à rechercher si, dans les circonstances de l'espèce, l'exécution du MAE a ou non entraîné une violation de l'article 3. En outre, la Convention et ses Protocoles ne protègent le droit d'asile. L'article 3 interdit le renvoi de tout étranger se trouvant dans la juridiction d'un État contractant vers un État dans lequel il pourrait courir un risque réel d'être soumis à des traitements inhumains ou dégradants voire à la torture et englobe l'interdiction de refoulement au sens de la Convention de Genève (*N.D. et N.T. c. Espagne* [GC]). Il n'appartient pas à la Cour de rechercher si la décision d'octroyer le statut de réfugié prise par les autorités d'un pays contractant à la Convention de Genève doit être interprétée comme conférant à l'intéressé le même statut dans tous les autres pays contractants de cette convention (*M.G. c. Bulgarie*).

La décision-cadre ne prévoit pas de motif de non-exécution tenant à la qualité de réfugié de la personne dont la remise est demandée. Toutefois, les autorités suédoises ont estimé qu'il existait suffisamment d'éléments établissant que le requérant risquait d'être persécuté dans son pays d'origine pour lui accorder le statut de réfugié. L'AJE a considéré que ce statut était un élément qu'elle devait particulièrement prendre en considération et concilier avec le principe de confiance mutuelle mais qu'il ne constituait pas *de plano* une dérogation à ce principe justifiant à lui seul le refus d'exécuter le MAE. Et les AJE ont recherché si la situation personnelle du requérant ne s'opposait pas, dans les circonstances de l'espèce prévalant à la date de leur décision, à sa remise aux autorités roumaines (*Shiksaitov c. Slovaquie*).

La chambre de l'instruction a procédé à un échange d'information avec les autorités suédoises qui entendaient maintenir le statut de réfugié du requérant sans toutefois se prononcer sur la persistance, dix ans après son octroi, des risques de persécution dans son pays d'origine.

En outre, les AJE ont conclu à l'absence de but politique du MAE et, que la seule appartenance de l'intéressé au Mouvement d'intégration spirituelle dans l'absolu (MISA) ne suffisait pas à établir la crainte qu'il soit porté atteinte à sa situation en Roumanie en raison de ses opinions ou convictions (*Amarandei et autres c. Roumanie*). Ainsi, aucun élément n'indique que le premier requérant risquait encore, en cas de remise, d'être persécuté pour des raisons religieuses en Roumanie. L'AJE ne disposait donc pas de bases factuelles suffisamment solides pour caractériser l'existence d'un risque réel de violation de l'article 3 et refuser, pour ce motif, l'exécution du MAE.

b) *Sur le risque de traitements inhumains ou dégradants en raison des conditions de détention en Roumanie* – Les conditions d'application de la présomption de protection équivalente s'appliquent dans les circonstances de l'espèce.

La description faite par le requérant à l'AJE des conditions de détention n'était ni suffisamment détaillée ni suffisamment étayée pour constituer un commencement de preuve d'un risque réel de traitements contraires à l'article 3 en cas de remise aux autorités roumaines. Ainsi, il n'incombait pas à l'AJE de demander des informations complémentaires aux autorités roumaines sur le lieu, les conditions et le régime de détention futur du requérant. L'AJE ne disposait pas de bases factuelles solides lui permettant de caractériser l'existence d'un risque réel de violation de l'article 3 et refuser, pour ce motif, l'exécution du MAE.

Conclusion : non-violation (unanimité).

Article 41 : 5 000 EUR au second requérant pour préjudice moral.

(Voir *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi c. Irlande* [GC], 45036/98, 30 juin 2005, Résumé juridique ; *M.G. c. Bulgarie*, 59297/12, 25 mars 2014, Résumé juridique ; *Amarandei et autres c. Roumanie*, 1443/10, 26 avril 2016 ; *Romeo Castaño c. Belgique*, 8351/17, 9 juillet 2019, Résumé juridique ; *N.D. et N.T. c. Espagne* [GC], 8675/15 et 8697/15, 13 février 2020, Résumé juridique ; et *Shiksaitov c. Slovaquie*, 56751/16 et 33762/17, 10 décembre 2020, Résumé juridique)

Degrading treatment/Traitement dégradant

Transit zone conditions for dependent repeat asylum-seeker and vulnerable pregnant woman and minors, confined for nearly four months, exceeding threshold of severity: *violation*

Dépassement du seuil de gravité requis à raison des conditions de vie infligées pendant près de quatre mois en zone de transit à un demandeur d'asile ayant déposé plusieurs demandes et se trouvant dans un état de dépendance, ainsi qu'à une femme enceinte et à des mineurs vulnérables : *violation*

R.R. and Others/et autres – Hungary/Hongrie, 36037/17, Judgment/Arrêt 2.3.2021 [Section IV]

(See Article 5 § 1 below/Voir l'article 5 § 1 ci-dessous, page 16)

Degrading treatment/Traitement dégradant

Inadequate conditions of immigration detention, given excessive *de facto* isolation and unnecessary placement with new arrivals in Covid-19 quarantine: *violation*

Caractère inadéquat des conditions de rétention d'un migrant à raison d'un isolement de fait excessif et d'un placement inutile en quarantaine Covid-19 avec de nouveaux arrivants : *violation*

Feilazoo – Malta/Malte, 6865/19, Judgment/Arrêt 11.3.2021 [Section I]

(See Article 34 below/Voir l'article 34 ci-dessous, page 27)

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

Protection of HIV-positive prisoners in the context of the COVID-19 health crisis: *communicated*

Protection des détenus séropositifs face à la crise sanitaire de la Covid-19 : *affaire communiquée*

Maratsis and Others/et autres & Vasilakis and Others/et autres– Greece/Grèce, 30335/20 and/et 30379/20, Communication [Section I]

English translation of the summary – Version imprimable

L'affaire concerne, principalement, les conditions de détention de détenus séropositifs. Est notamment posée la question de savoir si les autorités ont pris des mesures adéquates afin de protéger leur santé, en tant que séropositifs, face à la crise sanitaire de la Covid-19.

Affaire communiquée sous l'angle des articles 3, 5 § 1 et 13 de la Convention.

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

Victimisation of a prisoner on account of his position at the bottom of the prisoners' informal hierarchy: *communicated*

Brimades subies par un détenu du fait de sa position au plus bas de la hiérarchie informelle entre prisonniers : *affaire communiquée*

Rotari – Republic of Moldova/République de Moldova, 64977/17, Communication [Section II]

(See Article 9 below/Voir l'article 9 ci-dessous, page 25)

Effective investigation/Enquête effective

Continuing ineffectiveness of investigation into police brutality after domestic court finding of substantive and procedural violations of Article 3: *violation*

Ineffectivité persistante d'une enquête sur des brutalités policières après le constat par

une juridiction interne de violations matérielles et procédurales de l'article 3 : *violation*

Baranin and/et Vukčević – Montenegro/Monténégro, 24655/18 and/et 24656/18, Judgment/Arrêt 11.3.2021 [Section V]

Traduction française du résumé – Printable version

Facts – In 2015, the applicants were beaten by unidentified members of the police Special Anti-Terrorist Unit (SAU). They had been in the vicinity of a political protest organised by an opposition coalition which turned violent, but in which they had not participated. An ongoing investigation was opened into the incident by the State prosecutor's office (SPO), leading to the conviction of the SAU commander for aiding a perpetrator following the commission of a crime. In 2017, the Constitutional Court found a violation of both the substantive and procedural aspects of Article 3 in relation to the incident. The applicants also instituted civil proceedings against the State and received some compensation in respect of non-pecuniary damage for the ill-treatment suffered.

Law – Article 3

(a) *Scope of the case* – In view of the domestic courts' finding of a violation of the substantive aspect of Article 3, the compensation obtained in that regard, and in particular the applicants' focus on the continuing ineffective nature of the investigation under the procedural aspect of Article 3, it was no longer justified to continue the examination of the applicants' initial complaint under the substantive aspect of Article 3. The Court therefore limited its examination to the procedural aspect of Article 3.

(b) *Effective investigation* – The investigation conducted in the present case had resulted in clarifying some of the facts, in particular that the applicants had indeed been ill-treated by police officers, and the injuries they had sustained. It had also resulted in the prosecution and conviction of the SAU commander. However, the Court had to be persuaded that the fact that only part of the relevant facts had been established and only some of those responsible had been sanctioned had not been the result of a clearly deficient and ineffective investigation imputable to the authorities. As the Constitutional Court had found that the investigation prior to its decisions had not met the Article 3 requirements, the Court examined the investigation which had taken place after the publication of those decisions.

The investigation had been and was still being carried out by the SPO, which had eventually pursued most of the lines of enquiry and interviewed most of the traceable witnesses. However, the State prosecutor had not interviewed any of the SAU officers engaged on the night of the incident, nor a number of witnesses and potential witnesses, until after the Constitutional Court decisions had been published, namely two years after the incident. In other words, those acts had not been carried out promptly. The SPO also had not pursued all lines of enquiry: notably, not everybody had been questioned, and the Forensic Centre had not been contacted. It had also never been clarified if there had only been SAU members on the scene that night. While it was certainly possible that none of those lines of enquiry would have shed any additional light on the incident in question either, that did not sufficiently justify having not pursued them.

The State prosecutor's office was institutionally and hierarchically totally independent from the Police Directorate and Ministry of the Interior. However, the State prosecutor had depended heavily on the police and had requested the assistance of the Security Centre and the Police Directorate, which had been subject to the same chain of command as the officers under investigation and thus lacked independence. While police might participate in such investigations, sufficient safeguards had to be introduced in order to satisfy the requirement of independence, and in the present case, there had been no such safeguards.

Under national law the applicants, as injured parties, and their representative could attend the questioning of, *inter alia*, witnesses so that they could propose or directly put questions to them. In order to be able to exercise that right, however, they needed to be informed of the place and time of the questioning, which did not appear to have happened.

While the Government had submitted that the applicants' complaint had been premature as the investigation had still been ongoing, there was nothing in the case file as to what investigative measures, if any, had been taken after November 2017. The Court acknowledged that there had been a number of incidents and clashes that same evening, including attacks against the place, and security considerations had required police interventions. However, even where the events leading to the duty to investigate occurred in a context of generalised violence, and investigators were confronted with obstacles and constraints which compelled the use of less effective measures of investigation or caused an investigation to be delayed, Articles 2 and 3 entailed that all reasonable steps had to be taken to ensure that an effective and independent investigation was conducted.

In view of the above, the investigation had not been prompt, thorough and independent and had

not afforded sufficient public scrutiny. It had had deficiencies which had undermined its ability to identify the persons responsible and insufficient efforts had been made, following the Constitutional Court's decision, to remedy those deficiencies or comply with the Constitutional Court's instructions. That the facts concerning the actions of the SAU commander had been established and that he had been sanctioned could not lead to the conclusion that the respondent State had discharged their procedural duty to conduct an effective investigation.

(c) *Victim status* – Despite the prosecution and conviction of the SAU commander and award of compensation, the Court's finding regarding the continuing ineffectiveness of the investigation even after the Constitutional Court's ruling meant that the applicants had not lost their victim status.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 each in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Deprivation of liberty/Privation de liberté

Unlawful *de facto* detention in transit zone in the light of duration of confinement and extent of restrictions on free movement: *violation*

Détention illégale de fait à raison de la durée de rétention dans la zone de transit et de l'étendue des restrictions à la libre circulation imposées aux requérants : *violation*

R.R. and Others/et autres – Hungary/Hongrie, 36037/17, Judgment/Arrêt 2.3.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants, an Iranian-Afghan family including three minor children, were confined in the Röszke transit zone at the border of Hungary and Serbia for almost four months while awaiting the outcome of their requests for asylum. The second applicant was pregnant at the time. The family was initially kept in the section designated for families, but was later moved to the isolation section for health-related reasons.

Law

Article 3: The Court had already analysed the living conditions experienced by applicants as adult asylum-seekers in the Röszke transit zone in *Ilias and Ahmed v. Hungary* and had concluded that they had not reached the Article 3 threshold in that case. However, in the present case, the applicants' situation had been characterised by the first applicant's repeat asylum-seeker status, the applicant children's young age and the applicant mother's pregnancy and serious health condition.

(a) *Sufficiency of food supplies for the first applicant* – The first applicant had allegedly spent almost four months living in a state of the most extreme poverty, unable to obtain sufficient food. The authorities had refused to provide him with free meals throughout his stay in the zone. At the time, he could be considered to be a repeat asylum-seeker and, in principle, under EU law, Hungary had been allowed to decide to reduce or even withdraw material reception conditions on that basis. However, that had been subject to a reasoned decision, taking into account the principle of proportionality, which had not been forthcoming in the present case.

While repeat asylum applicants had been allowed to receive food assistance, that had not always been delivered, and there was a lack of any legal agreements or safeguards between the Government and the organisations allegedly supplying food assistance in the zone, which would have ensured legal certainty of the current arrangements. There was also lack of information and documentation to support the Government's general statements that the first applicant had had sufficient food supplies. The applicant could only have left the transit zone in the direction of Serbia, and would have thereby forfeited the examination of his asylum claim in Hungary had he done so. He had been fully dependent on the Hungarian authorities for his most basic needs and had been under their control.

The Government had failed to have due regard to the applicant's state of dependency at the transit zone and had failed to secure his basic subsistence there.

Conclusion: violation (unanimously).

(b) *The vulnerability of the second applicant and applicant children* – The authorities had in principle been obliged, under the EU Reception Conditions Directive, to take into account the specific situation of minors and pregnant women and to assess and monitor any special reception needs linked to their vulnerable status throughout the duration of their asylum procedures. They had also been obliged under domestic law to provide an individualised assessment of their special needs, which had not been carried out. The Court took into account a number of factors in the overall assessment of conditions:

– Physical conditions: For several months, the applicants had been made to suffer the heat in the family section's accommodation container, which did not have air-conditioning or proper ventilation.

– Suitability of facilities for children: The applicant children were seven months, six years and seven years old. The beds had not been fit for use by children and for a month and a half, after the family had been moved to the isolation section, there had been no playground accessible to the applicant children and no activities specifically organised for children. The applicants had also had no contact with other asylum-seeking families or NGO representatives after the move.

– Medical services and availability of psychological assistance: There had been a lack of medical documentation for the youngest child and it had not been disputed that she had not been given the vaccines recommended at her age. Outside medical treatment, in the presence of (male) police officers, must also have caused a degree of discomfort to the applicants, particularly during the second applicant's gynaecological examinations. Further, the second applicant, who had had trauma-related mental health problems for a long time and which had been brought to the attention of the authorities, had not received any psychological or psychiatric treatment. The presence of elements resembling a prison environment and the constraint inherent during confinement must have also caused the applicant children anxiety and psychological disturbance and created degradation of the parental image in the eyes of the child.

– Duration of stay: The applicants had been held for nearly four months at the zone. While the above-mentioned conditions might not attain the threshold of severity required to engage Article 3 where the confinement was of a short duration, their repetition and accumulation during a longer period would necessarily have had harmful consequences for those exposed to them.

In the light of the foregoing, the applicant children and applicant mother had been subjected to treatment which had exceeded the required threshold of severity.

Conclusion: violation (unanimously).

Article 5 § 1

(a) *Whether the applicants were deprived of their liberty (applicability)* – In *Ilias and Ahmed*, the Court had held that the applicants' stay of twenty-three days in the Röszke transit zone had not constituted a *de facto* deprivation of liberty and, consequently, that Article 5 had not been applicable. It had to examine whether the applicants' specific situation warranted a different conclusion in the present case, taking into account the following factors:

– The applicants' individual situation and choices: The applicants had entered the zone of their own initiative, and of their own free will, with the aim of seeking asylum in Hungary.

– The applicable legal regime, its purpose and duration: Unlike in *Ilias and Ahmed*, the provision limiting the maximum duration of an asylum-seeker's stay in the zone to four weeks had not applied in the present case and there had been no other domestic provision fixing the maximum duration of the applicant's stay in the zone. Moreover, the processing of the applicants' asylum claims had not respected the time-limits laid down in domestic law and had been anything but speedy. The applicants had spent almost four months there awaiting the outcome. Furthermore, there was no indication that the applicants themselves had failed to comply with the legal regulations in place or had not acted in good faith at any time during their stay in the zone.

– The nature and degree of the restrictions actually imposed/experienced: The applicants could have left the transit zone in the direction of Serbia at any time. However, their freedom of movement had been severely restricted while living in the transit zone, in a manner similar to that characteristic of a certain type of light-regime detention facility, and it had become even more restrictive after moving to the isolation section. Further, the living conditions had been found to be in violation of Article 3.

In those circumstances, the applicants' stay in the transit zone had amounted to a *de facto* deprivation of liberty. Article 5 § 1 was therefore applicable.

(b) *Whether the detention was lawful* – There had been no strictly defined statutory basis for the applicants' detention in the present case, which the authorities had based on an overly broad interpretation of a general provision of domestic law. The applicants' detention had occurred *de facto*: the authorities had not issued any formal decision of legal relevance complete with reasons for the detention, including an individual assessment and consideration of alternatives that would have been less coercive. The procedure had fallen short of the requirements enounced in the Court's case-law and could not be considered "lawful".

Conclusion: violation (six votes to one).

The Court also held, by six votes to one, that there had been a violation of Article 5 § 4, in that the applicants had not had at their disposal any proceed-

ings to challenge the lawfulness of their *de facto* detention.

Article 41: EUR 4,500 each to the first and second applicants and EUR 6,500 to each of the applicant children, in respect of non-pecuniary damage.

(See *Ilias and Ahmed v. Hungary* [GC], 47287/15, 21 November 2019, Legal Summary)

Lawful arrest or detention/Arrestation ou détention régulières

Lawful suspension of criminal proceedings for unspecified time during Covid-19 crisis and continued detention lasting three months: *inadmissible*

Caractère régulier de la suspension d'une procédure pénale pour une période indéterminée lors de la crise du Covid-19 et d'un maintien en détention durant trois mois : *irrecevable*

Fenech – Malta/Malte, 19090/20, Decision/Décision 23.3.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant was arrested and detained on remand, on suspicion of involvement in murder. Due to the spread of the coronavirus (Covid-19), national measures were introduced which led to the suspension of the criminal proceedings, and which were to remain in force until lifted on order of the competent authority. Domestic courts retained discretion to hear urgent cases or related matters. The proceedings resumed three months later.

The applicant made several unsuccessful applications for bail. During the Covid-19 crisis, he also made an unsuccessful *habeas corpus* petition, alleging unlawful detention due to the decision to suspend all criminal proceedings for an unspecified time.

Law

Article 5 §§ 1 (c) and 3: The Court first had to determine whether the purpose of the applicant's continued detention had been to bring the applicant before a "competent legal authority". Despite the different context, the principles in previous cases remained relevant (see *Brogan and Others v. the United Kingdom*, 11209/84 et al., 29 November 1988, and *Petkov and Profirov v. Bulgaria*, 50027/08 and 50781/09, 24 June 2014). The mere fact that due to the emergency measures, enacted in the light of the Covid-19 pandemic, the committal proceedings had been suspended *sine die*, and could not be continued unless authorised, did not mean that the prosecution had had no intention of bringing the applicant before the competent legal authority. The Court believed that, had it been possible and without risk to the different persons involved, including the applicant, the committal proceedings would have continued, as they in fact had resumed in June 2020. Moreover, the suspension had not exceeded three months. It followed that it could not be said that the applicant's detention in that period, during which the emergency measures had been in place, had not been for the purposes of bringing him before the competent legal authority.

In so far as the applicant had relied on Article 5 § 3, he had not articulated any specific complaint which went beyond the issuance of the emergency measures. Between the date of his arraignment/detention on remand and the last decision on his bail request, that is to say a period of less than five months, the applicant had lodged four bail applications. Those had been decided speedily by the domestic courts in all circumstances and two had been decided by the Criminal Court despite the closure of the courts, because the court had deemed it necessary and had applied its discretion granted to it under domestic law.

Each of those decisions had been based on relevant and sufficient reasons to justify holding the applicant in custody for the entire period of time: the applicant's detention had continued to be for the purpose of being brought before the competent authority; the domestic courts had given detailed decisions on the basis of the Court's case-law and the evidence available to them, substantiating the several grounds justifying the continuation of that detention; and it had been further considered that no other alternatives to the detention could have achieved the aim pursued. Furthermore, the domestic courts had given details of the grounds of the decisions in view of the developing situation and had stated whether and why the original grounds had remained valid despite the passage of time, despite the particularly brief intervals between the bail applications.

In relation to the denial of the applicant's last request for bail, the Criminal Court had considered the stage reached in the proceedings – involving further witness testimony to be heard and potential procedural pleadings – which, in its view, had heightened the risk of witnesses being influenced and obstructing the course of justice. A temporary suspension of hearings did not affect the validity of that ground for detention, as there had been no doubt that once the suspension had been lifted, the proceedings would resume. Once the proceedings resumed, the Attorney General could again ask for the hearing of witnesses, and if that had not been the case, the applicant having been committed for trial, witnesses would once again be heard at trial. Reliance on that ground amongst others

had therefore also been justified, it being a relevant consideration for the bail assessment.

As to whether the authorities had acted with due diligence, the proceedings had been suspended for a little less than three months. There was no indication that they had not been actively pursued before the emergency measures had been put in place or afterwards. Moreover, the temporary suspension had been due to the exceptional circumstances surrounding a global pandemic which, as held by the Constitutional Court, had justified such lawful measures in the interest of public health, as well as that of the applicant. It therefore could not be said in the circumstances of the present case that the duty of special diligence had not been observed.

Conclusion: inadmissible (manifestly ill-founded).

Article 5 § 4: The applicant claimed that the Criminal Court, in its decree rejecting his *habeas corpus* application, had refused to consider the lawfulness of his detention. The applicant's main argument had been that the introduction of the emergency measures which suspended the committal proceedings had rendered his detention unlawful. The domestic court had disagreed, considering in particular that the proceedings could still continue had the applicant so requested. The court had also noted that the proceedings had continued in respect of his requests for bail and the *habeas corpus* application it was deciding. Therefore, his request had been premature in that respect, or in any event ill-founded given the access he had had to the courts. Therefore, his detention could not be considered unlawful on that ground.

Moreover, despite the limited formulation of the applicant's complaint, the Criminal Court had proceeded to ascertain the lawfulness of his detention and had referred to the requirement that the duration of detention should not be excessive. The decision of the Criminal Court had thus dealt sufficiently with the applicant's complaint based on the arguments in his bail application and had even gone further, covering issues of a substantive and procedural nature not raised by the applicant.

Conclusion: inadmissible (manifestly ill-founded).

The Court also rejected as inadmissible (manifestly ill-founded) the applicant's complaint under Article 6 that the emergency measures had deprived him of his right of access to court to challenge the prosecution case and to trial within a reasonable time. It adjourned the examination of the applicant's complaints as to the conditions of detention and the risk to his life due to the pandemic and his vulnerable status under Articles 2 and 3.

ARTICLE 6

Article 6 § 1 (civil)

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

Length of preliminary investigations prevented the applicant from joining criminal proceedings as a civil party claiming damages: *Article 6 applicable; violation*

Durée des investigations préliminaires ayant empêché le requérant de se constituer partie civile dans une procédure pénale et de demander réparation du préjudice civil : *article 6 applicable ; violation*

Petrella – Italy/Italie, 24340/07, Judgment/Arrêt 18.3.2021 [Section I]

English translation of the summary – Version imprimable

En fait – Le 22 juillet 2001, un journal publia, en première page, un article intitulé «Trou de mille milliards "signé" Petrella & Co.», accompagné d'une photographie du requérant avocat et président d'une équipe de football. L'article mentionnait entre autres sa responsabilité dans les six ans de saignées du budget de la santé publique locale et régionale. Puis, les trois jours suivants, le journal publia d'autres articles ayant un contenu semblable.

Estimant que ces articles avaient porté atteinte à son honneur et à sa réputation, le requérant porta plainte le 28 juillet 2001 pour diffamation aggravée par voie de presse contre leur auteur et le directeur de ce journal, le président et l'administrateur délégué de la société d'édition. Dans sa plainte, déposée devant le procureur, le requérant précisait qu'il entendait se constituer partie civile dans la procédure et demander cinq millions d'euros de dommages-intérêts. En outre, il indiquait souhaiter être informé d'un éventuel classement de sa plainte.

Le 10 septembre 2001, l'affaire fut déférée au parquet du tribunal. Le 17 janvier 2007, le juge des investigations préliminaires classa la procédure sans suite en raison de la prescription de l'infraction pénale dénoncée.

En droit – Article 6 § 1

a) *Applicabilité* – Pour entrer dans le champ de la Convention, le droit de faire poursuivre ou condamner pénalement des tiers doit impérativement aller de pair avec l'exercice par la victime de son droit d'intenter l'action, par nature civile, offerte par le droit interne, ne serait-ce qu'en vue d'obtenir

une réparation symbolique ou la protection d'un droit de caractère civil, à l'instar par exemple du droit de jouir d'une « bonne réputation ». Dès lors, l'article 6 § 1 s'applique aux procédures relatives aux plaintes avec constitution de partie civile dès l'acte de constitution de partie civile, à moins que la victime ait renoncé de manière non équivoque à l'exercice de son droit à réparation (*Perez c. France* [GC]). De plus, la Cour a considéré cette disposition applicable à la partie lésée qui ne s'était pas constituée partie civile, dès lors qu'en droit italien, même avant l'audience préliminaire, où une telle constitution peut être présentée, la victime de l'infraction peut exercer les droits et les facultés expressément reconnus par la loi.

En l'espèce, la plainte du requérant visait à faire valoir un droit de caractère civil, à savoir le droit à la protection de sa réputation, dont l'intéressé pouvait, de manière défendable, se prétendre titulaire. Par ailleurs, dans sa plainte, le requérant avait affirmé qu'il entendait se constituer partie civile dans la procédure pénale et réclamer cinq millions d'euros de dommages-intérêts. Il avait également expressément demandé à être prévenu d'un éventuel classement de l'affaire. Par conséquent, le requérant a exercé, au moins, l'un des droits et facultés reconnus par le droit interne à la partie lésée (*Arnoldi c. Italie*). Ainsi, la Cour rejette l'exception d'incompatibilité *ratione materiae* soulevée par le Gouvernement.

Conclusion : article 6 applicable.

b) *Fond* – Le requérant avait fait usage des droits et facultés qui lui étaient ouverts en droit interne dans le cadre de la procédure pénale et qui lui auraient permis, au moment de l'audience préliminaire, de demander réparation du préjudice civil dont il se disait victime. En l'occurrence, c'est exclusivement en raison du retard avec lequel les autorités de poursuite ont traité le dossier et de la prescription de l'infraction dénoncée que le requérant n'a pas pu présenter sa demande de dédommagement et que, par conséquent, il n'a pas pu voir statuer sur cette demande dans le cadre de la procédure pénale. Ce comportement fautif des autorités a eu pour conséquence de priver le requérant de voir ses prétentions de caractère civil tranchées dans le cadre de la procédure qu'il avait choisi de poursuivre et qui était mise à sa disposition par l'ordre juridique interne. En effet, l'on ne saurait exiger d'un justiciable qu'il introduise une action aux mêmes fins en responsabilité civile devant la juridiction civile après le constat de prescription de l'action pénale en raison de la faute de la juridiction pénale. Ceci impliquerait probablement la nécessité de rassembler de nouveau des preuves, que le requérant aurait désormais la charge de produire, et l'établissement de l'éventuelle responsabilité civile pourrait s'avérer extrêmement difficile autant de temps après les faits.

Conclusion : violation (cinq voix contre deux).

Article 41 : 5 200 EUR pour préjudice moral.

La Cour conclut également, à l'unanimité, à la violation de l'article 6 § 1 en raison de la durée excessive de la procédure litigieuse et à la violation de l'article 13 pour l'absence en droit interne d'un recours permettant au requérant d'obtenir la sanction de son droit à voir sa cause entendue dans un délai raisonnable.

(Voir *Perez c. France* [GC], 47287/99, 12 février 2004, Résumé juridique, et *Arnoldi c. Italie*, 35637/04, 7 décembre 2017, Résumé juridique ; voir aussi *Sottani c. Italie* (déc.), 26775/02, 24 février 2005, Résumé juridique, et *Atanasova c. Bulgarie*, 72001/01, 2 octobre 2008, Résumé juridique ;)

Access to court/Accès à un tribunal

Absence of absolute universal jurisdiction of the criminal courts with regard to torture in relation to civil-party applications, under a new retroactive law: *no violation*

Absence de compétence universelle absolue des juridictions pénales en matière de torture concernant la constitution de parties civiles, en vertu d'une nouvelle loi à portée rétroactive : *non-violation*

Hussein and Others/et autres – Belgium/Belgique, 45187/12, Judgment/Arrêt 16.3.2021 [Section III]

English translation of the summary – Version imprimable

En fait – En 2001, les requérants d'origine jordano-palestinienne se constituèrent parties civiles dans une procédure pénale, sur la base du principe de compétence universelle absolue déduit de la loi du 16 juin 1993 (loi de 1993), contre des hauts dignitaires de l'État du Koweït pour crimes de droit international humanitaire. Ils réclamaient réparation du préjudice moral et matériel. Cependant, les juridictions décidèrent de l'irrecevabilité de l'action publique en Belgique pour donner suite à l'entrée en vigueur en 2005 de la loi du 5 août 2003 (loi de 2003) ayant restreint la compétence.

En droit – Article 6 § 1 : À la différence de l'affaire *Naït-Liman c. Suisse* [GC] qui portait sur la question de la compétence universelle des juridictions civiles dans le cadre d'une procédure civile autonome, la présente espèce concerne la possibilité de se constituer partie civile dans une procédure pénale engagée devant les juridictions pénales sur la base du principe de compétence universelle.

Cela étant, dans les deux types d'affaires, le droit d'accès à un tribunal en matière civile est en cause et les principes généraux rappelés dans l'arrêt *Naït-Liman* s'appliquent de la même manière.

La présente affaire met également en cause l'application d'une loi à des procédures judiciaires en cours. S'il n'est pas interdit, en principe, au pouvoir législatif de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige.

Les requérants ont subi une limitation de leur droit d'accès à un tribunal par le biais de la limitation de la compétence des juridictions belges qui était déduite du dispositif transitoire de la loi de 2003 qui est venue abroger la loi de 1993 prévoyant une compétence universelle même en l'absence de lien de rattachement avec la Belgique. Le litige est donc circonscrit aux conséquences en matière civile des restrictions apportées par le législateur belge à la compétence universelle dans le domaine pénal.

Les États qui, comme la Belgique, ont rendu leurs juridictions compétentes pour connaître de demandes de réparation pour des actes de torture, donnent effet au large consensus dans la communauté internationale sur l'existence d'un droit de victimes d'actes de torture à une réparation appropriée et effective, y compris quand leurs demandes se fondent sur des faits commis en dehors des frontières géographiques de l'État du for. Toutefois, il ne résulte ni du droit international ni de la Convention une obligation à charge des États contractants de se doter d'une compétence universelle civile. De plus, il n'était pas déraisonnable pour un État de lier cette compétence à des facteurs de rattachement avec cet État. En l'espèce, les motifs invoqués pendant l'examen du projet de loi par le parlement, tenant à la bonne administration de la justice, pour justifier l'introduction par le législateur de nouveaux critères de compétence universelle, ainsi que le lien avec la question d'immunité que ces poursuites soulevaient au regard du droit international, pouvaient être considérés comme des motifs d'intérêt général impérieux.

En 2001, lors de la constitution en partie civile des requérants, le droit belge reconnaissait la compétence universelle pénale dans une forme absolue. Le législateur a ensuite progressivement introduit des critères de rattachement *ratione personae* et *ratione loci* avec la Belgique ainsi qu'un système de filtrage de l'opportunité des poursuites. Lors de l'entrée en vigueur en 2005 de la loi de 2003, la procédure en question ne répondait pas aux nouveaux critères de compétence des juridictions belges définis pour l'avenir. L'affaire des requérants n'aurait donc pas pu être maintenue sur cette base. Toutefois comme les juridictions belges n'ont pas été dessaisies de l'affaire des requérants dès l'entrée en vigueur de la loi de 2003, car au moins un plaignant était de nationalité belge au moment de l'engagement initial de l'action publique selon l'une des conditions du régime transitoire de la loi, l'on ne saurait considérer que l'intervention du législateur, du seul fait que la loi s'appliquait aux affaires pendantes, rendait vaine toute continuation des procédures (voir, *a contrario*, *Arnolin et autres c. France*). Néanmoins, eu égard à la décision de la Cour de cassation de décembre 2010 selon laquelle la compétence des juridictions belges ne pouvait être maintenue que si un acte d'instruction avait été accompli avant l'entrée en vigueur de la loi, l'action engagée par les requérants était nécessairement vouée à l'échec s'il s'avérait qu'un tel acte n'avait pas été accompli. C'est ce qu'ultérieurement la chambre des mises en accusation et la Cour de cassation ont constaté.

Aussi la notion d'acte d'instruction n'a pas été précisée dans la loi même et elle a fait l'objet d'interprétations différentes. Toutefois, une fois la pertinence de l'accomplissement d'un acte d'instruction soulignée par la Cour de cassation, les requérants ont limité leur argumentaire à certains actes de procédure. La Cour ne s'exprime pas sur le point de savoir s'ils auraient utilement pu élargir leur thèse à d'autres actes de procédure qui avaient, eux aussi, été écartés par la chambre des mises en accusation ; elle constate toutefois que ces autres actes ont par la suite été considérés comme pertinents par l'avocat général à la Cour de cassation. Quoi qu'il en soit, force est de constater que le grief des requérants, tel que développé dans leur second moyen en cassation, se référait à certains actes précis.

De plus, les motifs retenus par les juridictions pour se déclarer incompétentes n'étaient ni arbitraires ni manifestement déraisonnables.

Eu égard à l'ensemble des éléments qui précèdent, le rejet par les juridictions belges, à la suite de l'entrée en vigueur de la loi de 2003, de leur compétence pour connaître de la constitution de partie civile introduite en 2001 par les requérants en vue d'obtenir la mise en mouvement d'une action publique du fait de violations graves de droit international humanitaire et la réparation du préjudice qu'ils alléguaient avoir subi en conséquence, n'était pas disproportionné par rapport aux buts légitimes poursuivis.

Conclusion : non-violation (unanimité).

La Cour conclut également qu'il n'y a pas eu violation de l'article 6 § 1 de la Convention en ce qui concerne la motivation des décisions rendues par la chambre des mises en accusation et la Cour de cassation.

(Voir *Arnolin et autres c. France*, 20127/03 et al., 9 janvier 2007, Résumé juridique, et *Naït-Liman c. Suisse* [GC], 51357/07, 15 mars 2018, Résumé juridique)

Impartial tribunal/Tribunal impartial

Lack of impartiality of Supreme Court judge who sat in a five-judge panel in criminal and closely related subsequent civil proceedings: *violation*

Manque d'impartialité d'un membre de la Cour suprême qui a siégé dans une formation de cinq juges dans un procès pénal et dans un procès civil étroitement rattaché : *violation*

Stoimenovikj and/et Miloshevikj – North Macedonia/Macédoine du Nord, 59842/14, Judgment/Arrêt 25.3.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The first applicant was convicted, along with his mother (B.S.) and others, for laundering money through fictitious loan agreements, which the first applicant had certified in his capacity as a notary public. On the basis of those agreements, third parties had made transfers to B.S.'s account by way of repayment of the fictitious loans. They appealed unsuccessfully against the judgment to Skopje Court of Appeal, which sat as a panel of five judges and included Judge M.S. The Supreme Court upheld the judgment.

B.S. also brought a civil claim, seeking an order for some of the same third parties to pay back a loan she had given them, pursuant to a loan agreement certified by the first applicant. Those parties brought a civil claim against B.S., seeking to have those loan agreements annulled for being fictitious. B.S.'s claim was dismissed and the loan agreements were annulled. B.S., and after her death, B.S.'s lawyer on her behalf, appealed unsuccessfully up to the Supreme Court on points of law. The Supreme Court sat as a panel of five judges and included Judge M.S.

A month before the Supreme Court's decision was served, the first applicant began inheritance proceedings in respect of B.S., which included, *inter alia*, her civil claim.

The applicants complained of the lack of impartiality of the Supreme Court's panel which had decided B.S.'s civil claim, given the participation of Judge M.S. both in that panel and in the Court of Appeal that had decided the criminal case against her.

Law – Article 6 § 1: The Court limited its examination to the objective test with regard to the lack of judicial impartiality.

While the loan agreements in the impugned civil proceedings had not been exactly the same as the loan agreements which had been the object of the criminal proceedings, given the identity of the parties, the first applicant's involvement as notary public and the context in which they had been concluded, they had been of a very similar, if not an identical nature. Their near identical nature had also been one of the arguments relied on by the plaintiffs in seeking their annulment in the civil proceedings. The civil courts, in finding that the agreements in question had been fictitious, had expressly relied, *inter alia*, on the findings of the criminal courts regarding the criminal liability of B.S. and other relevant individuals, as well as the applicant. They had done so notwithstanding that the criminal proceedings had concerned different loan agreements and could not therefore be regarded *res judicata* for the issues raised in the impugned civil proceedings. It was also noteworthy that the examination carried out by the adjudicating panels in both proceedings had concerned the merits of B.S.'s appeals.

Given the comprehensive assessment and the extensive scope of the review by the Court of Appeal, coupled with the high profile of the criminal case at the time, it could not be assumed that Judge M.S. would have been unaware of her participation in that case when deciding B.S's appeal in the impugned civil proceedings. However, there was nothing to suggest that she had considered the possibility of withdrawing from the case or that she had informed the President of the Supreme Court of the fact that she had sat in the earlier criminal proceedings. In that connection, national law expressly obliged judges sitting in a case to immediately inform the president of the court of the circumstances justifying his or her removal. It had been impossible for B.S. to request recusal of Judge M.S. from sitting in her civil case. Indeed, there had been no real opportunity for B.S.'s lawyer to learn that Judge M.S. would be a member of the Supreme Court's panel, all the more so given that an oral hearing had not been held before that court. Consequently, it had been the responsibility of Judge M.S. to bring the matter to the attention to the President of the Supreme Court.

While true that judge M.S. had been but one member of a five-judge panel of the Supreme Court, in view of the secrecy of the deliberations, it was impossible to ascertain her actual influence on that

occasion. However, it had not been disputed that judge M.S. had been the acting president of the Supreme Court at the time when the appeal on points of law had been lodged on behalf of B.S. and had been assigned to a panel of that court. It had also not been explained why it had been necessary to assign her to sit on the panel of the Civil Law Department of the Supreme Court that had decided B.S.'s appeal, which had allegedly been the only case in that Department during her career in the Supreme Court.

In light of the above, in the specific circumstances of the case, the first applicant's fears that Judge M.S. had already formed a view as to the merits of the civil case before it had been brought to the Supreme Court could be considered to have been objectively justified. The composition of the panel of the Supreme Court accordingly had failed to meet the required Convention standard under the objective test.

Conclusion: violation (unanimously).

The Court also held, unanimously, that the application in respect of the second applicant was inadmissible (incompatibility *ratione personae*) since, as B.S.'s grandson, he was not a direct heir and could not derive victim status from inheritance or any other form of succession.

Article 41: EUR 2,500 to the first applicant, in respect of non-pecuniary damage. Claim for pecuniary damage dismissed.

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Failure by a court of appeal to hear prosecution witnesses before overturning the acquittal verdict given at first instance under summary procedure: *no violation*

Non-audition des témoins à charge par la cour d'appel avant de renverser le verdict d'acquittement prononcé en première instance lors d'une procédure abrégée : *non-violation*

Di Martino and/et Molinari – Italy/Italie, 15931/15 and/et 16459/15, Judgment/Arrêt 25.3.2021 [Section I]

English translation of the summary – Version imprimable

En fait – Les requérants ont été jugés selon la procédure abrégée (simplifiée), dont ils ont demandé l'adoption en vue d'obtenir une réduction de peine. Le juge de l'audience préliminaire (GUP) a accueilli leur demande, estimant que l'affaire pouvait être tranchée sur la base des éléments du dossier constitué par le parquet au cours des investigations préliminaires, parmi lesquels figuraient les transcriptions des déclarations de plusieurs « repentis ». Par la suite, se prévalant de la possibilité prévue par le code de procédure pénale (CPP), le GUP a ordonné l'audition de B.S., un ancien mafieux, devenu entretemps collaborateur de justice.

Le GUP a acquitté la requérante et a partiellement acquitté le requérant condamné pour un seul délit. Il a estimé que les éléments de preuve recueillis ne prouvaient pas leur responsabilité pénale. La cour d'appel, quant à elle, a infirmé ce jugement et a déclaré les requérants coupables après avoir donné une nouvelle interprétation de l'ensemble des éléments de preuve, y compris les déclarations de tous les témoins, et les avoir jugés suffisants pour fonder la condamnation.

En droit – Article 6 § 1

a) *Sur l'absence d'audition de trois témoins* – La procédure abrégée entraîne des avantages indéniables pour l'accusé : une importante réduction de peine en cas de condamnation et l'impossibilité pour le parquet d'interjeter appel des jugements de condamnation ne modifiant pas la qualification juridique de l'infraction. En revanche, elle est assortie d'un affaiblissement des garanties de procédure offertes par le droit interne : la publicité des débats, la possibilité de demander la production d'éléments de preuve non contenus dans le dossier du parquet et d'obtenir la convocation des témoins.

La possibilité pour un accusé d'obtenir une atténuation des charges ou une réduction de peine à condition qu'il reconnaisse sa culpabilité, ou qu'il renonce avant le procès à contester les faits ou encore qu'il coopère pleinement avec les autorités d'enquête, est chose courante dans les systèmes de justice pénale des États européens.

En sollicitant l'adoption de la procédure abrégée, les requérants, qui étaient assistés d'avocats, ont accepté de baser leur défense sur les pièces recueillies pendant les investigations préliminaires, dont ils avaient pris connaissance, et ont ainsi renoncé sans équivoque à leur droit à obtenir la convocation et l'audition de témoins au procès de façon consciente et éclairée. Ils ont en outre accepté que les juges utilisent les transcriptions des dépositions de « repentis » versées au dossier du parquet. De plus, ils savaient ou auraient dû savoir qu'en cas d'acquittement en première instance la cour d'appel avait la faculté de rejuger l'affaire sur la base de ces mêmes éléments de preuve. Ainsi, leur demande d'être jugés selon la procédure abrégée a déterminé la renonciation aux preuves orales et a eu pour conséquence que leur procès soit fondé sur les preuves documentaires versées au dossier. Dès lors, l'espèce se distingue des précédentes

affaires de la Cour dans lesquelles la juridiction de recours n'avait pas satisfait à l'obligation d'interroger directement des témoins qui avaient été auditionnés par le juge de première instance et dont elle s'apprêtait à interpréter les déclarations d'une manière défavorable à l'accusé et radicalement différente pour condamner celui-ci pour la première fois.

Les requérants n'ont pas été privés arbitrairement des avantages qui se rattachent aux principes du procès équitable ayant bénéficié de la réduction de peine découlant de l'adoption de la procédure abrégée. Et l'affaire n'a pas soulevé des questions d'intérêt public s'opposant à une telle renonciation.

Aussi, la Cour de cassation a récemment interprété extensivement le CPP, faisant obligation aux juridictions d'appel d'ordonner même d'office l'audition de témoins décisifs pour la condamnation, aussi bien dans les procédures pénales ordinaires qu'abrégées.

En conclusion, les requérants ne sauraient se plaindre d'une entrave à leur droit à un procès équitable dérivant de la non-audition par la cour d'appel des témoins.

b) *Sur l'absence d'audition d'un témoin* – Ce témoin a été convoqué d'office par le GUP, et a donc été interrogé en audience par celui-ci, contrairement aux autres témoins à charge.

La possibilité que le juge déroge aux conditions ordinaires de la procédure abrégée et se procure, même d'office, des éléments de preuve nécessaires à sa décision est expressément prévue par le CPP et ne saurait constituer en soi une atteinte aux principes du procès équitable.

La condamnation des requérants a été fondée sur plusieurs éléments de preuve. Le témoignage du témoin en question n'a donc que confirmé les déclarations des autres témoins et corroboré l'ensemble des preuves à charge. En effet, ni le GUP ni la cour d'appel n'ont accordé un poids déterminant à ce témoignage. De plus, le GUP avait convoqué ce témoin pour juger de la position de l'un des coïnculpés des requérants.

Eu égard à ce qui précède, et notamment à la valeur probante du témoignage en question, et rappelant qu'il revient en principe aux juridictions nationales d'apprécier les éléments rassemblés par elles, l'on ne saurait considérer qu'en ne procédant pas à une nouvelle audition du témoin la cour d'appel a restreint les droits de la défense des requérants.

Conclusion : non-violation (unanimité).

(Voir aussi *Hermi c. Italie* [GC], 18114/02, 18 octobre 2006, Résumé juridique ; *Hany c. Italie* (déc.), 17543/05, 6 novembre 2007, Résumé juridique ; *Scoppola c. Italie (n° 2)* [GC], 10249/03, 17 septembre 2009, Résumé juridique ; *Lazu c. République de Moldova*, 46182/08, 5 juillet 2016, Résumé juridique ; et *Murtazaliyeva c. Russie* [GC], 36658/05, 18 décembre 2018, Résumé juridique)

Article 6 § 1 (administrative/ administratif)

Access to court/Accès à un tribunal

Inadmissibility of an application for judicial review of a temporary restriction linked to COVID-19, on the grounds that the decision was no longer in force when the application was examined: *communicated*

Irrecevabilité d'un recours en annulation contre une restriction temporaire liée à la Covid-19 au motif que la décision n'est plus en vigueur à la date d'examen du recours : *affaire communiquée*

Association d'obédience ecclésiastique orthodoxe – Greece/Grèce, 52104/20, Communication [Section I]

English translation of the summary – Version imprimable

Dans le contexte de la crise sanitaire due à la Covid-19, les autorités décidèrent d'interdire la pratique collective du culte du 16 mars au 16 mai 2020 – période qui couvrait notamment la fête de Pâques. Le 30 mars 2020, l'association requérante introduisit contre les mesures en cause un recours en annulation (accompagné d'une demande de mesures provisoires ainsi que d'une demande de sursis à l'exécution). Le 23 juin 2020, le Conseil d'État considéra qu'il n'y avait pas lieu de statuer sur ce recours en annulation, au motif que la requérante, entre autres, n'avait plus d'intérêt légitime car les décisions ministérielles conjointes en cause n'étaient plus valables.

Affaire communiquée sous l'angle de l'article 6 § 1 (accès à un tribunal) et de l'article 9 (liberté de religion) de la Convention.

Fair hearing/Procès équitable

Tax debt time-barred by retroactive effect of judicial decision but subsequently reinstated, while dispute still pending and with aim of providing legal certainty, by retrospective but foreseeable legislation: *case referred to the Grand Chamber*

Dette fiscale éteinte par l'effet rétroactif d'une jurisprudence et ensuite rétablie, toujours en cours du litige et aux fins de la sécurité juridique, par une loi rétroactive mais prévisible : *affaire renvoyée devant la Grande Chambre*

Vegotex International S.A.– Belgium/Belgique, 49812/09, Judgment/Arrêt 10.11.2020 [Section III]

Traduction française du résumé – Printable version

In 1995 the tax authorities corrected a tax return filed by the applicant company and applied a 10% penalty on the amount due. The applicant appealed and pending these proceedings the following occurred: (i) in October 2000 the tax authorities issued a summons to pay with the aim of interrupting the period before the tax debt became time-barred; (ii) in a judgment of 10 October 2002 the Court of Cassation adopted new case-law with retroactive effect which resulted in the recovery of tax debt being time-barred; (iii) in July 2004 the legislature intervened to reverse this development and to restore the previous administrative practice by means of a law that was immediately applicable to pending proceedings. This legislation was then applied to the applicant's case by the Court of Cassation, which consequently dismissed its appeal on points of law.

In a judgment of 10 November 2020 (see Legal Summary), a Chamber of the Court held unanimously that there had been no violation of Article 6 § 1 in respect of the legislature's intervention in the proceedings and the principle of legal certainty. It held, in particular, that the impugned retrospective application of the legislation in question had been driven by a compelling reason of general interest: to restore the interruption of the limitation period by payment orders that had been served well before the Court of Cassation's 2002 judgment, thus enabling the resolution of disputes pending before the courts and without affecting the rights of taxpayers.

The Chamber also held, unanimously, that there had been no violation of Article 6 § 1 (right to an adversarial procedure and the right of access to a court) on account of the substitution of grounds of appeal carried out by the Court of Cassation of its own motion; and that there had been a violation of Article 6 § 1 on account of the length of the proceedings.

On 8 March 2021 the case was referred to the Grand Chamber at the applicant's request.

ARTICLE 9

Freedom of religion/Liberté de religion
Manifest religion or belief/Manifester sa religion ou sa conviction

Prohibition on collective worship in the context of COVID-19: *communicated*

Interdiction de la pratique collective du culte dans le contexte de la Covid-19 : *affaire communiquée*

Association d'obédience ecclésiastique orthodoxe – Greece/Grèce, 52104/20, Communication [Section I]

(See Article 6 § 1 above/Voir l'article 6 § 1 ci-dessus, page 24)

Freedom of religion/Liberté de religion
Manifest religion or belief/Manifester sa religion ou sa conviction

De facto* impossibility for a prisoner to attend church on account of his position at the bottom of the prisoners' informal hierarchy: *communicated

Détenu empêché *de facto* de se rendre à l'église par sa situation au plus bas de la hiérarchie informelle entre les détenus : *affaire communiquée*

Rotari – Republic of Moldova/République de Moldova, 64977/17, Communication [Section II]

English translation of the summary – Version imprimable

La requête émane d'un requérant emprisonné qui soutient appartenir à la caste inférieure des « intouchables » dans la hiérarchie informelle des détenus. Il en décrit diverses conséquences pour ses déplacements, ses repas, ou pour l'utilisation de certains équipements collectifs – dont l'interdiction de se rendre à l'église de la prison. Notamment, selon ses dires, il n'a pas le droit de se déplacer normalement sur le territoire de la prison, mais doit longer les murs et les clôtures. En outre, il affirme qu'il lui est interdit de recevoir son repas à la fenêtre réservée à cet effet où le cuisinier ou son adjoint distribue la nourriture, mais qu'il doit aller à la fenêtre de la personne qui fait la plonge, où les conditions sanitaires sont déplorables.

Affaire communiquée sous l'angle des articles 3, 9 et 14 de la Convention.

(Voir également l'affaire communiquée *A.S. et autres c. Russie*, 45049/17 et al., Résumé juridique)

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

Justified conviction for assaulting police officer during proportionate dispersal of protest: *inadmissible*

Condamnation justifiée pour l'agression d'un policier lors de la dispersion proportionnée d'une manifestation : *irrecevable*

Knežević – Montenegro/Monténégro, 54228/18, Decision/Décision 2.2.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant was an opposition leader at the relevant time and his political party a part of an opposition coalition. The opposition coalition organised a protest rally from the boulevard in front of the national Parliament for a period of twenty days, during which time a number of temporary objects (including tents and a stage) were installed. The purpose of the gathering was to publicly protest and express dissatisfaction with citizens' living standards and to request the formation of a transitional government. The protest was subsequently dispersed by the police and the objects were removed. The applicant, who had been participating in the protest, was arrested and convicted for assaulting a police officer during the dispersal. He complained that his Article 11 right to freedom of peaceful assembly had been violated.

Law – Article 11

(a) *Applicability* – There was nothing to suggest that the protests had not been intended to be peaceful or that the organisers, including the applicant, had had violent intentions; nor that the applicant had had violent intentions when he had joined the demonstration. While the applicant had been convicted for assaulting a police officer, that had concerned an incident during the tense moments when the police had moved to disperse the protestors, and was not indicative of any initial violent intention on his part. Accordingly, he had enjoyed the protection of Article 11.

(b) *Removal of the tents and stage* – The organisers of the protest had been authorised to set up a number of temporary objects, including a stage, in the park opposite the Parliament building for a certain period of time. Against that authorisation, as well as relevant legislation in force at the time, the organisers had set up the stage not in the park but in the traffic lanes in front of Parliament. They had also set up about 300 tents on the road without any authorisation. The organisers, including the applicant, had thereby intentionally failed to abide by their own request, the rules, and the terms of the authorisation issued by the authorities. They had also caused disruption to ordinary life and other activities to a degree exceeding that which was inevitable. The boulevard in question had been the busiest road in the city and blocking it had completely obstructed the normal activities of other people and services for twenty days. Such conduct, although less serious than recourse to physical violence, could be described as "reprehensible" (see, *mutatis mutandis*, *Kudrevičius and Others v. Lithuania* [GC] and *Barraco v. France*).

A municipal police inspector had issued a decision ordering that the objects be removed, which had in no way interfered with the holding of the protest rally itself. However, the organisers had refused to sign the delivery slip accompanying that decision, had failed to comply with it, and had not allowed two municipal police inspectors to enforce it.

(c) *Dispersal of the gathering* – The authorities had tolerated the disturbance and obstruction for twenty days in total: although they had been authorised in law to do so, they had not imposed any fines on the organisers and/or protestors; they had prohibited traffic in the boulevard in question in order to facilitate the gathering; and the objects had been removed only at the end of that period. During those twenty days, the organisers, including the applicant, had been able to freely manifest their views. It had not been unreasonable *per se* that the authorities had viewed that period to be sufficient, and that the major disruption could no longer be allowed to continue.

The participants, including the applicant, had refused to comply with the police's request to step away so that the stage and tents could be removed. They had formed a human shield and put up resistance, including by breaking the police cordon and driving into the boulevard. It was only after such resistance that the police officer in command had ordered that the gathering be dispersed. In such circumstances, the intervention by the police had not overstepped the margin of appreciation of the national authorities.

(d) *Arrest and conviction of the applicant* – The applicant had not been prosecuted and convicted for organising a protest, but notably for assaulting an official performing his duties. By his own submission, the applicant had repeatedly pushed the police officer, removed the officer's hat and taken it away. The officer had remained calm and applied no force whatsoever in respect of the applicant.

When individuals were involved in acts of violence, State authorities enjoyed a wider margin of appreciation when examining the need for an interference, and the imposition of a sanction for such reprehensible acts might be considered compatible with the guarantees of Article 11. The Court was very attentive when assessing the proportionality as regards the chilling effect of criminal sanctions. However, the sanction in the present case had not been for the applicant's organising and/or participating in the protests. Assaulting an official was a criminal offence; the applicant's sentence of four months had been below the statutory minimum; and he had served less than three months. In the present case, that sentence, although not insignificant, had not been contrary to Article 11. The applicant's prosecution and conviction had been in

accordance with the law, had pursued legitimate aims, notably prevention of disorder or crime and protection of the rights and freedoms of others, and had been necessary in a democratic society.

Conclusion: inadmissible (manifestly ill-founded).

The Court also held, by a majority, that the applicant's complaint under Article 6 § 1 as to the alleged unfairness of his criminal proceedings was inadmissible, as it was manifestly ill-founded in the light of all the material in the Court's possession.

(See *Barraco v. France*, 31684/05, 5 March 2009, Legal Summary, and *Kudrevičius and Others v. Lithuania* [GC], 37553/05, 15 October 2015, Legal Summary; see also *Primov and Others v. Russia,* 17391/06, 12 June 2014, Legal Summary, and *Gülcü v. Turkey*, 17526/10, 19 January 2016, Legal Summary)

ARTICLE 14

Discrimination (Article 3)

Informal hierarchy among prisoners, giving rise to bullying and restrictions: *communicated*

Hiérarchie informelle entre détenus entraînant brimades et restrictions : *affaire communiquée*

Rotari – Republic of Moldova/République de Moldova, 64977/17, Communication [Section II]

(See Article 9 above/Voir l'article 9 ci-dessus, page 25)

Discrimination (Article 8)

Termination, when youngest child reaches adulthood, of pension entitlement for surviving parent with full-time childcare responsibilities where the beneficiary is a man: *case referred to the Grand Chamber*

Cessation, à la majorité du dernier enfant, du paiement de la rente de parent veuf s'occupant à plein temps des enfants, lorsque le bénéficiaire est un homme : *affaire renvoyée devant a Grande Chambre*

B. – Switzerland/Suisse, 78630/12, Judgment/Arrêt 20.10.2020 [Section III]

Traduction française du résumé – Printable version

Following the death of his wife, the applicant left his employment to look after their two young children and was paid a "widower's pension" on that account as provided for by the Federal Law on Old-Age and Survivors' Insurance. Pursuant to that law, his pension was terminated when his younger daughter reached the age of majority in 2010. The applicant's challenge on gender discrimination grounds, the law making no provision for a similar restriction where the beneficiary was a woman, was unsuccessful.

In a judgment of 20 October 2020 (see Legal Summary), a Chamber of the Court, held unanimously that there had been a violation of Article 14 taken together with Article 8. Having first considered the general purpose of a widows' or widower's pension and the tangible repercussions it had had on the applicant's family life, it found that his complaint fell within the scope of Article 8 and, accordingly, that Article 14 was applicable, in conjunction with that provision. It then ruled that the applicant had suffered unequal treatment *vis-à-vis* a widow in the same situation and that the Government had failed to provide any reasonable justification for this.

On 8 March 2021 the case was referred to the Grand Chamber at the Government's request.

ARTICLE 34

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

Interference with Court-applicant correspondence and ineffective legal representation through legal aid system for Court proceedings: *violation*

Ingérence dans l'exercice par le requérant de son droit au respect de sa correspondance avec la Cour et ineffectivité de l'assistance juridique offerte par le système d'aide judiciaire dans le cadre de la procédure devant la Cour : *violation*

Feilazoo – Malta/Malte, 6865/19, Judgment/Arrêt 11.3.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant, a Nigerian national, was placed in immigration detention pending deportation. His detention lasted for around fourteen months.

The applicant complained, *inter alia*, of the conditions of his detention. In relation to the proceedings before the Court, he alleged that he had not had the opportunity to correspond with the Court without interference by the prison authorities, and had been denied access to materials intended to substantiate his application.

Law

Article 3 (conditions of detention): The Court was particularly struck by the fact that the applicant had been held alone in a container for nearly seventy-

five days without access to natural light or air, and that during the first forty days he had had no opportunity to exercise. Furthermore, during that period, and particularly the first forty days, the applicant had been subjected to a *de facto* isolation. The applicant had been put in isolation for his own protection, upon his request. However, the stringency and duration of the measure put in place, namely, that for at least forty days the applicant had had barely any contact with anyone, seemed excessive in the circumstances. No measures appeared to have been taken by the authorities to ensure that the applicant's physical and psychological condition had allowed him to remain in isolation, nor did it appear that, in the specific circumstances of the case, any other alternatives to that isolation had been envisaged.

Furthermore, following that period, the applicant had been moved to other living quarters where new arrivals (of asylum seekers) had been kept in Covid-19 quarantine. There was not indication that the applicant had been in need of such quarantine – particularly after an isolation period which had lasted for nearly seven weeks. Thus, placing him, for several weeks, with other persons who could have posed a risk to his health, in the absence of any relevant consideration to that effect, could not be considered as a measure complying with basic sanitary requirements.

Conclusion: violation (unanimously).

Article 34

(a) *Correspondence with the Court* – The authorities had failed to ensure that the applicant had been provided with the possibility of obtaining copies of documents which he had needed to substantiate his application, and his correspondence concerning the case before the Court had not been dealt with under confidential cover. Information relating to ongoing proceedings before the Court being openly relayed *via* third persons, which moreover could be the subject of such complaints, might create a risk of reprisal. In that connection, while domestic law provided for the possibility of domestic complaints being made in confidence, no such safeguard appeared to apply concerning complaints and subsequent communication with international bodies.

In the circumstances of the case, the authorities' failures had amounted to an unjustified interference with the right of individual petition.

(b) *Domestic legal aid representation* – The Court had regard to its case-law under Article 6: in discharging the obligation to provide parties to civil proceedings with legal aid, when provided by domestic law, the State had to display diligence so as to secure to those persons the genuine and effective enjoyment of the rights guaranteed under Article 6 (*Staroszczyk v. Poland*, 59519/00, 22 March 2007; *Siałkowska v. Poland*, 8932/05, 22 March 2007; and *Bąkowska v. Poland*, 33539/02, 12 January 2010).

In the present case, after notice of a number of complaints had been given to the Government, a lawyer had been required for the purposes of the proceedings before the Court and at that stage legal aid had been granted to the applicant and a local legal aid lawyer had been appointed by the domestic courts. However, that grant had not been enough to safeguard the applicant's right to individual petition in a "concrete and effective manner". The Court left open the issue of the quality of the advice given to the applicant or whether pressure had been exerted on him to drop his case. The applicant's local legal aid representative had failed to keep regular confidential client-lawyer contact and had abandoned her mandate without informing the applicant (and/or Court) and without obtaining the revocation of her appointment by the domestic courts. As a result, contrary to her duty, she had failed to make submissions on behalf of the applicant when requested, which could have irremediably prejudiced the applicant's case. The Government had been informed of the foregoing, yet no steps had been taken by any State authority to improve the situation.

The situation, as developed over time, had led the President of the Chamber to take appropriate action to safeguard the applicant's right of individual petition. Nevertheless, the behaviour of the legal representative and the lack of any action by the State authorities had led to the prolongation of the proceedings before the Court, despite the fact that the case had been given priority. In the circumstances, those failings had amounted to ineffective representation in special circumstances which incurred the State's liability under the Convention.

The applicant had persistently pursued his case and contacted the relevant authorities to obtain pertinent information or to make further complaints, to no avail. In the absence of any relevant contact he had informed the Court about the continuing situation. He had therefore showed the required diligence by following his case conscientiously and attempting to maintain effective contact with his nominated representatives, despite the difficulties faced while in detention.

In light of the above, the applicant had been put in a position in which his efforts to exercise his right to individual petition before the Court by way of legal representation appointed under the domestic legal aid system had failed, as a result of the State's hindrance.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 5 § 1, as the grounds for the applicant's detention (action taken with a view to his deportation) had not remained valid for the whole period of his deprivation of liberty, and his detention had therefore been unlawful.

Article 41: EUR 25,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Anghel v. Italy*, 5968/09, 25 June 2013)

ARTICLE 3 OF PROTOCOL No. 4/ DU PROTOCOLE N° 4

Enter own country/Entrer dans son pays

Refusal to repatriate a national who left the country for the former territory of "Islamic State", and her young children: *relinquishment in favour of the Grand Chamber*

Refus d'organiser le rapatriement d'une ressortissante partie rejoindre l'ancien territoire de l'« État islamique », et de ses jeunes enfants : *dessaisissement au profit de la Grande Chambre*

H.F. and/et M.F. – France, 24384/19

(See Article 1 above/Voir l'article 1 ci-dessus, page 8)

PROTOCOL No. 16/PROTOCOLE N° 16

Advisory opinions/Avis consultatifs

Question raised under Article 6 not concerning an issue on which the requesting court would need the Court's guidance: *request rejected*

Question soulevée sous l'angle de l'article 6 ne concernant pas un sujet sur lequel la juridiction demanderesse aurait besoin des conseils de la Cour : *demande rejetée*

Advisory opinion requested by the Supreme Court of the Slovak Republic/Avis consultatif demandé par la Cour suprême de la République slovaque, P16-2020-001, Decision/Décision 1.3.2021 [GC]

English translation of the summary – Version imprimable

Contexte – La demande de la Cour suprême slovaque s'inscrit dans le contexte d'une procédure pénale ouverte contre un policier. En 2019, il saisit la Cour suprême d'un recours sur des points de droit contre sa condamnation pour coups et blessures et trouble à l'ordre public. Il contesta le fait que l'enquête sur son affaire ait été menée par les agents du service d'inspection du ministère de l'Intérieur, qui sont directement subordonnés d'un point de vue tant personnel que fonctionnel au ministre de l'Intérieur, et sont responsables de la poursuite des policiers qui sont subordonnés au même ministre.

Dans sa question, la Cour suprême demande à la Cour européenne des précisions pour déterminer si le service d'inspection satisfait aux critères énoncés par les articles 2, 3 et 6 § 1 de la Convention concernant les enquêtes sur des infractions commises par des policiers, et si pareilles enquêtes doivent être menées par une autorité indépendante et impartiale, ainsi que son rôle dans le procès en question.

Décision – La Cour observe que les points soulevés concernent essentiellement l'équité du procès de l'accusé sous l'angle de l'article 6. En particulier, un tribunal doit être indépendant du pouvoir législatif, du pouvoir exécutif ainsi que des parties.

Dans un précédent avis d'harmonisation (n° Tpj 62/2015) rendu en 2015, la Cour suprême slovaque a estimé que « la garantie d'indépendance qu'un tribunal doit offrir à l'accusé ne bénéficie pas à la victime si l'affaire ne parvient pas au stade du jugement ». Selon la Cour, en concluant dans l'avis précité que ce qui essentiel à la préservation du droit de l'accusé à un procès équitable en matière pénale, c'est l'indépendance de la juridiction de jugement, la Cour suprême a donné des indications pertinentes pour répondre à la question dont la Cour est à présent saisie.

Ainsi, les points soulevés dans la présente demande d'avis consultatif, compte tenu de leur nature, de leur degré de nouveauté et/ou de leur complexité, ou pour d'autres raisons, ne portent pas sur une question pour laquelle la juridiction demanderesse aurait besoin d'une orientation donnée par la Cour pour lui permettre de garantir le respect des droits de la Convention lorsqu'elle jugera le litige en instance. En résumé, cette demande ne répond pas aux exigences de l'article 1 du Protocole n° 16 et la Cour décide dès lors de ne pas l'accepter.

(Voir aussi *Mustafa Tunç et Fecire Tunç c. Turquie* [GC], 24014/05, 14 avril 2015, Résumé juridique)

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

Referrals/Renvois

B. – Switzerland/Suisse, 78630/12, Judgment/Arrêt 20.10.2020 [Section III]

(See Article 14 above/Voir l'article 14 ci-dessus, page 27)

Vegotex International S.A.– Belgium/Belgique, 49812/09, Judgment/Arrêt 10.11.2020 [Section III]

(See Article 6 § 1 (administrative) above/Voir l'article 6 § 1 (administratif) ci-dessus, page 25)

Relinquishments/Dessaisissements

H.F. and/et M.F. – France, 24384/19

(See Article 1 above/Voir l'article 1 ci-dessus, page 8)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

Natural persons who are subject to an administrative investigation for insider dealing have the right to remain silent when their answers might establish their liability for an offence that is punishable by administrative sanctions of a criminal nature, or their criminal liability

Une personne physique soumise à une enquête administrative pour délit d'initié a le droit de garder le silence lorsque ses réponses pourraient faire ressortir sa responsabilité pour une infraction passible de sanctions administratives présentant un caractère pénal ou sa responsabilité pénale

Case/Affaire C-481/19, Judgment/Arrêt 2.2.2021

Press release – Communiqué de presse

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Slovak Telekom, found liable by the Commission for abuse of a dominant position on the market for certain telecommunications services, could also be subject to sanctions imposed by the Slovak authorities for such abuse on the market for other telecommunications services

Slovak Telekom, condamnée par la Commission pour abus de position dominante sur le marché de certains services de télécommunication, pouvait être également sanctionnée par les autorités slovaques pour un tel abus sur le marché d'autres services de télécommunication

Case/Affaire C-857/19, Judgment/Arrêt 25.2.2021

Press release – Communiqué de presse

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Arabic/Arabe

دليل خاص بالمادة 2 من الاتفاقية الأوروبية لحقوق الإنسان

دليل حول المادة 5 من الاتفاقية الأوروبية لحقوق الإنسان

Croatian/Croate

Vodič kroz članak 2. Konvencije – Pravo na život

Vodič kroz članak 11. Konvencije – Sloboda okupljanja i udruživanja

Vodič kroz članak 1. Protokola br. 1 – Zaštita vlasništva