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May
2022
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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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The Information Note contains legal summaries of the cases examined during the month in question which the Registry considers to be of particular interest. The summaries are drafted by lawyers under the authority of the Jurisconsult and are not binding on the Court. They are normally drafted in the language of the case concerned. The translation of the legal summaries into the other official language can be accessed directly through hyperlinks in the Note. These hyperlinks lead to the HUDOC database, which is regularly updated with new translations. The electronic version of the Note may be downloaded at www.echr.coe.int/NoteInformation/en.

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

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

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

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

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M – France, 42821/18, Decision/Décision 26.4.2022 [Section V]

English translation of the summary – Version imprimable

En fait – La requérante, née en 1977, est une personne intersexuée ayant subi durant son enfance et son adolescence des opérations chirurgicales et des traitements médicaux de féminisation. Elle indique qu'ils lui ont causé de graves troubles psychologiques et psychiatriques, et la reconnaissance du statut de travailleur handicapé, qu'elle vit dès lors de l'allocation qu'elle perçoit à ce titre, demeure dans l'impossibilité de trouver un emploi stable et rencontre des difficultés d'insertion sociale et économique.

La requérante souligne que ses parents n'ont reçu qu'une information incomplète et fallacieuse au moment de sa naissance et lors de sa prise en charge, que la décision de la « féminiser » a été prise alors qu'elle était trop jeune pour consentir et qu'elle n'a pas, par la suite, été informée du but des traitements qui lui ont été administrés. Elle n'en aurait eu connaissance qu'en 2000, à l'occasion de l'interception d'un courrier. Mais ce ne serait qu'en 2014 qu'un professionnel ne lui aurait pas caché le sens de son état et le but des opérations.

En novembre 2015, la requérante déposa une plainte contre X avec constitution de partie civile au tribunal de grande instance pour dénoncer les violences subies. Mais le juge d'instruction refusa d'informer car le délai de prescription de l'action publique était dépassé depuis novembre 2005, soit dix années à compter de la majorité de la victime.

La requérante fit valoir sans succès que, faute d'avoir été dûment informée par les médecins l'ayant prise en charge, il existait un « obstacle insurmontable à l'exercice des poursuites », jusqu'à l'interception de la lettre en 2000, de sorte que le point de départ du délai de prescription était suspendu et reporté à cette date.

Invoquant l'article 3 de la Convention, la requérante se plaint de ce qu'elle n'a pas bénéficié d'une enquête officielle et effective quant à ces faits, et dénonce un manquement de l'État à son obligation de prendre des mesures effectives de protection contre les mauvais traitements infligés par autrui.

Invoquant l'article 6 § 1 de la Convention, elle soutient que le refus d'informer opposé à sa plainte avec constitution de partie civile est constitutif d'une violation de son droit d'accès à un tribunal.

En droit – Article 3

a) *Applicabilité* – Les affaires qui concernent des interventions médicales peuvent aussi être examinées sous l'angle de l'article 8 de la Convention, y compris lorsque les requérants soutiennent que les interventions médicales litigieuses ont été réalisées sans le consentement du patient.

Pour tomber sous le coup de l'article 3, qui est la disposition sur laquelle se fonde la requérante, un mauvais traitement doit atteindre un minimum de gravité. L'appréciation de ce minimum est relative ; elle dépend de l'ensemble des données de la cause, notamment de la durée du traitement et de ses effets physiques ou mentaux ainsi que, parfois, du sexe, de l'âge et de l'état de santé de la victime, et de sa situation de vulnérabilité. Si l'intention de blesser, d'humilier ou de rabaisser la victime est en principe requise pour qu'un traitement relève de l'article 3, l'absence d'une telle intention ne l'exclut pas de façon définitive.

Un acte de nature médicale réalisé sans nécessité thérapeutique et sans le consentement éclairé de la personne qui en est l'objet est susceptible de constituer un mauvais traitement au sens de l'article 3. S'agissant du premier point, une mesure dictée par une nécessité thérapeutique selon les conceptions médicales établies ne saurait en principe passer pour inhumaine ou dégradante. La nécessité médicale doit alors être démontrée de manière convaincante. S'agissant du second point, dans le domaine de l'assistance médicale, même lorsque le refus d'accepter un traitement particulier risque d'entraîner une issue fatale, l'imposition d'un traitement médical sans le consentement du patient s'il est adulte et sain d'esprit s'analyse en une atteinte au droit à l'intégrité physique de l'intéressé. Si le patient est mineur, le consentement éclairé de son représentant légal doit être recueilli.

La stérilisation d'une personne pratiquée sans finalité thérapeutique et sans son consentement éclairé est ainsi en principe incompatible avec le respect de la liberté et de la dignité de l'homme et constitutive d'un traitement contraire à l'article 3. Il en va de même des mutilations génitales.

La Cour réserve la question de savoir si, au regard des considérations qui précèdent, les actes médicaux de conformation sexuelle qui sont en litige

sont susceptibles, dans les circonstances de l'espèce, de relever de l'article 3, dès lors que le grief tiré de cette disposition est en tout état de cause irrecevable pour défaut d'épuisement des voies de recours internes.

b) *Épuisement des voies de recours internes* – La requérante n'a pas, ne serait-ce qu'en substance, préalablement saisi la Cour de cassation du grief qu'elle tire de l'article 3 de la Convention.

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

Article 6 : La voie d'une action en responsabilité civile n'était pas fermée lorsque la requérante a opté pour la plainte avec constitution de partie civile devant la doyenne des juges d'instruction, l'action en responsabilité civile se prescrivant par dix ans à compter de la consolidation du dommage corporel dénoncé, ce délai passant à 20 ans en cas de dommage causé par, notamment, des tortures ou des actes de barbarie, ou des violences commises contre un mineur, ce qui correspond à ce dont se plaint la requérante. Or celle-ci fait elle-même valoir dans ses écritures devant la Cour que le dommage qu'elle dénonce n'est pas consolidé à ce jour. Par ailleurs, il ressort des observations du Gouvernement que la possibilité de saisir la juridiction administrative d'une action en responsabilité dirigée contre l'hôpital public restait ouverte à la requérante.

On ne peut donc considérer que la requérante s'est vu priver, du seul fait qu'un refus de poursuivre l'information judiciaire a été opposé à sa plainte avec constitution de partie civile, de l'accès à un tribunal pour faire statuer sur ses droits de caractère civil.

Conclusion : irrecevable (défaut manifeste de fondement).

(Voir aussi *V.C. c. Slovaquie*, 18968/07, 8 novembre 2011, Résumé juridique ; *ES c. France* (déc.), 59345/11, 7 avril 2015 ; et *Sow c. Belgique*, 27081/13, 19 janvier 2016)

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

Failure to protect LGBT bar owner and activist from homophobic arson, physical and verbal attacks and to carry out effective investigation: *violation*

Absence de protection de la propriétaire d'un bar militante LGBT contre un incendie criminel et des agressions physiques et verbales homophobes, et absence d'enquête effective : *violation*

Oganezova – Armenia/Arménie, 71367/12 and/et 72961/12, Judgment/Arrêt 17.5.2022 [Section IV]

(See Article 14 below/Voir l'article 14 ci-dessous, page 16)

ARTICLE 6

Article 6 § 1 (criminal/pénal)

Access to court/Accès à un tribunal

Limitation period invoked in response to a criminal complaint by an intersex person concerning feminising medical procedures carried out during childhood, where other remedies were still available: *inadmissible*

Prescription opposée à la plainte pénale d'une personne intersexuée pour des actes médicaux de féminisation, réalisés durant son enfance, d'autres voies de recours restant ouvertes : *irrecevable*

M – France, 42821/18, Decision/Décision 26.4.2022 [Section V]

(See Article 3 above/Voir l'article 3 ci-dessus, page 6)

Fair hearing/Procès équitable

Fairness of conviction of membership of the Fetullahist terrorist organisation mainly on the basis of purported use of encrypted messaging application: *relinquishment in favour of the Grand Chamber*

Équité d'une condamnation pour appartenance à l'Organisation terroriste fetullahiste prononcée principalement à raison de l'utilisation prétendument faite d'une application de messagerie cryptée : *dessaisissement au profit de la Grande Chambre*

Yalçinkaya – Turkey/Turquie, 15669/20

Traduction française du résumé – Printable version

The applicant, a teacher at a public school, was convicted of membership of the terrorist "Fetullahist Terrorist Organisation/Parallel State Structure" (FETÖ/PDY), which was considered by the domestic authorities to be behind the attempted coup of 15 July 2016. His conviction was mainly on the basis of evidence indicating his use of Bylock, an encrypted messaging application, which had been accessed by the National Intelligence Agency of Turkey as part of its intelligence activities to gather information on FETÖ/PDY. The applicant was sentenced to six years and three months' imprisonment. He unsuccessfully appealed.

The applicant complains under Article 6 §§ 1 and 3 that (i) he was not tried by independent and impartial tribunals; (ii) he was convicted on the basis of evidence unlawfully obtained by the National Intelligence Agency in disregard of the procedural safeguards set out in the Code of Criminal Procedure and without a court order; (iii) the unlawfully obtained evidence in question was assessed arbitrarily and was not made available to his examination, nor was it subjected to direct and independent examination by the domestic courts, and the courts had relied exclusively on the unilateral assessment of the prosecution and other public officials on that evidence, in violation of the principle of equality of arms and adversarial proceedings; (iv) the objections and requests that he made before the appeal court and the Court of Cassation, within the framework of his right to adversarial proceedings, equality of arms and right to a fair trial, were ignored by those courts in judgments that lacked any reasoning; and (v) he was denied the right to effective legal assistance. The applicant further complains under Article 7 that he was convicted on the basis of acts that did not constitute a crime and in the absence of the requisite *mens rea*, which suggested an extensive and arbitrary interpretation of the relevant laws. Lastly, invoking Articles 8 and 11, the applicant complains that both the information concerning his alleged use of ByLock, and his internet traffic data, was retained and used unlawfully in violation of his right to private life, and that membership of a trade union and association was used as evidence for his conviction in violation of his right to freedom of association.

On 3 May 2022 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

Article 6 § 1 (constitutional/ constitutionnel)

Access to court/Accès à un tribunal

Disproportionate refusal to award costs for complaint before Constitutional Court concerning applicant's divestment of legal capacity: *violation*

Rejet disproportionné d'une demande de remboursement des dépens dans un recours devant la Cour constitutionnelle concernant une privation de capacité juridique : *violation*

Dragan Kovačević – Croatia/Croatie, 49281/15, Judgment/Arrêt 12.5.2022 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant, who has a mental disability, was divested of his legal capacity after the institution of proceedings by relevant authorities before the domestic civil courts. The applicant made a constitutional complaint to the Constitutional Court, which quashed the civil courts' decisions but dismissed his claim for reimbursement of costs. The ruling on costs was based on a domestic law provision providing that each participant in proceedings before the Constitutional Court has to bear its own costs unless the court decides otherwise.

Law – Article 6 § 1

(a) *As to whether there was a restriction of the applicant's right of access to a court* – A rule that a participant in proceedings before the court has to bear its own costs, unless the court decides otherwise, could not be regarded as incompatible *per se* with Article 6 § 1. The Court needed to ascertain in the present case whether the effects of the application of the rule in question were compatible with Article 6 § 1.

The cost of drafting a constitutional complaint (equivalent to EUR 815) had been more than the average salary in Croatia at the time. It had thus constituted a significant financial burden even for the average citizen, let alone the applicant whose monthly income had consisted of the equivalent of EUR 164 in disability benefits.

Having regard to the Court's case-law and to the applicant's particular situation, the Constitutional Court's refusal to award the applicant the costs of his constitutional complaint had thus constituted a restriction of his right of access to court.

(b) *As to whether the restriction pursued a legitimate aim* – Although constitutional rights are those which individuals and private legal entities have against the State and other public entities, proceedings before the Croatian Constitutional Court initiated by a constitutional complaint were formally one-party proceedings. Those intending to lodge constitutional complaints thus did not run the risk, normally present in civil proceedings, that, if unsuccessful, they would have to bear not only their own costs but reimburse the costs of the opposing party. That absence of such a risk, together with the absence of an obligation to pay court fees in proceedings before the Constitutional Court, might thus result in that court becoming overburdened with a large number of unmeritorious constitutional complaints, which could jeopardise its proper functioning.

The Court was therefore willing to accept that the aim behind the rule, on which the decision on costs had been based in the present case, had been to secure that court's smooth functioning, and to protect the State budget.

Nevertheless, the impugned provision allowed the Constitutional Court to make an exception. That

exception not only provided a necessary flexibility, but also suggested that, in certain cases, application of the default rule might not be justified by the identified legitimate aims.

(c) *As to whether the restriction was proportionate* – The proceedings before the Constitutional Court had been of existential importance for the applicant, as the impugned decisions of the civil courts had deprived him of his legal capacity. In that regard, the applicant was a person suffering from a mental disability and therefore had to be legally represented to effectively protect his rights, it being understood that the assistance of an advocate before the Constitutional Court could not be seen as unnecessary even for non-vulnerable individuals, because that court decided on complex issues which, for any lay person, might be difficult to grasp (see *Bibić v. Croatia*, 1620/10, 28 January 2014).

The Court also referred to its finding that the costs of the constitutional complaint had constituted a significant financial burden even for an average citizen, let alone for a person of low income like the applicant.

Furthermore, the domestic law had not provided for the possibility of obtaining legal aid in proceedings before the Constitutional Court. In any event, legal aid was not an individual right and not an obligation that had to be exercised, and it should not prevent applicants from choosing to be represented by an advocate (see *Černius and Rinkevičius v. Lithuania*, 73579/17 and 14620/18, 18 February 2020). Lastly, having regard to the identified legitimate aims, there was no difference between the State advancing the costs of the applicant's legal representation through a legal aid scheme or reimbursing them afterwards because he had succeeded with his constitutional complaint.

The Court was mindful that social services were often faced with difficult and delicate decisions, especially when, as in the present case, they had to decide whether to initiate the relevant proceedings to deprive a person with a mental disability of the capacity to act. They might adopt a more defensive approach to their duties if, each time the judicial authorities did not agree with their initiative, they had to pay the costs of the proceedings to the counterparty. However, as indicated, proceedings before the Croatian Constitutional Court initiated by a constitutional complaint were formally one-party proceedings. Any costs awarded would not therefore have been paid by social services, which had not been a participant in the proceedings. In the present case, therefore, there had been no risk that the award of costs would have had a chilling effect on social services in the performance of their duties.

Lastly, in the circumstances of the present case, the Constitutional Court had been required to provide reasons for its decision on costs rather than merely using the same wording as in the relevant domestic law provision. However, it had not given any meaningful reasons for its decision.

Overall, in the specific circumstances of the present case, the restriction of the applicant's right of access to a court had not been justified by the legitimate aims pursued.

Conclusion: violation (five votes to two).

Article 41: EUR 815 in respect of pecuniary damage; EUR 3,000 in respect of non-pecuniary damage.

ARTICLE 10

Freedom of expression/Liberté d'expression

Activist fined for a short and peaceful gathering, without prior notice, with three other persons, who handcuffed themselves to a government car park barrier, in protest against a mining project: *violation*

Activiste condamné à une amende pour avoir organisé un bref rassemblement pacifique sans déclaration préalable et s'être menotté, ainsi que trois autres personnes, à la barrière du parking d'un bâtiment public pour protester contre un projet minier : *violation*

Bumbeş – Romania/Roumanie, 18079/15, Judgment/Arrêt 4.5.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant, a known activist involved in various civic actions, was fined with three other persons for handcuffing themselves to a car park barrier blocking access to the government's headquarters and holding up signs, without having given the required prior-notification, in protest of a controversial mining project. The applicant unsuccessfully challenged the fine before the domestic courts.

Law – Article 10 in light of Article 11

(a) *Applicability* – Both Articles 10 and 11 were applicable. In particular, in the circumstances of the case the Court could not accept that the penalty imposed on the applicant could be dissociated from the views expressed by him through his actions or endorse the Government's argument that the applicant had been punished merely for committing acts affecting public order. In this connection, the Court noted that it had consistently found

Article 10 to be applicable to views or opinions expressed through conduct. In so far as Article 11 was concerned, it transpired from the evidence that the applicant's conduct had not amounted to violence or incitement to it, no one had been injured during the event in question and he had not been held liable for any damage.

(b) *Scope of the Court's assessment* – Given that the thrust of the applicant's complaint was that he had been punished for protesting, together with other participants in the non-violent direct action, against the government's policies, the Court was persuaded that the event had constituted predominantly an expression. This was all the more so since it had involved only four persons and lasted a very short time. Moreover, as it had been the result of a rather spontaneous decision and lacked any prior advertisement, it was difficult to conceive that such an event could have generated the presence of further participants or the gathering of a significant crowd warranting specific measures on the part of the authorities. The Court therefore found it appropriate to examine the case under Article 10, interpreted in the light of Article 11.

(c) *Merits* – The applicant's sanctioning had constituted an interference with his right to freedom of expression which had a legal basis in domestic law. The Court also accepted that the sanction imposed could have been aimed at the prevention of disorder and at the protection of the rights and freedoms of others; hence it proceeded on the assumption that it had pursued those legitimate aims.

As to whether the interference had been necessary in a democratic society, the Court observed that the applicant and the other participants in the event had wished to draw the attention of their fellow citizens and public officials to their disapproval of the government's policies concerning the mining project. This was a topic of public interest and contributed to the ongoing debate in society about the impact of this project and the exercise of governmental and political powers green-lighting it. In this connection, the Court reiterated that there was little scope under Article 10 § 2 for restrictions on political speech or debates on questions of public interest and very strong reasons were required for justifying such restrictions.

In the present case, the protest action had taken place in a square freely open to the public. It had been terminated swiftly by the law-enforcement officials and the applicant, with the other participants, had been taken to a police station where they were fined after having been given hardly any time to express their views. The domestic courts seemed to have dealt with the situation arising from the applicant's protest as a matter falling primarily within the ambit of the regulations concerning public events requiring prior notification and the exercise of one's right to freedom of peaceful assembly. The Court thus referred to the principles established in its case-law in the context of Article 11 concerning, in particular, the rules governing public assemblies such as the system of prior notification and the degree of tolerance that had to be shown by public authorities towards peaceful gatherings.

When dismissing the applicant's challenge against the police report and the fine imposed on him, the national courts had not assessed the level of disturbance his actions had caused, if any. They had not sought to strike a balance between the requirements of the purposes listed in Article 11 § 2 on the one hand, and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places, on the other, giving the preponderant weight to the formal unlawfulness of the event in question. The national courts' assertion of a prior notification of the event staged by the applicant being required had not been accompanied by any apparent consideration of the fact whether, given the number of participants, such a notification would have served the purpose of enabling the authorities to take necessary measures in order to guarantee the smooth conduct of the event. Further, the application of that rule to expressions – rather than only to assemblies – would create a prior restraint which was incompatible with the free communication of ideas and might undermine freedom of expression.

The authorities' impugned actions had disregarded the emphasis repeatedly placed by the Court on the fact that the enforcement of rules governing public assemblies should not become an end in itself. The absence of prior notification and the ensuing "unlawfulness" of the event, which the authorities considered to be an assembly, did not give carte blanche to the authorities; the domestic authorities' reaction to a public event remained restricted by the proportionality and necessity requirements of Article 11.

Finally, although the fine imposed had been the minimum statutory amount envisaged for the impugned contravention and the applicant had not argued or submitted evidence that paying the fine had been beyond his financial means, the imposition of a sanction, administrative or otherwise, however lenient, on the author of an expression which qualified as political could have an undesirable chilling effect on public speech.

In the light of the above, the decision to restrict the applicant's freedom of expression had not been supported by reasons which had been relevant

and sufficient for the purposes of the test of "necessity" under Article 10 § 2. The interference had thus been not necessary in a democratic society within the meaning of Article 10.

Conclusion: violation (unanimously).

Article 41: EUR 117 in respect of pecuniary damage corresponding to the amount of the fine imposed on the applicant and EUR 5,000 in respect of non-pecuniary damage.

(See also *Tatár and Fáber v. Hungary*, 26005/08 and 26160/08, 12 June 2012, Legal Summary; *Kudrevičius and Others v. Lithuania* [GC], 37553/05, 15 October 2015, Legal Summary; *Novikova and Others v. Russia*, 25501/07 et al., 26 April 2016, Legal Summary)

Freedom of expression/Liberté d'expression

Justified civil defamation award, after former President's statement that an advocate needed psychiatric treatment for implicating him in a criminal complaint: *no violation*

Condamnation justifiée au civil pour diffamation en ce qui concerne les propos tenus par l'ex-président selon lesquels un avocat avait besoin de soins psychiatriques pour l'avoir dénoncé dans une plainte au pénal : *non-violation*

Mesić – Croatia/Croatie, 19362/18, Judgment/Arrêt 5.5.2022 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant is a former President of Croatia. In the context of a criminal complaint filed in France, an advocate of Croatian origin, Mr Jurašinović, made comments to the effect that the applicant was an accomplice in the attempted murder and extortion of his client. The complaint and the alleged links to the applicant were subsequently published in two newspaper articles. When questioned by journalists about those articles, the applicant denied the links, and suggested that Mr Jurašinović visit a psychiatric hospital when he came to Croatia, where people such as him could receive effective treatment. That statement was reported by a number of Croatian media outlets.

Subsequently, Mr Jurašinović brought a civil action for defamation against the applicant before the Croatian domestic courts, and was awarded compensation for non-pecuniary damage as well as costs of proceedings. The applicant appealed unsuccessfully against that judgment up to the Constitutional Court.

Law – Article 10: The judgment had constituted an interference with the applicant's right to freedom of expression. It had been prescribed by law and had pursued the legitimate aim of protecting the reputation or rights of others. The Court therefore had to determine whether it had been "necessary in a democratic society".

The applicant's statement – that Mr Jurašinović needed psychiatric treatment – had reached the level of seriousness capable of bringing Mr Jurašinović's rights under Article 8 into play. The applicant had made that statement when he had been the State President, and it had been widely distributed by various media outlets. Regardless of whether it had to be understood literally or metaphorically, it had not only been capable of tarnishing Mr Jurašinović's reputation, but also of fomenting prejudice against him in his professional and social environments. By way of observation, the Court also considered that referring to a need of psychiatric treatment and using it as an insult was disrespectful of persons with mental health issues.

In cases concerning a conflict between the right to reputation and the right to freedom of expression, domestic courts hearing defamation claims were expected to perform a balancing exercise between those two rights, in line with the criteria established in the Court's case-law. Domestic courts might also be required to take into account certain additional criteria: in this case, for example, the applicant's status as a politician and as a high-ranking State official, and on the other hand, Mr Jurašinović's status as an advocate, might be of importance. Although the civil courts had recognised that the present case had concerned two conflicting rights, they had made no reference to the relevant criteria developed in the Court's case-law, instead examining the case only in terms of civil law. They had accordingly failed to carry out the required balancing exercise between the competing rights. Similarly, the Constitutional Court had not examined the case from a constitutional-law perspective but instead simply declared the applicant's constitutional complaint inadmissible. The Court therefore had to carry out the required balancing act itself:

(a) *The notoriety and prior conduct of the person concerned* – Mr Jurašinović had not been a public figure before information regarding part of the content of the criminal complaint had been reported by the Croatian media, nor had he made any public statement regarding the applicant. The allegation which had provoked the applicant's statement had not been made publicly; nor had it been intended for a public readership. Likewise, it could not be said that Mr Jurašinović had knowingly entered the public sphere.

(b) *The content and form of the statement and its contribution to a debate of public interest* – Contrary

to the findings of the domestic civil courts, the Court found that the impugned statement had been a metaphor and constituted a pure value judgment, and had not therefore been susceptible of proof.

The alleged involvement of a State President in an attempted murder and/or his possible links with organised crime was undoubtedly a matter of public interest. The applicant had had a right to reply to such an accusation and to defend himself, which he had done. However, he had then gone a step further and attempted to discredit Mr Jurašinović as a person to be trusted, by an offensive statement using belittling and impertinent terms. There was nothing to suggest that the applicant could not have denied the accusations against him without using the impugned language. By personally insulting Mr Jurašinović, the applicant had made no contribution to a debate on a matter of public interest and had gone beyond the limits of acceptable criticism.

Regarding the form of the statement, the applicant had made it when he had been the State President and it had been widely distributed by various media outlets. It had thus been capable of causing greater harm to the reputation of Mr Jurašinović.

(c) *The applicant's status as a high-ranking State official and Mr Jurašinović's status as an advocate* – Regarding high-ranking State officials, on the one hand, the Court had emphasised freedom of expression. In order to protect their free speech in the exercise of their functions and to maintain the separation of powers of the State, it was acceptable in a democratic society for States to afford functional immunity to their heads of State (see *Urechean and Pavlicenco v. the Republic of Moldova*). On the other hand, the Court had also acknowledged that, generally speaking, albeit in different circumstances, words spoken by high-ranking State officials carried more weight (see, for example, *Peša v. Croatia* and *Ivanovski v. the former Yugoslav Republic of Macedonia*).

Meanwhile, the Court had emphasised that lawyers play a vital role in the administration of justice and that the free exercise of the profession of a lawyer is indispensable to the full implementation of the fundamental right to a fair trial guaranteed by Article 6 (see, for example, *Morice v. France* [GC]).

It was also mindful of the occurrence of harassment, threats and attacks against lawyers in many Council of Europe member States. In the present case, the statement had not constituted a threat of involuntary psychiatric confinement. Nonetheless, high-ranking State officials attacking the reputation of lawyers and making them objects of derision with a view to isolating them and damaging their credibility – as the applicant had done in the present case – was often as effective as a threat in preventing lawyers from exercising their professional duties. Such statements could have serious consequences for the rights of the accused and the right of access to a court, which are essential components of the right to a fair trial guaranteed by Article 6 § 1.

Further, at the time that the impugned statement was made, Mr Jurašinović had been bound by the secrecy of the criminal investigation in France. That had precluded him from replying and placed him in an even more disadvantageous position *vis-à-vis* the applicant, a powerful public figure who, because of his role, had enjoyed great media attention.

(d) *Consequences of the statement and the severity of the sanction* – The applicant had been ordered to pay approximately EUR 6,660 in non-pecuniary damages. While the size of the award might appear substantial, the Court reiterated its findings that:

– words spoken by high-ranking State officials carried more weight and, consequently, statements made by them that were injurious to the reputation of others caused greater harm;

– the applicant's statement, to which Mr Jurašinović had not been in a position to reply, had been widely distributed by various media outlets; moreover,

– the applicant's statement had also been capable of having a "chilling" dissuasive effect on Mr Jurašinović's exercise of his professional duties as an advocate.

Therefore, the award of damages had been an appropriate sanction to neutralise the chilling effect and proportionate to the legitimate aim of protecting the reputation of Mr Jurašinović.

Having regard to all the foregoing considerations, the interference had been "necessary in a democratic society".

Conclusion: no violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 6 § 1, in that the length of the applicant's appeal proceedings before the domestic courts had been excessive and failed to meet the "reasonable time" requirement.

Article 41: EUR 2,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Peša v. Croatia*, 40523/08, 8 April 2010; *Urechean and Pavlicenco v. the Republic of Moldova*, 27756/05 and 41219/07, 2 December 2014, Legal Summary; *Ivanovski v. the former Yugoslav Republic of Macedonia*, 29908/11, 21 January 2016, Legal Summary; *Morice v. France* [GC], 29369/10, 23 April 2015, Legal Summary)

ARTICLE 11

Freedom of association/Liberté d'association

Criminal conviction of trade union representative, for refusing to admit would-be members to join, not necessary in a democratic society: *violation*

Caractère non nécessaire dans une société démocratique de la condamnation pénale d'un représentant syndical pour rejet de demandes d'adhésion : *violation*

Vlahov – Croatia/Croatie, 31163/13, Judgment/Arrêt 5.5.2022 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant, a representative of a local branch of the Croatian Customs Officers' Trade Union at the relevant time, was criminally convicted after he refused the applications of fifteen individuals to join the trade union. The applicant appealed against the conviction unsuccessfully.

Law – Article 11: The applicant's criminal conviction had amounted to an interference which had been prescribed by law. The Court proceeded on the assumption that it had had the aim of protection of the rights and freedoms of others, namely the fifteen would-be members, to exercise their right of association without undue hindrance.

The Court therefore had to determine whether the interference had been necessary in a democratic society. The question that arose in the present case concerned the extent to which the State could intervene to protect the would-be trade union members from the hindrance of their right to associate, taking into account the applicant's rights and those of the trade union, which he at the relevant time had represented, to control their membership by deciding with whom they wanted to associate.

The trade union in question operated as an independent and autonomous trade union designed to protect the employment rights and interests of customs officers. It had no public powers and its membership was purely on a voluntary basis. Its major source of income was membership fees, and it received no direct financial support from the State or other public funds. It was also not the only trade union representing customs officers, and there was no closed shop agreement in that area. The particular branch of the union which the applicant had represented had been a relatively small organisation comprising some thirty members at the relevant time.

As there was no closed shop agreement, it was not apparent that the fifteen would-be members had suffered, or had been liable to suffer, any particular detriment or hardship in terms of their livelihood or their conditions of employment owing to their inability to join the applicant's trade union at the relevant time. They had been free to join the other existing trade union and/or establish their own or to protect their rights through legal proceedings concerning the conditions of employment. There was therefore nothing to suggest that they had been at any individual risk of, or unprotected from, possible adverse actions by the employer.

There was also no indication that the would-be members had been subject to discriminatory treatment by the applicant. Nor had any issue arisen as regards the rules and Statute of the union itself. Rather, a dispute arose over the question whether the applicant had acted in an abusive and unreasonable manner in breach of the union rules when refusing to admit the would-be members. In particular, the Government had argued that the applicant had acted contrary to the Statute of the relevant trade union when refusing to admit the would-be members.

There had been no authoritative guidance on how to interpret the trade union internal rules on the admission of new members, as provided for in its internal regulations. At the same time, the domestic courts' reasoning had been very succinct and had not elaborated on the considerations related to the applicant's compliance with the relevant rules and the Statute, seen in the light of the relevant domestic law and the requirements of Article 11.

In particular, the Statute had provided no specific requirements for the admission of new members. The applicant had eventually, albeit after the change in the membership of the union, been removed from his position of trade union representative by a great majority of the vote of the members. However, there had been nothing to suggest at the relevant time that he had not represented the interests of the union or of other members of the union branch, who had not instituted any action against him under domestic law after he had informed them of the refusal to admit the would-be members. Indeed, according to the internal union regulations and Statute, the applicant's position had included taking actions to represent the union and to protect the interests of its members.

Moreover, there had been established procedures allowing the would-be members to eventually join the trade union, and the applicant's actions had not been intended to deny their admission as such, but to delay the decision on extension of membership until an upcoming ordinary annual assembly of the union. In that connection, it had not been suggested that the applicant had had institutional

or other power to decide for the assembly whether the membership would be extended, or to prevent the admission of new members contrary to the decision of the assembly, which was the highest body of the union. However, the domestic courts had not explained how those considerations related to the applicant's conduct when refusing the admission of the would-be members.

In that connection, the domestic courts had refused the applicant's proposal to take further evidence, something which arguably could have shed light on the circumstances in which the would-be members had wanted to join the trade union. In so doing, the courts had merely noted that his request had been irrelevant, which, given the circumstances, could not be considered a properly reasoned decision.

Conclusion: violation (unanimously).

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

(See also *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, 11002/05, 27 February 2007, Legal Summary)

Freedom of association/Liberté d'association

Refusal to authorise a political party to hold a congress in various towns, on the grounds that it had insufficient local branches, as a precondition for being able to put up candidates in parliamentary elections: *no violation*

Refus d'autoriser un parti politique à tenir un congrès dans des villes, faute d'y avoir des structures locales suffisantes, pour pouvoir se présenter aux élections législatives : *non-violation*

Yeşiller ve Sol Gelecek Partisi – Turkey/Turquie, 41955/14, Judgment/Arrêt 10.5.2022 [Section II]

English translation of the summary – Version imprimable

En fait – Le Conseil électoral supérieur (« le CES ») a refusé d'autoriser le requérant, un parti politique, à tenir un congrès local respectivement dans les trois villes d'Ankara, d'Antalya et d'Artvin pour pouvoir se présenter aux élections législatives. Il ne remplissait pas les critères exigés par la loi à savoir qu'il n'avait pas de structures locales respectivement dans au moins un tiers des communes de ces trois villes.

En droit – Article 11 : Le refus d'autoriser le requérant à tenir un congrès local respectivement dans les trois villes s'analyse en une ingérence dans l'exercice par l'intéressé de son droit à la liberté d'association, prévue par la loi et poursuivant les buts légitimes de la défense de l'ordre public ainsi que de la protection des droits et libertés d'autrui.

Le requérant était libre de mener ses activités politiques dans les trois villes et dans les communes de ces villes où il n'avait pas encore de structures ou de représentations locales. Il était libre de faire la propagande de ses idées, en tenant des réunions publiques pacifiques, au sens de l'article 11 de la Convention, pour recruter des adhérents et créer des sections locales dans les communes où il n'était pas représenté. De plus, il ressort des décisions du CES que le requérant a été informé qu'il pouvait réitérer sa demande de tenir un congrès local dans les villes concernées une fois qu'il aurait atteint le quorum légal requis.

L'exercice par l'intéressé de son droit à la liberté d'association, conformément à l'article 11 de la Convention, doit aussi s'envisager à la lumière de son droit de participer aux élections législatives, conformément à l'article 3 du Protocole n° 1, domaine dans lequel les États jouissent d'une grande latitude à cet égard. En l'occurrence, les décisions du CES se fondent sur le fait que le législateur national a souhaité apporter des conditions spécifiques pour qu'un parti politique puisse tenir un congrès pour, ensuite, pouvoir se présenter aux élections législatives. Ainsi, la tenue d'un congrès par tout parti politique à l'échelle locale, régionale puis nationale constitue des étapes importantes dans le fonctionnement des partis politiques pour qu'ils puissent à terme se présenter aux élections législatives en ayant une assise nationale entière et pleine. La volonté du législateur était de réguler la représentation des partis politiques sur l'ensemble du territoire à l'échelle nationale (telles les grandes métropoles) comme à l'échelle locale (tels les villages) pour tenir un congrès. Le contrôle opéré par le CES consistait à vérifier si les conditions spécifiques posées par le législateur étaient remplies par le requérant en se fondant sur des faits concrets.

Nonobstant les décisions rendues par le CES, la Cour ne relève aucune autre ingérence des autorités internes pour empêcher ou perturber les activités associatives menées par le requérant pour remplir les conditions exigées par la loi pour tenir un congrès local. La décision du CES rejetant la demande du requérant se fonde sur une appréciation factuelle et objective relative à l'insuffisance de l'implantation des structures du requérant à l'échelle locale dans l'ensemble des communes des villes concernées. La décision du CES n'était pas fondée sur des critères tirés par exemple des activités associatives illégales menées par le requérant et pouvant ainsi porter atteinte à l'intégrité du territoire ou bien sur des activités incompatibles avec l'article 11 ou encore en raison d'une atteinte à l'ordre constitutionnel, d'une manière générale,

pouvant ainsi porter atteinte à l'État de droit. Ainsi, le requérant n'a pas été empêché de se livrer à son droit à la liberté d'association ou de mener ses activités politiques conformément à ces statuts et à la loi en vigueur.

En conséquence, les motifs avancés dans les décisions litigieuses ainsi que ceux du législateur ne constituent pas un empêchement pour le requérant d'exercer son droit à la liberté de mener ses activités associatives en sa qualité de parti politique.

À la lumière de ce qui précède, les motifs indiqués par le CES étaient pertinents et suffisants, et l'ingérence était proportionnée au but légitime poursuivi dans une société démocratique.

Conclusion : non-violation (unanimité).

La Cour conclut aussi à l'unanimité à la non-violation de l'article 13 combiné avec l'article 11, car le requérant a joui d'un recours effectif devant une instance nationale en s'adressant au CES, la plus haute juridiction nationale compétente pour statuer sur de tels litiges selon le droit national en vigueur.

ARTICLE 13

Effective remedy/Recours effectif

Ineffective domestic judicial remedies for complaints as to inadequate conditions of detention: *violation*

Ineffectivité des recours judiciaires internes pour se plaindre des conditions de détention : *violation*

Volodya Avetisyan – Armenia/Arménie, 39087/15, Judgment/Arrêt 3.5.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant was held in pre-trial detention for approximately a year and a half. He alleged that the cells in the prison were overcrowded and that there were a number of other inadequacies in detention conditions.

At domestic level, the applicant lodged a complaint with the General Jurisdiction Court of a district ("the District Court"), asking them to acknowledge and put an end to the ongoing violation of his rights under Article 3 resulting from his detention conditions, and to provide compensation in respect of non-pecuniary damage. His complaint was dismissed for being outside the competence of the District Court, and that the matter fell rather within the competence of the Administrative Court. On appeal, the Civil Court of Appeal quashed the decision against the applicant, reasoning that the applicant's application had raised criminal-law matters which came within the scope of the courts of general jurisdiction, whereas the District Court had examined it under the rules of civil procedure. Subsequently, the District Court again declared the applicant's application inadmissible under the rules of civil procedure. The applicant appealed unsuccessfully up to the Court of Cassation.

Law – Article 13 in conjunction with Article 3: The Government had argued that the applicant had failed to exhaust domestic remedies. The issue was closely linked to the merits of the applicant's complaint that he had not had at his disposal an effective remedy for his complaint under Article 3 regarding the alleged inadequate conditions of his detention. The Court therefore joined the Government's objection to the merits of the complaint under Article 13.

The Court had previously rejected objections of non-exhaustion raised by the Armenian Government in cases concerning inadequate conditions of detention (see *Kirakosyan v. Armenia* and *Gaspari v. Armenia*). In the present case, the Government had raised a new ground for its objection, mainly based on the argument that, by submitting a civil claim instead of instituting administrative or criminal proceedings, the applicant had made use of a clearly futile remedy. The Government, however, had failed to submit any argument or evidence regarding the effectiveness of those remedies in respect of the applicant's particular complaints.

Firstly, it was not clear what result could have been achieved in the applicant's situation by applying to a judicial authority, whether administrative or criminal, against the penitentiary service and the prison authority, considering that the issues raised had apparently been of a structural nature. The Government had failed to explain the scope of such potential judicial review and the kind of redress the applicant could have obtained had he pursued any of those remedies, in particular, any preventive and compensatory measures that the courts could have ordered. They had neither referred to any specific domestic rules nor provided any examples of domestic judicial decisions taken in relevantly similar cases.

Secondly, there had been confusion in domestic law and practice at the material time as to which procedure – administrative or criminal – had to be pursued when lodging complaints against penitentiary authorities, with disagreement on the matter between the District Court and Court of Appeal. The Government had also referred to both remedies without, however, clarifying which of the two had been applicable to the applicant's case. That ambiguity had been acknowledged in 2019 by the

Constitutional Court, which had called for legislative amendments in order to resolve the issue and, pending such changes, had assigned such cases, with some exceptions, to the Administrative Court. The remedies referred to had therefore, in addition, lacked the requisite clarity at the material time.

Thirdly, the Government's argument that the applicant had had to apply to the Constitutional Court, in order to have his claim subsequently examined by the Administrative Court, could not be accepted. The Court had previously held that the constitutional remedy was generally not considered as a domestic remedy to be exhausted due to the specificities of the judicial role of the Armenian Constitutional Court (see *Gevorgyan and Others v. Armenia* (dec.)) and there was no reason to depart from that conclusion in the present case.

For those reasons, none of the judicial review proceedings indicated by the Government had provided an effective domestic remedy for the applicant's complaints regarding the allegedly inadequate conditions of detention, had been available both in theory and in practice, and been capable of preventing the continuation of the alleged violation and, if necessary, providing compensation for the damage sustained, as required by Article 13.

Conclusion: preliminary objection dismissed; violation (unanimously).

The Court also held, unanimously, that there had been a violation of Article 3 (substantive aspect), in that the cumulative effects of the applicant's conditions of detention, including the amount of personal space accorded to him, had amounted to degrading treatment.

Article 41: EUR 3,900 in respect of non-pecuniary damage.

(See *Kirakosyan v. Armenia*, 31237/03, 2 December 2008; *Gaspari v. Armenia*, 44769/08, 20 September 2018; and *Gevorgyan and Others v. Armenia* (dec.), 66535/10, 14 January 2020)

ARTICLE 14

Discrimination (Article 3)

Failure to protect LGBT bar owner and activist from homophobic arson, physical and verbal attacks and to carry out effective investigation: *violation*

Absence de protection de la propriétaire d'un bar militante LGBT contre un incendie criminel et des agressions physiques et verbales homophobes, et absence d'enquête effective : *violation*

Oganezova – Armenia/Arménie, 71367/12 and/et 72961/12, Judgment/Arrêt 17.5.2022 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant is a well-known member of the lesbian, gay, bisexual and transgender (LGBT) community in Armenia and has been involved in promoting the rights of LGBT persons both in her country and internationally. The applicant co-owned and managed a bar in the centre of Yerevan, a place where members of the LGBT community would meet to socialise. Following the broadcast of her interview in which she had mentioned her participation in a gay pride march, she became the subject of an online hate campaign, intimidation and threats on the basis of her sexual orientation. This culminated in an arson attack on the bar in May 2012 which caused significant damage. After this attack and that same month, the bar in general and the applicant personally became the target of continued aggression almost every day and lasting more than two weeks, by a number of individuals. The applicant was subjected to death threats, physical mobbing and hate speech, including online. In June 2012 she left Armenia for Sweden where she applied for asylum on the basis of persecution due to her sexual orientation. Two of the perpetrators of the arson attack were convicted of intentionally causing damage to property and received a suspended prison sentence which the applicant unsuccessfully appealed against.

Law – Article 3 read in conjunction with Article 14

(a) *Threshold of severity* – The fact that the applicant had not suffered actual physical injury at the hands of the perpetrators of the arson attack or any other individual engaged in the subsequent events was not decisive. She had become the target of a sustained and aggressive homophobic campaign which had eventually led to her to permanently leave the country where she had lived her entire life and had her family and social ties. In assessing the incidents in question, the Court bore in mind the precarious situation the LGBT community found itself in the respondent State, as it transpired by the various reports on the overall sentiment towards that community. Against that background, the discriminatory nature of the events and the level of vulnerability of the applicant, who had publicly positioned herself with the target group of sexual prejudice, were particularly apparent. The aim of the attacks had evidently been to frighten the applicant so that she would desist from her public expression of support for the LGBT community, including her community-oriented activism by running the bar as a communal project. They had also resulted in the applicant being deprived of her livelihood as a result of the loss of her source of income

from her destroyed business. It was clear that the behaviour of the perpetrators of the arson attack as well as the persons involved in the applicant's subsequent harassment had been premeditated, motivated by homophobic bias and aimed at deterring the applicant from reopening the bar. Further, at one point the applicant had to physically confront unknown men who had directly threatened and seriously humiliated her.

The applicant's emotional distress must have been further exacerbated by the fact that the police had failed to react properly and in a timely manner; they had only put in place protection measures in respect of her and her closest relations more than a week after she had requested protection for the first time and those measures had been discontinued only five days later without there being any indication that the applicant and her close relations were no longer at risk of ill-treatment. The situation that the applicant had thus found herself in as a result of all the attacks on her person motivated by homophobic hatred must necessarily have aroused in her feelings of fear, anguish and insecurity which had not been compatible with respect for her human dignity and, therefore, reached the threshold of severity within the meaning of Article 3 taken in conjunction with Article 14.

(b) *As regards the alleged ineffective investigation into the arson attack* – Albeit carrying out a prompt and reasonably expeditious investigation into the arson attack, the police had not taken any investigative measures at the scene. It had been the efforts of the employees of a nearby business and of the applicant and her associates that had led to two of the perpetrators being identified and later apprehended, resulting in the authorities having no difficulty in resolving the case. Although the hate motive had been overt from the very outset and despite unequivocal and direct evidence that setting the bar on fire had been motivated by the applicant's sexual orientation and the bias towards the LGBT community in general, the arson attack had been addressed by the investigative authorities and subsequently the courts as an ordinary crime of arson, effectively ignoring the hate-based nature of the offence in terms of legal consequences. This fundamental aspect of the crime had effectively been rendered invisible and of no criminal significance.

The existence of the evidence in this case mandated for an effective application of domestic criminal-law mechanisms capable of elucidating the hate motive with homophobic overtones behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible. No such mechanisms, however, existed in domestic criminal law which did not provide that discrimination on the grounds of sexual orientation and gender identity should be treated as a bias motive and an aggravating circumstance in the commission of an offence. Furthermore, Article 226 of the Criminal Code, which criminalised incitement to hatred, did not refer to sexual orientation and gender identity. The relevant recommendation by the European Commission against Racism and Intolerance in this respect had not been followed.

Given the clear hate motive behind the arson attack on the bar and the precariousness of the situation of the LGBT community in the respondent State, it had been essential for the relevant domestic authorities to adequately address the issue of discrimination motivating the arson attack on the bar. Without such a rigorous approach on the part of the law-enforcement authorities, prejudice-motivated crimes would inevitably be treated on an equal footing with cases involving no such overtones, and the resultant indifference could be tantamount to official acquiescence in, or even connivance with, hate crimes. Moreover, a failure to make a distinction in the way situations that were essentially different are handled might constitute unjustified treatment irreconcilable with Article 14.

The authorities had thus failed to discharge their positive obligation to investigate in an effective manner whether the arson attack which had been motivated by the applicant's sexual orientation constituted a criminal offence committed with a homophobic motive. Notwithstanding, there was no basis to find that it had been a discriminatory state of mind that had been at the core of this failure.

(c) As regards the authorities' reaction and the follow-up given to the applicant's complaints concerning the post-arson attacks and hate speech

(i) *Post-arson attacks* – No investigative measures had been taken whereas the protection measures had been put in place belatedly and had been discontinued after five days for reasons that remained unclear. Considering that the police had decided to put in place such measures because they had assessed that there existed "a real danger threatening the applicant's life, health and property", the decision to lift them had necessitated a careful reassessment of the persistence of the very same risks. Furthermore, there was no indication of any follow-up to the applicant's complaints and none of the violent incidents had been mentioned in the indictment nor the subsequent judicial decisions. In any event the law-enforcement authorities would not have had any legal possibility to properly address the incidents by, in particular, subjecting their homophobic motivation to a proper evaluation under domestic law, in line with the requirements of the Convention. The authorities had thus failed

to provide adequate protection to the applicant from the bias-motivated attacks by private individuals following the arson attack and to conduct a proper investigation of the applicant's allegations of abuse motivated by homophobia.

(ii) *Hate speech* – There was no indication that there had been any meaningful follow-up to the applicant's complaints despite the evidence she had submitted to the police. As in the case of *Beizaras and Levickas v. Lithuania*, the hateful comments in the present case had contained undisguised calls for violence against the applicant which had required protection by criminal law. No such possibility, however, existed under domestic criminal law. In addition, having regard to the actual acts of violence, which had preceded the online verbal abuse, the authorities should have had taken the hateful comments posted on social-media platforms more seriously. Instead, parliamentarians and high-ranking politicians themselves had made intolerant statements by publicly endorsing the actions of the perpetrators of the arson attack. Although domestic law had since evolved prohibiting hate speech, sexual orientation and gender identity were still not included in the characteristics of victims of the offence of hate speech despite the recommendations of the relevant international bodies in that respect. Consequently, the authorities had also failed to respond adequately to the homophobic hate speech of which the applicant had been a direct target because of her sexual orientation.

Conclusion: violation (unanimously).

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

(See *Beizaras and Levickas v. Lithuania*, 41288/15, 14 January 2020, Legal Summary; see also *Identoba and Others v. Georgia*, 73235/12, 12 May 2015, Legal Summary; *M.C. and A.C. v. Romania*, 12060/12, 12 April 2016, Legal Summary; *Association ACCEPT and Others v. Romania*, 19237/16, 1 June 2021, Legal Summary)

Discrimination (Article 8)

Revocable and reviewable order prohibiting a Jehovah's Witness from actively involving his young child, brought up in Catholicism, in his religious practice: *no violation*

Ordonnance révisable et révocable interdisant à un témoin de Jéhovah de faire participer activement sa jeune enfant, élevée dans la foi catholique, à ses pratiques religieuses : *non-violation*

T.C. – Italy/Italie, 54032/18, Judgment/Arrêt 19.5.2022 [Section I]

Traduction française du résumé – Printable version

Facts – In the context of child custody proceedings, a disagreement arose between the applicant, a Jehovah's Witness, and his daughter's mother, a Roman Catholic, for actively involving his daughter in his religious practice after their separation and the means he had been using in doing so. In particular, he had been concealing this from the mother and asking his daughter to also do so. The child had been baptised in the Roman Catholic Church and had been brought up since her birth in a Catholic family and social environment. She also participated in religious discussions and prayers at the applicant's home and attended Jehovah's Witnesses religious services from the age of 3 until the age of 8, when the domestic courts ordered the applicant to refrain from actively involving her in his religious practice. It remained open to him to communicate his beliefs to her.

Law – Article 14 taken in conjunction with Article 8, read in the light of Article 9: The domestic decisions had limited the applicant's relationship with his daughter, constituting thus an interference with his right to respect for family life. However, practical arrangements for exercising parental authority over children defined by the domestic courts could not, as such, infringe an applicant's freedom to manifest his or her religion. Further, the priority aim was to take into account the best interests of children, which involved reconciling the educational choices of each parent and attempting to strike a satisfactory balance between the parents' individual conceptions, precluding any value judgments and, where necessary, laying down minimum rules on personal religious practices.

The first question thus to be examined was whether the applicant could claim to have received different treatment from the mother of the child based on religion. The Court found that he could not for the following reasons.

In their decisions the domestic courts had had regard above all to the child's interests. These lay primarily in the need to maintain and promote her development in an open and peaceful environment, reconciling as far as possible the rights and convictions of each of her parents. At the same time, both the expert's report and the domestic courts' decisions had referred to the fact that involving the child in the applicant's religious practices would have destabilised her in that she would be induced to abandon her Roman Catholic religious habits. They had also mentioned the applicant's behaviour and the means he had been using to involve his daughter in his religious practices.

Even assuming that the parents could be considered to have been in comparable situations, the

contested measure had had little influence on the applicant's religious practices and had in any event been aimed solely at resolving the conflict arising from the opposition between the two parents' educational concepts, with a view to safeguarding the child's best interests. Further, no measure had been adopted to prevent the applicant from using the educational principles he had opted for in relation to his daughter. Nor had he been prevented from taking part in the activities of the Jehovah's Witnesses in a personal capacity. Rather, as demonstrated by the attenuated nature of the contested measure, the national authorities had attempted to reconcile the rights of each party.

The Court also observed that the said order had not severely circumscribed his relationship with his daughter. In particular, he had suffered no restrictions on his custody and visiting rights. The reasons given by the domestic courts showed that they had focused solely on the child's interests, having decided to protect her from the purported stress exerted by the applicant's intensive efforts to involve her in his religious activities. Following the expert's report, the domestic courts had concluded that these efforts would have been harmful for her. Thus, unlike the case of *Palau-Martinez v. France* in which a violation of Article 8 in conjunction with Article 14 was found on account of the fact that residence rights had been determined on the basis of the applicants' religious beliefs, in the present case, the sole purpose of the contested measure had been to preserve the child's freedom of choice by taking into account her father's educational views. Lastly, given that circumstances might change over time and the domestic decisions were not final and could therefore be revoked at any time, the applicant could reapply to the first instance court for a review of its decision on the matter.

Conclusion: no violation (five votes to two).

(See *Palau-Martinez v. France*, 64927/01, 16 December 2003, Legal Summary, and *Abdi Ibrahim v. Norway* [GC], 15379/16, 10 December 2021, Legal Summary)

Discrimination (Article 8)

No discrimination against wheelchair user unable to access two local public buildings, given other considerable measures to improve accessibility: *no violation*

Pas de discrimination envers une personne en fauteuil roulant dans l'impossibilité d'accéder à deux bâtiments gérés par l'administration locale, compte tenu des autres mesures importantes prises par cette dernière pour améliorer l'accessibilité : *non-violation*

Arnar Helgi Lárusson – Iceland/Islande, 23077/19, Judgment/Arrêt 31.5.2022 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant is paralysed from the chest down and uses a wheelchair for mobility. Before the domestic courts, and together with an association of people with spinal injuries, he brought unsuccessful civil proceedings challenging a lack of wheelchair access in two buildings housing arts and cultural centres run by his municipality. The plaintiffs appealed up to the Supreme Court without success.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – In the present case, the situation had to be distinguished from earlier Court case-law where it had found that the lack of wheelchair access had not fallen within the ambit of private life:

– Unlike in *Botta v. Italy* (21439/93, 24 February 1998, Legal Summary), the accessibility issue in the present case concerned buildings owned and/or operated by and located in the applicant's own municipality;

– Unlike in *Zehnalová and Zehna v. the Czech Republic* (dec.) (38621/97, 14 May 2002, Legal Summary), the applicant had identified a small, clearly defined number of buildings where access was lacking and had explained how the lack of access to each of those buildings had affected his life; and

– Unlike the situation in *Glaisen v. Switzerland* (dec.) (40477/13, 25 June 2019, Legal Summary), the present case did not concern merely one of several similar, privately run cultural venues.

The first building was the municipality's "main arts and cultural centre", and it was not evident that the applicant could access similar cultural and social events and services at other venues in his municipality. Admittedly, the second building was primarily aimed at children and teenagers, but it was nevertheless a public building whose hall was rented out for activities and events, including those which could be attended by children. No other buildings in the municipality had been available which had had an equivalent purpose.

The applicant had thus clearly identified two particular buildings which were publicly owned and/or operated and which appeared to play an important role in local life in his municipality, which was home to fewer than 20,000 inhabitants. The lack of access to the first had hindered the applicant's participation in a substantial part of the cultural activities that his community had to offer, and the lack of access to the second had hindered him from attending birthday parties and other social events with his children.

The Court was conscious of the importance of enabling people with disabilities to fully integrate into society and participate in the life of the community,

which had been emphasised by the Council of Europe and led to significant developments in European and international standards. Without access to the physical environment and to other facilities and services open or provided to the public, people with disabilities would not have equal opportunities for participation in their respective societies.

Against that background, and in the light of the circumstances of the case, the matter at issue was liable to affect the applicant's right to personal development and right to establish and develop relationships with other human beings and the outside world. Consequently, the matter fell within the ambit of "private life" within the meaning of Article 8. It followed that Article 14, taken together with Article 8, was applicable.

(b) *Merits* – In previous cases concerning the rights of people with disabilities, the Court, referring to the UN Convention on the Rights of Persons with Disabilities ("the CRPD"), had found that Article 14 had to be read in the light of the requirements of those texts regarding "reasonable accommodation" – understood as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case" – which people with disabilities were entitled to expect in order to ensure "the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 of the CRPD). Such reasonable accommodation helps to correct factual inequalities which are unjustified and which therefore amount to discrimination. Those considerations applied equally to the participation of people with disabilities in social and cultural life. In that regard, Article 30 of the CRPD explicitly required States Parties to guarantee to people with disabilities the opportunity to take part on an equal basis with others in cultural life.

The present case had to be considered from the viewpoint of whether or not the national authorities had complied with their positive obligation to take appropriate measures to enable the applicant, whose mobility was impaired due to disability, to exercise his right to private life on an equal basis with others. For that assessment, and taking account of the facts of the case, the test to be applied was limited to examining whether the State had made "necessary and appropriate modifications and adjustments" to accommodate and facilitate persons with disabilities, like the applicant, which, at the same time, did not impose a "disproportionate or undue burden" on the State. The Court proceeded to assess whether the respondent State had fulfilled its duty to accommodate the applicant, as a person with disabilities, in order to correct factual inequalities, applying the above-outlined test.

The Court had not benefitted from a prior assessment by the national courts of the balancing of the competing interests and whether sufficient steps had been taken to accommodate the accessibility needs of people with disabilities, including the applicant. Nevertheless, taking account of the nature and limited scope of its assessment, and the State's wide margin of appreciation, the Court was not convinced that the lack of access to the buildings in question had amounted to a discriminatory failure by the respondent State to take sufficient measures to correct factual inequalities in order to enable the applicant to exercise his right to private life on an equal basis with others.

In that regard, considerable efforts had been made to improve accessibility of public buildings and buildings with public functions in the municipality following a parliamentary resolution in 2011. In deciding on those improvements, the municipality had prioritised improving accessibility to educational and sports facilities, which was neither an arbitrary nor unreasonable strategy of prioritisation, also considering the emphasis which the Court had placed on access to education and educational facilities in its case-law. Further accessibility improvements which had since been made demonstrated a general commitment to work towards the gradual realisation of universal access in line with the relevant international materials. In the circumstances of the present case, imposing on the State a requirement to put in place further measures would have amounted to imposing a "disproportionate or undue burden" on it within the context of its positive obligations established by the Court's case-law to reasonably accommodate the applicant.

The respondent State and municipality had therefore taken considerable measures to assess and address accessibility needs in public buildings, within the confines of the available budget and having regard to the cultural heritage protection of the buildings in question.

In the light of the above, and considering the measures already undertaken, the applicant had not been discriminated against in the enjoyment of his right to respect for private life.

Conclusion: no violation (six votes to one).

ARTICLE 46

Execution of judgment – Individual measures/Exécution de l'arrêt – Mesures individuelles

Respondent state required to take desegregation measures in an elementary school attended almost exclusively by Roma and Egyptian children

État défendeur tenu de prendre des mesures d'abolition de la ségrégation dans une école primaire fréquentée presque exclusivement par des enfants roms et égyptiens

X and Others/et autres – Albania/Albanie, 73548/17 and/et 45521/19, Judgment/Arrêt 31.5.2022 [Section III]

(See Article 1 of Protocol No. 12 below/Voir l'article 1 du Protocole n° 12 ci-après)

ARTICLE 1 OF PROTOCOL No. 12/ DU PROTOCOLE N° 12

General prohibition of discrimination/ Interdiction générale de la discrimination

Failure to implement swift and comprehensive desegregation measures in an elementary school attended almost exclusively by Roma and Egyptian children: *violation*

Absence de mise en œuvre de mesures rapides et complètes d'abolition de la ségrégation dans une école primaire fréquentée presque exclusivement par des enfants roms et égyptiens : *violation*

X and Others/et autres – Albania/Albanie, 73548/17 and/et 45521/19, Judgment/Arrêt 31.5.2022 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants are Albanian nationals of Roma and Egyptian ethnic origin forming different households. Their children attended the "Naim Frashëri" elementary school in Korça. During the 2012/19 academic years, the school was attended almost exclusively by children of the Roma and Egyptian minorities. Since 2012 the Government have implemented a food support programme whereby food packages have been provided to Roma and Egyptian pupils attending that school with the aim of increasing school attendance rates of the children of those communities. Eventually, segregation complaints by the European Roma Rights Centre (ERRC) and another organisation, resulted in a binding decision by the Commissioner against Discrimination, on 22 September 2015, finding that the Roma and Egyptian children of that school were suffering indirect discrimination on account of their over-representation in the school and ordering the competent bodies requesting the Government to take desegregation measures. The applicants complained that the authorities had failed to implement such measures.

Law – Article 1 of Protocol No. 12

(a) *Exhaustion of domestic remedies* – The applicants had not been required to file a discrimination claim with the domestic courts, which would essentially have had the same objective as the ERRC's action before the Commissioner and which, in any event, had not been shown to be an effective remedy in the present case. In the absence of an appeal by the authorities against the Commissioner's decision, that decision had become final and enforceable.

(b) *Merits* – The right to inclusive education, in the enjoyment of which the applicants had alleged to have been treated differently, was provided for by domestic law. It had not been disputed in the domestic proceedings or before the Court that the applicants' situation had amounted to segregation and that desegregation measures had been called for. Nor had the applicants contested the Government's position that the situation had been unintentional. Notwithstanding discrimination that was potentially contrary to the Convention might result from a *de facto* situation and did not necessarily require discriminatory intent.

The salient question in the instant case was therefore whether the Government had complied with their positive obligation to take steps to correct the applicants' factual inequality and to avoid the perpetuation of the discrimination that had resulted from their over-representation in the school thereby breaking their circle of marginalization and allowing them to live as equal citizens from the early stages of their life. The Court replied in the negative. First of all, although two measures had been taken by the authorities to address the applicants' segregation, these had been implemented with delays which had been incompatible both with the time sensitivity of a situation where children had been segregated and the Commissioner's decision that measures be taken "immediately". More specifically, the decision to remove the ethnicity criterion for the pupils that benefited from the food support programme, in an effort to attract pupils of all ethnicities in the school, had been adopted almost one and a half years after the Commissioner's decision whereas the renovation of the school building had ended four years after that decision. Secondly, the Government had not set forth any objective reason for failing to implement the measures that had been discussed by the competent Ministry, namely the extension of the food support programme to four additional schools in the area – which could presumably have had encouraged some of the Roma/Egyptian pupils of the school to move to other schools – and the merger of the "Naim Frashëri"

school with three other non-segregated schools. Both these measures had been likely to have a had more immediate beneficial effect on the Roma and Egyptian children. In this regard, the Court was unable to accept the authorities' justification that the merger had not been implemented due to the reconstruction of the "Naim Frashëri" school, as the reconstruction work had lasted only for a limited period of time. Indeed, the merger appeared a very pertinent solution and could have contributed to the creation of schools where the ratio between Roma/Egyptian and other pupils had been reasonably proportional to the city-wide ratio for elementary schools. The authorities had already implemented similar solutions in respect of segregated schools elsewhere in the country where in addition they had also provided transportation for the pupils. While it was not for the Court to indicate the specific measures to be undertaken to remedy a school segregation situation, it was nevertheless difficult to understand the reasons why this approach had not been implemented in the present case too.

The Court had already found a violation of the prohibition of discrimination in a similar context in *Lavida and Others v. Greece* where the State had failed to implement desegregating measures. Likewise, in the instance case, the delays and the non-implementation of appropriate desegregating measures could not be considered as having had an objective and reasonable justification.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 per applicants' household in respect of non-pecuniary damage.

Article 46: The respondent State had to take measures to end the discrimination of Roma and Egyptian pupils of the "Naim Frashëri" school as ordered by the Commissioner's decision.

(See *Lavida and Others v. Greece*, 7973/10, 30 May 2013; see also *Zarb Adami v. Malta*, 17209/02, 20 June 2006, Legal Summary; *D.H. and Others v. the Czech Republic* [GC], 57325/00, 13 November 2007, Legal Summary; and *Horváth and Kiss v. Hungary*, 11146/11, 29 January 2013)

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

Relinquishments/Dessaisissements

Yalçinkaya – Turkey/Turquie, 15669/20

(See Article 6 § 1 (criminal) above/Voir l'article 6 § 1 (pénal) ci-dessus, page 7)

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