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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

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

European Court of Human Rights

Cour européenne des droits de l'homme

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

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An annual index provides an overview of the cases that have been summarised in the monthly Information Notes. The index for 2019 is cumulative and is regularly updated.

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

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Un index annuel récapitule les affaires résumées dans les Notes d'information. L'index pour 2019 est cumulatif ; il est régulièrement édité.

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Savran – Denmark/Danemark, 57467/15, Judgment/Arrêt 1.10.2019 [Section IV]

Traduction française du résumé | Printable version

Facts – The applicant, a Turkish national diagnosed with paranoid schizophrenia, entered Denmark in 1991 when he was six years old. In 2007 he was convicted of assault under highly aggravating circumstances, which had caused the death of a man. He was sentenced to committal to a secure unit of a residential institution for the severely mentally impaired for an indefinite period and was made subject to an expulsion order. In 2014 the City Court held that, regardless of the nature and gravity of the crime committed, the applicant's health made it conclusively inappropriate to enforce the expulsion order. In 2015 that decision was reversed by the High Court and the applicant was subsequently refused leave to appeal.

Law – Article 3: The High Court had concluded that the applicant would have access to the medical treatment he required upon his return to Turkey. It had noted that the psychiatric treatment would be available at public hospitals and from private healthcare providers who had concluded an agreement with the Turkish Ministry of Health. According to information the High Court had obtained, the applicant would be eligible to apply for free or subsidised treatment and Kurdish-speaking staff would be available to assist him.

The High Court had found that the fact that the applicant was aware of his disease and the importance of adhering to his medical treatment and taking the drugs prescribed would not make his removal conclusively inappropriate. The Court observed, however, that according to the applicant's psychiatrist, the applicant's awareness of his illness would not suffice to avoid a relapse; it was essential that he also had regular supervision. In the light of the statements made by two consultant psychiatrists during the proceedings which insisted on the necessity of a follow-up and control in connection with intensive outpatient therapy, it was noteworthy that the High Court, in contrast to the City Court, had not developed on that issue.

The existence of a social and family network was also one of the important elements to take into account when assessing whether in practice an individual had access to medical treatment. The applicant had maintained that he had no family or other social network in Turkey. Although recognising that there was no medical information pointing to the importance of a family network as part of the applicant's treatment, the Court could not ignore that the applicant was suffering from a serious and long-term mental illness, namely paranoid schizophrenia, and permanently needed medical and psychiatric treatment. To return him to Turkey, where he had no family or other social network, would unavoidably cause him additional hardship, and make it even more crucial that he be provided with the necessary follow-up and control in connection with intensive outpatient therapy. The Court reiterated in that respect, *inter alia*, that according to the psychiatric reports, the applicant had been prescribed a complex course of treatment, which had to be followed carefully. Antipsychotic medication had to be administered on a daily basis, which was deemed to constitute a risk of pharmaceutical failure and which consequently could lead to a worsening of the applicant's psychotic symptoms and thus a greater risk of aggressive behaviour.

Therefore, a follow-up and control scheme was essential for the applicant's psychological outpatient therapy and for the prevention of any degeneration of his immune system, a potential side effect of his medication. For that reason he would, at least, need assistance in the form of a regular and personal contact person. The Danish authorities ought to have assured themselves that, upon his return to Turkey, such assistance would have been available to the applicant.

Accordingly, although the threshold for the application of Article 3 was high in cases concerning the removal of aliens suffering from serious illness, the Court shared the concern expressed by the City Court that it was unclear whether the applicant had a real possibility of receiving the relevant psychiatric treatment, including the necessary follow-up and control in connection with intensive outpatient therapy, if returned to Turkey. That uncertainty

raised serious doubts as to the impact of removal on the applicant. When such serious doubts persisted, the returning State had to either dispel such doubts or obtain individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment would be available and accessible to the persons concerned so that they did not find themselves in a situation contrary to Article 3.

Conclusion: expulsion without the Danish authorities having obtained individual and sufficient assurances would constitute a violation (four votes to three).

(See also *Paposhvili v. Belgium* [GC], 41738/10, 13 December 2016, Information Note 202)

ARTICLE 5

Article 5 § 4

Review of lawfulness of detention/ Contrôle de la légalité de la détention Speediness of review/Contrôle à bref délai

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Ineffectivité totale du mécanisme de contrôle de la détention irrégulière d'une mère migrante et de ses enfants mineurs : *violation*

G.B. and Others/et autres – Turkey/Turquie, 4633/15, Judgment/Arrêt 17.10.2019 [Section II]

Traduction française du résumé | Printable version

Facts – The applicants were Russian nationals, comprising a mother (the first applicant) and her three children (the second, third and fourth applicants). The three minors were detained – without legal basis – for a period of three months in the Kumkapı Removal Centre, pending the determination of their asylum request and deportation procedure. The governor's office issued an order for the first applicant's detention. The applicants challenged the lawfulness of their administrative detention under Law no. 6458 on six occasions before the Istanbul Magistrates' Court without success, and also lodged an individual application with the Constitutional Court while they were still being detained. They were then transferred to the Gaziantep Removal Centre and eventually released following a decision of the Gaziantep Magistrates' Court, which declared their detention, on the basis of the latest order issued by the Gaziantep governor's office, as unlawful. The applicants regained their liberty while their case was still pending before the Constitutional Court.

Law – Article 5 § 4: Under sections 57(6) and 68(7) of Law no. 6458, foreign nationals who have been placed in administrative detention under the relevant provisions may challenge the lawfulness of their detention before the magistrates' courts, which should rule on it within five days by way of a final decision.

(a) *The situation as regards the second, third and fourth applicants (minor children)*

A literal reading of the law suggested that magistrates' courts only had jurisdiction to review the lawfulness of administrative decisions ordering the detention of a foreign national, thereby leaving individuals who had being detained without such a decision outside of their reach. This had been the case of the second, third and fourth applicants before the Istanbul Magistrates' Court.

Before their transfer to Gaziantep and their release following a decision of the Gaziantep Magistrates' Court, the applicants had been left in a legal limbo for a considerable amount of time without an effective remedy at their disposal. The scope of the Gaziantep Magistrates' Court's review that led to their release had been limited to the lawfulness of the detention order delivered by the Gaziantep governor's office, and had not concerned the period during which they had been detained without an official decision in Istanbul.

(b) *The situation as regards the first applicant (mother)*

There had been no reason why the factors that ultimately led to the Gaziantep Magistrates' Court declaring the first applicant's detention unlawful, such as the absence of any explanation or evidence to justify her detention, as well as the absence of a final decision rejecting her asylum request, had not been, or could not have been, taken into account earlier by the Istanbul Magistrates' Court given that they had been present from the very beginning.

What had been more significant than the duration of the individual proceedings was the overall effect of the inadequate review conducted by the Istanbul Magistrates' Court in its successive decisions because it had led to an unjustified prolongation of the first applicant's detention, thereby significantly undermining the effectiveness of the review mechanism set out under Law no. 6458.

(c) *Individual application before the Constitutional Court*

The applicants had complained of both the unlawfulness of their detention and the failure of the Istanbul Magistrates' Court to review the lawfulness issue in an effective manner. They had drawn attention to the fact that they had been detained without consideration of alternatives to detention, despite their vulnerable position as a single mother and three young children, and that they had been kept in the dark about the underlying reasons for their detention.

The individual application remedy before the Turkish Constitutional Court was, in principle, capable of providing an appropriate remedy within the meaning of Article 5 § 4 of the Convention. Nevertheless the Constitutional Court had not examined the applicants' complaints concerning their right to liberty. Some three and a half years after the lodging of the individual application, the Constitutional Court merely found that since the applicants' detention had in the meantime been declared unlawful by the Gaziantep Magistrates' Court and that they had been released, they could seek compensation for their unlawful detention before the administrative courts.

The applicants had remained in administrative detention for some fifty days after lodging their application with the Constitutional Court, during which period that court had taken no action as regards their complaints. While the Court was in principle prepared to tolerate longer periods of review in proceedings before a constitutional court, on condition that the original detention order had been given by a court in a procedure offering appropriate guarantees of due process, constitutional courts were nevertheless similarly bound by the requirement of speediness. In the present case the Constitutional Court had failed to act with the speed that the special circumstances required.

Firstly, in cases where the detention order had not been issued by a judicial authority, the subsequent review by a court had to be followed with greater speed than might otherwise be found appropriate for the review of a detention order by a court. The original detention order in respect of the applicants had been – or should have been – issued by a governor's office, which was an administrative authority. The Istanbul Magistrate's Court, which had been the first-instance court tasked with reviewing the lawfulness of the administrative detention for the initial period of three months while the applicants were detained, had either not undertaken such a review at all or its review had been devoid of any effect. In those circumstances, it had fallen on the Constitutional Court to carry out its review much more promptly.

Secondly, in exceptional circumstances where the national authorities had decided to detain a child and his or her parents for immigration-related purposes, the lawfulness of such detention should have been examined with particular expedition at all levels. In the absence of any explanation as to why the Constitutional Court could not have examined the lawfulness of the applicants' detention while they were in detention, which had been a not insignificant period, that court had not displayed the necessary diligence called for by the circumstances of the case. This was particularly so considering that the case had not been complex and the applicants had presented clear arguments challenging the lawfulness of their detention, which could easily be verified from the case file without the need for further investigation.

Thirdly, although the Constitutional Court had found that the unlawfulness of the applicants' detention had already been established by the Gaziantep Magistrates' Court and that compensation would therefore have provided them with an effective remedy, the magistrates' court decision had concerned solely the unlawfulness of the detention order delivered by the governor's office, and had not concerned the applicants' previous detention in Istanbul. The question of the lawfulness of this three-month period of detention had never been subject to an effective judicial review, which could also have undermined the applicants' prospects of receiving any compensation for that period.

(d) *Summing-up*

Both the Istanbul Magistrates' Court and the Constitutional Court had failed to conduct a review of the lawfulness of the applicants' detention in an effective and speedy manner. The review mechanism set out under Law no. 6458 appeared to have been wholly ineffective in a case where the detention of a minor, in the immigration context, had not been based on an administrative decision. Otherwise, however, the conclusion under this head should have been seen in the light of the particular circumstances of the instant case and should not have been taken as casting doubt on the general effectiveness of the judicial review mechanism under Law no. 6458 or that of the individual application procedure before the Constitutional Court.

Conclusion: violation (unanimously).

Article 13 – The conditions of the applicants' detention had amounted to a violation of Article 3; their complaint in this regard was therefore "arguable" for the purposes of Article 13.

The Constitutional Court had not examined the admissibility and merits of the applicants' complaints during the period in which they had been detained, which had therefore undermined the remedial efficacy of the individual application mechanism in that particular context. Having particular regard to the apparent vulnerability of the three minor applicants and to the problems at the Kumkapı Removal Centre which were well-known to international bodies and domestic authorities, and to the fact that the Constitutional Court had been apparently acting as a first-instance court in the circumstances, that court could have been expected to show the necessary diligence in reviewing the applicants' complaints under Article 3.

Once the applicants had been released from detention, the Constitutional Court had held that "in the event of the release of the foreigner, the effective legal mechanism had been that of the action for a full remedy" before the administrative courts, which had the capacity to compensate the victims as necessary. The Constitutional Court had declared the applicants' complaint under Article 3 inadmissible for non-exhaustion of domestic remedies for that reason. While compensatory remedies might provide sufficient relief to those who had been released from detention, the applicants were still detained at the time of their application to the Constitutional Court. Therefore, a purely compensatory remedy available after release could not have provided them with an effective remedy in respect of their specific complaints under Article 3.

The individual-application mechanism before the Constitutional Court had not proven effective in respect of the applicants' complaints regarding the material conditions of detention at the Kumkapı Removal Centre. Nor had the Government suggested any other remedies that could have provided the applicants with sufficient redress at the material time by putting an end to the ongoing violation of their rights under Article 3 rapidly, over and above providing a purely compensatory remedy.

Conclusion: violation (unanimously).

Article 41: EUR 2,250 to the first applicant, and EUR 20,000 to each of the second, third and fourth applicants, in respect of non-pecuniary damage.

The Court also, unanimously, found a violation of Article 3 of the Convention on account of the conditions of the applicants' detention at the Kumkapı Removal Centre; a violation of Article 3 of the Convention on account of the conditions of the applicants' detention at the Gaziantep Removal Centre; and a violation of Article 5 § 1 of the Convention because the second, third and fourth applicants had been detained despite the absence of any official decisions ordering the deprivation of their liberty.

(See also *Mehmet Hasan Altan v. Turkey*, 13237/17, 20 March 2018, Information Note 2016)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Lack of direct access to a court for person deprived of legal capacity with no corresponding safeguards: *violation*

Impossibilité pour une personne juridiquement incapable d'accéder directement à un tribunal et absence de garanties à cet égard : *violation*

Nikolyan – Armenia/Arménie, 74438/14, Judgment/Arrêt 3.10.2019 [Section I]

(See Article 8 below/Voir l'article 8 ci-dessous, page 20)

Article 6 § 1 (criminal/pénal)

Impartial tribunal/Tribunal impartial

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Pastörs – Germany/Allemagne, 55225/14, Judgment/Arrêt 3.10.2019 [Section V]

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Criminal charge/Accusation en matière pénale
Fair hearing/Procès équitable

Civil fine imposed on the surviving company in respect of an infringement committed by its merged subsidiary, in the context of business continued by the parent: *inadmissible*

Amende civile infligée à la société absorbante pour des abus commis par la société absorbée, dans le cadre de l'activité économique continuée de l'une à l'autre : *irrecevable*

Carrefour France – France, 37858/14, Decision/Décision 1.10.2019 [Section V]

(See Article 6 § 2 below/Voir l'article 6 § 2 ci-dessous, page 14)

Article 6 § 2

Presumption of innocence/ Présomption d'innocence

Applicability of Article 6 § 2 in the absence of "criminal charge" in circumstances where authorities had disseminated a manipulated audio recording before arrest: *Article 6 applicable; violation*

Applicabilité de l'article 6 § 2 en l'absence d'« accusation pénale » dans une situation où les autorités ont diffusé un enregistrement audio manipulé avant l'arrestation : *article 6 applicable ; violation*

Batiashvili – Georgia/Géorgie, 8284/07, Judgment/Arrêt 10.10.2019 [Section V]

Traduction française du résumé | Printable version

Facts – On 22 July 2006, a preliminary investigation was opened in respect of a criminal case concerning the creation and leadership of an illegal armed group. The following day a warrant to intercept the telephone calls of the leader of a local armed group was obtained and telephone conversations between that leader and the applicant, a prominent member of the opposition, were recorded. A recording of a telephone conversation between them was provided to a television channel and broadcast on 25 July 2006.

The applicant denounced the situation and stated that the recording had been tampered with. Senior political figures publicly commented on the association between the applicant and the local leader, their involvement in anti-government activity, and described the guilt of the applicant as unquestionable. On 29 July 2006, the applicant was arrested and charged with covering up the preparation of a crime and aiding and abetting high treason. He was convicted but received a presidential pardon before an appeal to the Supreme Court had been determined.

Law – Article 6 § 2

(a) *Admissibility* – The applicant alleged that the authorities had manipulated that recording in order to insinuate the existence of a crime and had then made it available to the public before formally bringing the charge against him. Such allegedly *mala fide* conduct, if established or inferred during the Court's examination on the merits, combined with the close temporal proximity between the timing of the release of the recording, the questioning of the applicant and the bringing of the charge could attract, in the particular circumstances of the applicant's case, the protection of Article 6 § 2 from the moment the allegedly manipulated version of the recording had been made available to the public by the authorities. Accordingly the question of applicability of Article 6 § 2 was closely linked to the substance of the complaint and was joined to the merits.

(b) *Merits* – The applicant's consistent position, voiced several times at domestic level, was that the audio recording had been manipulated in order to omit crucial parts of the conversation. By contrast, the Government's position at domestic level and before the Court had been inconsistent on several accounts. The Government had submitted before the Court that only one version of the audio recording existed at domestic level. However, it could be concluded, based on the official documents issued by the Ministry of the Interior and the Chief Prosecutor's Office, that two versions of the recording had existed at domestic level.

As regards the question of whether it had been the government authorities or the private television channel that had manipulated the audio recording in question, the Court dismissed the Government's argument at domestic level that the television channel must have edited the video to omit the relevant parts based on the limitations of available airtime as unconvincing. Before the Court, the Government had submitted that it was within the private television company's remit to transmit whichever parts of the conversation it had deemed relevant. That was not consistent with the

Government's position before the Court that only one official version of the recording had existed and that it was identical to the one transmitted by the television channel in question. On the basis of all the information available, the recording had been provided to the media outlet in question by the Ministry of the Interior.

In view of those considerations, the Court had to draw inferences from the available material and the authorities' conduct and proceeded on the basis that the applicant's allegations concerning the manipulation of evidence in his criminal trial and the timing of the dissemination of the recordings were well founded.

As to whether such conduct was compatible with Article 6 § 2, the Court observed that the recording provided to the television channel had been broadcast four days prior to the applicant being formally charged and arrested. The sequence of closely inter-connected events, considered as a whole, indicated that the applicant's situations had been substantially affected, for the purposes of the applicability of Article 6 § 2, by the conduct of the investigating authorities which had wrongly created a suspicion in respect of the applicant by tampering with evidence and having it disseminated in order to subsequently charge him with a crime based on that material.

While the charge of failing to report a crime had been dropped in the course of the proceedings before the first-instance court, the indictment sent for trial – almost four months after the recording had been made available to the public – had still referred to it, even though the prosecuting authorities must have been well aware of the falseness of the evidence underlying that charge. In such circumstances, the applicant's portrayal as guilty in respect of the charge had continued beyond the initial transmission of the audio recording in the media and persisted for at least four months.

Immediately following the transmission of the recording, several statements had been made by members of parliament referring to it and expressing their opinions as to the applicant's role in particular events. While the applicant's complaints regarding the public statements had been declared inadmissible by the Court, they nevertheless formed part of the overall context surrounding the transmission of the recordings which had helped create the impression that the applicant had committed crimes before his guilt had been proved in court. The dissemination of the recordings could not therefore be justified in the public interest and the relevant authorities' involvement in the manipulation and subsequent dissemination of the audio recording to the media had contributed to the applicant being perceived as guilty before his guilt had been proved in court.

Conclusion: Article 6 § 2 applicable; violation (unanimously).

The Court found no violation of Article 5 § 3, accepting that the reasons cited by the domestic courts had constituted relevant and sufficient grounds for detention and that it could not be said that the investigating and judicial authorities had displayed a lack of special diligence in handling the applicant's case. The Court also found no violation of Article 5 § 4, noting that the applicant had been present at all hearings of the first-instance court related to his pre-trial detention and that he had had the possibility to challenge the allegations against him effectively.

Article 41: EUR 3,600 in respect of non-pecuniary damage.

(See also *Blake v. the United Kingdom* (dec.), 68890/01, 25 October 2005, Information Note 79; and compare *Zollmann v. the United Kingdom* (dec.), 62902/00, 27 November 2003, Information Note 58)

Presumption of innocence/ Présomption d'innocence

Civil fine imposed on the surviving company in respect of an infringement committed by its merged subsidiary, in the context of business continued by the parent: *inadmissible*

Amende civile infligée à la société absorbante pour des abus commis par la société absorbée, dans le cadre de l'activité économique continuée de l'une à l'autre : *irrecevable*

Carrefour France – France, 37858/14, Decision/ Décision 1.10.2019 [Section V]

English translation of the summary – Version imprimable

En fait – En 2005, un magasin de la société Carrefour Hypermarchés France (filiale à cent pour cent de la société requérante) fit l'objet d'un contrôle par des agents du ministère de l'Économie, qui décelèrent des pratiques anticoncurrentielles. En 2006, le ministère saisit le tribunal de commerce afin de voir infliger à la requérante l'amende civile prévue en la matière.

En janvier 2009, la société visée fit l'objet d'une fusion-absorption au profit de la requérante (qui

s'en est trouvée subrogée à la société absorbée dans tous ses contrats en cours et est devenue l'employeur de ses salariés). En 2012, la cour d'appel condamna la société requérante à une amende civile de 60 000 euros.

La requérante y vit une atteinte au principe de la personnalité des peines. La Cour de cassation rejeta son pourvoi, considérant que, dès lors que la fusion-absorption avait permis la continuité économique et fonctionnelle de l'entreprise, la condamnation de la société absorbante à raison d'actes commis auparavant dans le cadre de l'activité de la société absorbée n'était pas contraire à ce principe.

En droit – Article 6 §§ 1 et 2

a) *Applicabilité (critères « Engel »)* – Certes, en droit interne, l'infraction ne relève pas du droit pénal. Toutefois le Conseil constitutionnel a précisé que l'amende civile en cause « a la nature d'une sanction pécuniaire » et que le principe de la personnalité des peines est applicable. Et la sanction encourue est sévère (jusqu'à deux millions d'euros). L'article 6 est donc applicable sous son volet pénal (voir aussi *Produkcija Plus storitveno podjetje d.o.o. c. Slovénie*, 47072/15, 23 octobre 2018).

b) *Fond*

i. *Considérations générales* – Aux yeux de la Cour, l'approche des tribunaux fondée sur la continuité économique et fonctionnelle de l'entreprise, qui vise à prendre en compte la spécificité de la situation générée par la fusion-absorption d'une société par une autre, ne contrevient pas au principe de la personnalité des peines, tel que garanti par la Convention (voir, entre autres, *E.L., R.L. et J.O.-L. c. Suisse*, 20919/92, 29 août 1997, et *A.P., M.P. et T.P. c. Suisse*, 19958/92, 29 août 1997)

En effet, en cas de fusion-absorption d'une société par une autre société, il y a transmission universelle du patrimoine ; et les actionnaires de la première deviennent actionnaires de la seconde. L'activité économique exercée dans le cadre de la société absorbée, qui était l'essence même de son existence, se poursuit dans le cadre de la société qui a bénéficié de cette opération.

Du fait de cette continuité d'une société à l'autre, la société absorbée n'est pas véritablement « autrui » à l'égard de la société absorbante. Ainsi, condamner la seconde à raison d'actes restrictifs de concurrence commis avant la fusion-absorption ne contrevient qu'en apparence au principe de la personnalité des peines (alors que ce principe est, au contraire, frontalement heurté lorsqu'il y a condamnation d'une personne physique à raison d'un acte commis par une autre personne physique).

Le choix opéré en droit positif français est donc dicté par un impératif d'efficacité de la sanction pécuniaire, qui serait mis à mal par une application mécanique du principe de la personnalité des peines aux personnes morales (puisqu'il suffirait alors à celles-ci de passer par le biais d'opérations telles que la fusion-absorption pour échapper à toute condamnation pécuniaire en matière économique).

Le droit positif de l'Union européenne dans le domaine de la concurrence suit une approche similaire, mue par le même souci : éviter que des entreprises échappent au pouvoir de sanction de la Commission par le simple fait que leur identité a été modifiée à la suite de restructurations, de cessions ou d'autres changements juridiques ou organisationnels ; et assurer la mise en œuvre efficace des règles de concurrence.

Par ailleurs, le Conseil constitutionnel a noté que, hormis le bénéficiaire de la transmission du patrimoine de la société dissoute sans liquidation, l'amende en cause n'était encourue par personne d'autre.

ii. *Considérations d'espèce* – La société Carrefour Hypermarchés France a été absorbée par la société requérante après dissolution, avec transmission universelle de son patrimoine à cette dernière. La décision de procéder à cette fusion-absorption a été prise par la société requérante elle-même, qui était alors l'unique actionnaire de la société absorbée. Cette décision a été prise après le contrôle effectué par les agents du ministère et la saisine du tribunal par ce dernier, et juste avant le jugement de première instance.

S'il est vrai qu'à l'issue de cette opération la société absorbée a cessé d'exister sur le plan formel, il n'en reste pas moins que l'activité de l'entreprise dont elle était la structure juridique s'est poursuivie au travers de la société requérante. Or c'est précisément pour des actes restrictifs de concurrence commis dans le cadre de cette activité que la procédure litigieuse avait été initiée contre l'ancienne société.

Le principe de la personnalité des peines n'a donc pas été méconnu.

Conclusion : irrecevable (défaut manifeste de fondement).

(Voir également, sur la portée de l'écran social, vis-à-vis des dirigeants de l'entreprise : *G.I.E.M. S.r.l. et autres c. Italie* [GC], 1828/06 et al., 28 juin 2018, Note d'information 219, et, vis-à-vis des actionnaires : *Albert et autres c. Hongrie*, 5294/14, 29 janvier 2019, Note d'information 230, affaire renvoyée devant la Grande Chambre)

ARTICLE 8

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

Alleged lack of investigations into online harassment against a woman, including dissemination of intimate photographs: *communicated*

Défaillances alléguées de l'enquête sur des actes de cyber-harcèlement contre une femme, incluant la diffusion de photos intimes : *affaire communiquée*

Volodina – Russia/Russie, 40419/19, Communication [Section III]

English translation of the summary – Version imprimable

Après la rupture d'une relation de couple, qui fut suivie de violences physiques répétées de la part de son ex-compagnon (voir *Volodina c. Russie*, 41261/17, 9 juillet 2019, Note d'information 231), la requérante fut informée en juin 2016 que son compte sur le réseau social VKontakte avait été piraté : son pseudonyme avait été remplacé par son vrai nom avec des photographies la montrant nue ; et ce, avec la maîtresse d'école et les camarades de classe de son fils de douze ans ajoutés comme « amis ». De nouveaux faux comptes à son nom furent ouverts à son insu par la suite ; elle trouva également un émetteur de pistage dans son sac. La requérante dénonce diverses lenteurs et carences de l'enquête ouverte sur sa plainte.

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

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

Domestic courts' failure to conduct comprehensive assessment in defamation claim: *violation*

Manquement des juridictions internes à procéder à une appréciation complète d'un grief de diffamation : *violation*

Lewit – Austria/Autriche, 4782/18, Judgment/ Arrêt 10.10.2019 [Section V]

Traduction française du résumé – Printable version

Facts – In August 2015 a right-wing journal published an article in which the author called those liberated from the Mauthausen concentration camp in 1945 a "plague" and described the former prisoners as "criminals" who "plagued the country" by "robbing and plundering, murdering and defiling". Criminal proceedings brought against the author of the article were discontinued. In February 2016 the same journal published another article by the same author, reporting on the discontinuation of the criminal proceedings against him and repeating the impugned statements.

The applicant, a Holocaust survivor, activist and former prisoner of Mauthausen, lodged a claim under sections 6 and 8a of the Media Act against the 2016 article, requesting compensation for non-pecuniary damage and a revocation of the statements. The domestic courts rejected his claim, finding that it could not be established that the applicant had been individually identifiable and that no one could be personally affected by an article which essentially reiterated the outcome of a criminal investigation.

Law – Article 35 § 1: In order to have his reputation protected from defamatory statements, the applicant had had the choice between several different legal avenues. The applicant's goals in the domestic proceedings had been: (1) to have the domestic courts establish that the impugned passages of the 2016 article were defamatory and had violated his personality rights as protected under Article 8, and to have the statements retracted and the retraction published; and (2) to obtain compensation for the non-pecuniary damage he had (allegedly) suffered as a result of the defamatory article.

(a) *Effectiveness of the remedies under Article 1330 of the Civil Code and sections 12 and 14(1) of the Media Act*

The Government had argued that the applicant should have brought actions under Article 1330 of the Civil Code in relation to both the 2015 and 2016 articles. That would have been an effective remedy for the applicant's first declared aim, namely to have the statements in question retracted.

The Court had regularly made awards in respect of non-pecuniary damage in cases where an applicant's personality rights had been violated by media publications. In other cases, it had held that the finding of a violation of Article 8 had constituted sufficient just satisfaction and rejected the claim for non-pecuniary damage. It followed *a fortiori* from its case-law concerning privacy cases triggered by media publications that a remedy available at national level had to give the domestic courts at least the possibility of making an award in respect of damage, if appropriate in the specific case. Consequently, a remedy which did not allow a claim to be made in respect of non-pecuniary damage could not be considered effective for the purposes of privacy cases under Article 8.

Since the applicant's second declared aim had been to obtain compensation for the non-pecuniary damage resulting from the publication of the statements in question, it followed that a claim under Article 1330 of the Civil Code could not be considered effective for his purposes as it did not entail the possibility of obtaining redress for non-pecuniary damage in the event of a finding of a violation of his personality rights. The same considerations applied to the remedies under sections 12 and 14(1) of the Media Act, which, contrary to claims under sections 6 to 7c of the Media Act, did not provide for the possibility of a claim for compensation.

(b) *Effectiveness of the claim under sections 6 and 8a of the Media Act in respect of the 2015 article*

Section 8a(2) of the Media Act required a claim under sections 6 and 8a of that Act to be brought in relation to the first publication with allegedly defamatory content. The Government had argued that in the applicant's case, that had been the 2015 article, in respect of which the applicant had failed to exhaust domestic remedies by missing the six-month deadline.

If the Government's logic were to be followed, that would have meant that the applicant had no longer had a remedy available in respect of the first article when the second one had been published. However, the domestic courts had not explained whether that deadline, provided for the "first dissemination" of an article, was applicable at all in the case of a repetition of statements in a new context in another press article. The lack of an explanation was all the more relevant as the article had been published under a different heading and added new comments and elements which had not been present in the first article.

The Court also dismissed the Government's objections that the applicant could have reported the impugned statements to the public prosecutor's office under Article 297 of the Criminal Code, requesting a criminal investigation under Articles 111 and 115 of the Criminal Code.

Conclusion: admissible.

Article 8: The facts underlying the instant case fell within the scope of the applicant's private life, even though he had not been named personally in the article in question.

At the outset, the first-instance court had found that the claimant lacked legal standing to bring the claim. The very particular question of whether members of a group could be personally affected by a statement which concerned a historical event involving a group that had been large at the time, but had over time been reduced to a rather small number of individuals, as in the applicant's case, had not yet been dealt with by the domestic courts. The Court of Appeal had not mentioned the question of legal standing at all, notwithstanding that apparent lack of established case-law, the extensive arguments raised by the applicant in his initial claim and in his appeal, and the fact that the determination of that preliminary question had been essential for the examination of the merits of the claim. Since no finding had been made on that issue, the core of the applicant's claim – namely that, in his view, he had indeed been personally affected by the defamatory nature of the statements, because the group had meanwhile been reduced to a very small number of members – had consequently never been examined by the domestic courts.

When looking at the statements in question within the context of the 2016 article, the Court was not persuaded by the domestic courts' view that the claimants could not have been personally affected by them. The whole context of the 2016 article was very different from that of the 2015 article. While the 2015 article had focused on the historical event of the liberation of the Mauthausen prisoners, the 2016 article had concerned the criminal investigations in respect of the author of the articles and the person who had reported him to the public prosecutor's office. Therefore a comprehensive explanation of the reasons for the domestic courts' interpretation had been required.

Due to the lack of a comprehensive examination of the questions of legal standing and whether the statements had had the same or a separate meaning in the context of the 2016 article, the domestic

courts had never actually examined the core of the applicant's claim of defamation. The domestic courts had therefore failed to comply with their procedural obligation under Article 8 to conduct a comprehensive assessment of a matter affecting the applicant's privacy rights.

Conclusion: violation (unanimously).

Article 41: EUR 648.48 in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage.

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

Covert video-surveillance of supermarket cashiers and sales assistants by employer: *no violation*

Vidéosurveillance secrète des caissières et des vendeuses d'un supermarché par leur employeur : *non-violation*

López Ribalda and Others/et autres – Spain/Espagne, 1874/13 and/et 8567/13, Judgment/Arrêt 17.10.2019 [GC]

Traduction française du résumé | Printable version

Facts – The applicants worked as cashiers and sales assistants in a supermarket. The supermarket had been sustaining economic losses. In order to investigate these losses, the employer of the applicants decided to install surveillance cameras. Some of the cameras were in plain sight while others were hidden. The applicants were notified of the presence of the cameras that were visible, but not about those that were hidden. The applicants were dismissed when video footage showed that they had been stealing items.

In a judgment of 9 January 2018 (see Information Note 214), a Chamber of the Court held, by six votes to one, that there had been a violation of Article 8. In the Court's view, the video-surveillance carried out by the employer, which had taken place over a prolonged period of time, had not complied with the requirements stipulated in the relevant legislation. Moreover, the domestic courts had failed to strike a fair balance between the applicants' right to respect for their private life and their employer's interest in the protection of its property rights.

On 28 May 2018 the case was referred to the Grand Chamber at the Government's request.

Law – Article 8

(a) *Applicability* – The applicants had been subjected to a video-surveillance measure implemented by their employer in their workplace for a period of ten days, the cameras having been directed towards the supermarket checkout area and its surroundings. Thus, while the applicants had not been individually targeted by the video-surveillance, it was not in dispute that they could have been filmed throughout their working day.

As to whether the applicants had had a reasonable expectation that their private life would be protected and respected, the Court observed that their workplace, a supermarket, was open to the public and that the activities filmed there – namely the taking of payments for purchases by the customers – were not of an intimate or private nature. Their expectation as to the protection of their private life was thus necessarily limited. However, even in public places, the creation of a systematic or permanent recording of images of identified persons and the subsequent processing of the images thus recorded could raise questions affecting the private life of the individuals concerned. Domestic law had provided a formal and explicit statutory framework which obliged a person responsible for a video-surveillance system, even in a public place, to give prior information to the persons being monitored by such a system. The applicants had been informed about the installation by their employer of other CCTV cameras in the supermarket, those cameras having been visible and positioned such as to film the shop's entrances and exits. In those circumstances the applicants had had a reasonable expectation that they would not be subjected to video-surveillance in the other areas of the shop without having been informed beforehand.

As to the processing and use of the video recordings, they had been viewed by a number of people working for the applicants' employer even before the applicants were informed of their existence. In addition, they constituted the basis of the dismissal of the applicants and had been used in evidence in the employment tribunal proceedings.

Article 8 was therefore applicable.

(b) *Merits*

(i) *General principles* – The principles established by the Court in *Bărbulescu v. Romania* [GC] were transposable, *mutatis mutandis*, to the circumstances in which an employer might implement video-surveillance measures in the workplace. Those criteria had to be applied taking into account the specificity of

the employment relations and the development of new technologies, which might enable measures to be taken that were increasingly intrusive in the private life of employees. In that context, in order to ensure the proportionality of video-surveillance measures in the workplace, the domestic courts had to take account of the following factors when they weighed up the various competing interests:

– whether the employee had been notified of the possibility of video-surveillance measures being adopted by the employer and of the implementation of such measures: while in practice employees might be notified in various ways, depending on the particular factual circumstances of each case, the notification should normally be clear about the nature of the monitoring and be given prior to implementation;

– the extent of the monitoring by the employer and the degree of intrusion into the employee's privacy: in that connection, the level of privacy in the area being monitored should be taken into account, together with any limitations in time and space and the number of people who had access to the results;

– whether the employer had provided legitimate reasons to justify monitoring and the extent thereof: the more intrusive the monitoring, the weightier the justification that would be required;

– whether it would have been possible to set up a monitoring system based on less intrusive methods and measures: in that connection, there should be an assessment in the light of the particular circumstances of each case as to whether the aim pursued by the employer could have been achieved without interfering with the employee's privacy to such an extent;

– the consequences of the monitoring for the employee subjected to it: account should be taken, in particular, of the use made by the employer of the results of the monitoring and whether such results had been used to achieve the stated aim of the measure;

– whether the employee had been provided with appropriate safeguards, especially where the employer's monitoring operations were of an intrusive nature: such safeguards might take the form, among others, of: the provision of information to the employees concerned or the staff representatives as to the installation and extent of the monitoring; a declaration of such a measure to an independent body; or the possibility of making a complaint.

(ii) *Application* – The employment courts had identified the various interests at stake and had found that the installation of the video-surveillance had been justified by legitimate reasons, namely the suspicion that thefts had been committed. The courts had then examined the extent of the monitoring and the degree of intrusion into the applicants' privacy, finding that the measure had been limited as regards the areas and staff being monitored and that its duration had not exceeded what was necessary in order to confirm the suspicions of theft. That assessment could not be regarded as unreasonable.

The applicants' duties had been performed in a place that was open to the public and involved permanent contact with customers. It was necessary to distinguish, in the analysis of the proportionality of a video-surveillance measure, the various places in which the monitoring had been carried out, in the light of the protection of privacy that an employee could reasonably expect. That expectation was very high in places which were private by nature, such as toilets or cloakrooms, where heightened protection, or even a complete ban on video-surveillance, was justified. It remained high in closed working areas such as offices. It was manifestly lower in places that were visible or accessible to colleagues or, as in the applicants' case, to the general public.

The length of the monitoring (ten days) had not appeared excessive in itself. Only the supermarket manager, the company's legal representative and the union representative had viewed the recordings obtained through the impugned video-surveillance before the applicants themselves had been informed. Having regard to those factors, the Court took the view that the intrusion into the applicants' privacy had not attained a high degree of seriousness. The consequences of the impugned monitoring for the applicants had been significant. However, the video-surveillance and recordings had not been used by the employer for any purposes other than to trace those responsible for the recorded losses of goods and to take disciplinary measures against them. Moreover, the extent of the losses identified by the employer suggested that thefts had been committed by a number of individuals and the provision of information to any staff member might well have defeated the purpose of the video-surveillance, which was to discover those responsible for the thefts but also to obtain evidence for use in disciplinary proceedings against them.

The requirement of transparency and the ensuing right to information were fundamental in nature,

particularly in the context of employment relationships, where the employer had significant powers with regard to employees and any abuse of those powers were to be avoided. The provision of information to the individual being monitored and its extent constituted just one of the criteria to be taken into account in order to assess the proportionality of a measure of that kind in a given case. However, if such information was lacking, the safeguards deriving from the other criteria would be all the more important. At the same time, given the importance of the right to information in such cases, only an overriding requirement relating to the protection of significant public or private interests could justify the lack of prior information.

The employment courts which had examined the applicants' claims had carried out a detailed balancing exercise between, on the one hand, their right to respect for their private life, and on the other the employer's interest in ensuring the protection of its property and the smooth operation of the company. The domestic courts had verified whether the video-surveillance had been justified by a legitimate aim and whether the measures adopted for that purpose had been appropriate and proportionate, having observed in particular that the legitimate aim pursued by the employer could not have been attained by measures that had been less intrusive for the applicants' rights.

In the specific circumstances of the case, having particular regard to the degree of intrusion into the applicants' privacy and to the legitimate reasons justifying the installation of the video-surveillance, the employment courts had been able, without overstepping the margin of appreciation afforded to national authorities, to take the view that the interference with the applicants' privacy had been proportionate. Thus, while the Court could not accept the proposition that, generally speaking, the slightest suspicion of misappropriation or any other wrongdoing on the part of employees might justify the installation of covert video-surveillance by an employer, the existence of reasonable suspicion that serious misconduct had been committed and the extent of the losses identified in the case would appear to constitute weighty justification. That was all the more so in a situation where the smooth functioning of a company was endangered not merely by the suspected misbehaviour of one single employee, but rather by the suspicion of concerted action by several employees, as that created a general atmosphere of mistrust in the workplace.

Having regard to the significant safeguards provided by the Spanish legal framework, including the remedies that the applicants had failed to use, and the weight of the considerations justifying the video-surveillance, as taken into account by the domestic courts, the national authorities had not failed to fulfil their positive obligations under Article 8 such as to overstep their margin of appreciation.

Conclusion: no violation (fourteen votes to three).

The Court also held, unanimously, that there had been no violation of Article 6 § 1, in particular as regards the use of the video-surveillance images.

(See *Bărbulescu v. Romania* [GC], 61496/08, 5 September 2017, Information Note 210; *Köpke v. Germany* (dec.), 420/07, 5 October 2010, Information Note 134; and the Factsheet on Workplace surveillance)

Respect for private life/Respect de la vie privée

No possibility of tailor-made response in deprivation of legal capacity proceedings: *violation*

Impossibilité de moduler le degré d'incapacité juridique : *violation*

Nikolyan – Armenia/Arménie, 74438/14, Judgment/Arrêt 3.10.2019 [Section I]

Traduction française du résumé | Printable version

Facts – In April 2012 the applicant instituted proceedings seeking to divorce his wife and evict her from his flat. In response, the applicant's wife and their son instituted court proceedings seeking to declare him incapable. Later that year a panel of psychiatric experts concluded that the applicant suffered from a delusional disorder which deprived him of his ability to understand and control his actions. In November 2013 the District Court declared the applicant incapable; that judgment was upheld by the Court of Appeal. The divorce and eviction proceedings were subsequently terminated at the request of the applicant's son, who had been appointed as the applicant's guardian.

Law – Article 6 § 1

(a) *Access to court in divorce and eviction proceedings* – The applicant's divorce and eviction claim had never been examined by the domestic courts. Having been fully deprived of his legal capacity and as a result – and in line with domestic law – of his right of access to a court, the only proper and effec-

tive means of protection of his legal interests before the courts was through a conflict-free guardianship. The body responsible for the appointment of guardians had failed to hear the applicant, despite the legal requirement to take into account, if possible, his wishes, and had appointed the applicant's son as guardian, despite their conflictual relationship and the applicant's opposition to his son's appointment.

Given the circumstances of the case, it was doubtful whether the applicant's son was genuinely neutral and that no conflict of interests existed as regards specifically the applicant's claim filed against his wife seeking to divorce and evict her. The District Court had failed to carry out any examination of the question of whether the applicant's son's request to withdraw the claim had been in the applicant's best interests or to provide any explanation for its decision to accept that request. The domestic court had failed to carry out the necessary scrutiny and oversight when deciding to accept the request to withdraw the applicant's claim and consequently the termination of those proceedings had been unjustified.

Conclusion: violation (unanimously).

(b) *Access to court for restoration of legal capacity* – The right to ask a court to review a declaration of incapacity was one of the fundamental procedural rights for the protection of those who had been partially or fully deprived of legal capacity. The general prohibition in Armenia at the material time on direct access to a court by persons declared incapable did not leave any room for exception. The domestic law did not provide safeguards to the effect that the matter of restoration of legal capacity was to be reviewed by a court at reasonable intervals despite the requirement of the United Nations Convention on the Rights of Persons with Disabilities[1] that measures restricting legal capacity be subject to regular review by a competent authority. The applicant's situation had been further exacerbated by the fact that the authorities had failed to ensure a conflict-free guardianship. The applicant's inability to seek restoration of his legal capacity directly at the material time was disproportionate to any legitimate aim pursued.

Conclusion: violation (unanimously).

Article 8: The deprivation of the applicant's legal capacity amounted to an interference with his right to private life. That interference was based on Article 31 of the Civil Code. The judgment declaring the applicant incapable had relied solely on the psychiatric expert opinion. The existence of a mental disorder, even a serious one, could not be the sole reason to justify full deprivation of legal capacity. By analogy with the cases concerning deprivation of liberty, in order to justify full deprivation of legal capacity the mental disorder had to be "of a kind or degree" warranting such a measure. Armenian law did not provide for any borderline or tailor-made response in situations such as that of the applicant and distinguished only between full capacity and full incapacity.

The psychiatric expert report had not analysed the degree of the applicant's incapacity in sufficient detail. The report had not explained what kind of actions the applicant was incapable of understanding or controlling. Assuming, nevertheless, that the applicant's condition had required some sort of measure of protection in his respect, the domestic court had had no other choice than to apply and maintain full incapacity – the most stringent measure which meant total loss of autonomy in nearly all areas of life.

The objectivity of medical evidence entailed a requirement that it be sufficiently recent. The question whether evidence was sufficiently recent depended on the specific circumstances of the case. The psychiatric expert opinion had been issued in September 2012, more than fourteen months before the judgment declaring the applicant incapable and almost a year and a half before the decision of the Civil Court of Appeal upholding that judgment. That opinion could not be regarded as "up to date".[2] It had been the first time that the applicant had been subjected to a psychiatric medical examination, as he had had no history of mental illness, and nothing suggested that the applicant's condition was irreversible. In such circumstances, the domestic courts should have sought some sort of fresh assessment of the applicant's condition.

The District Court had relied solely on that opinion without questioning whether it credibly reflected the applicant's state of mental health at the material time. As for the Civil Court of Appeal, it had made reference to the absence of any evidence rebutting the findings of that report or suggesting that the applicant had recovered, despite the fact that it was the duty of the domestic courts to seek such evidence and, if necessary, to assign a new medical examination. The measure imposed

1. Article 12 § 4.

2. See Principle 8 of Recommendation No. R (99) 4 of the Committee of Ministers of the Council of Europe to member States on principles concerning the legal protection of incapable adults, adopted on 23 February 1999.

on the applicant was disproportionate to the legitimate aim pursued. As a result, the applicant's rights under Article 8 were restricted more than was strictly necessary.

Conclusion: violation (unanimously).

Article 41: EUR 7,800 in respect of non-pecuniary damage.

(See also *Stanev v. Bulgaria* [GC], 36760/06, 17 January 2012, Information Note 148; *Nataliya Mikhaylenko v. Ukraine*, 49069/11, 30 May 2013, Information Note 163; *Shtukaturov v. Russia*, 44009/05, 27 March 2008, Information Note 106; *Lashin v. Russia*, 33117/02, 22 January 2013, Information Note 159 and compare *A.-M.V. v. Finland*, 53251/13, 23 March 2017, Information Note 205)

Respect for private life/Respect de la vie privée

Excessively broad scope and restrictive character of "cleansing" measures affecting civil servants of the Yanukovych regime (2010-14) and the Communist regime: *Article 8 applicable; violation*

Mesures d'épuration visant les fonctionnaires de l'ère Ianoukovitch (2010-2014) et du régime communiste, excessives dans leur champ d'application et leur portée : *article 8 applicable ; violation*

Polyakh and Others/et autres – Ukraine, 58812/15, Judgment/Arrêt 17.10.2019 [Section V]

Traduction française du résumé | Printable version

Facts – Following the change in power after the Euro-Maidan events in early 2014, a Government Cleansing Act (GCA) was adopted concerning officials and civil servants of either the Yanukovych regime (2010-14) or the former Communist regime (pre-1991).

The applicants had hitherto been career civil servants. In October 2014, on foot of that legislation they were all dismissed and banned from civil service for ten years and had their names entered into the publicly accessible online Lustration Register.

They lodged appeals with the administrative courts, which referred the question of the constitutionality of the lustration law to the Constitutional Court, before whom it has remained pending ever since.

Law – Article 8

(1) *Admissibility*

(a) *Applicability* – While the *reasons* for the application of the GCA to the applicants had had no connection to their private life, the combination of the applied measures had had very serious *consequences* (see *Denisov v. Ukraine* [GC], 76639/11, 25 September 2018, Information Note 221) on their capacity to establish and develop relationships with others and their social and professional reputation, in so far as:

(i) they had lost all their remuneration with immediate effect;

(ii) they had been excluded from any employment in the civil service, the sphere where they had worked for many years;

(iii) whereas it was very likely to carry social and professional stigma – given the wording of the GCA's aims –, the application of those measures to them had been made public knowledge with immediate effect.

Conclusion: Article 8 applicable.

(b) *First three applicants: exhaustion of domestic remedies and six-month time-limit* – While the appeals to the administrative courts, in combination with the proceedings before the Constitutional Court initiated by those courts, had been an effective domestic remedy in principle, those proceedings in practice had lost their effectiveness in respect of the applicants, due to excessive delays.

At the same time, as the Constitutional Court had not remained inactive throughout the relevant period, the applicants and the public at large had been likely to believe that that court's decision might be forthcoming at any moment. Moreover, the [Strasbourg] Court's single-judge formations had previously rejected as premature a number of applications in similar cases.

Therefore, it cannot be said that the applicants had been or ought to have been aware that the remedy in question was ineffective, so as to trigger the running of the six-month period.

Conclusion: preliminary objection dismissed.

(c) *Fourth and fifth applicants: six-month time-limit* – While the applicants' claims had, for the most part, been based on the arguments relating to the constitutionality of the GCA, an application to the

Constitutional Court had not been the only remedy in that respect; indeed: (i) the domestic administrative courts could have interpreted the GCA in a way that would have been compatible with the applicants' understanding of the Constitution; (ii) the same Constitution-related arguments could have been turned and relied on as Convention-related arguments.

Therefore, the appeals to the ordinary courts did constitute, in principle, an effective remedy to be exhausted. In that process, the applicants had lodged their applications within six months of the final domestic decisions.

Conclusion: preliminary objection dismissed.

(2) *Merits*

While the principles developed in cases concerning post-Communist lustration might also be applied in the novel context of the present case, due account must nonetheless be taken of the specificity of the Yanukovych presidency.

(a) *Lawfulness of the impugned interference*

Foreseeability / Retrospectivity – The GCA had contained a list of the positions whose holders would be subject to restrictive measures under the Act. The inability to predict that such legislation would be enacted when taking up the posts which triggered the application of restrictive measures to them did not call into doubt the interference's lawfulness: non-retrospectivity was only prohibited as such under Article 7 § 1 of the Convention with respect to criminal offences and penalties, whereas the measures provided for under the GCA had not been of that nature. That said, the fact that the conduct of the applicants had been legal at the relevant time was a factor that could be taken into account in assessing the necessity of the interference.

(b) *Aims pursued*

According to the Venice Commission, the GCA had pursued two legitimate aims: (i) protecting society from individuals who, due to their past behaviour, could pose a threat to the newly established democratic regime; and (ii) to cleanse the public administration of individuals who had engaged in large-scale corruption.

However, unlike the Venice Commission, the Court cannot confine its role to an *in abstracto* assessment.

Since the impugned measures were much broader in scope and had been applied in a context different from that which had prevailed in other Central and Eastern European States, the Court had doubts as to whether legitimate aims had been pursued in the present case:

– the alleged threat posed by the wide range of persons subject to the GCA measures to the functioning of the democratic institutions could not be equated to that posed in the cases of collaboration with totalitarian security services. Unlike the latter, the present applicants occupied posts in institutions of a State based on democratic constitutional foundations (at least as a matter of principle);

– their dismissal appeared to have been based on a collective liability of individuals employed by State institutions during President Yanukovych's time in power, regardless of the specific functions they had performed and their link to the anti-democratic tendencies and developments which had occurred during that period.

It was a well-established principle that lustration may not be used for punishment, retribution or revenge. The same was true of the impugned measures provided by the GCA.

The alleged goals of restoring trust in the public institutions and protecting democratic governance could conceivably have been achieved by less intrusive means (such as, where possible, following an individual assessment, removing the applicants from their positions of authority and transferring them, where possible, to less sensitive positions).

The far-reaching nature of the measures applied to the applicants, combined with the highly charged language used in the GCA to describe the Act's aims, raised the possibility that some of those measures might have been motivated, at least in part, by vindictiveness towards those associated with the previous governments. If that were shown to be the case, then, far from pursuing the aim of protecting democratic governance, the GCA measures could be seen as undermining that very governance through politicisation of the civil service, a problem the law had supposedly been designed to combat.

In addition, the information about the application of the GCA to the applicants had been published immediately.

(c) *Necessity in a democratic society of the impugned measures*

(i) *The first three applicants* – The period of Mr Yanukovych's rule in Ukraine had been characterised by a number of negative developments concerning respect for democracy, the rule of law and human rights, and his government had been perceived to be undemocratic and engaged in large-scale systemic corruption. A number of international observers had also made comments pointing to such problems.

Measures of change and reform in the civil service, including measures against civil servants personally associated with the said negative developments, were thus, in principle, justified. While the authorities should be afforded a margin of appreciation in that respect, this margin appeared to have been overstepped, for the following reasons.

A lack of coherence could be discerned between the Act's proclaimed aims (worded with reference to "the presumption of innocence" and "individual liability" among the principles that had been supposed to guide the cleansing process) and the rules that the Act had actually promulgated. The legislative scheme did not appear sufficiently narrowly tailored to address the supposed "pressing social need" pursued. Given that the then President of Ukraine , who had signed the GCA into law, had himself served for nine months as a minister in President's Yanukovych's government, it was difficult to see how the goal of restoring public trust in State authorities could be achieved by "cleansing" officials of much lesser importance.

Moreover, no cogent explanation had been given for the one-year period of service during the presidency of V. Yanukovych as the key criterion triggering the application of the GCA measures. Furthermore, the period from 1991 to 2010 had been excluded from the scope of the Act, although, according to the Government, the GCA had been intended as a response to the negative results of the activities of all post-Communist elites.

The impugned measures had not been applied on a provisional or temporary basis, but for ten years; which belied the argument that the state of emergency created by hostilities in the Donetsk and Luhansk regions had prevented the authorities from individualising them to a greater extent. Even assuming that certain personnel changes had been urgent, there was no indication that the situation would have remained so unstable throughout the relevant period that it prevented a detailed review of each individual official's role and, based on such review, the phasing out of initial urgent measures at a later stage.

Since the GCA measures applied to the applicants had been very restrictive and broad in scope, very convincing reasons were required to show that they could be applied without individual assessment of personal conduct, by mere inference that the applicants' remaining in office sufficiently demonstrated that they had lacked loyalty to the democratic principles of State organisation or that they had engaged in corruption.

However, it had never been alleged that the applicants had themselves committed any specific acts undermining democratic governance, the rule of law, national security, defence or human rights. They had been dismissed merely for having occupied certain relatively high-ranking positions in the civil service under Mr Yanukovych's presidency. The subsequent allegations of misconduct on the part of the third applicant did not change that fact. In the eye of the Court, career civil servants could not be subjected to restrictive measures of such severity merely for remaining in their positions in the civil service following the election of a new Head of State.

There was, moreover, no indication that the applicants had been "placed" in the civil service and that their careers had evolved in any unusually positive way under Mr Yanukovych's rule. None of the applicants appeared to have been involved in any of the alleged abuses of Mr Yanukovych's government. While an internal finding in that respect had been made as regards the third applicant, it was couched in very vague terms and there had been no independent review of it; in any event, that finding had been made after the third applicant's dismissal and, therefore, had not been determinative of it.

Information about the applicants' removal from civil service had been made publicly available before they could obtain a review of such measures. Even the *ex post facto* remedy available to them had operated with excessive delay (so far, the proceedings had already lasted for almost half of their ten-year exclusion period).

(ii) *The fourth applicant (late filing of self-declaration)* – The fourth applicant had been subjected to the same measures because he had filed his lustration declaration four days late. However, the outcome for him would likely have been the same anyway (as he had remained in office from 2010 to 2014). To that extent, the above considerations also applied to him. Now, even assuming that there had been no other ground than this four-day delay to apply those measures to him, they appeared disproportionate to the trivial nature of the applicant's omission.

Firstly, his situation was particular: he had been ill when the time-limit for filing had expired; he had filed the declaration the day after leaving hospital. It had not been argued that this could cause any problem in the context of the overall screening process.

Secondly, the essence of the declaration in question was the official's statement to the effect that the GCA restrictive measures applied or did not apply to him. However, the only possible grounds for application of the GCA to him lay in the position he had occupied in 2010 to 2014, which had been well known to his employer to whom the declaration was submitted. The obligation to file a declaration in the present case had thus not been aimed at revealing certain potentially hidden facts, such as secret collaboration with the security services of former totalitarian regimes.

(iii) *The fifth applicant (pre-1991 era)* – The impugned lustration measures were enacted and applied more than twenty-three years after Ukraine's transition from totalitarian Communist rule to democracy in 1991. In the absence of any specific individual wrongdoing, implementation of restrictive measures of such seriousness after such a long lapse of time required very strong justification, which had failed to be given.

Indeed, the applicant had been a mere local official working in agriculture; there was no indication that his activities in the Communist party had been associated with any human rights abuses or specific anti-democratic activities, so that he could conceivably pose a threat to the newly established democratic regime. The disproportionate nature of the lustration measure was thus particularly pronounced in his case.

Conclusion: violation (unanimously), for all the applicants.

Article 41: EUR 5,000 to each applicant, for non-pecuniary damage; claim for pecuniary damage dismissed, given that relevant proceedings could be reopened.

The Court also found, unanimously, a violation of Article 6 § 1 (civil limb; criminal limb inapplicable) in respect of the first three applicants, as regards the length of proceedings.

(Compare post-Communist lustration cases: *Turek v. Slovakia*, 57986/00, 14 February 2006, Information Note 83; *Sõro v. Estonia*, 22588/08, 3 September 2015, Information Note 188; *Ivanovski v. the former Yugoslav Republic of Macedonia*, 29908/11, 21 January 2016, Information Note 192; *Anchev v. Bulgaria* (dec.), 38334/08 and 68242/16, 5 December 2017, Information Note 213; and, in the context of Article 14 with Article 8: *Sidabras and Džiautas v. Lithuania*, 55480/00 and 59330/00, 27 July 2004, Information Note 67; *Naidin v. Romania*, 38162/07, 21 October 2014, Information Note 178)

Respect for private life/Respect de la vie privée

Photograph published in lifestyle magazine with erroneous caption, identifying applicant as someone else: *Article 8 inapplicable; inadmissible*

Photographie publiée dans un magazine féminin sous un titre erroné, désignant la requérante par le nom d'une autre personne : *article 8 inapplicable ; irrecevable*

Vučina – Croatia/Croatie, 58955/13, Decision/Décision 31.10.2019 [Section I]

Traduction française du résumé | Printable version

Facts – A photograph of the applicant, showing her clapping at a concert, was published by a lifestyle magazine. The caption erroneously identified her as another person, namely the wife of the then mayor of a city. Her civil action for damages against the publisher was ultimately dismissed.

Law – Article 8: The taking of the applicant's photograph in a public place at a public event and its subsequent publication did not in itself raise a particular issue under Article 8. The key issue was the erroneous designation of the applicant's name.

The publication had contained no disparaging statements as regards the applicant and there had been no distortion or other interference in respect of her photograph which had been small and had simply depicted her clapping at a concert. The purpose of the publication and the context in which the impugned photograph had been used had been to inform the public of the fact that a popular-music concert had been held and that many celebrities had attended it.

The domestic court had found that the erroneous information had not been capable of causing the applicant any prejudice, reasoning that the mayor's wife was not perceived by the public as a negative person in any way. Having regard to their direct and continuous contact with their societies and their knowledge of local circumstances, it was primarily for the domestic courts to assess how well

known a person was, especially where that person was mainly known at a national level. The Court agreed with the domestic court's finding that the published information had been incapable of giving rise to the applicant's denigration in the eyes of the public since those who recognised her in the photograph obviously knew that she was not the mayor's wife, and the mere indication of the name of the mayor's wife next to the applicant's photograph did not in itself give rise to any negative connotations concerning the applicant.

The publication of a photograph had in general to be considered to constitute a more substantial interference with the right to respect for private life than the mere communication of the person's name. Thus, in so far as the manner in which the photograph had been obtained did not raise any issue under Article 8, the mere communication of an erroneous name next to the photograph, without any negative connotations associated with that name and/or the distortion of the photograph, could not be considered a particularly substantial interference with the right to respect for private life. The Court was unable to find that the false impression created by the impugned photograph had been objectively capable of creating any negative public perception of the applicant.

Although the erroneous placement of the name of the mayor's wife next to the photograph of the applicant might have caused some distress to her, the level of seriousness associated with that erroneous labelling and the inconvenience she had suffered did not give rise to an issue – neither in the context of the protection of her image nor her honour and reputation – under Article 8.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See *Denisov v. Ukraine* [GC], 76639/11, 25 September 2018, Information Note 221; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], 17224/11, 27 June 2017, Information Note 208; and compare *Couderc and Hachette Filipacchi Associés v. France* [GC], 40454/07, 10 November 2015, Information Note 190, and *Eerikäinen and Others v. Finland*, 3514/02, 10 February 2009, Information Note 116)

Respect for family life/Respect de la vie familiale
Positive obligations/Obligations positives

Widow denied access to her children by relatives-in-law in defiance of court orders and later arbitrarily deprived of parental authority: *violation*

Veuve privée d'accès à ses enfants par sa belle-famille au mépris des décisions judiciaires, puis arbitrairement déchue de son autorité parentale : *violation*

Zelikha Magomadova – Russia/Russie, 58724/14, Judgment/Arrêt 8.10.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The applicant is a widow with six children (born between 1997 and 2006). After the death of her husband, relations with her in-laws deteriorated. In February 2010, one of her brothers-in-law, E.B., took her to her mother's home in another village within the Chechen Republic. Since then the applicant has had no access to her children, who have remained with her husband's family. By an administrative decision dated April 2010, E.B. was appointed as the children's legal guardian. Three sets of court proceedings ensued, all brought by E.B., in which he sought to have the applicant deprived of her parental authority.

(1) Between August and September 2010 the courts rejected E.B.'s first claim (and annulled his guardian status), finding that there was no evidence to prove his allegations that the applicant had neglected her parental duties or ill-treated the children. Although the courts ordered that the children should live with their mother, the judgment was never enforced because the bailiff in charge repeatedly refused to commence the enforcement procedure.

(2) The proceedings for deprivation of parental authority were then reopened in 2011 on the basis of newly discovered circumstances, namely that the applicant had been seen in the cars of unknown men on several occasions. In the view of the courts, this proved that she was cohabiting with a man and thus had an "immoral lifestyle". Yet in January 2012, E.B.'s claim was again rejected for lack of evidence. However, given that the children had by that time been living with their paternal relatives for two years, the court ordered that they should continue living with E.B. (who was reappointed as their legal guardian). The court made arrangements for the children to have contact with their mother. That part of the judgment too was never enforced, despite several applications.

(3) Ultimately, in the third set of proceedings in 2013 (and in 2014, on appeal), the courts granted E.B.'s claim to have the applicant deprived of her

parental authority. They found that, despite the arrangements ordered in the judgment of 2012, the applicant had failed to contact her children – especially her two elder daughters (aged around 14 and 16), who by that time were at a medical college in Grozny – or to support them financially. The courts concluded that she had therefore avoided bringing up her children.

Law – Article 8: It transpired from the reasons set forth below that the interference in the applicant's parental rights had not been "necessary in a democratic society". The domestic authorities had overstepped their margin of appreciation.

(a) *Consideration of authorities' failure to enforce previous judgments, as background information* – While only the third set of court proceedings was admissible for the Court's examination, previous events could nevertheless be of relevance as background information. The latest situation had in fact been prompted by the authorities' inaction in the enforcement proceedings in respect of the judgments of August 2010 and January 2012. When the 2012 judgment had become final and enforceable, the applicant had previously had no contact with her children for over two years, with all the consequences that this might have had for relations between them, and for the children's physical and psychological well-being. It had thus been particularly important for the authorities to act with exemplary diligence and expediency. On the contrary, while fully aware of the applicant's situation, the authorities had remained passive and taken no tangible steps to ensure and facilitate the applicant's reunion with her children.

Timing – Despite the applicant's numerous requests, the enforcement proceedings had only commenced more than five months after the date on which the 2012 judgment had previously become final and enforceable. The enforcement proceedings had been ongoing for more than sixteen months before they were terminated.

Steps – The bailiff had done no more than (i) obtain a "written declaration" from E.B. confirming that he would not obstruct the applicant's contact with her children, and (ii) inform E.B. of the risk that he might be found administratively liable. No other steps had been taken, despite the fact that the applicant had sought the authorities' protection and assistance in connection with the hostile attitude of her relatives-in-law, who had threatened her with physical violence and obstructed all contact between her and the children, including communications by telephone.

Applicant's attitude – Throughout all sets of proceedings, the applicant had consistently reaffirmed her intention to take care of her children, and had sought access to them and their return, repeatedly contacting the competent domestic authorities about this. Faced with their inaction, she had even attempted to approach her two elder daughters herself, but in vain given the extremely negative attitude of the girls.

(b) *Arbitrariness in domestic courts' findings and application of national law* – The Court then assessed the grounds on which the domestic courts had relied when depriving the applicant of her parental authority.

Failure to establish contact with the children – Not only had the authorities remained idle for years when faced with her situation, but in reaching that conclusion, the domestic courts had chosen to shift responsibility for this flagrant inaction onto the applicant.

Failure to provide financial support – It remained unclear whether the applicant's alleged failure to provide financial support had been based on any evidence. Even assuming that it was accurate, the applicant had not been solely responsible for this situation. In particular, given the long-standing conflict between the applicant and her late husband's relatives, it had not been convincingly demonstrated in the domestic proceedings that she had a realistic opportunity to provide financial support, communicate with her late husband's relatives and ensure that such support would reach her children.

Concluding assessment – In the light of the foregoing objective obstacles, the unreasonableness of those court findings was so striking and palpable on the face of it that they can only be regarded as grossly arbitrary.

By relying on such grounds for depriving the applicant of her parental authority, the courts had also arbitrarily applied the relevant provisions of national law. Indeed, in a ruling of 1998 the Supreme Court of Russia had stated that: (i) only in the event of proven guilty conduct might parents be deprived of their parental authority on grounds similar to those in the case; (ii) parents who failed to fulfil their parental obligations for reasons beyond their control should not be deprived of their parental authority; and (iii) even where a parent's guilty conduct was established, deprivation of parental authority should not be automatic.

(c) *Deficiency of decision-making process when establishing the best interests of the children* – The

relevant court decisions had failed to give due consideration to the best interests of the children.

Assessing psychosocial circumstances – In the proceedings under examination, no expert opinion had ever been sought on such important questions as the degree of the children's attachment to their mother, the effect that severance of all ties with her might have had on them and her parenting abilities, among others.

No reasons had been advanced to explain why such a drastic measure as depriving the children's mother – their only surviving parent – of her parental authority would be in their interests, nor whether any weighty considerations relating to their health and development could have justified that measure.

No attempts had been made to explore the effectiveness of less far-reaching alternatives, before severing the applicant's ties with the children by depriving her of her parental authority.

Weighing up the children's views – The first-instance court had confined itself to referring briefly to the opinion of the applicant's two elder daughters (born in 1997 and 1999), who had stated that they did not want to see their mother, as "she [had] dishonoured them" with her immoral life. It had ignored the applicant's arguments that she had had no contact with her children at all and that her late husband's relatives had set them against her.

Of the other four children (born between 2000 and 2006), none had been heard in the proceedings under examination. As regards the two elder of these, the Court noted the applicant's argument that this failure had been in breach of domestic law. As for the two younger ones, no expert opinion had been sought on whether it was possible, given their age and maturity, to interview them in court, if need be with the assistance of a specialist in child psychology.

In any event, in the Court's view, the right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children without any other factors being considered and an examination being carried out to determine their best interests. Indeed, those views are not necessarily immutable, and their objections are not necessarily sufficient to override the parents' interests, especially in having regular contact with their child. Moreover, children may be palpably unable to form and articulate an opinion as to their wishes – for example, because of a conflict of loyalty and/or their exposure to the alienating behaviour of one parent.

Conclusion: violation (unanimously).

Article 41: EUR 30,000 in respect of non-pecuniary damage.

(Compare *Strand Lobben and Others v. Norway* [GC], 37283/13, 10 September 2019, Information Note 232; and *Haddad v. Spain*, 16572/17, 18 June 2019, Information Note 230)

ARTICLE 10

Freedom of expression/Liberté d'expression

Criminal conviction of member of parliament for statements made in Parliament found to constitute Holocaust denial: *inadmissible*

Parlementaire condamné pénalement pour des propos constitutifs de déni de l'Holocauste tenus au parlement : *irrecevable*

Pastörs – Germany/Allemagne, 55225/14, Judgment/Arrêt 3.10.2019 [Section V]

Traduction française du résumé | Printable version

Facts – The applicant was a member of parliament and chairperson of the National Democratic Party of Germany in the *Land* Parliament of Mecklenburg-Western Pomerania. He was convicted at first instance of violating the memory of the dead and of defamation following statements he had made in a speech to Parliament. The Regional Court, sitting at second instance, dismissed the applicant's appeal on points of fact and law as ill-founded, having established the circumstances of the case anew. The applicant lodged an appeal with the Court of Appeal. After learning that one of the three judges responsible for adjudicating his appeal was married to one of the judges who had decided his case at first instance, he lodged a complaint of bias. The Court of Appeal, with the participation of the impugned judge, dismissed the bias complaint and his appeal on points of fact and law as ill-founded. A subsequent panel of the Court of Appeal dismissed his bias complaint.

Law – Article 10: In cases concerning Holocaust denial, whether the Court applied Article 17 directly, declaring a complaint incompatible *ratione materiae*, or instead found Article 10 applicable, invoking Article 17 at a later stage when it

examined the necessity of the alleged interference, was a decision taken on a case-by-case basis and would depend on all the circumstances of each individual case.

In the applicant's case, on the one hand, his statements had shown his disdain towards the victims of the Holocaust, which spoke in favour of the incompatibility *ratione materiae* of the complaint with the provisions of the Convention. On the other hand, the statements had been made by a member of parliament during a parliamentary session, such that it could warrant an elevated level of protection and any interference with it would warrant the closest scrutiny on the part of the Court.

The Regional Court had cited and assessed the applicant's speech in full. The gist of its reasoning was threefold: the applicant had inserted the qualified Holocaust denial into his speech, large parts of which had not raised an issue under criminal law, as if inserting "poison into a glass of water, hoping that it would not be detected immediately"; the parts of his speech that had not raised an issue under criminal law could not mitigate, conceal or whitewash the qualified Holocaust denial; and he had wanted to convey his message exactly in the way that it had been understood by the Regional Court, in the view of an objective observer.

The Court attached fundamental importance to the fact that the applicant had planned his speech in advance, deliberately choosing his words and resorting to obfuscation to get his message across. It was with reference to that aspect of the applicant's case that Article 17 had an important role to play, regardless of Article 10 being deemed applicable. The applicant had sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention. That weighed heavily in the assessment of the necessity of the interference.

While interferences with the right to freedom of expression called for the closest scrutiny when they concerned statements made by elected representatives in Parliament, utterances in such scenarios deserved little, if any, protection if their content was at odds with the democratic values of the Convention system. The exercise of freedom of expression, even in Parliament, carried with it the "duties and responsibilities" referred to in Article 10 § 2. Parliamentary immunity offered, in that context, enhanced, but not unlimited, protection to speech in Parliament.

The applicant had intentionally stated untruths in order to defame the Jews and the persecution that they had suffered during the Second World War. The applicant's impugned statements had affected the dignity of the Jews to the point that they had justified a criminal-law response. Even though the applicant's sentence of eight months' imprisonment, suspended on probation, was not insignificant, the domestic authorities had adduced relevant and sufficient reasons and had not overstepped their margin of appreciation. The interference had therefore been proportionate to the legitimate aim pursued and was thus "necessary in a democratic society". There was no appearance of a violation of Article 10.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 1: The fact that two judges had been married and had dealt with the applicant's case at different levels of jurisdiction could give rise to doubts as to impartiality.

As regards the procedure for ensuring impartiality, the Court of Appeal, with the participation of the impugned judge, had decided on both the applicant's complaint of bias and on his appeal on points of law. The default approach under domestic law would have been for the complaint of bias to have been decided without the judge's participation. However domestic law provided an exception. While it was not for the Court to interpret domestic law, it was difficult to understand how the applicant's bias complaint could have been deemed "completely ill-suited", as required by that exception. The applicant's complaint of bias could not be considered as abusive or irrelevant as there could have been an appearance of lack of impartiality. The judge's participation in the decision on the bias complaint against him had not helped dissipate what doubts there may have been.

The Court had previously found that a lack of impartiality in criminal proceedings had not been remedied in cases where a higher court had not quashed the lower court's judgment adopted by a judge or tribunal lacking impartiality. Unlike in the applicant's case, where the objective justification of the applicant's doubt in respect of the judges dealing with his appeal on points of law had primarily resulted from the procedure they had chosen, the impartiality defects in earlier cases had either been more severe or the subsequent decisions had not given substantive arguments in response to the applicant's complaint of bias, thus not remedying the defect.

In the applicant's case the subsequent review decision had not been rendered by a higher court, but rather by a bench of three judges of the same court

who had not been involved in any previous decisions in the applicant's case. The review decision had not entailed a full assessment of either the applicant's appeal on points of law or the decision dismissing it as ill-founded, but had been limited to the question of whether the judges involved in that decision had been biased. However, if the review decision had been rendered in the applicant's favour, the applicant's motion to be heard would subsequently have had to have been adjudicated by other judges. It had thus been submitted to a subsequent control of a judicial body with sufficient jurisdiction and offering the guarantees of Article 6.

Lastly, the applicant had not given any concrete arguments why a professional judge – being married to another professional judge – should be biased when deciding on the same case at a different level of jurisdiction which did not entail review of the spouse's decision. The Court of Appeal had given sufficient arguments in response to the applicant's submissions. The participation of the judge in the decision on the bias complaint against him had been remedied by the subsequent assessment, on the merits, of the bias complaint, for which the applicant had advanced the same ground, by a separate panel of judges of the same court. There had not been objectively justified doubts as to the Court of Appeal's impartiality.

Conclusion: no violation (four votes to three).

(See also *Perinçek v. Switzerland* [GC], 27510/08, 15 October 2015, Information Note 189; *Williamson v. Germany* (dec.), 64496/17, 8 January 2019; *Roj TV A/S v. Denmark* (dec.), 24683/14, 17 April 2018, Information Note 218; *Karácsony and Others v. Hungary* [GC], 42461/13 and 44357/13, 17 May 2016, Information Note 196; *Vera Fernández-Huidobro v. Spain*, 74181/01, 6 January 2010, Information Note 126; *Crompton v. the United Kingdom*, 42509/05, 27 October 2009 and compare *A.K. v. Liechtenstein*, 38191/12, 9 July 2015)

Freedom of expression/Liberté d'expression

Failures in examination of civil defamation case brought by administrative entity in reaction to criticism about works on historical monument: *violation*

Défaillances dans l'examen de la plainte civile en diffamation introduite par une entité administrative en réaction à des critiques visant des travaux de restauration sur un monument historique : *violation*

Margulev – Russia/Russie, 15449/09, Judgment/Arrêt 8.10.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The applicant was head of a community-based non-governmental organisation (NGO) created to help preserve Tsaritsyno, an architectural complex in the south of Moscow that has the status of a museum and comprises an English landscape garden.

In 2007 a newspaper published an article, entitled "*Tsaritsyno is not going to survive the winter*", which reported in a critical tone on the ongoing restoration works that were being funded by the City Council of Moscow. The article suggested that the works had adversely affected the old English landscape garden. The article also contained various quotes by the applicant, whom the newspaper had interviewed, such as "... People have been deprived of their historical and cultural heritage. ... The restoration of Tsaritsyno is the desecration of a historical monument..."

The Moscow City Council lodged a statement of claims for defamation against the newspaper's editorial board, alleging that those statements had tarnished their business reputation. The City Council sought the retraction of these statements. The applicant successfully applied to be admitted to the proceedings as a third party, albeit without lodging independent claims.

The first-instance court considered the impugned statements as statements of facts, whose veracity the defendant had failed to prove. The newspaper's editorial board was ordered to publish, at their expense, a retraction in another newspaper (since in the meantime their own production had been suspended). The appellate court upheld that judgment in a summary fashion.

Law – Article 10

(a) Interference/Victim status

(i) *Applicant's procedural position* – Under domestic law, the status of third party to proceedings might be granted – even if that party had not lodged independent claims regarding the object of a dispute – where "the judgment may affect the third party's rights and obligations *vis-à-vis* the claimant or defendant". By admitting the applicant to the defamation proceedings as a third party, the domestic courts had tacitly accepted that his rights might have been affected by their outcome. The Court accepted this interpretation.

(ii) *Applicant's aims at stake* – The applicant claimed before the Court that the domestic courts' judgments ordering a retraction of his statements disseminated in the newspaper had restricted the opportunities for sharing and spreading his published opinion regarding the restoration works of the Tsaritsyno museum complex. This matter was clearly of importance to the general public, who had a vested interest in preserving cultural heritage.

(iii) *Conclusion*: victim status upheld – The applicant has made out a prima facie case of interference with his freedom of expression; he thus could be said to have been "directly affected" by the proceedings to which he was a party.

(b) *Legitimacy of the aim pursued* – While prepared to assume that such aim was legitimate, the Court emphasised that the City Council's mere institutional interest in protecting its "reputation" did not necessarily attract the same level of guarantees as that accorded to "the protection of the reputation ... of others" within the meaning of Article 10 § 2 of the Convention (see, *mutatis mutandis*, *Uj v. Hungary*, no. 23954/10, 19 July 2011, Information Note 143; and *Kharlamov v. Russia*, no. 27447/07, 8 October 2015, Information Note 189).

(c) *Necessity "in a democratic society"* – Firstly, the applicant had made the impugned statements in his capacity as head of an NGO. When an NGO drew attention to matters of public interest (as had been the case here), it might be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press.

Secondly, no problem relating to the ethics of journalism or to the good faith of the said NGO could be discerned here. Indeed, the statements decrying the restoration works in issue had been presented as the opinion of a third person interviewed by the newspaper and had clearly been attributed to the applicant.

Thirdly, the domestic courts had limited themselves to finding that the impugned statements had tarnished the City Council's business reputation, and that the defendant had not proved its veracity. It transpired from the following elements that they had failed to apply the relevant Convention standards:

– *essential role of the press in a democratic society*: No account was taken of: the defendant's position, as the editorial board of a newspaper, and that of the applicant, as the representative of an NGO; the presence or absence of good faith on their parts; the position of the claimant as a public authority; the aims pursued by the defendant, in publishing the article, and by the applicant, in making the impugned statements; whether the impugned article had addressed a matter of public interest or general concern; or the relevance of information regarding the quality of the restoration works in issue, in relation to concerns about the preservation of cultural heritage.

– *distinction between statements of fact and value judgments*: The domestic courts had not drawn a clear distinction between these two categories of statements. They had also disregarded the requirements of a resolution of the Supreme Court, under which value judgments were not actionable by way of a retraction claim, as used in the present case. In any event, the distinction between statements of fact and value judgments was of less significance where the impugned statement was made in the course of the debate on a matter of public interest and where representatives of civil society and journalists should enjoy wide freedom to criticise the actions of a public authority, even where the statements made might lack a clear basis in fact.

– *balancing exercise between the concurring rights*: The domestic courts appeared to have tacitly assumed that interests relating to the protection of reputation prevailed over freedom of expression in all circumstances. They had failed to consider that the claimant in the defamation proceedings was a public authority, which as such should accept wider criticism. They had also expressly rejected the defendant's argument that the City Council had not even been named in the impugned statements, whereas the existence of an objective link between the impugned statement and the party suing in defamation was a requisite element for proportionality.

The domestic courts had thus failed to provide relevant and sufficient reasons to justify the interference in question. Had they done so, strong reasons would have been needed by the Court to substitute its view for theirs. In the absence of such a balancing exercise at national level, it was not incumbent on the Court to perform a full proportionality analysis.

Conclusion: violation (unanimously).

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

Freedom of expression/Liberté d'expression
Freedom to impart information/Liberté de communiquer des informations

Journalist denied access to conduct interviews about living conditions in reception centre for asylum-seekers: *violation*

Refus de laisser un journaliste accéder à un centre d'accueil de demandeurs d'asile pour y réaliser des entretiens sur les conditions d'accueil : *violation*

Szurovecz – Hungary/Hongrie, 15428/16, Judgment/Arrêt 8.10.2019 [Section IV]

Traduction française du résumé | Printable version

Facts – The applicant, a journalist, was denied access by the Office of Immigration and Nationality (OIN) to a reception centre accommodating asylum-seekers. The applicant wanted to conduct interviews for an article on the subject of living conditions inside the reception centre.

Law – The refusal to authorise the applicant to conduct interviews and take photos inside the reception centre had prevented him from gathering information first hand and from verifying information from other sources about the conditions of detention. The refusal constituted an interference with the exercise of his right to freedom of expression in that it had hindered journalistic research. The interference had been "prescribed by law" and had pursued the legitimate aim of protecting the private lives of asylum-seekers and residents of a camp.

At the material time the media had widely reported on the "refugee crisis" when a large number of asylum-seekers were entering the territory of Hungary. In particular, following an investigation the Commissioner for Fundamental Rights had found that the living conditions in the reception centre amounted to inhuman and degrading treatment.

How residents are accommodated in State-run reception centres, whether the State fulfils its international obligations towards asylum-seekers and whether this vulnerable group have the ability to fully enjoy their human rights had undisputedly been issues that were newsworthy and of great public significance. Therefore the article which the applicant had intended to prepare concerned a matter of public interest. Nevertheless the conclusion of the OIN in refusing the applicant access to the reception centre had been reached without any sensible consideration of his interest as a journalist in conducting his research or of the interest of the public in receiving information on a matter of public interest.

In the absence of a European consensus on how the rights of asylum-seekers were to be best ensured in reception centres, the Court was prepared to accept a somewhat wider margin of appreciation than otherwise accorded with respect to restrictions on publications raising a matter of major public concern. Moreover most member States required that some limitations be placed on journalists visiting facilities which accommodated asylum-seekers as regards their time, place and manner for institutional considerations, as well as for the protection of the rights of the residents.

However, the domestic authorities had not given sufficient consideration to whether the refusal of permission to access and conduct journalistic research inside the reception centre, for reasons concerning the private life and security of asylum-seekers, had been effectively necessary in practice.

The applicant had intended to gather materials concerning the living conditions and treatment of asylum-seekers by the Hungarian authorities. Moreover, he would have taken photos of only those individuals who had given their prior consent and, if needed, he would have also obtained written authorisation from them. In such conditions the reliance on the potential effects of research on the private lives of the people accommodated in the reception centre, although relevant, had not been sufficient to justify the interference with the applicant's freedom of expression.

Furthermore there had been no indication in what respect the safety of asylum-seekers would have been jeopardised in practice by the proposed research, especially if it had taken place only with the consent of the individuals involved.

Likewise, information obtained outside the reception centre might not have had, in the eyes of the public, the same value and reliability as first-hand data that the applicant could have obtained by accessing the reception centre in person; and any information available through indirect sources might have been gathered for purposes other than that of the applicant, without his having the possibility to verify their authenticity. The existence of other alternatives to direct newsgathering within the reception centre had not extinguished the applicant's interest in having face-to-face discussions on, and gaining first-hand impressions of, living conditions there. In those circumstances the availability of other forms and tools of research

had not been sufficient reasons to justify the interference complained of or to remedy the prejudice caused by the refusal of authorisation to enter the reception centre.

Lastly, essentially for the reason that the decision of the OIN had not been an administrative one, there had been no legal possibility open to the applicant to argue for the necessity of his access to the reception centre in order to exercise his right to impart information; and the domestic courts had been prevented from performing a proper proportionality analysis.

The domestic authorities were better placed than the Court was to say whether, and to what extent, access to the reception centre was compatible with the authorities' obligation to protect the rights of asylum-seekers. However, in view of the importance of the media in a democratic society and of reporting on matters of considerable public interest, the need for restrictions on freedom of expression had to be convincingly established. Therefore, considering the rather summary reasoning put forward by the OIN and the absence in its decision of any real balancing of the interests in issue, the domestic authorities had failed to demonstrate convincingly that the refusal of permission to enter and conduct research in the reception centre, which had been an absolute refusal, had been proportionate to the aims pursued and thus had met a "pressing social need".

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

(See also *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, 34124/06, 21 June 2012, Information Note 153)

ARTICLE 13

Effective remedy/Recours effectif

Effective preventive and compensatory remedies for inadequate conditions of detention: *inadmissible*

Caractère effectif d'un recours préventif et d'un recours compensatoire pour mauvaises conditions de détention : *irrecevable*

Ulemek – Croatia/Croatie, 21613/16, Judgment/Arrêt 31.10.2019 [Section I]

(See Article 35 below/Voir l'article 35 ci-dessous, page 36)

ARTICLE 14

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

No distinction made in favour of certain categories of vulnerable social housing tenants in the application of amended housing benefit scheme: *no violation; violation*

Pas de conditions particulières pour certains locataires sociaux en situation de vulnérabilité dans l'application du mécanisme modifié d'allocations de logement : *non-violation ; violation*

J.D. and/et A – United Kingdom/Royaume-Uni, 32949/17 and/et 34614/17, Judgment/Arrêt 24.10.2019 [Section I]

Traduction française du résumé | Printable version

Facts – The two applicants were tenants of social housing. Following a change to a statutory scheme, payments of housing benefit – to which the two applicants had previously been entitled in order to subsidise their rental costs – were reduced, as the amended scheme categorised them both as having an extra bedroom. Most of the shortfall between their rent and the reduced rate of housing benefit was replaced by payments under a discretionary housing benefit scheme, for which they had to apply.

They argued that these changes put them in a more precarious position than others affected by the reduction because of their personal circumstances – the first applicant cared for her disabled child full time and the second had been included in a "sanctuary scheme" designed to protect those who had experienced and remained at risk of serious domestic violence.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1

(a) *General principles* – In the context of Article 1 of Protocol No. 1 alone, in matters concerning general measures of economic or social strategy, States usually enjoyed a wide margin of appreciation under the Convention and the Court would generally respect the legislature's policy choice unless it had been "manifestly without reasonable foundation".

In the context of Article 14 in conjunction with Article 1 of Protocol No. 1, however, although the margin of appreciation in the context of general measures of economic or social policy was, in principle, wide, such measures had nevertheless to be implemented in a manner that did not violate the prohibition of discrimination as set out in the Convention and that complied with the requirement of proportionality. Thus, even a wide margin in the sphere of economic or social policy did not justify the adoption of laws or practices that would violate the prohibition of discrimination. Hence, in that context the Court had limited its acceptance to respect the legislature's policy choice as not "manifestly without reasonable foundation" to circumstances where an alleged difference in treatment had resulted from a transitional measure forming part of a scheme carried out in order to correct a historic inequality. Outside of that context, given the need, for example, to prevent discrimination against people with disabilities or to advance gender equality, "very weighty reasons" would have to be put forward before such a difference in treatment could be regarded as compatible with the Convention.

(b) *Application* – The changes made had applied to all beneficiaries under the scheme without any distinction by reference to their characteristics such as disability or gender. The applicants had been treated in the same way as other recipients of housing benefit in that their entitlements had been reduced on the same grounds and according to the same criteria as those of other recipients. Thus, the issue arising was one of alleged indirect discrimination. The question to be examined was whether there had been a discriminatory failure by the authorities to make a distinction in the applicants' favour on the basis that their relevant circumstances were significantly different from those of other recipients of housing benefit who had been adversely affected by the contested policy.

It had been an anticipated consequence of the reduction of housing benefit that all benefit recipients who had experienced such a reduction could be at risk of losing their homes. Indeed, the Government had argued that that precarity had been the intention of the scheme: to incentivise families to move. The applicants were in a significantly different situation and had been particularly prejudiced by the policy because they had a particular need to be able to remain in their specifically adapted homes for reasons directly related to their status.

Having established that the applicants – who had been treated in the same way as other recipients of the housing benefit even though their circumstances were significantly different – were particularly prejudiced by the impugned measure, the Court had to ask whether the failure to take account of that difference was discriminatory. In the circumstances of the applicants' cases – where the alleged discrimination was on the basis of disability and gender, and had not resulted from a transitional measure carried out in good faith in order to correct an inequality – very weighty reasons would be required to justify the impugned measure in respect of the applicants.

(i) *The first applicant* – Whilst it had been acknowledged that any move would be extremely disruptive and highly undesirable for the first applicant, it would not be in fundamental opposition to the recognised needs of disabled persons in specially adapted accommodation, but without a medical need for an "extra" bedroom, to move into smaller, appropriately adapted accommodation.

The discretionary housing payments scheme had a number of significant disadvantages including, *inter alia*, that the awards of those payments were purely discretionary in nature and their duration uncertain. The first applicant had in fact been awarded the payment for several years following the changes to the housing benefit legislation. Whilst the discretionary housing payments scheme could not be characterised as ensuring the same level of certainty and stability as the previous, unreduced housing benefit, its provision with attendant safeguards had amounted to a sufficiently weighty reason to satisfy the Court that the means employed to implement the measure had a reasonable relationship of proportionality to its legitimate aim. Accordingly, the difference in treatment identified in the case of the first applicant had been justified.

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

(ii) *The second applicant* – In the case of the second applicant, the legitimate aim of the scheme – to incentivise those with "extra" bedrooms to leave their homes for smaller ones – was in conflict with the aim of sanctuary schemes, which was to enable those at serious risk of domestic violence to remain in their own homes safely, should they wish to do so.

Given those two legitimate but conflicting aims, the Court considered that the impact of treating the second applicant – or others housed in sanctuary schemes – in the same way as any other housing benefit recipient affected by the impugned measure was disproportionate in the sense of not corresponding to the legitimate aim of the measure. The Government had not provided any weighty reasons to justify the prioritisation of the

aim of the scheme over that of enabling victims of domestic violence who had benefited from protection in sanctuary schemes to remain in their own homes safely. In that context, the provision of discretionary housing payments could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to *leave* their homes, as demonstrated by its identified disadvantages.

Accordingly, the imposition of the statutory change on that small and easily identifiable group had not been justified and was discriminatory.

Conclusion: violation in respect of the second applicant (five votes to two).

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

(See also *Thlimmenos v. Greece* [GC], 34369/97, 6 April 2000, Information Note 17; *D.H. and Others v. the Czech Republic* [GC], 57325/00, 13 November 2007, Information Note 102; *British Gurkha Welfare Society and Others v. the United Kingdom*, 44818/11, 15 September 2016, Information Note 199; *Konstantin Markin v. Russia* [GC], 30078/06, 22 March 2012, Information Note 150; and *Guberina v. Croatia*, 23682/13, 22 March 2016, Information Note 194)

ARTICLE 17

Prohibition of abuse of rights/ Interdiction de l'abus de droit

Criminal conviction of member of parliament for statements made in Parliament found to constitute Holocaust denial: *inadmissible*

Parlementaire condamné pénalement pour des propos constitutifs de déni de l'Holocauste tenus au parlement : *irrecevable*

Pastörs – Germany/Allemagne, 55225/14, Judgment/Arrêt 3.10.2019 [Section V]

(See Article 10 above/Voir l'article 10 ci-dessus, page 28)

ARTICLE 34

Victim/Victime

Author of impugned statements in published interview admitted as third party, albeit without own claim, to civil defamation proceedings against newspaper: *victim status upheld*

Personne interviewée admise, même sans prétentions propres, comme tiers intervenant dans la procédure civile en diffamation contre le journal ayant publié ses propos : *qualité de victime reconnue*

Margulev – Russia/Russie, 15449/09, Judgment/Arrêt 8.10.2019 [Section III]

(See Article 10 above/Voir l'article 10 ci-dessus, page 30)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/ Épuisement des voies de recours internes

Failure to exhaust preventive remedies counterbalanced by Constitutional Court's overall ruling on the merits in compensatory proceedings: *preliminary objection dismissed*

Défaut d'épuisement d'un recours préventif compensé par la décision globale au fond de la Cour constitutionnelle dans le cadre d'un recours compensatoire : *exception préliminaire rejetée*

Ulemek – Croatia/Croatie, 21613/16, Judgment/Arrêt 31.10.2019 [Section I]

(See below/Voir ci-dessous, page 36)

Effective domestic remedy/Recours interne effectif – Austria/Autriche

Effectiveness of remedy which did not allow for a claim of non-pecuniary damage to be made in defamation proceedings: *admissible*

Effectivité d'un recours ne permettant pas de demander une somme à titre de réparation du préjudice moral dans le cadre d'une procédure en diffamation : *recevable*

Lewit – Austria/Autriche, 4782/18, Judgment/Arrêt 10.10.2019 [Section V]

(See Article 8 above/Voir l'article 8 ci-dessus, page 16)

Effective domestic remedy/Recours interne effectif – Ukraine
Six-month period/Délai de six mois

Delays rendering Constitutional Court remedy ineffective in post-Yanukoviych lustration cases but not triggering six-month time-limit, failing perceptible inactivity: *preliminary objection dismissed*

Retards rendant le recours à la Cour constitutionnelle ineffectif dans les affaires de lustration post-Ianoukovitch mais ne déclenchant pas le délai de 6 mois, faute d'inactivité perceptible : *exception préliminaire rejetée*

Polyakh and Others/et autres – Ukraine, 58812/15, Judgment/Arrêt 17.10.2019 [Section V]

(See Article 8 above/Voir l'article 8 ci-dessus, page 22)

Effective domestic remedy/Recours interne effectif – Croatia/Croatie
Six-month period/Délai de six mois

Application duly lodged with the Court after obtaining the decision of the Constitutional Court in compensatory proceedings: *preliminary objection dismissed*

Introduction en bonne et due forme d'une requête devant la Cour après l'obtention d'une décision de la Cour constitutionnelle dans le cadre d'un recours compensatoire : *exception préliminaire rejetée*

Ulemek – Croatia/Croatie, 21613/16, Judgment/Arrêt 31.10.2019 [Section I]

Traduction française du résumé | Printable version

Facts – The applicant had served a prison sentence in two detention facilities in Croatia, namely Zagreb Prison and Glina State Prison. The prison regime and conditions of detention in these two prison facilities differed. As to the conditions of detention in Zagreb Prison, the applicant did not avail himself of the preventive remedy before the prison administration and/or the sentence-execution judge, which the European Court had already found in its case-law to be effective. As to the conditions in Glina State Prison, the applicant had made use of that remedy but, once his complaints were dismissed, he failed to complain to the Constitutional Court. The European Court had already found that lodging a complaint with the Constitutional Court was an additional required step in the process of exhausting the preventive remedy for conditions of detention in Croatia. Nevertheless, after his release from Glina State Prison, the applicant began a civil action for damages for the allegedly inadequate conditions in both facilities. After the dismissal of his constitutional complaint on the merits, the applicant lodged an application with the European Court within six months of receiving the Constitutional Court's decision. He mainly complained under Articles 3 and 13 of the Convention about the inadequate conditions of his detention in both prisons and about the lack of an effective remedy in that regard.

Law – Article 35 § 1

(a) *Effective remedies under Article 13 of the Convention in general and specifically with respect to conditions of detention in the case-law of the European Court*

The Court had recently examined the structural reforms in the systems of remedies of different countries. These reforms had been introduced in response to the Court's pilot and leading judgments concerning inadequate conditions of detention. The Court had thereby reaffirmed its case-law, according to which the preventive and compensatory remedies in this context had to be complementary.

(b) *Exhaustion of remedies and compliance with the six-month rule in cases concerning conditions of detention in the case-law of the European Court*

Applicants who were still in detention under the circumstances of which they complained were obliged to exhaust the available and effective preventive remedy before bringing their complaints before the Court.

However, in cases where unsatisfactory conditions of detention had already ended, the use of a compensatory remedy, such as a civil action for damages, was normally an effective remedy for the purposes of Article 35, when there had not been a preventive remedy providing for an effective avenue which the applicants could and should have used during their confinement. Accordingly, where an applicant had already been released when he or she lodged his application, a remedy of a purely compensatory nature could in principle have been effective and could have provided him or her with fair redress for the alleged breach of Article 3. By contrast, for countries where there had been an effective preventive remedy, the Court had considered the effectiveness of the compensatory

remedy in combination with the use of an effective preventive remedy.

In this context, the use of a civil action for damages had not been an alternative to the proper use of the preventive remedy, irrespective of the fact that those remedies may be, as a whole, exercised through two separate sets of judicial proceedings. Moreover, it had not been unreasonable to require a prisoner to use the available and effective preventive remedy as a precondition for his or her use of the compensatory remedy, aimed at obtaining damages for inadequate conditions of detention in the past. Indeed, an effective preventive remedy was capable of having an immediate impact on an applicant's inadequate conditions of detention. In the case of the compensatory remedy, this could only provide redress for the consequences of an applicant's allegedly inadequate conditions of detention.

From the perspective of the State's duty under Article 13, the prospect of future redress could not legitimise particularly severe suffering in breach of Article 3 and unacceptably weaken the legal obligation on the State to bring its standards of detention into line with the Convention requirements. Thus, given the close affinity between Articles 13 and 35 § 1 of the Convention, it would have been unreasonable to accept that once a preventive remedy had been established from the perspective of Article 13 – as a remedy found by the Court to be the most appropriate avenue to address the complaints of inadequate conditions of detention – an applicant could be dispensed from the obligation to use that remedy before bringing his or her complaint to the Court.

Thus, normally, before bringing their complaints to the Court concerning the conditions of their detention, applicants were first required to use properly the available and effective preventive remedy and then, if appropriate, the relevant compensatory remedy.

However, there might be instances in which the use of an otherwise effective preventive remedy would be futile in view of the brevity of an applicant's stay in inadequate conditions of detention. In such a scenario, the only viable option would be a compensatory remedy opening up the possibility of obtaining redress for past placement in inadequate conditions. How short a period had to be that use of the preventive remedy was futile might depend on many factors related to the manner of operation of the domestic system of remedies and the nature of the alleged inadequacy of an applicant's conditions of detention.

Use of the compensatory remedy could not be unlimited in time: it normally had to be used within six months of the allegedly inadequate conditions of detention ceasing to exist. This was without prejudice to the possibility that the relevant domestic law provided for different arrangements in the use of remedies or for a longer statutory time-limit for the use of a compensatory remedy, in which case the use of that remedy was determined by the relevant domestic arrangements and time-limits.

Where no effective remedy was available to the applicant, the period ran from the date of the acts or measures complained of, or from the date of the knowledge of that act or its effect on or prejudice to the applicant. When it was clear from the outset that the use of a remedy could not be considered effective for an applicant's complaints, the use of that remedy could not interrupt the running of the six-month time-limit. Where, therefore, an applicant availed him or herself of an apparently existing remedy and only subsequently became aware of circumstances which rendered the remedy ineffective, it might be appropriate to take as the start of the six-month period the date when the applicant first had become or ought to have become aware of those circumstances.

Moreover, in the context of conditions of detention, a period of an applicant's detention should have been regarded as a "continuing situation" where an applicant had been confined in different detention regimes and/or facilities as long as the detention had been effected in the same type of detention facility in substantially similar conditions. Short absences, during which the applicant had been taken out of the facility for interviews or other procedural acts, would have no incidence on the continuous nature of the detention. However, the applicant's release or transfer to a different type of detention regime, both within and outside the facility, would put an end to the "continuing situation". The complaint about the conditions of detention had to be filed within six months of the end of the situation complained of or, if there had been an effective domestic remedy to be exhausted, within six months of the final decision in the process of exhaustion.

(c) *Preliminary remarks concerning the Croatian preventive and compensatory remedies*

The Croatian legal system provided for both preventive and compensatory remedies. The preventive remedy was exercised by making a complaint to the prison administration and/or the sentence-execution judge directly, while the compensatory remedy related to the possibility of obtaining compensation in the form of damages before the

relevant civil courts. In any event, in case of an unfavourable outcome in the use of the preventive and/or compensatory remedy, an applicant could bring complaints before the Constitutional Court which also had the competence to order his or her release or removal from inadequate prison conditions.

Nevertheless the compensatory remedy, aimed at obtaining damages for the time the applicant had been detained in inadequate conditions of detention, had not been in itself effective. It was only in combination with an effective use of the preventive remedy, leading to an acknowledgment of a breach of the applicant's rights and his or her removal from the inadequate conditions of detention, that civil proceedings could satisfy the requirements of effectiveness. Applicants had to use diligently the available preventive remedy and, in the event of an unfavourable outcome, to lodge a constitutional complaint before the Constitutional Court.

Accordingly applicants were required, before bringing their complaints to the European Court, to afford the Croatian Constitutional Court the opportunity of remedying their situation and addressing the issues they wished to bring before the European Court. Where applicants had failed to comply with that requirement, the Court had declared their applications inadmissible for non-exhaustion of domestic remedies.

According to the relevant practices of the domestic authorities, including the Constitutional Court, once the preventive remedy had been set in motion by first lodging a complaint before the prison administration and/or the sentence-execution judge directly, neither removal from inadequate conditions of detention nor release prevented the examination and finding of a breach of Article 3.

As regards the use of the compensatory remedy, the Constitutional Court had recently held that appellants were not required to use the preventive remedy before the sentence-execution judge in order formally to be allowed to lodge a civil action for damages before the civil courts (which itself would also have allowed them, if needed, to bring their complaints before the Constitutional Court). However, where appellants lodged their constitutional complaints after their civil actions for damages (related to inadequate conditions of detention) had been dismissed, it seemed that the Constitutional Court approached cases in two ways. On the one hand, in several such cases the Constitutional Court had limited its examination to the procedural assessment of the civil courts' duty to elucidate the circumstances of a former prisoner's conditions of detention. On the other hand, in other cases the Constitutional Court itself had examined the (in) adequacy of detention conditions, and not just the procedural aspect of the complaints.

The above principles concerning the effective remedies had been found to be applicable to the complaints under Article 8 of the Convention concerning the conditions and regime of an applicant's detention.

(d) *Effectiveness of remedies in Croatia concerning allegations of inadequate conditions of detention*

The European Court confirmed its case-law as to the existence of effective preventive and compensatory remedies in Croatia concerning allegations of inadequate conditions of detention.

(e) *Whether the applicant had properly exhausted the domestic remedies and complied with the six-month time-limit*

Regarding the applicant's complaint about the inadequate conditions of detention, an issue that had to be considered was whether the applicant had properly exhausted the relevant domestic remedies (preventive and compensatory) for some of the periods of his imprisonment, as required under the Court's case-law. There was consequently also the question of whether the applicant had complied with the six-month time-limit for bringing his complaints to the Court. The Constitutional Court, as the highest court in the country, had examined on the merits the applicant's complaints of inadequate conditions of detention for the overall period of his confinement in Zagreb Prison and Glina State Prison, and the applicant had duly lodged his application with the European Court after obtaining that decision of the Constitutional Court. As the Constitutional Court's case-law stood, the applicant's complaints could not be dismissed for failure to exhaust domestic remedies and/or non-compliance with the six-month time limit.

(f) *Summing-up*

In view of the above considerations, reiterating that there was nothing in the applicant's arguments calling into question the general effectiveness of remedies in Croatia concerning allegations of inadequate conditions of detention, the Court found that the applicant's complaint under Article 13 was manifestly ill-founded.

Conclusion: preliminary objection dismissed (exhaustion of domestic remedies).

The Court also found, unanimously, a violation of Article 3 in respect of the applicant's conditions of detention in Zagreb Prison; but no violation of Arti-

cle 3 as regards the applicant's conditions of detention in Glina State Prison.

Article 41: EUR 1,000 in respect of non-pecuniary damage.

(See also the Factsheet on Detention conditions and treatment of prisoners; *Łomiński v. Poland* (dec.), 33502/09, 12 October 2010, Information Note 134; *Ananyev and Others v. Russia*, 42525/07 and 60800/08, 10 January 2012, Information Note 148: *Torreggiani and Others v. Italy*, 43517/09 et al., 8 January 2013, Information Note 159; *Stella and Others v. Italy* (dec.), 49169/09 et al., 16 September 2014, Information Note 177; *Varga and Others v. Hungary*, 14097/12 et al., 10 March 2015, Information Note 183; *Shishanov v. the Republic of Moldova*, 11353/06, 15 September 2015, Information Note 188; *Muršić v. Croatia* [GC], 7334/13, 20 October 2016, Information Note 200; *Domján v. Hungary* (dec.), 5433/17, 14 November 2017, Information Note 212; and *Draniceru v. the Republic of Moldova* (dec.), 31975/15, 12 February 2019, Information Note 226)

ARTICLE 46

Execution of judgment – General measures/Exécution de l'arrêt – Mesures générales

Respondent State required to amend electoral legislation to enable the holding of local elections

État défendeur tenu de modifier sa législation électorale pour permettre la tenue d'élections locales

Baralija – Bosnia and Herzegovina/Bosnie-Herzégovine, 30100/18, Judgment/Arrêt 29.10.2019 [Section IV]

(See Article 1 of Protocol No. 12 below/Voir l'article 1 du Protocol n° 12 ci-dessous, page 42)

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

Respondent State required to secure full repossession of land by internally displaced persons, including removal of a church

État défendeur tenu de faire en sorte que des déplacés internes rentrent pleinement en possession de leurs terrains et notamment d'en retirer une église

Orlović and Others/et autres – Bosnia and Herzegovina/Bosnie-Herzégovine, 16332/18, Judgment/Arrêt 1.10.2019 [Section IV]

(See Article 1 of Protocol No. 1 below/Voir l'article 1 du Protocole n° 1 ci-dessous, page 39)

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

Peaceful enjoyment of possessions/Respect des biens
Positive obligations/Obligations positives

Non-enforcement of final decision ordering full repossession of land by internally displaced persons, including plot on which church had been built: *violation*

Inexécution d'une décision définitive ordonnant la restitution pleine et entière à des déplacés internes de leurs terrains, dont une parcelle sur laquelle une église avait été construite : *violation*

Orlović and Others/et autres – Bosnia and Herzegovina/Bosnie-Herzégovine, 16332/18, Judgment/Arrêt 1.10.2019 [Section IV]

Traduction française du résumé | Printable version

Facts – The applicants were forced to flee their home during the 1992-95 Bosnian war and became internally displaced persons. In 1997 a part of the applicants' land was expropriated and allocated to the parish for the purpose of building a church. In 1999 the Commission for Real Property Claims of Displaced Persons and Refugees ("the CRPC") annulled any involuntary transfer or restriction of ownership after 1992 and established that the applicants were entitled to repossess the land. In 2001 the Ministry for Refugees ordered immediate repossession of the land. The applicants regained possession of their land with the exception of the plot on which the church remained. The applicants' efforts to regain full possession were unsuccessful.

Law – Article 1 of Protocol No. 1: It was not disputed that the applicants were the owners of the property in question and that they were entitled to have the land restored to them. The applicants' right to full restitution had been established by decisions of both the CRPC and the Ministry for Refugees.

Both decisions had conferred the right to immediate repossession and both were final and enforceable. Under the Restitution of Property Act 1998 and the Dayton Peace Agreement of 1995, the relevant authorities had to implement the CRPC's decisions.

The land had subsequently been returned to the applicants, except for the plot on which the church remained. The applicants had repeatedly sought full repossession to no avail. The State's obligation to secure to the applicants the effective enjoyment of their right of property, as guaranteed by Article 1 of Protocol No. 1, had required the national authorities to take practical steps to ensure that the decisions of the CRPC and the Ministry for Refugees were enforced. Instead, the authorities initially even did the opposite by effectively authorising the church to remain on the applicants' land. The applicants' civil claim seeking to recover possession of their land had ultimately been dismissed.

Despite having two final decisions ordering full repossession of their land, the applicants were still prevented, seventeen years after the ratification of the Convention and its Protocols by the respondent State, from the peaceful enjoyment thereof.

Although a delay in the execution of a judgment might be justified in particular circumstances, the Government had not offered any justification for the authorities' inaction in the applicants' case. The very long delay had amounted to a clear refusal of the authorities to enforce the relevant decisions, leaving the applicants in a state of uncertainty with regard to the realisation of their property rights. Thus, as a result of the authorities' failure to comply with the final and binding decisions, the applicants had suffered serious frustration of their property rights. As such, they had had to bear a disproportionate and excessive burden.

Conclusion: violation (unanimously).

Article 46: The violation found in the applicants' case did not leave any real choice as to the measures required to remedy it. In those conditions, having regard to the particular circumstances of the case, the Court considered that the respondent State had to take all necessary measures in order to secure full enforcement of the decisions of the CRPC and the decision of the Ministry for Refugees, including, in particular, the removal of the church from the applicants' land, without further delay and at the latest within three months from the date on which the judgment became final.

Article 41: EUR 5,000 to the first applicant and EUR 2,000 to each of the remaining applicants in respect of pecuniary damage.

ARTICLE 2 OF PROTOCOL No. 1/DU PROTOCOLE N° 1

Respect for parents' religious convictions/Respect des convictions religieuses des parents

Parents obliged to submit solemn declaration, with teacher's countersignature, as to non-Orthodox Christian status of children for exemption from religious education course: *violation*

Parents obligés de remettre une déclaration solennelle, contresignée de l'enseignant, attestant que leurs enfants n'étaient pas chrétiens orthodoxes pour que ceux-ci soient dispensés du cours d'éducation religieuse : *violation*

Papageorgiou and Others/et autres – Greece/Grèce, 4762/18 and 6140/18, Judgment/Arrêt 31.10.2019 [Section I]

Traduction française du résumé | Printable version

Facts – Application no. 4762/18 concerned three applicants, namely two parents and their daughter (a child); and application no. 6140/18 concerned a mother and her daughter (also a child). The two children were students at schools on two small Greek islands.

The parent applicants complained that they were obliged to submit a solemn declaration to seek exemptions for their children from a religious education course. They also complained that such declarations had to be kept with the school records and that the relevant school principal had to enquire whether their content was true.

Law – Article 2 of Protocol No. 1: The main issue raised had been that of the obligation on the parents to submit to the principal of each school a solemn declaration in writing, countersigned by a teacher, declaring that their daughters were not Orthodox Christians, in order for the latter to be exempted from the religious education course.

Under both Article 16 § 2 of the Constitution and the Education Act, the religious education course was mandatory for all students. However, a circular of 23 January 2015 provided that non-Ortho-

dox Christian students – that is to say, students with a different religious or doctrinal affiliation, or non-religious students who relied on grounds of religious conscience – could be exempted from attending the course. This exemption procedure had been maintained in force by Article 25 § 3 of a decision of the Minister of Education dated 23 January 2018.

The 2015 circular did not require religious justification to be provided in the exemption form. However, the parents had been obliged to submit to the relevant school principal a solemn declaration in writing, countersigned by a teacher, stating that their child was not an Orthodox Christian. That school principal had the responsibility of checking the documentation in support of the grounds relied on by the parents and drawing their attention to the seriousness of the solemn declaration they had filed.

Checking the seriousness of the solemn declaration implied that the school principal was to verify whether it contained false information, namely whether the birth certificate of the child which indicated the parents' religion and which must be submitted to the school authorities corresponded to the solemn declaration. In addition, "religion" as a subject was compulsory in primary, middle and high school, as well as in certificates of studies, under the relevant ministerial decisions. Where there was a discrepancy, the school principal had to alert the public prosecutor that a false solemn declaration had been submitted, since it was a criminal offence.

The current system of exemption for children from the religious education course was capable of placing a heavy burden on parents with a risk of undue exposure of their private life; the potential for conflict was also likely to deter them from making such a request, especially if they lived in a small and religiously compact society, as was the case with the small Greek islands, where the risk of stigmatisation was much more likely than in large cities. The parent applicants had actually been deterred from making such a request not only for fear of revealing that they were not Orthodox Christians in an environment in which the great majority of the population owed allegiance to one particular religion, but also because, as they had pointed out, there had been no other course offered to exempted students and they had been made to lose school hours simply because of their declared beliefs.

Although the parent applicants had been under no obligation to disclose their convictions, the fact that they had been required to submit a solemn declaration had amounted to forcing them to adopt behaviour from which it might be inferred that they themselves and their children held, or did not hold, any specific religious beliefs.

In its previous cases the Court had stated that the freedom to manifest one's beliefs also contained a negative aspect, namely the individual's right not to manifest his or her religion or religious beliefs and not to be obliged to act in such a way as to enable conclusions to be drawn as to whether he or she held – or did not hold – such beliefs. In the present case the State authorities had not had the right to intervene in the sphere of individual conscience and to ascertain individuals' religious beliefs or oblige them to reveal their beliefs concerning spiritual matters.

Having regard to the foregoing, the Government's objection of non-exhaustion was dismissed as regards the applicants' omission to use the exemption procedure. Moreover, the Court concluded that there had been a breach of the rights of the applicants under the second sentence of Article 2 of Protocol No. 1, as interpreted in the light of Articles 8 and 9 of the Convention.

Conclusion: violation (unanimously).

Article 41: The Court awarded, in respect of non-pecuniary damage, EUR 8,000 jointly to the applicants in application no. 4762/18 and EUR 8,000 jointly to the applicants in application no. 6140/18.

(See also *Hasan and Eylem Zengin v. Turkey*, 1448/04, 9 October 2007, Information Note 101; *Alexandridis v. Greece*, 19516/06, 21 February 2008, Information Note 105; *Dimitras and Others v. Greece*, 42837/06 et al., 3 June 2010, Information Note 131; and *Grzelak v. Poland*, 7710/02, 15 June 2010, Information Note 131)

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

General prohibition of discrimination/ Interdiction générale de la discrimination

Inability of resident of a city to vote and stand in local elections for a prolonged period of time: *violation*

Impossibilité prolongée pour un résident de voter et de se porter candidat aux élections locales : *violation*

Baralija – Bosnia and Herzegovina/Bosnie-Herzégovine, 30100/18, Judgment/Arrêt 29.10.2019 [Section IV]

Traduction française du résumé | Printable version

Facts – The applicant lived in the city of Mostar, where local elections had last been held in 2008.

In November 2010 the Constitutional Court declared certain sections of the Election Act 2001 and the Statute of the City of Mostar as unconstitutional. It ordered the Parliamentary Assembly of Bosnia and Herzegovina to amend, within six months of the publication of its decision in the Official Gazette, the unconstitutional provisions of the Election Act 2001. It also ordered Mostar City Council to inform it of the steps taken to bring the Statute of the City of Mostar into line with the Constitution of Bosnia and Herzegovina within three months of the publication in the Official Gazette of amendments made by the Parliamentary Assembly to bring the Election Act 2001 into line with the Constitution of Bosnia and Herzegovina in accordance with its decision.

In January 2012 the Constitutional Court adopted a ruling on the non-enforcement of its decision of November 2010 by the Parliamentary Assembly. It established that the impugned provisions of the Election Act 2001 would cease to be in effect on the day following the publication of its ruling in the Official Gazette. On February 2012 the relevant provisions of the Election Act 2001 lost their legal validity.

Local elections in Mostar could therefore not be held in the election cycles of 2012 and 2016. The current mayor of Mostar was elected by the city council in 2009. Since 2012 he has had a "technical mandate" in the absence of local elections. As at September 2019, the relevant provisions of the Election Act 2001 regulating elections to the city council had still not been adopted.

The applicant complained that her inability to vote or stand in local elections in the city of Mostar amounted to discrimination on the grounds of her place of residence.

Law – Article 1 of Protocol No. 12

(a) *Whether the applicant enjoyed a right set forth by law* – The applicant had a right set forth by law – namely the right to vote and stand in local elections – for which she met the general conditions for exercising that right.

(b) *Whether there was an analogous or relevantly similar situation and a difference in treatment* – The applicant, as a person residing in the city, had been in an analogous or relevantly similar situation to a person residing in another part of the country, as regards the enjoyment of the right to vote and stand in local elections.

This case involved the different application of the same legislation depending on a person's residence. As the difference in treatment complained of was based on "other status", the applicant enjoyed the protection offered by Article 1 of Protocol No. 12.

(c) *Whether sufficient measures had been taken by the authorities to protect the applicant from the alleged discriminatory treatment* – The delay in implementing the Constitutional Court's decision had been justified by the need to establish a long-term and effective power-sharing mechanism for the city council, in order to maintain peace and to facilitate a dialogue between the different ethnic groups in the city. A similar justification had already been examined in the context of the existing constitutional provisions, which had been designed to end a brutal conflict marked by genocide and "ethnic cleansing", and which had been necessary to ensure peace. The European Court had held that some of the existing power-sharing arrangements – insofar as they had granted special rights for constituent peoples to the exclusion of ethnic minorities and persons who had not declared affiliation with any particular group – were not compatible with the Convention. It had also noted, however, that there was "no requirement under the Convention to abandon totally the power-sharing mechanisms peculiar to Bosnia and Herzegovina and that the time [might] still not [have been] ripe for a political system which would be a simple reflection of majority rule". However, whereas in previous cases the Strasbourg Court had dealt with the existing legislative arrangements, in this case there was a legal void which had made it impossible for the applicant to exercise her voting rights and her right to stand in local elections for a prolonged period of time.

In the context of Article 3 of Protocol No. 1, the European Court had held that the primary obligation with regard to the right to free elections was not one of abstention or non-interference, as with the majority of civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections. The same viewpoint had been adopted by the United Nations Human Rights Committee in the context of the rights under Article 25 of the International Covenant on Civil and Political Rights which applied in Bosnia

and Herzegovina by virtue of their constitutional status.

The local elections in the city had been last held in 2008. Since 2012 the city had been governed solely by a mayor who had a "technical mandate" and therefore did not enjoy the required democratic legitimacy. Moreover, he could not exercise all the functions of local government, which consequently remained unfulfilled. This situation was not compatible with the concepts of "effective political democracy" and "the rule of law" to which the Preamble to the Convention refers. There was no doubt that democracy was a fundamental feature of the European public order, and that the notion of effective political democracy was just as applicable to the local level as it was to the national level, bearing in mind the extent of decision-making entrusted to local authorities and the proximity of the local electorate to the policies which their local politicians adopted. In this respect the Preamble to the Council of Europe's European Charter of Local Self-Government proclaimed that local authorities were one of the main foundations of any democratic regime, and that local self-government was to be exercised by councils or assemblies composed of freely elected members.

Against this background, the difficulties in reaching a political agreement for a sustainable power-sharing mechanism was not a sufficient, objective and reasonable justification for the situation complained of, which had already lasted for a long time. In sum, the State had failed to fulfil its positive obligations to adopt measures to hold democratic elections in the city.

Conclusion: violation (unanimously).

Article 46: The matter complained of in the present case had resulted from a failure on the part of the respondent State to implement the decision of the Constitutional Court and its ancillary orders. The failure to implement a final, binding judicial decision would be likely to lead to situations that had been incompatible with the principle of the rule of law which the Contracting States had undertook to respect when they had ratified the Convention. Consequently, having regard to these considerations, and to the large number of potential applicants as well as the urgent need to put an end to the impugned situation, the respondent State had, within six months of the date on which the present judgment became final, to amend the Election Act 2001 in order to enable the holding of local elections in Mostar. If the State failed to do so, the Constitutional Court, under domestic law and practice, had the power to set up interim arrangements as necessary transitional measures.

Article 41: claim in respect of pecuniary damage dismissed; finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

(See also *Mathieu-Mohin and Clerfayt v. Belgium*, 9267/81, 2 March 1987; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 27996/06 and 34836/06, 22 December 2009, Information Note 125; *Zornić v. Bosnia and Herzegovina*, 3681/06, 15 July 2014, Information Note 176; and *Pilav v. Bosnia and Herzegovina*, 41939/07, 9 June 2016, Information Note 197)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

Environment and protection of human health – Placing of plant protection products on the market – Precautionary principle

Environnement et protection de la santé humaine – Mise sur le marché des produits phytopharmaceutiques – Principe de précaution

Blaise and Others/e.a., C-616/17, Judgment/Arrêt 1.10.2019 (CJEU, Grand Chamber/CJUE, grande chambre)

See press release | Voir le communiqué de presse

In this judgment, the CJEU gave a ruling on the validity, in the light of the precautionary principle (in relation to Article 35 of the Charter of Fundamental Rights of the European Union), of Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market.

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Dans cet arrêt, la CJUE s'est prononcée sur la validité, au regard du principe de précaution (rattachable à l'article 35 de la Charte des droits fondamentaux de l'Union européenne), du règlement (CE) n° 1107/2009 du Parlement européen et du Conseil du 21 octobre 2009 concernant la mise sur le marché des produits phytopharmaceutiques.

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

Criminal proceedings and conviction due to publication of op-ed denouncing alleged mismanagement of funds in the Legislative Assembly of Venezuela

Individu poursuivi et condamné pénalement pour avoir publié un article d'opinion dénonçant des manquements allégués dans la gestion des fonds de l'Assemblée législative du Venezuela

Case of Álvarez Ramos v. Venezuela/Affaire Álvarez Ramos c. Venezuela, Series C No. 380/Série C n° 380, Judgment/Arrêt 30.8.2019

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]
[Le présent résumé a été fourni gracieusement (en anglais uniquement) par le Secrétariat de la Cour interaméricaine des droits de l'homme. Il porte uniquement sur les questions de fond et de réparation traitées dans l'arrêt. Un résumé officiel plus détaillé (en espagnol uniquement) est disponible sur le site web de cette cour : www.corteidh.or.cr.]

The case concerned criminal proceedings against Mr Tulio Álvarez Ramos that had been initiated by the then President of the Legislative Assembly of Venezuela. Mr Álvarez Ramos had published an op-ed denouncing the mismanagement of funds in the Legislative Assembly, which affected its employee's savings trust. The judge presiding over the criminal proceedings prohibited Mr Álvarez Ramos from leaving the country without prior authorisation. In February 2005 the criminal court issued its judgment and sentenced Mr Álvarez Ramos to a term of imprisonment of two years and three months for the crime of "continued aggravated defamation". He was also barred from participating in government or in elections. The prison term was suspended pending the fulfilment of certain requirements established by the courts. Mr Álvarez Ramos lodged several appeals, but to no avail. By March 2009 he had served the full term of his sentence.

Merits

(a) Articles 13(2) (freedom of expression) and 23(2) (right to participate in government), in conjunction with Article 1(1) (obligation to respect and guarantee rights without discrimination) of the American Convention on Human Rights (ACHR): The Inter-American Court of Human Rights (hereafter "the Court") noted that the imposition of liability for the exercise of freedom of expression had to comply with the requirements of legality, legitimate objective and necessity. In the case of speech protected by public interest – such as that referring to the conduct of public officials in the exercise of their functions – the punitive response of the State through criminal law was not appropriate from the standpoint of the ACHR when protecting the honour of the official in question.

The Court considered that the op-ed published by Mr Álvarez Ramos had constituted information of public interest because the person referred to in the article was a public official at the time, linked to the events, and the subject was relevant to the public.

The Court observed that on issues of public interest, protection was granted not only to the expression of views that were harmless or favourably received, but also those that offended, shocked or disturbed public officials or any sector of the population, as in the case at hand. Indeed, the use of a criminal penalty for having disseminated views of this nature would directly or indirectly produce intimidation which, in turn, would limit freedom of expression and prevent the public scrutiny of conduct by public officials that had breached the law, such as instances of corruption. The foregoing would weaken public control over the power of the State, with considerable damage to democratic pluralism.

Therefore, the Court concluded that Mr Álvarez Ramos' conduct could not be considered prohibited by criminal law and declared that there had been a violation of Article 13.2 of the ACHR. In addition, given that the criminal prosecution and penalty imposed on Mr Álvarez Ramos were declared contrary to the ACHR, it was considered that there had also been a violation of Article 23.

(b) Article 8(1) (right to fair trial), in conjunction with Article 1(1) (obligation to respect and guarantee rights without discrimination) of the ACHR: The Court observed that a party's right to have the time and adequate means to prepare its defence obliged the State to allow a defendant to access the files and accusations that had been brought against him or her and to respect the adversarial principle. In the present case it had been proved that, until the time of the trial hearing, Mr Álvarez Ramos and his lawyers had not had access to the videos that had given rise to the amendment of the accusation. Therefore, the Court concluded that this restriction had prevented Mr Álvarez Ramos from adequately defending himself, in violation of Article 8.2.c of the ACHR. On the other hand, with respect to the detention of a witness during his testimony and the decision to reject his statements as evidence, the Court considered that it had at least had the effect of arousing concern or fear in

the successive witnesses at the hearing. Likewise, the lack of justification or arguments regarding the detention order (since it had been based solely on the allegation of the accusing party's lawyer) was a violation of the due process guarantees provided for in Article 8.2.f of the ACHR.

(c) Article 22(2) (freedom of movement), in conjunction with Article 1(1) (obligation to respect and guarantee rights without discrimination) of the ACHR: The Court affirmed that the right to freedom of movement, including the right to leave the country, might be subject to restrictions in accordance with the provisions of Articles 22.3 and 30 of the ACHR. In order to establish such restrictions, States had to observe the requirements of legality, necessity and proportionality. The Court also reiterated that precautionary measures affecting the personal liberty and freedom of movement of the accused were exceptional in nature. Thus, in the present case, it was verified that the judge's decision prohibiting Mr Álvarez Ramos from leaving the country had not presented an objective analysis or indications that could have led to the conclusion that there had been a risk of the accused escaping justice. Thus, the Court concluded that the necessity and proportionality of the restriction were not duly justified, which amounted to a violation of Article 22 of the ACHR.

(d) Article 25(1) (right to judicial protection), in conjunction with Article 1(1) (obligation to respect and guarantee rights without discrimination) of the ACHR: The Court considered that the *amparo* appeal lodged by Mr Álvarez Ramos to secure his participation in an election to the Professors' Association of the Central University of Venezuela had been effective, addressing his complaint in a timely and lawful manner. The subsequent revocation of this decision by the Constitutional Chamber of the Supreme Court of Justice had not affected the protection provided in the original decision because, by that time, the criminal sentence had already expired and Mr Álvarez Ramos' right to participate in government had been restored. Therefore, the Court concluded that there was no violation of the right to judicial protection in the present case.

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) adopt all the necessary measures to render the sentence against Mr Álvarez Ramos null and void, including the consequences that derived from it, as well as the judicial or administrative, criminal, electoral or police records; (ii) publish the judgment and its official summary; and (iii) pay compensation in respect of pecuniary and non-pecuniary damage, as well as costs and expenses.

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Elections/Élections

During its autumn session from 30 September to 4 October 2019, the Parliamentary Assembly of the Council of Europe elected Ana Maria Guerra Martins as judge to the Court in respect of Portugal. Her term of office of nine years will commence as from 1 April 2020.

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Lors de sa session d'automne qui s'est tenue du 30 septembre au 4 octobre 2019, l'Assemblée parlementaire du Conseil de l'Europe a élu Ana Maria Guerra Martins juge à la Cour au titre du Portugal. Son mandat de neuf ans commencera à partir du 1er avril 2020.

Request for an advisory opinion/ Demande d'avis consultatif

On 2 October 2019 the Grand Chamber panel decided to accept the request for an advisory opinion from the Constitutional Court of Armenia received in September 2019 (request no. P16-2019-001). It is the second request received by the Court since the entry into force of Protocol No. 16. More information is available in the Court's press release.

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Le 2 octobre 2019, le collège de la Grande Chambre a accepté la demande d'avis consultatif soumise par la Cour constitutionnelle d'Arménie en septembre 2019 (demande no P16-2019-001). Il s'agit de la deuxième demande d'avis consultatif reçue par la Cour depuis l'entrée en vigueur du Protocole no 16 à la Convention. Plus d'informations sont disponibles dans le communiqué de presse de la Cour.

Superior Courts Network: new member/ Réseau des cours supérieures : nouveau membre

In October 2019 the Superior Courts Network welcomed a new member: the Supreme Court of Norway, which brings the membership of the SCN to 81 courts from 38 States. The list of the member courts is available on the Court's website.

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En octobre 2019, le Réseau des cours supérieures a accueilli un nouveau membre : la Cour suprême de Norvège, faisant passer le nombre de membres

actuels à 81 juridictions de 38 États. La liste des juridictions membres est disponible sur le site web de la Cour.

Non-contentious procedure/Procédure non contentieuse

The Court has introduced a non-contentious procedure from the communication of the case – that is, the point where notice of the application is given to the respondent Government. This mechanism allows the parties to reach a friendly settlement, with the aim of reducing case-processing time and ensuring speedier resolution of the dispute.

A video explaining the stages of the non-contentious procedure has been published by the Court.

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La Cour a mis en place une procédure non contentieuse dès la communication de l'affaire, c'est-à-dire dès la notification de la requête au Gouvernement défendeur. Ce mécanisme permet aux parties de parvenir à un règlement amiable, et a pour objectifs de réduire le temps de traitement de l'affaire et de parvenir à une issue rapide.

Une vidéo expliquant les étapes de la procédure non contentieuse a été publiée par la Cour.

70th anniversary of the Council of Europe/70e anniversaire du Conseil de l'Europe

The President of the Court, Linos-Alexandre Sicilianos, took part in the ceremony to commemorate the 70th anniversary of the Council of Europe, a ceremony also attended by the organisation's Secretary General, Marija Pejčinović Burić, and by French President Emmanuel Macron.

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Le Président de la Cour, Linos-Alexandre Sicilianos, a pris part à la cérémonie de commémoration du 70e anniversaire du Conseil de l'Europe, cérémonie à laquelle ont également assisté la Secrétaire Générale de l'organisation Marija Pejčinović Burić, ainsi que le Président de la République française Emmanuel Macron.

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

Key cases/Affaires phares

The list of key cases for the year 2019, as proposed by the Jurisconsult and approved by the Bureau, has been updated to include the selection of cases from the third quarter of the year.

La liste des affaires phares pour l'année 2019, recommandée par le jurisconsulte et approuvée par le Bureau, a été mise à jour en incluant la sélection des affaires du 3e trimestre.

New Case-Law Guide/Nouveau Guide sur la jurisprudence

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

Guide on the case-law of the European Convention on Human Rights – Immigration

Dans sa série sur la jurisprudence par thème, la Cour a publié un Guide sur l'immigration, qui est disponible pour le moment uniquement en anglais.

Tous les guides sur la jurisprudence peuvent être téléchargés à partir du site web de la Cour.

Strengthening Confidence in the Judiciary/Renforcer la confiance en la magistrature

Following on from the seminar held in January 2019 in conjunction with the official opening of the judicial year, a Russian version of the background paper is now available on the Court's website.

Укрепление доверия к судебной власти – Рабочий документ

À la suite du séminaire qui a eu lieu en janvier 2019 lors de l'inauguration de l'année judiciaire de la Cour, une version russe du document de travail est disponible sur le site de la Cour.

Joint publications by the ECHR and FRA/Publications conjointes de la CEDH et la FRA

The Finnish and Romanian versions of the Handbook on European non-discrimination law are now available.

Euroopan syrjinnänvastaisen oikeuden käsikirja

Manual de drept european privind nediscriminarea

Les versions finnoise et roumaine du Manuel de droit européen en matière de non-discrimination sont disponibles.

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The Spanish version of the Handbook on European data protection law is now also available.

Manual de legislación europea en materia de protección de datos

La version espagnole du Manuel de droit européen en matière de protection des données est aussi disponible.

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Finally, the Azerbaijani version of the Handbook on European law relating to access to justice is now also available.

Ədalət mühakiməsinə çatım üzrə Avropa hüququna dair məlumat kitabı

Finalement, la version azerbaïdjanaise du Manuel de droit européen en matière d'accès à la justice est aussi disponible.

Commissioner for Human Rights/ Commissaire aux droits de l'homme

The second quarterly activity report 2019 of the Council of Europe's Commissioner for Human Rights, Dunja Mijatović, is available on the Commissioner's website (www.coe.int – Commissioner for Human Rights – Activity reports).

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Le deuxième rapport trimestriel d'activité 2019 de la Commissaire aux droits de l'homme du Conseil de l'Europe, Dunja Mijatović, est disponible sur le site internet de cette dernière (www.coe.int – Commissaire aux droits de l'homme – Rapports d'activité).