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October
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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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

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

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

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La Note d'information contient les résumés d'affaires dont le greffe de la Cour a indiqué qu'elles présentaient un intérêt particulier. Les résumés sont rédigés par des juristes 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. La version électronique de la Note peut être téléchargée à l'adresse suivante : www.echr.coe.int/NoteInformation/fr.

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

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Juridiction de la Géorgie en Ossétie du Sud pendant la phase active des hostilités : *irrecevable*

Shavlokhova and Others/et autres – Georgia/Géorgie, 45431/08 et al., Decision/Décision 5.10.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants are Russian nationals. They complained of violations under various Convention articles in relation to the military actions undertaken by the Georgian armed forces, during the active phase of international armed conflict between Georgia and the Russian Federation in August 2008.

Law – Article 1: The acts allegedly constitutive of violations of the applicants' various Convention rights had taken place in and around Tskhinvali, the administrative capital of South Ossetia, on 8 and 9 August 2008. Those two days fell within the five-day international armed conflict that took place between the military forces of Georgia and the Russian Federation mostly in South Ossetia, but also in Abkhazia, as well as in undisputed Georgian territory, between 8 and 12 August 2008 (see *Georgia v. Russia (II)* [GC]). Consequently, whilst those regions clearly fell within the respondent State's internationally recognised borders and thus were covered by the notion of its territorial jurisdiction under Article 1, the Court had to answer the question of whether or not there had existed a valid limitation of the normal exercise of that jurisdiction. That major question had to be addressed against the reality of the "acts of war" that had taken place in South Ossetia on the above-mentioned days.

The Court had already comprehensively examined the active phase of the hostilities (from 8 to 12 August 2008) between Georgia and the Russian Federation in *Georgia v. Russia (II)*. It considered that the same considerations, which excluded an "element of proximity" between military actions and the alleged violations of individual victims' various rights under the Convention, applied equally to the presumption of the "normal exercise" by the respondent State of its territorial jurisdiction over Tskhinvali and other conflict-stricken areas of South Ossetia. Indeed, having regard to the exceptionally large-scale nature of the international armed conflict which had taken place between the armed forces of the two States between 8 and 12 August 2008, and the fact that both sides, the Russian and Georgian armed forces, had resorted to massive bombing and shelling of the territories within the same period of time, it would be impossible to track either direct and immediate cause or even sufficiently close proximity between the actions of the Georgian army proper and the effects produced on the applicants. The possible contradictions and inconsistencies between the military actions which had actually occurred in the conflict zone and the effects of those actions on individual victims could be explained by such complexities as the exceptionally large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations were predominantly regulated by legal norms other than those of the Convention, notably international humanitarian law and/or the law of armed conflict.

The Court therefore concluded that the events that had unfolded in South Ossetia and other areas of Georgia, including in the so-called "buffer zone", where the massive fighting between the armed forces of the Russian Federation and the respondent State had taken place between 8 and 12 August 2008, had been "acts of war", in a context of chaos, effectively preventing the respondent State from exercising its authority over the areas in question for the duration of the armed conflict. In the same way as those "acts of war", or the "active phase of the hostilities", had not fallen within the extraterritorial jurisdiction of the Russian Federation, one side of the international armed conflict, the same events could not be considered as attracting the normal exercise of the territorial jurisdiction of Georgia, the other side of the conflict, merely because the territory in which the hostilities had taken place was formally Georgian. Any other conclusion would go against the spirit of the Grand Chamber's ruling in *Georgia v. Russia (II)*, where the international armed conflict between the two Contracting States, as well as the repercussions of that conflict for the overall jurisdictional test contained in Article 1, had already been comprehensively examined.

Following the logic of the *Ilaşcu and Others* approach, Georgia's inability to exercise State authority over the relevant territories during the active phase of the hostilities was to be understood as a limitation of the normal exercise of the respondent State's territorial jurisdiction over the war-stricken territories. Thus, as matter of principle, the respondent State had still been expected under the Convention to take diplomatic, economic, judicial or other measures. However, it would have been unrealistic to expect the respondent State to have taken any such measures during the active phase of the hostilities, in a context of chaos and confusion. Given

the ongoing massive armed conflict, such positive measures of a public order nature had been, on the one hand, impossible to implement and, on the other, of no real value, as they could not have meaningfully contributed to the protection of the applicants' rights in times of war.

Conclusion: inadmissible (incompatibility *ratione materiae*).

(See *Ilaşcu and Others v. Moldova and Russia* [GC], 48787/99, 8 July 2004, Legal Summary, and *Georgia v. Russia (II)* ([GC], 38263/08, 21 January 2021, Legal Summary)

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain ou dégradant Inhuman or degrading punishment/Peine inhumaine ou dégradante

Extradition to the USA with alleged real risk of life imprisonment without parole: *relinquishment in favour of the Grand Chamber*

Extradition vers les États-Unis susceptible d'emporter un risque réel de réclusion à perpétuité incompressible : *dessaisissement au profit de la Grande Chambre*

Sanchez-Sanchez – United Kingdom/Royaume-Uni, 22854/20

Traduction française du résumé – Printable version

The applicant is a Mexican national currently being detained in the United Kingdom. He faces extradition to the USA where he is wanted on federal charges of drug dealing and trafficking. If convicted, his sentencing level would be Level 43 in the US Sentencing Guidelines, which has a sentence range of life imprisonment.

The applicant appealed unsuccessfully to the High Court against his extradition order. In its decision, the High Court considered itself bound, by an earlier decision of the House of Lords, to hold that to extradite a claimant to the USA to face, if convicted, a life sentence without parole would not breach Article 3. The High Court considered that, following the European Court's judgment in *Trabelsi v. Belgium*, there was no "clear and consistent" jurisprudence from the European Court about the application of Article 3 to sentences of life imprisonment without parole in the extradition context. It was also satisfied that the life sentence was not irreducible, noting the two routes by which a prisoner could seek a reduction in sentence under the US federal system: compassionate release and executive clemency (compared with *McCallum v. Italy*, concerning the system applicable in the State of Michigan).

The applicant complains under Article 3 that, if extradited, there would be a real risk that he would be subjected to inhuman and degrading punishment through the imposition of an "irreducible" life sentence; and that there is a real risk that post-conviction detention conditions would be inhuman and degrading.

Under Rule 39 of the Rules of Court, the Court has indicated to the United Kingdom Government that the applicant should not be extradited for the duration of the proceedings before it.

On 19 October 2021 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

(See *Trabelsi v. Belgium*, 140/10, 4 September 2014, Legal Summary, and *McCallum v. Italy* (relinquishment), 20863/21, Legal Summary)

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

No coercion to be vaccinated against Covid-19 as a result of introduction of the health pass for individuals who are not subject to compulsory vaccination: *inadmissible*

Absence de contrainte à la vaccination contre la covid-19 pour une personne non soumise à l'obligation vaccinale, du fait de la mise en place du passe sanitaire : *irrecevable*

Zambrano – France, 41994/21, Decision/Décision 7.10.2021 [Section V]

(See Article 35 § 3 (a) below/Voir l'article 35 § 3 (a) ci-dessous, page 36)

ARTICLE 4

Effective investigation/Enquête effective Trafficking in human beings/Traite d'êtres humains Forced labour/Travail forcé Compulsory labour/Travail obligatoire

Failure to conduct effective investigation into migrant workers' arguable claims of cross-border human trafficking and forced labour: *violation*

Défaut d'enquête effective sur des allégations défendables de traite transfrontière des êtres humains et de travail forcé formulées par un travailleur migrant : *violation*

Zoletic and Others/et autres – Azerbaijan/Azerbaïdjan, 20116/12, Judgment/Arrêt 7.10.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The applicants, 33 nationals of Bosnia and Herzegovina, were recruited and taken to Azerbaijan as foreign construction workers for a construction company, Serbaz Design and Construction LLC ("Serbaz", a company registered in Azerbaijan). They stayed in Azerbaijan for periods of six months or longer. The applicants alleged, *inter alia*, that during this period they had been victims of forced labour and human trafficking, had worked without contracts and work permits, had their documents taken away and their freedom of movement restricted by their employer, and had not been paid their wages starting from May 2009 and until their departure from Azerbaijan. The civil claim they brought against Serbaz before the Azerbaijani courts following their return to Bosnia and Herzegovina seeking unpaid wages and non-pecuniary damage for alleged "breaches of their rights and freedoms" was unsuccessful. Their appeal and cassation appeal were also dismissed.

Following a criminal investigation into allegations of forced labour and trafficking by Serbaz management and employees, criminal proceedings by the Prosecutor's Office of Bosnia and Herzegovina were initiated against thirteen nationals of Bosnia and Herzegovina. In the context of these proceedings three legal-assistance requests were made by the Bosnia and Herzegovina authorities to the Azerbaijani authorities, referring to the allegations concerning the situation at Serbaz.

The applicants complained that the respondent State had failed to comply with its procedural obligation to investigate their claims.

Law – Article 4 § 2

(a) *Applicability* – The Court found that the totality of the applicants' arguments and submissions made both before the domestic courts in their civil claim and the Court, constituted an "arguable claim" that they had been subjected to cross-border human trafficking and to forced or compulsory labour on the territory of Azerbaijan by, among others, some alleged perpetrators who had been resident in Azerbaijan. In particular:

First, it transpired from the case file that the period during which the applicants had worked in Azerbaijan had coincided, either fully or at least partially, with the period in respect of which the grievances in general about the situation at Serbaz had been raised, namely May to November 2009. Second, the Court took into account the general description of the working and living conditions provided in the applicants' civil claim as well as the additional material they had relied on both before the domestic courts and the Court. More specifically they had referred to a report ("ASTRA" report) dated 27 November 2009 prepared by three NGOs from Serbia, Bosnia and Herzegovina and Croatia in cooperation with the Azerbaijan Migration Centre ("AMC"). This report provided a more detailed account of the allegations made concerning the treatment of workers by Serbaz and contained additional information as to the potential situation of forced or compulsory labour and human trafficking. The existence and contents of this report had been sufficiently brought to the attention of the domestic courts. Although an NGO report would not, in itself, have significant evidentiary value without further investigation, given the area of expertise of the NGOs involved, namely assistance to migrant workers and combating human trafficking, the prima facie information provided in it constituted material corroborating the applicants' submissions. Further, there had been other corroborating information regarding workers who had reportedly been in the same or similar situation as the applicants during the same time period which had been referred to by the applicants or otherwise brought to the attention of the domestic courts and other authorities.

The allegations concerning physical and other forms of punishments, retention of documents and restriction of movement explained by threats of possible arrests of the applicants by the local police because of their irregular stay in Azerbaijan had been indicative of possible physical and mental coercion and work extracted under the menace of penalty. The allegations as to non-payment of wages and "fines" in the form of deductions from wages, in conjunction with the absence of work and residence permits, disclosed a potential situation of the applicants' particular vulnerability as irregular migrants without resources. These allegations suggested that even assuming at the time of their recruitment the applicants had offered themselves for work voluntarily and had believed in good faith that they would receive their wages, the situation might have subsequently changed as a result of their employer's conduct. In this connection, the allegations of forced excessively long work shifts, lack of proper nutrition and medical care, and the general picture of the coercive and intimidating atmosphere within Serbaz was also relevant. The Court considered that all of the above allegations, taken together, amounted to an arguable claim that the applicants had been subjected to work or service which had been exacted from them under the menace of penalty and for which they had not offered themselves voluntarily.

Moreover, the three constituent elements of human trafficking were also present: the fact that the applicants had been recruited in Bosnia and Herzegovina, brought in groups to Azerbaijan by a private company and settled collectively in designated accommodation, which they allegedly could not have left without permission by the employer, could have constituted "recruitment, transportation, transfer, harbouring or receipt of persons" ("action"); the information in the ASTRA Report concerning the circumstances of recruitment disclosed an alleged situation that may have amounted to recruitment by means of deception or fraud ("means"); the conclusion reached as regards the arguability of their claim of "forced or compulsory labour" also disclosed the potential purpose of exploitation in the form of forced labour ("purpose").

(b) *Compliance with obligations*

(i) *Whether an obligation to investigate arose in the present case* – The Court found that it did, even though the applicants themselves had not lodged a formal criminal complaint, as it considered that their "arguable claim" had been sufficiently and repeatedly drawn to the attention of the relevant domestic authorities in various ways, such as, complaint letters by the AMC to the law-enforcement authorities and its challenge of the authorities' inactivity before the domestic courts; the applicants' civil claim and the legal-assistance requests. In connection to the latter, the Court noted that in the context of positive obligations under Article 3 of the Convention, which were similar to those under Article 4 of the Convention, sufficiently detailed information contained in an inter-State legal-assistance request concerning alleged grave criminal offences which might have been committed on the territory of the State receiving the request might amount to an "arguable claim" raised before the authorities of that State, triggering its duty to investigate those allegations further.

The Azerbaijani authorities had also been aware of the 2011 report of the European Commission against Racism and Intolerance (ECRI) on Azerbaijan according to which many employers employing migrant workers in Azerbaijan, including in the construction sector, had had recourse to illegal employment practices and, as a result, migrants employed illegally often found themselves vulnerable to serious forms of abuse. The findings of this report had been later developed in the 2014 Report of the Group of Experts on Action against Trafficking in Human Beings of the Council of Europe (GRETA) concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Azerbaijan. This report observed that law-enforcement officials in Azerbaijan reportedly had a tendency to see potential cases of human trafficking for labour exploitation as mere labour disputes between the worker and the employer and there seemed to be a confusion between cases of human trafficking for labour exploitation and disputes concerning salaries and other aspects of working conditions. While far from being conclusive, the general context described in both these reports was relevant in the assessment of the facts of the present case.

In view of all the above, the authorities had been under an obligation to act on their own motion by instituting and conducting an effective investigation.

(ii) *Whether there was any effective investigation* – The Government had not submitted any information or comments about any investigation conducted by the domestic law-enforcement authorities, failing thus to demonstrate that any effective investigation had taken place into the applicants' allegations. Nor did it follow from the case file, including the documents submitted by the third party, that any such investigation had taken place. Among other things, these documents contained no information as to any attempts to identify and question any potential or already-identified alleged victims, including the applicants. In so far as the Anti-Trafficking Department of the Ministry of Internal Affairs had known that many alleged victims had been sent back to Bosnia and Herzegovina and had been informed about the criminal proceedings there, it could have sent a formal legal-assistance request to the authorities of that country under the Mutual Assistance Convention, requesting the latter to identify and question such potential victims and to provide copies of their statements to the Azerbaijani law-enforcement authorities. Furthermore, it had not been demonstrated that any attempts had been made to identify and question any of the allegedly implicated persons who were nationals or residents of Azerbaijan.

The respondent State had thus failed to comply with its procedural obligation to institute and conduct an effective investigation of the applicants' claims concerning the alleged forced labour and human trafficking.

Conclusion: violation of Article 4 § 2 under its procedural limb (unanimously).

Article 41: EUR 5,000 to each of the applicants in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Van der Mussele v. Belgium*, 8919/80, 23 November 1983; *C.N. and V. v. France*, 67724/09, 11 October 2012, Legal Summary; *J. and Others v. Austria*, 58216/12, 17 January 2017, Legal Summary; *Chowdury and Others v. Greece*, 21884/15, 30 March 2017, Legal Summary; *S.M. v. Croatia* [GC], 25 June 2020, Legal Summary)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Refusal by the courts to assume jurisdiction to examine a civil claim for sexual abuse against the Holy See, which enjoyed immunity from jurisdiction: *no violation*

Rejet par les tribunaux de leur juridiction pour connaître de l'action en responsabilité civile pour des abus sexuels introduite contre le Saint-Siège jouissant de l'immunité de juridiction : *non-violation*

J.C. and Others/et autres – Belgium/Belgique, 11625/17, Judgment/Arrêt 12.10.2021 [Section III]

English translation of the summary – Version imprimable

En fait – Les requérants ont engagé en Belgique une action en indemnisation contre le Saint-Siège, plusieurs dirigeants de l'Église catholique de Belgique et des associations catholiques à raison des dommages causés par la manière structurellement déficiente avec laquelle l'Église aurait fait face à la problématique des abus sexuels en son sein.

Le 25 février 2016, la cour d'appel s'est déclarée sans juridiction pour juger de cette action notamment en raison de l'immunité de juridiction dont le Saint-Siège jouit.

En droit

Article 6 § 1 : La présente affaire soulève pour la première fois la question de l'immunité du Saint-Siège. La cour d'appel s'est déclarée sans juridiction pour juger de l'action des requérants ayant conclu que le Saint-Siège jouit de l'immunité de juridiction. La juridiction a constaté que le Saint-Siège se voyait reconnaître sur la scène internationale les attributs communs d'un souverain étranger disposant des mêmes droits et obligations qu'un État : il était partie à d'importants traités internationaux, il avait signé des concordats avec d'autres souverainetés, il entretenait des relations diplomatiques avec environ 185 États, et la Belgique le reconnaît comme un État. La Cour n'aperçoit rien de déraisonnable ni d'arbitraire dans cette motivation circonstanciée.

La cour d'appel en a ensuite déduit que le Saint-Siège jouissait en principe de l'immunité juridictionnelle, consacrée par le droit coutumier international et codifiée dans l'article 5 de la Convention des Nations unies sur les immunités juridictionnelles des États et de leurs biens et l'article 15 de la Convention européenne sur l'immunité des États.

L'octroi de l'immunité juridictionnelle de l'État doit être considéré comme un obstacle procédural à la compétence des juridictions nationales pour statuer sur un droit matériel. Dans les cas où cette immunité entrave l'exercice du droit d'accès à un tribunal, la Cour doit rechercher si les circonstances de la cause justifiaient cette entrave.

En ce qui concerne le caractère proportionné de la limitation subie par les requérants de leur droit d'accès à un tribunal, des mesures prises par un État qui reflètent des principes de droit international généralement reconnus en matière d'immunité des États ne sauraient en principe passer pour imposer une restriction disproportionnée au droit d'accès à un tribunal.

Aux termes d'une analyse des principes de droit international public, du droit canon et de la pratique belge, la cour d'appel a estimé que les fautes et omissions reprochées, directement ou indirectement, tant aux évêques et responsables d'ordres belges qu'au Saint-Siège se situaient dans l'exercice de pouvoirs administratifs et de l'autorité publique, et qu'elles concernaient donc des actes de puissance publique. L'immunité de juridiction s'appliquait donc *ratione materiae* à l'ensemble de ces actes et omissions. L'approche de la cour d'appel correspond à la pratique internationale en la matière. En outre, la juridiction a répondu à tous les arguments des requérants pour contester l'octroi de cette immunité, tels que le fait que la politique du Saint-Siège était destinée à fournir un soutien à la seule Église catholique, une organisation religieuse, et non à préserver les intérêts de l'entité publique qu'est la Cité du Vatican. La Cour ne relève rien d'arbitraire ni de déraisonnable dans l'interprétation donnée par la cour d'appel.

Dans la mesure où les requérants allèguent que l'immunité de juridiction des États ne peut être maintenue dans des cas où sont en jeu des traitements inhumains ou dégradants, la Cour a précédemment conclu que dans l'état du droit international, il n'était pas permis de dire que les États ne jouissaient plus de l'immunité juridictionnelle dans des affaires se rapportant à des violations graves des droits de l'homme ou du droit international humanitaire, ou à des violations d'une règle de *jus cogens*. Dans l'affaire *Jones et autres c. Royaume-Uni*, la Cour s'est référée à l'arrêt de la Cour internationale de justice dans l'affaire *Allemagne c. Italie*, qui avait « clairement » établi qu'au mois de février 2012 « aucune exception tirée du *jus cogens* à l'immunité de l'État ne s'était encore cristallisée ». Alors qu'un développement futur du droit international coutumier ou conventionnel n'est pas exclu, les requérants n'ont pas apporté des éléments permettant de conclure que l'état du droit international s'est développé depuis 2012 à un point tel que les constats de la Cour ne seraient plus valables.

Les requérants reprochent au Saint-Siège d'avoir omis de prendre des mesures pour prévenir ou réparer des actes constituant des traitements inhumains. La Cour estime qu'il faudrait un pas additionnel pour conclure que l'immunité juridictionnelle des États ne s'applique plus à de telles omissions.

Ensuite, les requérants ont évoqué devant la cour d'appel l'exception au principe de l'immunité juridictionnelle des États relatives à une « action en réparation pécuniaire en cas de décès ou d'atteinte à l'intégrité physique d'une personne, ou en cas de dommage ou de perte d'un bien corporel » (article 12 de la Convention des Nations unies sur les immunités juridictionnelles des États et de leurs biens, article 15 de la Convention européenne sur l'immunité des États). Cette exception ne s'applique toutefois que si l'acte ou l'omission prétendument attribuable à l'État étranger « se sont produits, en totalité ou en partie, sur le territoire de [l'État du for] et si l'auteur de l'acte ou de l'omission était présent sur ce territoire au moment de l'acte ou de l'omission ».

La cour d'appel a rejeté l'applicabilité de cette exception au motif notamment que les fautes reprochées aux évêques belges ne pouvaient être attribuées au Saint-Siège, le Pape n'étant pas le commettant des évêques ; qu'en ce qui concerne les fautes reprochées directement au Saint-Siège, celles-ci n'avaient pas été commises sur le territoire belge mais à Rome ; et que ni le Pape ni le Saint-Siège n'étaient présents sur le territoire belge quand les fautes reprochées aux dirigeants de l'Église en Belgique auraient été commises. Il n'appartient pas à la Cour de substituer son appréciation à celle des juridictions nationales n'étant pas arbitraire ou manifestement déraisonnable.

Les requérants soutiennent enfin que l'immunité de juridiction du Saint-Siège a pour effet que les victimes d'abus sexuels dans l'Église catholique sont totalement privées d'accès à la justice, n'ayant pas de possibilité d'obtenir réparation du Saint-Siège devant une instance de la Cité du Vatican.

La compatibilité de l'octroi de l'immunité de juridiction à un État avec l'article 6 § 1 de la Convention ne dépend pas de l'existence d'alternatives raisonnables pour la résolution du litige. Toutefois, les intérêts en jeu pour les requérants sont très sérieux, concernant de façon sous-jacente des agissements graves d'abus sexuel relevant de l'article 3 de la Convention, et l'existence d'une alternative est pour le moins souhaitable. Or les requérants ne se sont pas trouvés sans recours.

La plainte avec constitution de partie civile qu'ils ont déposée en 2010 à propos de délits sexuels et d'abstention coupable étant toujours au stade de l'instruction, elle n'a pas encore pu conduire à une réparation du dommage prétendument souffert par les requérants.

En outre, la procédure devant le tribunal de première instance, qui était aussi dirigée contre des responsables de l'Église catholique de Belgique n'a pas prospéré en raison du manquement des requérants à des règles procédurales. À supposer que leur action eût été recevable, les juridictions belges auraient pu examiner le bien-fondé de leur demande, dans la mesure où elle était dirigée contre des responsables de l'Église catholique belge.

Eu égard à l'ensemble des éléments qui précèdent, le rejet par les tribunaux belges de leur juridiction pour connaître de l'action en responsabilité civile introduite par les requérants contre le Saint-Siège ne s'est pas écarté des principes de droit international généralement reconnus en matière d'immunité des États, et l'on ne saurait dès lors considérer la restriction au droit d'accès à un tribunal comme disproportionnée par rapport aux buts légitimes poursuivis.

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

(Voir aussi *Al-Adsani c. Royaume-Uni* [GC], 35763/97, 21 novembre 2001, Résumé juridique ; *Cudak c. Lituanie* [GC], 15869/02, 23 mars 2010, Résumé juridique ; *Sabeh El Leil c. France* [GC], 34869/05, 29 juin 2011, Résumé juridique ; et *Jones et autres c. Royaume-Uni*, 34356/06 et 40528/06, 14 janvier 2014, Résumé juridique)

Access to court/Accès à un tribunal

Domestic court's continuing failure to assess eligibility for exemption from stamp duty impairing very essence of right of access to court: *violation*

Atteinte à la substance même du droit du requérant à accéder à un tribunal faute d'examen par les autorités nationales de l'éligibilité de l'intéressé à une exonération du droit de timbre : *violation*

Laçi – Albania/Albanie, 28142/17, Judgment/Arrêt 19.10.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant lodged a claim for damages for the loss of his wife's life after an explosion in an ammunition dismantling facility, and for which he was required to pay stamp duty. Owing to his poor financial situation as a result of his unemployment status, the applicant was unable to pay the high stamp duty, which amounted to one hundred and twenty times the level of his monthly allowance. The applicant's request for an application form from

the State Commission for Legal Aid ("the SCLA"), to seek legal aid in the form of an exemption from the stamp duty payment, was unanswered and his request for an exemption before the domestic courts at first instance was rejected. There are pending proceedings before the Supreme Court.

Law – Article 6 § 1: The central issue was whether the domestic authorities had carried out an assessment of his financial situation in accordance with the requirements of Article 6, so that the obligation to pay the high stamp duty did not impair the essence of his right of access to a court.

The Court noted the shortcomings in the functioning of the SCLA since its establishment, which had been reported by the Council of Europe monitoring bodies in 2013 and 2014 and highlighted in a letter sent by the Ministry of Justice to the applicant in 2015.

The applicant had also made a request for exemption from stamp duty to the Court of First Instance, which had rejected the request and returned the claim for damages to him without taking a decision on the merits. Despite being in possession of supporting documents from the applicant about his poor financial situation, the Court of First Instance had failed to make an assessment of his personal circumstances in accordance with what appeared to be the clear provisions of the Legal Aid Act. Furthermore, the court appeared to have disregarded the interpretation made by the Constitutional Court in a relevant decision.

The Court took note of the situation prevailing in Albania at the relevant time in respect of which the Council of Europe monitoring bodies had expressed serious concerns, stating that "judges [we] re reluctant to exempt persons with financial constraints from the payment of court fees". The Court further considered that the amount of stamp duty payable by the applicant had been excessively high in view of the level of monthly allowance he received. The restriction in question had been imposed at the very initial stage of the proceedings.

Following an appeal by the applicant, the Administrative Court of Appeal had quashed the Court of First Instance's decision and remitted the case to a different bench of the same court. However, owing to a cassation appeal filed by the defendant, namely the Ministry of Defence, the proceedings appeared to have been pending before the Supreme Court since 2018. Consequently, the domestic courts had not yet carried out an individualised assessment of the applicant's financial situation in order to determine whether he should be exempted from stamp duty. The examination of his claim for damages on the merits was yet to start.

Overall, the applicant's conduct in making use of the possibilities provided for by domestic law could not be reproached. However, those efforts had been thwarted by the cumulative effect of the shortcomings in the functioning of the SCLA and its failure to adopt the required implementing regulations, the apparent reluctance of national judges to exempt persons with inadequate financial means from the payment of stamp duty, the Court of First Instance's failure to properly assess his financial situation, and the significant delay in the cassation proceedings on the interim question before the Supreme Court. As a result, the applicant had continued to face uncertainty as regards the prospect of his claim for damages filed in 2011 being examined on the merits.

Conclusion: violation (unanimously).

Article 46: The national courts should ensure, as a matter of urgency, that the applicant's eligibility for exemption from the payment of court fees was assessed without undue delay. In view of the Legal Aid Act 2017 which repealed the Legal Aid Act 2008, the Court did not consider that any general measures were called for. The implementation of the 2017 Act might, however, be subject to the Court's review depending, in particular, on the authorities' capacity to consider applications for legal aid.

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

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Unfairness of revision proceedings before Supreme Court due to distortion of European Court judgment which had found a violation of the applicant's right to a fair trial: *violation*

Procédure en révision devant la Cour suprême entachée d'iniquité en raison de la distorsion d'un arrêt de la Cour européenne qui avait conclu à l'existence d'une violation du droit du requérant à un procès équitable : *violation*

Serrano Contreras – Spain/Espagne (no. 2/n° 2), 2236/19, Judgment/Arrêt 26.10.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant was charged with fraud, forgery of official documents and forgery of commercial documents. He was acquitted at first instance, but found guilty on appeal on points of law to the Supreme Court, which did not first hold a hearing. In a judgment of 20 March 2012, the European Court of Human Rights found a violation of Article 6 § 1 in respect of the fairness and the length of the proceedings.

On the basis of the Court's judgment, the applicant lodged an application for a revision of the judgment with the Supreme Court. In May 2015, the Supreme Court allowed in part the application for revision and quashed the applicant's conviction in respect of the offence of forgery of official documents but dismissed the application in respect of the other offences. The applicant unsuccessfully requested an annulment of the proceedings, appealing up to the Constitutional Court.

Law – Article 6 § 1

(a) *Admissibility* – The Government had argued that a new judgment finding Spain to be in breach of the Convention on the same grounds as in the judgment of March 2012 would interfere with the *non bis in idem* principle. Although the application was undoubtedly connected with the execution of the Court's judgment of March 2012, the complaint regarding the unfairness of the subsequent judicial proceedings before the Supreme Court both concerned a situation distinct from that examined in that judgment and contained relevant new information relating to issues undecided by that judgment. The "new issue" that the Court had authority to examine concerned the alleged unfairness of the revision proceedings before the Supreme Court in that, in view of the Court's judgment of March 2012, it had annulled the applicant's conviction in respect of the offence of forgery of official documents, while upholding his convictions for fraud and forgery of commercial documents. Accordingly, the Court was not prevented by Article 46 of the Convention from examining the applicant's new complaint concerning the unfairness of the proceedings leading to the judgment of the Supreme Court of May 2015.

Concerning the applicability *ratione materiae* of Article 6 § 1, under the Spanish legal system, applicants are provided under section 954 the Criminal Procedure Act with a remedy entailing the possibility of a revision of a final judgment after the finding of a violation by the Court, as long as the effects of that violation could not be remedied in any way other than by such a judicial revision. In the context of that examination under section 954, the Supreme Court's task is to consider the outcome of the terminated domestic proceedings in relation to the findings of the Court and, where appropriate, order the re-examination of the case with a view to securing a fresh determination of the criminal charge against the injured party. The examination on the basis of section 954 is therefore likely to be decisive for the determination of a criminal charge. Given the scope of the Supreme Court's scrutiny in the present case, the Court considered that it should be regarded as an extension of the criminal proceedings against the applicant. The Supreme Court had once again focused on the determination, within the meaning of Article 6 § 1, of the criminal charge against the applicant. Consequently, the safeguards of Article 6 § 1 had been applicable to the proceedings before the Supreme Court.

(b) *Merits* – In the present case, the "new issue" brought before the Court was the interpretation made by the Supreme Court of the Court's judgment of March 2012, within the framework of the applicant's request for the reopening of proceedings. The issue of the applicant's conviction on the basis of evidence not directly examined by the Supreme Court had been the object of the Court's previous judgment, and the Court was prevented by Article 46 of the Convention from undertaking a fresh examination of the same issue. The Supreme Court's judgment of May 2015 had not freshly convicted the applicant; rather, it had upheld the previous conviction in respect of two of the offences, on the basis of the Supreme Court's own interpretation of the Court's judgment of March 2012.

As regards the Supreme Court's reasoning, it had correctly stated that the finding of a violation by the Court did not give rise to any automatic right to the reopening of proceedings and that it might even be possible to remedy a violation found by the Court by means of a partial reopening of proceedings, as the Supreme Court envisaged in the present case. Nevertheless, where, in its examination of an extraordinary remedy, a domestic court determines a criminal charge and gives reasons for its decision, those reasons must satisfy the requirements of Article 6 § 1 (see *Moreira Ferreira v. Portugal (no. 2)* [GC]). In cases as the present one, the domestic court's presentation of the Court's earlier findings should not be grossly arbitrary or even amount to denial of justice, resulting in an effect of defeating the applicant's attempt to have the proceedings against him examined in the light of the Court's judgment in his previous case (see, *mutatis mutandis*, *Bochan v. Ukraine (no. 2)* [GC]).

In order to decide on the applicant's application for revision, the Supreme Court had extensively examined the grounds for his conviction contained in its judgment of 2005. On that basis the Supreme Court had considered that the applicant's convictions for fraud and forgery of commercial documents had not entailed any breach of Article 6 § 1 and that, for that reason, the Court's findings in the judgment of March 2012 could only apply to his conviction for forgery of official documents. However, the question whether the applicant's convictions had complied with Article 6 § 1 had actually been the object of the Court's judgment of 2012. That issue had been settled, in the Court's view with sufficient clarity. It followed that, despite the margin of ap-

preciation that the national authorities enjoy when deciding on the reopening of proceedings, the Court's findings in its earlier judgment should have been respected.

In its judgment of March 2012, the Court had found a violation of Article 6 § 1 on account of the applicant's conviction by the Supreme Court on the basis of deductions arising from the findings of fact, as established by the court at first instance, without the Supreme Court having heard the applicant in person. In the judgment of March 2012, the Court had referred to the proceedings before the Supreme Court as a whole and had made no distinction as to whether the findings concerned only some of the convictions and not the others. Nonetheless, elsewhere in that judgment, the Court had specifically mentioned elements that had clearly addressed either the applicant's conviction for forgery of official documents, his conviction for fraud or his conviction for forgery of commercial documents. Those statements had left no doubt as to the scope of the Court's finding of a violation. Therefore, the Supreme Court's interpretation, namely that the violation of Article 6 § 1 found by the Court had concerned only the offence of forgery of official documents, had contradicted the findings of the Court in its earlier judgment in the applicant's case.

Thus, the Supreme Court, when making its own interpretation as to the scope and meaning of the Court's findings in the judgment of March 2012, had gone beyond the national authorities' margin of appreciation and distorted the conclusions of the Court's judgment; the impugned proceedings had therefore fallen short of the requirements of a "fair trial" under Article 6 § 1.

Conclusion: violation (unanimously).

Article 41: EUR 9,600 in respect of non-pecuniary damage.

(See *Serrano Contreras v. Spain*, 49183/08, 20 March 2012; *Bochan v. Ukraine (no. 2)* [GC], 22251/08, 5 February 2015, Legal Summary; and *Moreira Ferreira v. Portugal (no. 2)* [GC], 19867/12, 11 July 2017, Legal Summary)

Article 6 § 1 (criminal/pénal) (administrative/administratif)

Reasonable time/Délai raisonnable

Significant delays before the Supreme Court unacceptable despite the context of the far-reaching reform of the justice system: *violation*

Caractère inacceptable de la durée de procédures suivies devant la Cour suprême, même dans un contexte de réforme en profondeur du système judiciaire : *violation*

Bara and/et Kola – Albania/Albanie, 43391/18 and/et 17766/19, Judgment/Arrêt 12.10.2021 [Section III]

(See Article 13 below / Voir l'article 13 ci-dessous, page 26)

Article 6 § 1 (disciplinary/disciplinaire)

Impartial tribunal/Tribunal impartial

Objective impartiality not affected in the framework of the assignment of case to a trial formation, even in the absence of random designation of all the formation judges: *no violation*

Impartialité objective non entachée dans le cadre de l'attribution de l'affaire à une formation de jugement, même en l'absence de désignation aléatoire de tous les juges de celle-ci : *non-violation*

Miroslava Todorova – Bulgaria/Bulgarie, 40072/13, Judgment/Arrêt 19.10.2021 [Section IV]

(See Article 10 below/Voir l'article 10 ci-dessous, page 22)

ARTICLE 8

Respect for private life/Respect de la vie privée

Dismissal of action against tabloids, which published unverified tawdry statements on, and pictures of, applicant's son, a priest convicted of sexual offences, years after his death: *violation*

Rejet d'une action engagée par la requérante contre des journaux à sensation qui avaient publié des propos sordides et non vérifiés, illustrés de photographies, au sujet de son fils, un prêtre condamné pour délits sexuels, des années après le décès de celui-ci : *violation*

M.L. – Slovakia/Slovaquie, 34159/17, Judgment/Arrêt 14.10.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant's late son, who had been a Roman Catholic priest, had been convicted of offences relating in particular to child sexual abuse. Two years after the son's death, three tabloid newspapers published articles about his conviction and

a possible link between it and his supposed suicide. The applicant unsuccessfully instituted proceedings against the newspapers, seeking post-mortem protection of her son's and her own personal integrity. She also appealed unsuccessfully up to the Constitutional Court.

Law – Article 8: The case required an examination of the fair balance that had to be struck between the applicant's right to protection of her private life under Article 8 and the newspaper publishers' right to freedom of expression as guaranteed by Article 10. The Court examined the following criteria:

(a) *How well known the person concerned was and the prior conduct of that person* – While alive, the applicant's son had not been a well-known public figure or a high-ranking Church dignitary. The domestic courts had considered, nevertheless, that, as a parish priest, he could not be treated as an ordinary person but rather as a public figure expected to be more tolerant to criticism.

In the present case it was true that the applicant's son's prior conduct had led to him being the subject of criminal proceedings and being convicted. In the light of the Court's case-law, that could not, however, deprive him entirely of the protection of Article 8. It was moreover to be noted that the applicant's son had been given a conditional sentence and had complied with its conditions during the probationary period. Thus the Court had to take into account that not only had the articles in question been published several years after the applicant's son's criminal convictions but also after those convictions had become spent.

(b) *Subject matter, contents and consequences of the articles* – Regarding the contents of the articles in question, the material had been presented in a sensational and gossip-like manner, with flashy headlines placed on the front pages, along with – in the third article – photographs of the applicant's late son. The allegations made by the tabloid press in respect of the latter had been of a serious nature and had been presented as statements of fact which had led to his criminal convictions, rather than value judgments.

In that context, despite finding that the articles had also relied on sources other than the criminal files, the domestic courts had not drawn a clear distinction between statements of fact and value judgments. Many statements in the articles had been presented in a way which made them appear to have been verified or confirmed by a credible source of information, be it a mayor or the bishop's office. The courts had omitted to take account of the evasive answers of the journalists and of their inability to adduce concrete evidence in support of their allegations.

In such circumstances, the Court found that the domestic courts had failed to carry out an adequate assessment of all the elements relevant to the matter and of the evidence available. Although the journalists had to be afforded some degree of exaggeration or even provocation, the frivolous and unverified statements about the applicant's son's private life had to be taken to have gone beyond the limits of responsible journalism.

Lastly, the distorted facts and the expressions used must have been upsetting for the applicant and they had been of such a nature as to be capable of considerably and directly affecting her feelings as a mother of a deceased son as well as her private life and identity, the reputation of her deceased son being a part and parcel thereof.

(c) *Contribution to a debate of general interest* – In the present case, the Court could accept that the subject of sexual abuse by clergymen and the attitude of the Roman Catholic Church thereto, as identified by the domestic courts, had been in the public interest, and that the criminal cases in respect of the applicant's son had been selected as an example illustrating the problems involved.

However, it had been possible to inform the public adequately about the matter at issue by means which entailed less interference with the applicant's son's legitimate interests, namely by reporting only the facts accessible from the publicly available criminal files. In that context, the Court reiterated that there was a distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life. The Court was of the view that the publication of additional, particularly intrusive information concerning the intimate sphere of the applicant's son's private life and the publication of his picture could not be justified by any considerations of general interest.

Thus, as well as being rather provocative and sensationalist, the articles in question could hardly be considered as having made a contribution to a debate of general interest.

(d) *Overall* – It followed that the domestic courts had failed to carry out a balancing exercise between the applicant's right to private life and the newspaper publishers' freedom of expression in conformity with the criteria laid down in the Court's case-law.

Conclusion: violation (unanimously).

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

Respect for private life/Respect de la vie privée

Compulsory Covid-19 vaccination imposed on the applicant, on account of his occupation, under the law on the management of the health crisis: *communicated*

Obligation vaccinale contre la covid-19 imposée au requérant, en raison de sa profession, sur le fondement de la loi relative à la gestion de la crise sanitaire : *affaire communiquée*

Thevenon – France, 46061/21, Communication [Section V]

English translation of the summary – Version imprimable

La requête concerne l'obligation vaccinale imposée au requérant en raison de sa profession de sapeur-pompier professionnel, sur le fondement de la loi n° 2021-1040 du 5 août 2021 relative à la gestion de la crise sanitaire. L'article 12 de cette loi dresse la liste des personnes soumises à l'obligation vaccinale contre la covid-19, sauf contre-indication médicale reconnue, en raison soit du type d'établissement dans lequel elles exercent leurs fonctions, soit de leur profession, à l'instar des sapeurs-pompiers. À partir du 15 septembre 2021 (délai reporté au 15 octobre de la même année pour les personnes qui, dans le cadre d'un schéma vaccinal comprenant plusieurs doses, justifient de l'administration d'au moins une des doses requises, sous réserve de présenter le résultat d'un examen de dépistage virologique ne concluant pas à une contamination par la covid-19), les professionnels concernés ne peuvent plus exercer leur activité s'ils n'ont pas satisfait à l'obligation de vaccination en présentant leur certificat de statut vaccinal. Dans cette hypothèse, ils peuvent utiliser, avec l'accord de leur employeur, des jours de congés payés. À défaut, ils sont suspendus de leurs fonctions ou de leur contrat de travail, ce qui s'accompagne de l'interruption du versement de leur rémunération, et ce tant qu'ils ne remplissent pas les conditions liées à l'obligation vaccinale.

Affaire communiquée sous l'angle de l'article 8 de la Convention, pris seul et combiné avec l'article 14, et de l'article 1 du Protocole n° 1, avec une question sur l'épuisement des voies de recours internes (article 35 § 1).

(Voir aussi *Zambrano c. France* (déc.), n° 41994/21, 7 octobre 2021, Résumé juridique)

Respect for family life/Respect de la vie familiale

Unjustified and disproportionate general ban on telephone calls for life prisoners under strict regime: *violation*

Caractère injustifié et disproportionné de l'interdiction générale de téléphoner pour tous les condamnés à perpétuité détenus en régime strict : *violation*

Danilevich – Russia/Russie, 31469/08, Judgment/Arrêt 19.10.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant is currently serving a sentence of life imprisonment. During the first ten years of his detention in special-regime correctional colonies, he was placed under the strict regime which involved among other things, a general ban on telephone calls. Save for telephone calls made in "exceptional personal circumstances" or emergency situations, the applicant could only correspond in writing with his family. The applicant's challenges before the domestic courts were unsuccessful.

Law

Article 8: The Court was satisfied that the applicant, by maintaining written correspondence with his family had demonstrated that he had relatives with whom he genuinely wished and attempted to maintain contact in detention. The restrictions on the applicant's telephone calls as a life prisoner under the strict regime constituted an interference with his rights to private and family life. They had a clear, accessible and sufficiently precise legal basis. It was not necessary, however, to examine whether they had pursued a "legitimate aim" as, in any event, they had not been "necessary in a democratic society" and amounted to a disproportionate interference with his above-mentioned rights for the following reasons:

It was well established in the Court's case-law that, during their imprisonment, individuals continued to enjoy all fundamental rights and freedoms, save for the right to liberty; on imprisonment a person did not forfeit his or her Convention rights. Having had the opportunity in a number of cases to examine the compatibility with Article 8 of such restrictions on prisoners' telephone communications with their families (including under high-security prison regimes) as monitoring, frequency, duration, language that could be used, the Court was struck by the severity of the total ban on life-sentenced prisoners' telephone communications with their relatives, except in an emergency, under the conditions of the strict regime. The applicant had not received any visits from his relatives living a significant distance away, which had left him – in the absence of any possibility of communicating by telephone – with written correspondence as the only way of maintaining contact with them. That means of communication had been seemingly insufficient for various reasons, including the time it

took for letters to be delivered and the difficulty for the applicant to have an effective contact with his only child, who had been for many years too young for written correspondence. Given the child's age (seven years old at the beginning of the applicant's imprisonment in the special-regime correctional colony under the strict regime), those years had been crucial for developing a family relationship between them. The very scarce occasions on which the applicant had been allowed to telephone his family in "exceptional personal circumstances" did not appear to change that situation.

As in *Khoroshenko*, the ban had been imposed directly by law and applied to the applicant solely on account of his life sentence, irrespective of any other factors. The regime had been imposed for a fixed period of ten years which could be extended in the event of poor behaviour but could not be shortened. Thus, the applicant's arguments concerning his relatives' difficulties to visit him in view of the remoteness of the prison and their lack of financial means, his son's age and the availability of technical means for telephone calls from the prison had been dismissed as irrelevant by the domestic courts. This had been despite their finding, in the context of his handcuffing complaint (see below), that he did not present a risk of escape and the absence of any other specific security concerns. Indeed, the State did not have a free hand in introducing restrictions in a general manner without affording any degree of flexibility for determining whether limitations in specific cases were appropriate or indeed necessary, and the principle of proportionality required a discernible and sufficient link between the application of such measures and the conduct and circumstances of the individual concerned.

The Court found in *Khoroshenko* that the very strict nature of the regime concerned prevented life-sentence prisoners from maintaining contact with their families and thus seriously complicated their social reintegration and rehabilitation instead of fostering and facilitating it. Further, the relevant Council of Europe instruments highlighted the importance of preventing the breakdown of prisoners' family ties by maintaining all forms of contact, including by telephone, as often as possible. Among other things, opportunities to make calls had to be made widely available, a minimum number of calls had to always be allowed, there was a need for flexibility for making and receiving telephone calls in order to maximise communication between imprisoned parents and their children as well as in respect of prisoners whose families lived far away (thereby rendering regular visits impracticable); any limitations on prisoners' contact with the outside world had to be based exclusively on security concerns of an appreciable nature or resource considerations. A total ban on telephone calls was deemed unacceptable and no additional restrictions should be imposed on life-sentenced prisoners as compared to other sentenced prisoners when it concerned the possibilities for them to maintain meaningful contact with their families and other close persons.

The cases examined by the Court indicated the availability of regular telephone calls for prisoners in a number of Contracting States, including in high-security prisons, if need be, accompanied by the appropriate security arrangements.

The Constitutional Court's position, relied on by the Government to justify the restrictions in the present case, had evolved since the *Khoroshenko* judgment and the ban on long-term visits had been abolished. Further, the Concept for the Development of the Russian Penal System for the period up to 2030, adopted by the Government in 2021, identified as one of the challenges prisoners' loss of social ties leading, along with other factors, to recidivism on release and required additional measures aimed at the resocialisation and social adaptation of convicted persons, such as the increase in the number of telephone calls between convicted persons with their relatives.

Lastly, the fact that convicted prisoners, as a rule, were allowed telephone calls showed not only that the restrictions at issue did not "inevitably flow from the circumstances of imprisonment" but also that the necessary technical means were presumably available. The Government had not suggested that access to telephone calls would impose any significant administrative or financial demands on the State.

Conclusion: violation (unanimously).

Article 37 § 1 (b) (complaint under Article 3 regarding routine handcuffing): both conditions for the application of Article 37 § 1 (b) of the Convention had been met. First, the applicant was no longer subjected to the routine handcuffing complained of. Second, the domestic courts had declared unlawful the decision to systematically handcuff him and had ordered that he should not be subjected to handcuffing save for valid security measures; they had thus adequately and sufficiently remedied his complaint in the circumstances of the present case. In connection to the latter, the Court reiterated that according to its established case-law under Article 37 § 1 (b) it was not a requirement that the Government acknowledged a violation of the Convention or that the applicant, in addition to having obtained a resolution of the matter complained of directly, was also granted compensation.

The matter could therefore be considered to have been resolved.

Conclusion: complaint struck out (unanimously).

The Court also found, unanimously, a violation of Article 6 § 1 of the Convention in that the applicant had been deprived of the opportunity to present his case effectively before the domestic courts and that thus there had been a failure to ensure respect for the principle of a fair trial.

Article 41: EUR 3,400 for non-pecuniary damage.

(See also *Hagyó v. Hungary*, 52624/10, 23 April 2013; *Khoroshenko v. Russia* [GC], 41418/04, 30 June 2015, Legal Summary; and *Chernenko and Others v. Russia* (dec.), 4246/14 et al., 5 February 2019, Legal Summary)

ARTICLE 10

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

Newspaper publisher required to anonymise the archived version on Internet of an article published twenty years previously, on account of the "right to be forgotten" of a driver who had caused a fatal accident: *no violation*

Éditeur d'un journal contraint à anonymiser l'archive sur Internet d'un article paru vingt ans auparavant, au nom du droit à l'oubli de l'auteur d'un accident mortel : *non-violation*

Hurbain – Belgium/Belgique, 57292/16, Judgment/Arrêt 22.6.2021 [Section III]

On 11 October 2021 the case was referred to the Grand Chamber at the applicant's request (see the Legal Summary of the Chamber judgment).

Le 11 octobre 2021, cette affaire a été renvoyée devant la Grande Chambre à la demande du requérant (voir le Résumé juridique de l'arrêt de chambre).

Freedom of expression/Liberté d'expression

No compensation awarded by domestic court despite acknowledgment in substance of an Article 10 breach on account of defamation liability: *violation*

Absence d'octroi d'une indemnité par une juridiction interne ayant pourtant reconnu en substance l'existence d'une violation de l'article 10 à raison de poursuites en diffamation : *violation*

The Association of Investigative Reporters and Editorial Security of Moldova and Sanduța – Republic of Moldova / Association des journalistes d'investigation et pour la sécurité de la presse d'opinion en Moldova et Sanduța – République de Moldova, 4358/19, Judgment/Arrêt 12.10.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants, a non-governmental organisation and journalist, published an article relating to the alleged financing of one of the main political parties by an offshore company with Russian ties, ahead of the 2016 presidential elections. The party brought successful civil defamation proceedings against them and the judgment was upheld on appeal in April 2018.

After the communication of the present application to the Moldovan Government, the Government Agent lodged an application with the Court of Appeal to review its judgment. The Court of Appeal quashed its judgment of April 2018 but rejected the Agent's request to expressly find a violation. It examined the appeal anew, quashing the first-instance judgment and dismissing the defamation action as ill-founded.

The applicants complained that their being held liable for defamation had breached their right to freedom of expression under Article 10.

Law – Article 10

(a) *Admissibility* – The Government had submitted that the Court of Appeal had acknowledged a breach of the applicants' rights under Article 10 and then dismissed the defamation action against them. The Court interpreted the Government's argument as relating to an objection to admissibility based on loss of victim status.

It was true that the Court of Appeal had upheld the Government Agent's request for review and had quashed the relevant judgment. After the re-examination of the case, the plaintiff's defamation action against the applicants had been dismissed. While the Court of Appeal had refused to expressly acknowledge a breach of Article 10, the Court was prepared to assume for the purposes of the present case that the overall outcome of the revision proceedings and of the subsequently reopened proceedings on the merits had amounted to an acknowledgement of that breach in substance. However, neither the Court of Appeal nor the Government had awarded any compensation to the applicants. The Court did not consider that the

quashing of the judgment of 18 April 2018 and the dismissal of the defamation action constituted in themselves sufficient redress in the present case. The Government's objection therefore had to be rejected.

(b) *Merits* – As seen, the Court was prepared to accept that the overall outcome of the proceedings had amounted in substance to an acknowledgement of a breach of Article 10. In view of its own case-law, and noting that the domestic courts in the initial proceedings had not conducted a proper balancing exercise, the Court saw no reason to depart from the above conclusion and did not consider it necessary to re-examine the merits of the complaint.

Conclusion: violation (unanimously).

Article 41: EUR 2,300 in respect of non-pecuniary damage.

(See also *A.O. Falun Dafa and Others v. the Republic of Moldova*, 29458/15, 29 June 2021)

Freedom of expression/Liberté d'expression

Sanctioning of journalist in summary proceedings under the Election Code for publishing untrue statements about a local government election candidate: *no violation*

Journaliste sanctionné en application du code électoral dans le cadre d'une procédure sommaire pour avoir publié de fausses déclarations sur un candidat à une élection locale : *non-violation*

Staniszewski – Poland/Pologne, 20422/15, Judgment/Arrêt 14.10.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant is a local journalist and editor of a free monthly newsletter in the village of Bulkowo. He was found liable for defamation in summary proceedings instituted under Article 111 of the Election Code by G.G., a politician and a candidate for the post of mayor of the municipality of Bulkowo, in respect of statements made in two editions of the newsletter published during the local election campaign in 2014. *Inter alia*, the applicant and the trade union which had published the newsletter were jointly ordered to publish an apology and to pay the equivalent of EUR 2,500 to a charity. The applicant unsuccessfully appealed.

Law – Article 10: The domestic decisions against the applicant and the sanctions imposed constituted interference by a public authority with his right to freedom of expression which had been prescribed by Article 111 of the Election Code and pursued the legitimate aim of protecting the reputation or rights of others – namely G.G. as a candidate in local elections. It also served to protect the integrity of the electoral process and thus the rights of the voters. As to whether the interference was "necessary in a democratic society" the Court found as follows.

Free elections and freedom of expression, particularly freedom of political debate, formed the bedrock of any democratic society. The two rights were interrelated and operated to reinforce each other. It was thus particularly important that in the period preceding an election, opinions and information of all kinds were permitted to circulate freely. This principle applied equally to national and local elections. At the same time the Court recognised the importance of protecting the integrity of the electoral process from false information that affected voting results, and the need to put in place the procedures to effectively protect the reputation of candidates.

As a politician holding public office and a candidate in elections, G.G. had inevitably and knowingly laid himself open to public scrutiny. Article 10 did not, however, guarantee wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern and of political figures. As found by the domestic courts, the statements in question had been to a large extent statements of fact and the claimant had proved on the basis of material evidence that they had been untrue. The applicant, however, had failed to produce any evidence before them in support of the veracity of his statements, indicate the sources of his information and explain why they had been accurate. Nor had he contested the first-instance court's conclusions on appeal. Likewise, in the proceedings before the Court, he had failed to specify his sources, demonstrate that he had acted with due diligence and that the research done by him before the publication of the untrue statements of fact had been in good faith and complied with the ordinary journalistic obligation to verify a factual allegation.

Further, the domestic courts had balanced the two conflicting interests at stake, namely the interest of all participants in election campaigns in being able to use every mean possible to influence voters, and the right of a candidate to be protected from untrue allegations. The first instance court had emphasised the duties of the press to report in a diligent manner and on the basis of facts whilst the appellate court had noted that even value judgments had to be based on sufficient facts. The Court thus considered that the reasons adduced by

the domestic courts for sanctioning the applicant had been relevant and sufficient within the meaning of its case-law.

It could not be said that the very use of summary proceedings provided by the Election Code had been in violation of Article 10. Proceedings of this type were conducted within very short time frames and were aimed at ensuring the proper conduct of the election campaign by preventing infringements of the candidates' personal rights, which were capable of affecting the outcome of the elections. The provision of such a summary remedy during periods of election campaigns, whether at local or national level, served the legitimate goal of ensuring the fairness of the electoral process and as such should not be questioned from the Convention standpoint. At the same time, such a remedy should not result in the undue curtailment of the procedural guarantees afforded to the parties to such proceedings. The Court was not persuaded, however, that the circumstances of the instant case amounted to a lack of procedural fairness and equality that could give rise to an issue under Article 10.

Lastly, as the applicant had not submitted details of his personal financial situation, the Court was unable to assess whether the award against him had been excessive and imposed a disproportionate burden on him. It was also unclear what amount had actually been paid by him given the fact that he had been found jointly liable with the trade union.

Consequently, and given the State's margin of appreciation in applying the summary procedure under the Election Code, the interference complained of had been proportionate to the legitimate aim pursued within the meaning of paragraph 2 of Article 10.

Conclusion: no violation (unanimously).

(See also *Pedersen and Baadsgaard v. Denmark* [GC], 49017/99, 17 December 2004, Legal Summary, and *Kwiecień v. Poland*, 51744/99, 9 January 2007, Legal Summary)

Freedom of expression/Liberté d'expression

Disciplinary proceedings and sanctions against the President of the judges' association in retaliation against her criticism of the Supreme Judicial Council and the executive: *violation*

Poursuites et sanctions disciplinaires contre la présidente de l'association des juges en représailles à ses critiques du Conseil supérieur de la magistrature et de l'exécutif : *violation*

Miroslava Todorova – Bulgaria/Bulgarie, 40072/13, Judgment/Arrêt 19.10.2021 [Section IV]

English translation of the summary – Version imprimable

En fait – Deux procédures disciplinaires ont été engagées contre la requérante, qui est juge et était présidente de la principale association professionnelle de juges (UJB).

Dans le cadre de ces procédures, le Conseil supérieur de la magistrature (CSM) lui a imposé une sanction de réduction de salaire puis sa révocation au motif de retards accusés dans le traitement de ses affaires. Cette dernière sanction a néanmoins été annulée par la Cour administrative suprême et la requérante s'est finalement vu imposer une rétrogradation pour une durée de deux ans.

La requérante soutient que les poursuites disciplinaires ont été motivées par ses prises de position en tant que présidente de l'UJB.

En droit

Article 6 § 1 *(sur le défaut allégué d'indépendance et d'impartialité) :* Le CSM peut être considéré, au sens de la jurisprudence de la Cour, comme un organe judiciaire de pleine juridiction, auquel les garanties de l'article 6 trouvent à s'appliquer. Mais la Cour n'estime pas nécessaire de déterminer si la procédure devant le CSM était conforme à l'article 6 eu égard à ses conclusions ci-après concernant la Cour administrative suprême, qui jouissait d'une juridiction d'une étendue suffisante pour corriger les éventuels défauts de la procédure devant le CSM.

La requérante ne remet pas en cause l'impartialité subjective de l'un des membres des formations judiciaires ayant statué sur ses affaires. Quant à l'impartialité objective, l'attribution de l'affaire de la requérante à la sixième chambre de la Cour administrative suprême n'a pas visé à influencer l'issue de la procédure et n'a pas affecté l'indépendance ou l'impartialité des formations en cause. En effet, la répartition des types de contentieux entre les différentes chambres décidée par le président de la haute juridiction, G.K, concernait l'ensemble des recours dirigés contre des décisions du CSM et surtout elle est intervenue plusieurs mois avant l'introduction du recours par l'intéressée. Concernant le parti pris allégué de G.K. contre la requérante à raison des critiques exprimées par l'UJB lors de sa nomination, tout d'abord, G.K. n'a pas pris part aux formations ayant statué sur les affaires de la requérante. Les critiques en question ne sauraient avoir pour conséquence d'entacher de partialité toutes les décisions prises par G.K. dans le cadre exclusif de ses fonctions administratives. Par ailleurs, la requérante a eu la possibilité de contester les décisions rendues par les formations de la sixième chambre

devant des formations de cinq juges n'émanant pas de cette même chambre.

En ce qui concerne les formations de cinq juges de la Cour administrative suprême, il ressort de la réglementation et de la pratique internes pertinentes que seul le juge rapporteur devait être désigné au moyen d'un système informatique de répartition aléatoire. La manière de répartir les affaires au sein d'une juridiction relève en principe de la marge d'appréciation des États. Dès lors, le défaut de désignation aléatoire de tous les juges des formations de jugement ne saurait suffire pour conclure à une méconnaissance de l'article 6.

Concernant la désignation des membres de la formation de cinq juges par G.K., la requérante n'a pas allégué que les juges ayant statué sur son affaire auraient été spécifiquement désignés en vue de connaître son cas ou qu'ils auraient agi sur les instructions ou sous pression du président de la haute juridiction. Qui plus est, elle n'a pas récusé les membres de la Cour administrative suprême pour de tels motifs, alors qu'elle en avait la possibilité. Enfin, les juges n'ont pas nécessairement pris des positions défavorables à l'intéressé. La Cour ne constate donc pas un défaut d'indépendance et d'impartialité de la Cour administrative suprême.

Conclusion : non-violation (cinq voix contre deux).

Article 8 : La Cour a recherché si les sanctions en question ont eu des conséquences graves sur des éléments constitutifs de la vie privée de la requérante, de nature à entraîner l'application de l'article 8. Tout d'abord, la requérante n'a produit aucun élément permettant de dire que la baisse de sa rémunération aurait eu de sérieuses incidences sur le « cercle intime » de sa vie privée en la plaçant dans une situation financière difficile. En outre, le magistrat dont la révocation a été annulée a droit à une indemnisation. La perte de revenus s'est donc avérée temporaire en l'espèce. De surcroît, la requérante n'a pas été empêchée d'exercer une autre activité rémunérée. Même si sa relation avec ses collègues a pu changer dans une certaine mesure, la requérante n'a pas fourni d'éléments indiquant que les conséquences des sanctions imposées étaient graves au point de constituer une ingérence dans l'exercice par elle de son droit au respect de la vie privée. Elle n'apporte pas d'éléments démontrant que les poursuites disciplinaires dirigées contre elle ou le compte rendu qui en a été fait dans les médias auraient eu pour effet de ternir sa réputation professionnelle : les publications reflétaient des opinions tant critiques que positives et la publicité donnée à son affaire a aussi valu à l'intéressée des soutiens parmi les professionnels du droit, les journalistes et l'opinion publique. Les sanctions disciplinaires litigieuses n'ont donc pas eu des conséquences au point d'atteindre le niveau de gravité requis par l'article 8.

Conclusion : irrecevable (incompatible *ratione materiae*).

Article 10 : Les motifs exposés par le CSM, puis par la Cour administrative suprême, pour justifier les sanctions disciplinaires infligées à la requérante avaient trait au non-respect par l'intéressée de ses obligations professionnelles, en particulier les retards dans le traitement de ses affaires, et non à des opinions qu'elle aurait exprimées.

Or, l'inspectrice générale du CSM avait déclaré dans la presse que le contrôle qui donna lieu à la première procédure disciplinaire était une réponse aux critiques de magistrats, dont l'UJB, contre la nomination de la nouvelle présidente du tribunal.

Plus généralement, les opinions critiques formulées par l'UJB et d'autres organisations semblent avoir provoqué une réaction hostile de la part du CSM et du gouvernement. Le ministre de l'Intérieur a formulé des attaques personnelles contre la requérante. Pour la Cour administrative suprême, l'UJB et d'autres ONG, au moyen de nombreuses déclarations critiques, se sont mises à exercer une pression sur le CSM qu'il a perçu comme une sorte de guerre.

Par ailleurs, le CSM a fait preuve à l'égard de la requérante d'une particulière sévérité, en lui infligeant la sanction la plus grave de révocation de la magistrature, sanction qui a été par la suite jugée disproportionnée par la juridiction administrative et annulée par voie de conséquence.

Si les procédures engagées contre la requérante faisaient partie des mesures prises par les autorités à l'égard de l'ensemble des juges de la chambre pénale du tribunal pour veiller au respect des délais de procédure et ainsi améliorer le bon fonctionnement de la justice, toutefois, compte tenu du contexte existant en l'espèce, de l'enchaînement des événements et de la gravité de la sanction imposée par le CSM, ces mesures étaient aussi liées aux prises de position publiques de l'intéressée. Dès lors ces sanctions ont constitué une ingérence dans l'exercice par la requérante de son droit à la liberté d'expression.

Les mesures litigieuses étaient prévues par la loi et poursuivaient les buts légitimes d'assurer le bon fonctionnement de la justice pénale en vue de « garantir l'autorité (...) du pouvoir judiciaire » et d'assurer la prévention du crime.

À l'époque des faits, la requérante était la présidente de l'UJB. Son rôle et son devoir consistaient avant tout à défendre les intérêts professionnels des membres de l'organisation, notamment en ex-

primant publiquement des avis sur le fonctionnement du système judiciaire, la nécessité de le réformer ou l'impératif de préserver l'indépendance de la justice.

En cette qualité, la requérante a souvent exprimé des positions critiques sur la gestion par le CSM et le gouvernement de l'organisation de la justice, questions qui relèvent indiscutablement de l'intérêt général. Ses déclarations s'inscrivaient dans un vaste débat public, en cours à l'époque des faits, concernant la réforme du système judiciaire et l'efficacité et l'indépendance de la justice. Dès lors, les prises de position de la requérante relevaient manifestement d'un débat sur des questions d'intérêt général, en sa qualité de présidente de la principale association professionnelle de juges. Ainsi, sa liberté d'expression devait bénéficier d'un niveau élevé de protection, et toute ingérence dans l'exercice de cette liberté devait faire l'objet d'un contrôle strict, qui va de pair avec une marge d'appréciation restreinte des autorités. De plus, en l'espèce, rien n'indique que les déclarations de la requérante auraient été totalement dépourvues de base factuelle ou auraient dépassé le domaine de la critique acceptable d'ordre strictement professionnel.

Concernant la lourdeur des sanctions imposées, la requérante s'est vu infliger une première sanction de réduction de salaire pour une durée de deux ans, puis a fait l'objet d'une révocation, sanction qui a été ensuite remplacée par une rétrogradation pour deux ans. Ces sanctions avaient pour motif formel de sérieux manquements professionnels de la part de la requérante qui sont distincts de ses prises de position publiques et dont la réalité ne peut être contestée. Mais les poursuites contre la requérante étaient liées à ses prises de position. La sanction de révocation initialement imposée à la requérante revêtait une particulière gravité et a été perçue par des tiers comme une atteinte à la liberté d'expression de l'intéressée et à l'indépendance de la magistrature. Indépendamment de la possibilité qu'avait l'intéressée d'obtenir une indemnisation à la suite de l'annulation de cette mesure par la Cour administrative suprême, la révocation et l'exécution provisoire de cette sanction durant environ un an ont indéniablement eu un effet dissuasif tant sur la requérante que sur les autres juges, les décourageant d'exprimer des avis critiques sur l'action du CSM ou, plus généralement, sur des questions relatives à l'indépendance de la justice.

En ce qui concerne l'existence de garanties procédurales adéquates, la requérante a eu la possibilité de présenter les arguments en sa défense à la fois devant le CSM et la Cour administrative suprême. Cependant, la haute juridiction a fait abstraction, dans son appréciation de la responsabilité de l'intéressée et des sanctions à imposer, des fonctions de la requérante au sein de l'UJB et de son argument selon lequel les contrôles et les poursuites disciplinaires avaient été engagés par le CSM à titre de réprimande pour ses prises de position critiques. La juridiction n'a pas non plus tenu compte de l'effet dissuasif des sanctions imposées à la requérante et en particulier de la révocation prise à son égard et mise en application pendant un an.

La formation de trois juges de la Cour administrative suprême avait pourtant admis que les poursuites disciplinaires contre la requérante pouvaient être la conséquence de ses prises de position en tant que présidente de l'UJB, et jugé nécessaire de réduire la sanction imposée à l'intéressée, mais cette décision a été annulée par la formation de cinq juges de la haute juridiction, qui a confirmé la sanction imposée par le CSM. La Cour administrative suprême a donc passé sous silence les constats faits par la formation de trois juges et n'a pas analysé la question d'une manière conforme à la Convention. Ainsi, les autorités nationales n'ont pas fourni dans leurs décisions des motifs pertinents et suffisants pour justifier que les poursuites disciplinaires et les sanctions en question étaient nécessaires et proportionnées aux buts légitimes poursuivis en l'espèce. Ces mesures n'étaient pas « nécessaire dans une société démocratique ».

Ce constat n'exclut pas la possibilité de poursuivre un magistrat pour des manquements à ses obligations professionnelles suite à l'exercice de sa liberté d'expression, à condition qu'une telle action soit exempte de tout soupçon d'avoir été menée à titre de représailles pour l'exercice de ce droit fondamental. Pour dissiper toute suspicion à cet égard, les autorités nationales doivent être en mesure d'établir que les poursuites en cause visaient exclusivement un ou plusieurs des objectifs légitimes de l'article 10.

Conclusion : violation (unanimité).

Article 18 combiné avec l'article 10 : La Cour a reconnu sous l'article 10 que pour autant que les poursuites disciplinaires et les sanctions imposées à la requérante par le CSM ont été appliquées à raison de son non-respect de ses obligations professionnelles en tant que juge, ces mesures poursuivaient un but légitime, et elles étaient aussi directement liées à ses prises de position publiques.

Par ailleurs, les procédures disciplinaires ont commencé dans un contexte de vifs débats dans la société et des polémiques ont eu lieu entre l'UJB et le pouvoir exécutif.

Ces éléments suffisent pour conclure que les mesures poursuivaient aussi un objectif non prévu par la Convention, à savoir celui de sanctionner la requérante pour ses prises de position en tant que

présidente de l'UJB. Les mesures poursuivaient donc une pluralité de buts et la Cour doit rechercher si le but non-conventionnel était prédominant au sens de sa jurisprudence. La Cour doit tenir compte de l'ensemble des circonstances de la cause.

Concernant la manière dont les événements se sont succédé : la requérante et son organisation ont d'abord exprimé de vives critiques vis-à-vis du CSM ; des contrôles ont ensuite été réalisés, parfois sur signalement des magistrats concernés par ces critiques, et des poursuites disciplinaires ont été engagées à l'encontre de la requérante ; les fautes disciplinaires constatées concernaient parfois des retards intervenus bien avant le début des contrôles. Cette séquence des événements tend à démontrer que la réalisation de ces contrôles était principalement motivée par la volonté de sanctionner la requérante et non par le souci légitime de remédier aux délais excessifs des procédures judiciaires.

Les avis clairement hostiles à l'UJB et à d'autres ONG exprimés lors de la réunion du CSM relative à la responsabilité disciplinaire des magistrats, tenue quelques jours après la décision de révoquer l'intéressée, démontrent le caractère dominant de cette motivation chez au moins une partie des membres du CSM.

La sévérité exceptionnelle et le caractère disproportionné de la révocation ordonnée par le CSM, ont été relevés par une grande partie de la communauté judiciaire et juridique en Bulgarie, par la ministre de la Justice elle-même, par des médias, des ONG et également par des organisations internationales. Il est également notable à cet égard que, dans le cadre des deux procédures disciplinaires, le CSM a pris en compte des retards pour lesquels la responsabilité disciplinaire de la requérante était prescrite, erreur qui a dû être rectifiée par la Cour administrative suprême et qui a notamment justifié l'annulation de la révocation de la requérante.

Or les activités de la requérante au sein de l'UJB constituaient l'exercice par l'intéressée de ses libertés d'association et d'expression, et rien n'indique que ces activités auraient été contraires à la loi ou aux règles de déontologie des magistrats. En particulier, les positions critiques exprimées par l'UJB visaient à assurer plus de transparence et à limiter les interventions de l'exécutif dans les promotions de magistrats, dans le but de renforcer l'indépendance de la justice, dont la Cour a fréquemment souligné l'importance dans sa jurisprudence. Au vu de ces éléments, la volonté d'utiliser la procédure disciplinaire à titre de représailles pour les prises de position de la requérante apparaît comme particulièrement préoccupante.

Par ailleurs, le contrôle judiciaire de la décision du CSM n'a pas corrigé cette situation. La requérante avait pourtant soutenu dans ses recours que les poursuites disciplinaires avaient été motivées exclusivement par des considérations politiques et visaient, en réalité, à punir ses prises de position en tant que présidente de l'UJB. Une formation de trois juges de la Cour administrative suprême avait même fait des constats dans ce sens et en avait tenu compte pour conclure que la sanction imposée à la requérante devait être réduite. Cependant, dans son arrêt définitif, la formation de cinq juges de la haute juridiction s'est contentée d'examiner la légalité de la décision du CSM selon le droit disciplinaire national. Elle a ainsi passé sous silence la thèse de la requérante et n'en a tiré aucune conséquence pratique sur sa responsabilité disciplinaire ou la lourdeur de la sanction imposée.

Compte tenu de l'ensemble des circonstances de l'espèce, indépendamment du fait que la révocation de la requérante a finalement été annulée par la Cour administrative suprême, le but prédominant des poursuites disciplinaires engagées contre la requérante et des sanctions qui lui ont été imposées par le CSM n'était pas d'assurer le respect des délais de clôture des affaires, mais celui de sanctionner et intimider l'intéressée à raison de ses prises de position critiques à l'égard du CSM et du pouvoir exécutif.

Conclusion : violation (unanimité).

Article 41 : aucune demande formulée pour dommage.

(Voir aussi *Merabishvili c. Géorgie* [GC], 72508/13, 28 novembre 2017, Résumé juridique ; *Kövesi c. Roumanie*, 3594/19, 5 mai 2020, Résumé juridique ; et *Azizov et Novruzlu c. Azerbaïdjan*, 65583/13 et 70106/13, 18 février 2021, Résumé juridique)

Freedom of expression/Liberté d'expression

Various criminal-law measures for insulting the President of the Republic on account of defamatory content shared on Facebook: *violation*

Diverses mesures pénales pour insulte au président de la République au sujet de publications diffamatoires partagées sur Facebook : *violation*

Vedat Sorli – Turkey/Turquie, 42048/19, Judgment/Arrêt 19.10.2021 [Section II]

English translation of the summary – Version imprimable

En fait – Le requérant a été placé en garde à vue, mis en détention provisoire, puis condamné à onze mois et vingt jours d'emprisonnement du chef d'insulte au président de la République, en raison de

deux contenus partagés sur le compte Facebook de l'intéressé, dont une caricature et une photo du chef de l'État avec des commentaires satiriques et critiques visant ce dernier. Le prononcé du jugement a été suspendu durant cinq ans et, en l'absence de commission d'une infraction volontaire pendant cette période, la peine prévue devrait être annulée et l'affaire radiée.

En droit – Article 10 : Compte tenu de l'effet dissuasif que la décision de placement en détention provisoire, même considérée non exécutée, rendue dans le cadre de la procédure pénale diligentée contre ce dernier, la condamnation pénale du requérant ainsi que la décision de sursis au prononcé de ce jugement rendue à l'issue de cette procédure, qui a soumis l'intéressé à une période de sursis de cinq ans, ont pu provoquer, celles-ci s'analysent en une ingérence dans l'exercice par le requérant de son droit à la liberté d'expression.

L'ingérence litigieuse était prévue par la loi et poursuivait le but légitime de la protection de la réputation ou des droits d'autrui.

Les juridictions internes se sont appuyées sur l'article 299 du code pénal qui accorde au président de la République un niveau de protection plus élevé qu'à d'autres personnes, protégées par le régime commun de diffamation, à l'égard de la divulgation d'informations ou d'opinions les concernant, et prévoit des sanctions plus graves pour les auteurs de déclarations diffamatoires. À cet égard, une protection accrue par une loi spéciale en matière d'offense n'est, en principe, pas conforme à l'esprit de la Convention et à l'intérêt d'un État de protéger la réputation de son chef.

S'il est tout à fait légitime que les personnes représentant les institutions de l'État soient protégées par les autorités compétentes en leur qualité de garantes de l'ordre public institutionnel, la position dominante que ces institutions occupent commande aux autorités de faire preuve de retenue dans l'usage de la voie pénale.

Or rien dans les circonstances de la présente affaire n'était de nature à justifier le placement en garde à vue du requérant et la décision de mise en détention provisoire rendue à son égard ni l'imposition d'une sanction pénale, même si, comme en l'espèce, il s'agissait d'une peine de prison assortie d'un sursis au prononcé du jugement. Par sa nature même, une telle sanction produit immanquablement un effet dissuasif sur la volonté de l'intéressé de s'exprimer sur des sujets relevant de l'intérêt public, compte tenu notamment des effets de la condamnation.

Et le Gouvernement n'apporte aucun élément de nature à établir que la procédure pénale diligentée contre le requérant avait été rendue nécessaire par l'état d'urgence déclaré à la suite de la tentative de coup d'état du 15 juillet 2016.

Dès lors, dans les circonstances de l'espèce, compte tenu de la sanction, qui revêtait un caractère pénal, infligée au requérant en application d'une disposition spéciale prévoyant une protection accrue pour le président de la République en matière d'offense, qui ne saurait être considérée conforme à l'esprit de la Convention, la mesure litigieuse n'était pas proportionnée aux buts légitimes visés et elle n'était pas nécessaire dans une société démocratique.

Conclusion : violation (unanimité).

Article 46 : La violation dans le chef du requérant du droit garanti par l'article 10 trouve son origine dans un problème tenant à la rédaction et à l'application de la disposition spéciale en matière d'offense conférant au chef de l'État un privilège ou une protection spéciale vis-à-vis du droit d'informer et d'exprimer des opinions à son sujet. À cet égard, la mise en conformité du droit interne pertinent avec l'article 10 constituerait une forme appropriée de réparation qui permettrait de mettre un terme à la violation constatée.

Article 41 : 7 500 EUR pour préjudice moral.

(Voir aussi *Artun et Güvener c. Turquie*, 75510/01, 26 juin 2007)

ARTICLE 13

Effective remedy/Recours effectif

New length-of-proceedings remedy, albeit effective in principle, ineffective in the instant case: *violation*

Nouveau recours permettant de se plaindre de la durée d'une procédure effectif en principe, mais dépourvu d'effectivité en l'espèce : *violation*

Bara and/et Kola – Albania/Albanie, 43391/18 and/et 17766/19, Judgment/Arrêt 12.10.2021 [Section III]

Traduction française du résumé – Printable version

Facts – In 2016 Albania introduced sweeping reforms of the entire justice system which led to amendments to the Constitution and the organisation and functioning of the highest courts in the country, such as the Supreme Court, including the manner in which its judges were to be elected by various institutions, and paved the way for the vetting of all serving judges and prosecutors. However, even prior to the institution of the vetting process, the Supreme Court had accumulated delays and

a significant backlog of cases. Moreover, between May 2019 and March 2020, it lacked the required statutory quorum to take any decisions.

Further, on 5 November 2017, in response to the Court's leading judgment in *Luli and Others v. Albania*, the Albanian authorities introduced a new acceleratory/preventive and compensatory remedy in the Code of Civil Procedure (CCP) in respect of undue length of proceedings in administrative, civil and criminal cases.

The first applicant (application 43391/18) complained about the length of administrative proceedings he had brought challenging the fairness of academic elections to the publicly funded position of university rector and the second applicant (application 17766/19) about the length of criminal proceedings against him with charges of premeditated murder and illegal possession of firearms. They complained, in particular, about the duration of the proceedings before the Supreme Court. The first applicant also complained that in the circumstances of his case the new remedy had not been effective within the meaning of Article 13.

Law – Article 6 § 1

(a) *Applicability (application 43391/18)* – Article 6 was applicable under its civil head. More specifically:

(i) *Existence of a right* – Domestic law gave candidates who fulfilled the statutory requirements specified in the relevant provisions the right to apply for the publicly funded position of university rector and provided for judicial remedies against any procedural irregularities in the academic election for that position. The first applicant who had been one of the candidates who had met the statutory eligibility requirements and possessed the necessary qualifications to run, had ranked second. The domestic courts had not dismissed his complaints against the administrative decisions on the grounds of the non-existence of a right but because there had been no irregularities in the conduct of the election. He could thus arguably claim to have a right to participate in a lawful and fair election process for this position.

(ii) *Civil nature of the right* – the election and subsequent appointment to this position had undoubtedly concerned the exercise of an individual's professional career and, consequently, his or her pecuniary interests. The applicant had had access to the domestic courts to challenge the outcome of the election and the proceedings in issue had been directly decisive for his rights in so far as they could have ended in the annulment and rerunning of the election, which in turn could have led to him to being elected.

(b) *Merits (both applications)* – The proceedings in the two cases were still ongoing; to date the administrative proceedings had lasted over five years and four months and the criminal proceedings over nine years and nine months; both at three levels of jurisdiction. The length of proceedings had been unreasonable in both cases, the main delays being before the Supreme Court in the cassation appeal proceedings. Neither of the cases had been particularly complex nor had there been lack of diligence on behalf of the applicants. In view of what was at stake for the applicants, a diligent examination by the Supreme Court had been called for.

While not disregarding the understandable delay stemming from the far-reaching justice system reforms and the vetting process, the Court reaffirmed that States had a general obligation to organise their legal systems so as to ensure compliance with the requirements of Article 6 § 1, including that of a fair hearing within a reasonable time. Further, it noted that from 2012 the Supreme Court's backlog had gradually increased and remained very significant; the Court could not accept that it was only temporary, or that, despite recent measures undertaken to reduce its backlog sufficiently prompt and comprehensive remedial action had been taken over a number of years to deal with the situation. Finally, while it was not for the Court to decide on the proper interpretation of domestic law, it considered that the Supreme Court's approach in the first applicant's case not to count the effects of the ongoing justice sector reforms on its functioning in the overall length of proceedings, in the circumstances, would not be *consistent* with its case-law under Article 6 § 1 on the "reasonable time" requirement as it might shift to individual litigants the full burden of any delays caused by justice sector reforms.

Conclusion: violation (unanimously).

Article 13 in conjunction with Article 6 § 1 (application 43391/18)

(a) *Compliance in principle of the new remedy with the requirements of Article 13* – The CCP provided for both an accelerative/preventive and a compensatory remedy. As to the former aspect, bearing in mind the relevant domestic law and the criteria taken into account by the domestic courts for finding a breach of the "reasonable time" requirement which were those developed by the Court's relevant case-law, the Court found that the procedure for the implementation of the acceleratory/preventive remedy would have an effect on the length of the proceedings as a whole, either by speeding up the proceedings or preventing them taking an unreasonably long time. This had been further supported by the Supreme Court's decisions relied on

by the Government that showed that the preventive remedy in question had produced results not only *de jure* but also *de facto*. In this connection, emphasising the importance of speedy proceedings in the context of such a remedy, the Court observed that these decisions had been taken promptly. At this stage, therefore, there was no reason to believe that a request for finding a breach of the "reasonable time" requirement and expedition of the proceedings would be ineffective.

The new remedy also provided for the possibility to obtain damages caused by the unjustifiable length of proceedings. A claim for compensation could be lodged within six months of the finding of a breach of the "reasonable time" requirement and was to be examined in accordance with the usual procedural rules within three months of being lodged. If allowed, the competent court would grant an award having regard to the criteria as developed in the Court's case-law. Taking note of the domestic courts' decisions regarding the remedy's compensatory aspect, the Court noted the following concerning its effectiveness: the procedural rules governing the examination of a claim for compensation had to conform to the principle of fairness enshrined in Article 6; individuals should, in principle, be able to raise claims regarding the entire length of proceedings up to that point, no matter how many levels of jurisdiction; the proceedings had to be conducted promptly, and thus consideration might be given to subjecting examination of such claims to different rules from those governing ordinary damages claims; the importance of ensuring the prompt enforcement of the compensation awards. Lastly, the Court considered that the amounts awarded in compensation to date had not been such as to enable it to determine that they were unreasonable. It had previously accepted that a State which had introduced a number of remedies, one of which was designed to expedite proceedings and one to afford compensation, might award amounts which, although lower than those awarded by the Court, had not been unreasonable, on condition that the relevant decisions, which must be consonant with the legal tradition and the standard of living in the country concerned, were speedy, reasoned and executed very quickly.

That being said, at this stage, there was no reason to believe that the compensatory aspect of the remedy did not afford a claimant the opportunity to obtain adequate and sufficient compensation for his or her grievances or that it would not offer reasonable prospects of success. In addition, it was closer, more accessible and faster than an application to the Court and was processed in the applicant's own language.

In the light of the foregoing considerations, the new remedy was effective in that it could both prevent the continuation of the alleged violation of the individual's right to have his or her case heard without any excessive delay and provide appropriate redress for violations which had already occurred. Accordingly, in principle it fulfilled the respondent State's obligation to provide effective remedies in respect of alleged violations of an individual's rights under the Convention and it had to be therefore used by individuals claiming a breach of the right to a hearing within a reasonable time

(b) *Effectiveness of the remedy in the present case* – Although the applicant, following the entry into force of the acceleratory/preventive remedy, had lodged a request for the expedition of his cassation appeal proceedings, this had gone unanswered for more than three years and the proceedings had not been expedited but still remained pending. Consequently, the acceleratory/preventive remedy in the circumstances of his case had not served the purpose of speeding up the proceedings before the Supreme Court or preventing them from becoming unreasonably long. Lastly, in the absence of a finding of a breach of the "reasonable time" requirement, he could not seek compensation for the duration of those proceedings.

Conclusion: violation (unanimously).

Article 41: EUR 1,200 to the first applicant and EUR 2,300 to the second applicant as regards non-pecuniary damage; claim for pecuniary damage dismissed.

(See *Luli and Others v. Albania*, 64480/09 et al., 1 April 2014, Legal Summary; see also *Scordino v. Italy (no. 1)* [GC], 36813/97, 29 March 2006, Legal Summary, and *Rutkowski and Others v. Poland*, 72287/10 et al., 7 July 2015, Legal Summary)

Effective remedy/Recours effectif

Lack of effective remedy for disabled applicants' complaints as to accessibility of polling stations and voting procedure in a national referendum: *violation*

Absence de recours effectif pour les griefs tirés par des requérants handicapés de problèmes d'accès à des bureaux de vote et de la procédure de scrutin lors d'un référendum national : *violation*

Toplak and/et Mrak – Slovenia/Slovénie, 34591/19 and/et 42545/19, Judgment/Arrêt 26.10.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The two applicants had muscular dystrophy and used electric wheelchairs for mobility. They both voted during the national referendum in 2015 ("the 2015 Referendum") but only the second applicant voted in the elections of the Members of the European Parliament in 2019 ("the 2019 EP Elections"). The first applicant's condition had deteriorated in 2018 which meant that he had no longer been able to hold a pen and, thus, to mark his ballot paper by himself. The applicants complained of the lack of effective judicial means by which they could have requested an accessible polling station in advance as well as the lack of any effective remedy by which to claim compensation for being discriminated against in exercising their right to vote in elections or referendums. They also complained about the lack of adequate measures to allow them access to the voting procedures of the said referendum and elections.

Law – Preliminary issue: The first applicant died soon after lodging the application. His two daughters – his sole heirs – had standing to continued proceedings in his stead.

(a) *In relation to both applicants* – Disability fell under "any other status" as a prohibited ground for discrimination. It was also undisputed that the applicants had a right to vote in both the referendum and the elections. Consequently, their complaints under the substantive provisions were arguable and thus Article 1 of Protocol No. 3 and Article 1 or Protocol No. 12 were applicable.

The question was not one of direct discrimination by way of unjustified differentiation but rather of the national authorities' compliance with their positive obligation to take appropriate measures to enable the applicants, whose mobility was impaired due to disability, to exercise their right to vote on an equal basis with others.

Article 13 (together with Article 1 of Protocol No. 12) concerning the 2015 Referendum: The available domestic remedies had been unable to offer the applicants any meaningful redress. Firstly, the remedy under the Referendums and Popular Initiatives Act could have had an effect only if the grounds for complaint had potentially affected the referendum's outcome. It was not meant to be and was not capable of addressing the kind of individual complaints raised by the applicants. Second, neither an action under the Administrative Disputes Act for a finding of a violation of their human rights nor any other remedy would have enabled them to obtain any form of compensation for the alleged violation. Third, in view of the absence of any legal remedy with a preventive effect, an action of which the sole purpose was to obtain a finding of a violation without the possibility to seek redress would constitute an inadequate remedy. The fact that the Court in some cases concerning the right to vote had not awarded monetary compensation could not alter this finding. In the present case, the Court was not confronted with a domestic decision by which no compensation had been awarded in view of the circumstances of the case, but with a domestic court that had lacked any power to award appropriate redress.

Conclusion: violation (unanimously).

Article 13 (together with Article 14 of the Convention and Article 3 of Protocol No. 1) with respect to the 2019 EP Elections: The first applicant claimed that he could have voted by using a voting machine; such equipment, however, was no longer provided for by domestic legislation following the 2017 amendment to the National Assembly Elections Act ("the Elections Act"). The issue at stake was therefore not one of any reasonable accommodation that could have been provided at the polling station but one of alleged discrimination under the relevant legislation. The Constitutional Court, having had regard to all the arguments of those involved as well as the relevant international material, had thoroughly examined whether the removal of the voting machines had been in compliance with the fundamental rights of disabled voters. Although its conclusion had not been favourable to the first applicant, this fact alone did not mean that the remedy had been ineffective. In so far as the second applicant was concerned, it had been open to him to express any concerns that he might have had regarding the accommodation of his needs to the relevant electoral bodies, which ahead of the 2015 Referendum had constructively responded to his requests. Had he considered that he had suffered discrimination in exercising his right to vote he could have lodged a claim for compensation under section 39 of the Protection Against Discrimination Act. This provision had been specifically de-signed to address discrimination and did not raise any ambiguity that would – prima facie – call the effectiveness of this remedy into question. In the circumstances of his case, a remedy capable of affording appropriate redress in the form of compensation would satisfy the criteria of Article 13.

Conclusion: no violation (unanimously).

Article 1 of Protocol No. 12 with respect to the 2015 Referendum: A general and complete adaptation of polling stations in order to fully accommodate wheelchair users would no doubt facilitate their participation in the voting process. The States' margin of appreciation in assessing the needs of people with disabilities in respect of elections and the means of providing them with adequate access to polling stations within the context of the allocation

of limited State resources applied also with respect to referendums. The national authorities were in a better position to carry out such an assessment than an international court.

The applicants had been able to vote at the polling stations in proximity of their residence, in accordance with their wishes, as opposed to having to go to specially designated polling stations. While adaptations to the voting facilities (such as tables, voting booth and ballot box) had not been made in advance, assistance could be provided to the applicants on the spot by means of a reasonable accommodation of their needs. Both applicants had been able to mark their ballot paper by themselves. Since voting in public referendums was organised *ad hoc* in buildings that otherwise served other purposes it might be particularly difficult to ensure full accessibility in respect of the voting process for people with different types of disability in advance – especially if the State aimed to provide a high number of polling stations (as seemed to be the case in Slovenia). As the improvement of accessibility in the built environment could take time it was essential that in the meantime the domestic authorities reacted with the requisite diligence to ensure that people with disabilities could vote freely and by secret ballot. This had been so in the present case; the authorities had responded promptly and constructively to the applicants' requests that their respective polling stations be rendered accessible. On the day of the referendum the entrances to the applicants' respective polling stations had been equipped with ramps, which the applicants had used to enter. At the second applicant's request a visit to the building that would serve as a polling station had been arranged a few days before the day of referendum so as to ensure that he would be able to enter the building and the polling room. Even if the applicants had encountered certain problems, these did not appear to have produced a particularly prejudicial impact on them and been such as to have reached the threshold of discrimination or to indicate indifference to their needs on the part of the respondent State.

Conclusion: no violation (unanimously).

(b) *In relation to the first applicant*

Article 14 (together with Article 3 of Protocol No. 1) concerning the 2019 EP Elections: Under the Elections Act, the first applicant could have voted either by going physically to his local polling station (which, pursuant to the 2017 Amendment, had to be wheelchair accessible), by post or possibly at his home. He could also have been assisted by another person of his own choice, who could have marked his ballot paper for him and taken care of other practicalities. Actually, the applicant had been assisted by several people during the 2015 Referendum. Although the provision of this kind of assistance would have most likely meant disclosing his electoral choice to the person assisting him, provided that the voter's free will was respected, this was in compliance with the international standards in the field and as confirmed by the Constitutional Court, the voting assistant had been obliged to respect the secrecy of the voting procedure under, *inter alia*, the Penal Code.

It was true that voting machines might afford a higher level of autonomy in voting for some people with disabilities. The importance of the inclusion of people with disabilities in political life (which required accessible voting procedures) had been clearly recognised in international instruments which mentioned technology-assisted voting as one means of ensuring the right of people with disabilities to vote. The use of assistive technology was, however, not a necessary condition requiring immediate implementation. Further, it entailed significant financial investment (especially if it had to be made available on a larger scale), the operation of voting machines posed potential problems for the secrecy of the voting procedure and such machines did not appear to be widely available in the member States. Indeed, there was no indication of a consensus having been reached among the member States as to the use of voting machines as a requirement for the effective exercise of the voting rights by people with disabilities.

Therefore, and as assistance to people with disabilities might take a variety of forms, the decision as to whether voting machines should be used for that purpose was to be made primarily by the national authorities which had to take great care with the choices they made in this sphere, in view of the impact of those choices on people with disabilities, whose particular vulnerability could not be ignored. In the present case the Constitutional Court – during proceedings in which both applicants participated – had carefully addressed whether the lack of availability of voting machines resulting from the 2017 amendment had been in compliance with the Constitution and with Slovenia's international obligations and had given persuasive reasoning, having also taking into account, *inter alia*, the fact that a very small number of people with disabilities had used voting machines in the past, that such machines could not assist people with all types of disabilities and the high costs that were involved.

Accordingly, and having regard to the other options available to the first applicant, especially the possibility of assistance by a person of his own choice, the respondent State could not be said to have failed to strike a fair balance between the pro-

tection of the interests of the community and respect for his rights and freedoms, as safeguarded by the Convention.

Conclusion: no violation (unanimously).

Article 41: EUR 3,200 to the second applicant and EUR 1,600 to each of the first applicant's daughters in respect of non-pecuniary damage.

ARTICLE 14

Discrimination (Article 8)

Paternal surname automatically preceding maternal surname in naming of child, where parents disagree, without consideration of specific circumstances: *violation*

Nom du père précédant automatiquement celui de la mère dans l'ordre des noms de famille de l'enfant, si désaccord entre les parents, sans prise en compte des circonstances particulières : *violation*

León Madrid – Spain/Espagne, 30306/13, Judgment/Arrêt 26.10.2021 [Section III]

English translation of the summary – Version imprimable

En fait – Le 9 novembre 2005, la requérante donna naissance à une fille qui fut inscrite au registre de l'état civil avec les deux noms de famille de la mère.

Par un jugement du 14 février 2007, le juge de première instance reconnut l'ancien compagnon de la mère comme le père biologique. Il décida en outre que l'enfant porterait, conformément à la loi applicable, le nom de famille du père suivi de celui de la mère, vu le désaccord entre les parents.

La demande de la requérante d'inverser l'ordre des noms de famille portés par sa fille mineure a été rejetée.

En droit – Article 14 combiné avec l'article 8

a) *Sur l'existence d'une distinction de traitement entre des personnes placées dans des situations analogues* – La règle en vigueur à l'époque des faits prévoyait qu'en cas de désaccord entre les parents, le nom de famille du père, suivi par celui de la mère, était automatiquement donné à l'enfant.

L'article 194 du Règlement pour l'application de la loi relative à l'état civil a été modifié par la loi 20/2011 qui prévoit qu'en cas de désaccord entre les parents il appartient au juge chargé de l'état civil de décider sur l'ordre d'attribution des noms de famille de l'enfant, en prenant comme critère principal l'intérêt supérieur de l'enfant. Cependant, ces dispositions ne sont pas applicables à la fille de la requérante, qui a seize ans à ce jour. En outre, l'application automatique de la législation précédente n'a pas permis au juge de prendre en considération les plaintes de la requérante sur les circonstances concrètes du cas d'espèce, par exemple, l'insistance initiale du géniteur pour la convaincre d'interrompre la grossesse, ou encore le fait que l'enfant portait les noms de famille de la mère depuis sa naissance et pendant plus d'un an, faute de reconnaissance immédiate du père.

À la lumière de ce qui précède, deux individus placés dans une situation analogue, à savoir la requérante et le père de l'enfant, ont été traités de manière différente sur la base d'une distinction fondée exclusivement sur le sexe.

b) *Sur le point de savoir s'il existait une justification objective et raisonnable* – Le contexte social actuel en Espagne ne correspond pas à celui existant au moment de l'adoption de la loi en vigueur applicable au cas d'espèce. Ainsi, plusieurs changements sociaux ont traversé le pays depuis les années 1950, qui ont permis d'aligner la législation interne avec les instruments internationaux en vigueur et d'abandonner le concept patriarcal de famille. L'Espagne a adopté de nombreuses mesures visant l'égalité entre les hommes et les femmes dans la société espagnole en accord avec les résolutions et recommandations du Conseil de l'Europe. La modification introduite par la loi 20/2011 traduit une avancée significative considérée par le législateur comme une manière de rapprocher la loi à la nouvelle réalité sociale en Espagne, privilégiant l'achèvement de l'égalité sur le maintien des traditions pouvant l'entraver. La Cour prend note de cette évolution, mais constate que c'est bien la précédente disposition qui s'applique au cas d'espèce et rappelle que des références aux traditions présupposées d'ordre général ou attitudes sociales majoritaires ayant cours dans un pays donné ne suffissent pas à justifier une différence de traitement fondée sur le sexe.

Le Gouvernement écarte l'existence de discrimination au motif que la fille de la requérante pourra, si elle le souhaite, modifier l'ordre de ses noms de famille une fois qu'elle aura atteint ses 18 ans. Outre l'impact certain qu'une mesure d'une telle durée peut avoir sur la personnalité et l'identité d'une mineure qui devra porter en premier le nom de famille d'un père avec qui elle n'est liée que de manière biologique, la Cour ne peut négliger les répercussions dans la vie de la requérante : en tant que son représentant légal partageant la vie de sa fille depuis la naissance de cette dernière, la requérante pâtit au quotidien des conséquences de la discrimination provoquée par l'impossibilité de modifier le nom de famille de son enfant. Il y a lieu de rappeler qu'il faut distinguer les effets de la détermination

du nom à la naissance de la possibilité de changer de nom au cours de la vie.

Le caractère automatique de l'application de la loi en cause, qui a empêché les juridictions de prendre en compte les circonstances particulières du cas d'espèce ne trouve pas de justification valable du point de vue de la Convention. Si la règle voulant que le nom du père soit attribué en premier en cas de désaccord des parents peut se révéler nécessaire en pratique et n'est pas forcément en contradiction avec la Convention, l'impossibilité d'y déroger est excessivement rigide et discriminatoire envers les femmes.

Enfin, si la sécurité juridique peut être manifestée par le choix de placer le nom du père en premier, elle peut aussi bien être manifestée par le nom de la mère.

Ainsi, les raisons avancées par le Gouvernement ne s'avèrent pas suffisamment objectives et raisonnables pour justifier la différence de traitement subie par la requérante.

Conclusion : violation (unanimité).

Article 41 : 10 000 EUR pour préjudice moral.

(Voir aussi *Ünal Tekeli c. Turquie*, 29865/96, 16 novembre 2004, Résumé juridique ; *Losonci Rose et Rose c. Suisse*, 664/06, 9 novembre 2010, Résumé juridique ; et *Cusan et Fazzo c. Italie,* 77/07, 7 janvier 2014, Résumé juridique)

Discrimination (Article 8)

Compulsory Covid-19 vaccination imposed on the applicant, on account of his occupation, under the law on the management of the health crisis: *communicated*

Obligation vaccinale contre la covid-19 imposée au requérant, en raison de sa profession, sur le fondement de la loi relative à la gestion de la crise sanitaire : *affaire communiquée*

Thevenon – France, 46061/21, Communication [Section V]

(See Article 8 above/Voir l'article 8 ci-dessus, page 18)

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

Upper age limit (35 years) for eligibility for "young families" housing subsidy based on objective data and justified: *no violation*

Critère de l'âge maximal (35 ans) pour pouvoir prétendre à l'aide au logement « jeunes familles » fondé sur des éléments objectifs et justifié : *non-violation*

Šaltinytė – Lithuania/Lituanie, 32934/19, Judgment/ Arrêt 26.10.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant, a single mother of a minor child, was refused a housing subsidy available to "young families" of low income when buying their first home, as she was over the upper age-limit of thirty-five years prescribed by the Housing Assistance Act when she had lodged her request. She unsuccessfully brought proceedings for discrimination before the administrative courts.

Law – Article 14 taken in conjunction with Article 1 of Protocol No. 1: The applicant fulfilled the first two legal requirements for the subsidy, namely, her income had been under the set threshold and she had sought to buy her first home. Her application, however, had been refused because of her age – if she had been younger, she would have been granted the subsidy. Accordingly, her complaint fell within the scope of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 and Article 14 of the Convention was thus applicable.

(a) *Whether there was a difference in treatment between persons in analogous or relevantly similar situations* – The Court replied in the affirmative. As the other legal requirements had been fulfilled, the differential treatment had been on the grounds of age. Taking note of the applicant's argument that all parents, regardless of their age, might have similar needs when raising small children, the Court was prepared to accept that she had been in a relevantly similar situation to a younger single mother who, in the same circumstances, would have likely been granted the housing subsidy in question.

(b) *Whether the difference in treatment was justified* – The Housing Assistance Act provided for different types of housing assistance and there were various other welfare benefits that were available to parents and families in Lithuania. There were no grounds to find that the applicant had been left without any possibility to obtain social assistance, should she require it. The present case was limited to the examination of the specific housing subsidy granted to "young families" as defined in the domestic law, and in particular, whether by limiting the eligibility for the said subsidy to those parents whose age did not exceed thirty-five years the respondent State had complied with the requirements of Article 14.

(i) *Legitimate aim* – It had been sufficiently established that by granting the impugned housing subsidy to people of a younger age the national authori-

ties had sought to encourage them to have more children and thereby offset the decrease of the population caused by emigration and low birth rate. The Court was thus prepared to accept that the measure pursued a legitimate aim in the public interest.

(ii) *Proportionality between the means employed and the aim sought to be realised* – When examining the proportionality of the choices made by the national authorities in the area of social security and welfare, the specific national context could not be disregarded. A steady decline of the Lithuanian population had been observed since the 1990s, caused mainly by high rates of emigration, especially among young people, and a low birth rate. The decreasing number of children and the ageing population thus had been legitimate causes of concern to the national authorities, which had to seek ways of altering the demographic trends by employing various measures within their powers. Although this had not been disputed by the applicant, she argued that age could not be legitimately used as the sole criterion for determining eligibility for the housing subsidy in question.

The Court was mindful of the possibly similar needs of parents who raised small children, for social assistance, regardless of their age, but also of the domestic authorities' difficult task when allocating limited public resources and the need to set certain limits to eligibility for specific welfare benefits. In view of their familiarity with the demands made on the social security system, as well as with the funds available to meet those demands, the national authorities were in a better position than an international court to carry out an assessment of the priorities in the context of the allocation of limited State resources. The States enjoyed a wide margin of appreciation when it came to general measures of economic or social strategy and the Court would respect the legislature's choice if reasonable and suited to achieving the legitimate aim being pursued.

According to the information provided by the Government, there was a lack of consensus among various Contracting States when deciding whether to grant any housing assistance at all or when determining the conditions of eligibility for such assistance and some had established upper age limits for its recipients. In the Court's view, the Lithuanian legislature's decision to provide additional social assistance to families constituted of persons of a younger age could not, in and of itself, be seen as manifestly without reasonable foundation, having regard to the fact that young people's financial situation was an important factor influencing their decisions on whether to emigrate, whether to have children, and when to do so. Moreover, bearing in mind that the statistical data provided by the Government, showed that, on average, Lithuanians got married, had their first child and obtained a housing loan between the ages of twenty-eight and thirty-five, the impugned age limit of thirty-five years had been reasonably based on objective data, and not on general assumptions or prevailing social attitudes, as alleged by the applicant. Lastly, that age limit had been revised to thirty-six years in the light of more recent data. Indeed, it was important that the legal regulation, even if it aimed at encouraging people to have children at a younger age, adequately reflected the actual demographic situation in the country.

Accordingly, the State had not overstepped its wide margin of appreciation and there had been a reasonable relationship of proportionality between the impugned difference in treatment and the legitimate aim sought.

Conclusion: no violation (unanimously).

The Court also found, unanimously, that there had been no violation of Article 6 § 1 as the Supreme Administrative Court had given sufficient reasoning in its decision dismissing the applicant's request for referral to the Constitutional Court.

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

Lack of voting machines not discriminatory for disabled voter allowed to be assisted by a person of his own choice under legal duty to respect secrecy: *no violation*

Absence de machines de vote non discriminatoire pour un électeur handicapé autorisé à être assisté par une personne de son choix légalement tenue de respecter le secret : *non-violation*

Toplak and/et Mrak – Slovenia/Slovénie, 34591/19 and/et 42545/19, Judgment/Arrêt 26.10.2021 [Section II]

(See Article 13 above/Voir l'article 13 ci-dessus, page 28)

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Freezing of bank accounts of a human rights defender and his NGO and imposition of travel bans for the purpose of punishing them for, and impeding, their work: *violation*

Gel des comptes bancaires d'un défenseur des droits de l'homme et de son ONG et imposition

d'interdictions de voyager aux fins de les sanctionner pour leur travail et d'y faire obstacle : *violation*

Democracy and Human Rights Resource Centre and Mustafayev/Centre de ressources sur la démocratie et les droits de l'homme et Mustafayev – Azerbaijan/Azerbaïdjan, 74288/14 and/et 64568/16, Judgment/Arrêt 14.10.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The individual applicant is a human rights lawyer in Azerbaijan and the founder and chairman of the applicant association, a non-governmental organisation specialising in legal education and protection of human rights. The applicants complained about the freezing of their bank accounts and the imposition of travel bans on the applicant.

Law

Article 1 of Protocol No. 1: The freezing of the applicants' bank accounts, which had to be regarded as a measure of control of the use of property, had not been lawful as the applicants did not belong to the categories of persons to whom an attachment measure could be applied under the domestic law; the applicants had not been charged with any criminal offence and it did not appear from the case file that they could be "a person who could materially liable" for the criminal actions of another accused person.

Conclusion: violation (unanimously)

Article 2 of Protocol No. 4

(a) *Travel ban imposed by the prosecuting authorities* – The impugned travel bans had been imposed within the framework of criminal proceedings in connection with alleged irregularities in the financial activities of a number of non-governmental organisations. However, the applicants' names did not figure in the relevant decision instituting those proceedings. In *Mursaliyev and Others v. Azerbaijan* the Court had found that the imposition of a travel ban on the applicants, who had been only witnesses in criminal proceedings, in the absence of any judicial decision had not been "in accordance with law". That finding was equally applicable to the present case.

Conclusion: violation (unanimously)

(b) *Judicially imposed travel ban* – Another travel ban had been imposed on the applicant in connection with the tax dispute between the applicant association and the tax authorities. Such a measure could be imposed under domestic law. However, the respondent Government had not demonstrated that the impugned measure had pursued any of the legitimate aims set out in Article 2 § 3 of Protocol No. 4. More specifically, neither the tax authorities nor the domestic courts had sought to collect the tax debt in question without imposing a travel ban. In particular, they had not considered deducting the alleged tax debt from the money that had been available on the applicants' bank accounts or seizing any other assets owned by them despite the applicant's explicit request in that regard in the court proceedings. Indeed, the Government had not contested the applicant's submission that the sum allegedly due had been available on the bank accounts. The tax authorities and the domestic courts had also failed to put forward any argument how imposing the travel ban had been necessary for the collection of the tax debt. In that connection, the Court reiterated that restriction on the right to leave one's country on grounds of unpaid debt could only be justified as long as it served its aim, namely, recovering the debt.

Conclusion: violation (unanimously)

Article 18 in conjunction with Article 1 of Protocol No. 1 in respect of both applicants and Article 2 of Protocol No. 4 in respect of the applicant:

(a) *Applicability* – Both the right to protection of property and the right to freedom of movement were qualified rights subject to restrictions permitted under the Convention, thus Article 18 was applicable in the present case.

(b) *Merits* – That complaint constituted a fundamental aspect of the case which had not been addressed and merited a separate examination. In view of the Court's findings under Article 1 of Protocol No. 1 and Article 2 of Protocol No. 4 regarding the lack of legal basis for the impugned restrictions or a legitimate aim, no issue arose with respect to the plurality of purposes. Notwithstanding, the authorities' actions had been actually driven by an ulterior purpose, namely, to punish the applicants for their activities in the area of human rights and to prevent them from continuing those activities. Proof of this ulterior purpose resulted from a juxtaposition of the relevant case-specific facts with contextual factors. In particular:

(i) The applicant association was specialised in protection of human rights and the applicant was a lawyer who has represented applicants in a large number of cases before the Court. The Court was particularly struck by the fact that, at the request of the prosecuting authorities, the domestic court had adopted, without relying on any legal basis, an attachment order in respect of an amount of money transferred from the Council of Europe to the applicant as legal aid on the grounds that the amount in question had constituted the object of a criminal offence and had been used "as its instrument". This fact pointed to the possibility that the

attachment of the applicant's bank accounts had been used as a measure preventing him from exercising his professional legal activity.

(ii) The restriction of the applicants' rights within the framework of a criminal case in which they had not been charged with any criminal offence, had not only been devoid of any legal basis, but had also been applied in a manner capable of paralysing their work. Neither the domestic courts nor the Government had given any explanation why the attachment orders had not been limited to specific amounts but had been applied in respect of all the applicants' bank accounts, preventing them practically from conducting their professional activities. They had also failed to put forward legitimate reasons for the imposition of the travel bans on the applicant.

(iii) The applicants' situation had to be viewed against the backdrop of the pattern of arbitrary arrest and detention of government critics, civil society activists and human rights defenders in the respondent State. In this connection, the Court referred to its findings in *Aliyev v. Azerbaijan*. The reports and opinions made by various international human rights instances about the use of freezing of bank accounts and imposition of travel bans on the civil society activists in this context could also not be overlooked.

Conclusion: violation (unanimously).

The Court further found, unanimously, a violation of Article 13 in conjunction with Article 1 of Protocol No. 1 as the applicants had not had an effective remedy in practice to contest the interference with their property rights.

Article 46: It was left to the Committee of Ministers to supervise, on the basis of the information provided by the respondent State and with due regard to the applicants' evolving situation, the adoption of measures aimed, among others, at eliminating any impediment to the exercise of their activities. Those measures should be feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violations found, and they should put the applicants, as far as possible, in the position in which they had been before the freezing of their bank accounts and the imposition of the travel bans on the applicant.

Article 41: EUR 8,000 to the applicant association and EUR 15,000 to the applicant in respect of both pecuniary and non-pecuniary damage.

(See *Aliyev v. Azerbaijan*, 68762/14 and 71200/14, 20 September 2018, Legal Summary, and *Mursaliyev and Others v. Azerbaijan*, 66650/13 et al., 13 December 2018, Legal Summary)

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Disciplinary proceedings and sanctions against the President of the judges' association in retaliation against her criticism of the Supreme Judicial Council and the executive: *violation*

Poursuites et sanctions disciplinaires contre la présidente de l'association des juges en représailles à ses critiques du Conseil supérieur de la magistrature et de l'exécutif : *violation*

Miroslava Todorova – Bulgaria/Bulgarie, 40072/13, Judgment/Arrêt 19.10.2021 [Section IV]

(See Article 10 above/Voir l'article 10 ci-dessus, page 22)

ARTICLE 34

Victim/Victime

Application complaining *in abstracto* about the health pass system and other measures for managing the Covid-19 crisis, without specifying their effect on the applicant's personal situation: *inadmissible*

Requête dénonçant *in abstracto* le système de passe sanitaire et d'autres mesures de la gestion de la crise due à la covid-19, sans préciser leur effet sur la situation personnelle : *irrecevable*

Zambrano – France, 41994/21, Decision/Décision 7.10.2021 [Section V]

(See Article 35 § 3 (a) below/Voir l'article 35 § 3 (a) ci-dessous, page 36)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/ Épuisement des voies de recours internes

Non-exhaustion of judicial review as a remedy in order to challenge the health pass system and other measures for managing the Covid-19 crisis: *inadmissible*

Non-épuisement du recours pour excès de pouvoir pour contester le système de passe sanitaire et d'autres mesures de la gestion de la crise due à la covid-19 : *irrecevable*

Zambrano – France, 41994/21, Decision/Décision 7.10.2021 [Section V]

(See Article 35 § 3 (a) below/Voir l'article 35 § 3 (a) ci-après)

Article 35 § 3 (a)

Abuse of the right of application/Requête abusive

Call to "paralyse" the Court by submitting a very high number of applications, using an automatically generated form on the applicant's internet site and copying his application: *inadmissible*

Appel à « paralyser » la Cour en multipliant des saisines à l'aide d'un formulaire généré automatiquement sur le site Internet du requérant et copiant sa requête : *irrecevable*

Zambrano – France, 41994/21, Decision/Décision 7.10.2021 [Section V]

English translation of the summary – Version imprimable

En fait – Dans son formulaire de requête, le requérant dénonce les lois n^os^ 2021-689 et 2021-1040 relatives à la gestion de la crise sanitaire causée par la pandémie de covid-19. La loi n° 2021-689 a mis en place un régime transitoire de sortie de l'état d'urgence sanitaire jusqu'au 30 septembre 2021, qui autorise le Premier ministre notamment à limiter les déplacements et l'utilisation des transports collectifs ou à imposer des mesures barrières dans les commerces. Elle a également instauré un dispositif de passe sanitaire jusqu'au 30 septembre 2021 pour les voyageurs en provenance ou à destination de la France et pour l'accès à de grands rassemblements. La loi n° 2021-1040, d'une part, prolonge le régime de sortie de l'état d'urgence sanitaire jusqu'au 15 novembre 2021 et, d'autre part, étend le périmètre du passe sanitaire à d'autres activités de la vie quotidienne jusqu'au 15 novembre (bars et restaurants, y compris en terrasse, à l'exception des restaurants d'entreprise ; grands magasins et centres commerciaux, sur décision du préfet du département, en cas de risques de contamination ; séminaires ; transports publics dans les trains, bus et les avions pour les longs trajets ; les hôpitaux, les établissements d'hébergement pour personnes âgées dépendantes et les maisons de retraite pour les accompagnants, les visiteurs et les malades accueillis pour des soins programmés, à l'exception des cas d'urgence médicale). Le passe sanitaire est exigible pour les personnes majeures qui souhaitent pratiquer les activités dans les lieux concernés et, pour les personnels qui y travaillent, depuis le 30 août 2021. Des sanctions sont encourues tant par le public en cas de non-présentation ou d'utilisation frauduleuse d'un passe sanitaire que par les commerçants et professionnels chargés de le vérifier en cas de défaillance dans le contrôle. La loi n° 2021-1040 a par ailleurs rendu la vaccination contre la covid-19 obligatoire, sauf contre-indication médicale, pour les personnes travaillant dans les secteurs sanitaire et médico-social. Un délai au 15 septembre 2021 a été fixé à cette fin, voire jusqu'au 15 octobre 2021 pour les personnels ayant déjà reçu une première dose de vaccin.

Le requérant invoque les articles 3, 8 et 14 de la Convention, ainsi que l'article 1 du Protocole n° 12. Selon lui, ces lois, en créant et en imposant un système de passe sanitaire, constitueraient une ingérence discriminatoire dans le droit au respect de la vie privée et visent essentiellement à contraindre le consentement à la vaccination.

En droit

Article 35 § 1 (épuisement des voies de recours internes) : Le requérant n'a pas saisi les juridictions administratives de recours au fond dirigés contre les actes réglementaires que sont les décrets d'application des lois litigieuses. Certes, il soutient que, dans la mesure où les lois en cause ont été déclarées conformes à la Constitution par le Conseil constitutionnel, il n'existerait pas de recours disponible et effectif qui aurait dû être préalablement exercé.

Cependant, en droit français, le recours pour excès de pouvoir, dans le cadre duquel il est possible de développer, à l'appui des conclusions d'annulation, des moyens fondés sur une violation de la Convention, est une voie de recours interne à épuiser. Pour pleinement épuiser les voies de recours internes, il faut donc en principe mener la procédure interne, le cas échéant, jusqu'au juge de cassation. Or une telle exigence vaut indépendamment de l'intervention d'une décision du Conseil constitutionnel, qui ne se prononce pas au regard des dispositions de la Convention. En effet, le contrôle du respect de la Convention effectué par le « juge ordinaire » est distinct du contrôle de conformité de la loi à la Constitution effectué par le Conseil constitutionnel : une mesure prise en application d'une loi (acte réglementaire ou décision individuelle) dont la conformité aux dispositions constitutionnelles protectrices des droits fondamentaux a été déclarée par le Conseil constitutionnel peut être jugée incompatible avec ces mêmes droits tels qu'ils se trouvent garantis par la Convention à raison, par exemple, de son caractère disproportionné dans les circonstances de la cause. Par ailleurs, il est loisible à un requérant qui saisit le Conseil d'État d'un recours pour excès de pouvoir dirigé contre un décret d'ap-

plication d'une loi ou une décision refusant d'abroger un tel décret d'invoquer, par la voie de l'exception, l'inconventionnalité de cette loi à l'appui de ses conclusions d'annulation. Un recours effectif était donc ouvert en droit interne qui aurait permis au requérant de contester devant le Conseil d'État le respect par la loi du 5 août 2021 des articles de la Convention invoqués devant la Cour (voir *Graner c. France* et *Charron et Merle-Montet c. France*). La requête est en tout état de cause irrecevable pour non-épuisement des voies de recours internes.

Article 35 § 3 a) (abus du droit de recours) : Le requérant a pris l'initiative, s'appuyant sur son site Internet « nopass.fr », de lutter contre le passe sanitaire institué en France en invitant ses visiteurs à se joindre à lui pour exercer un recours collectif devant la Cour et à multiplier des saisines par l'emploi d'un formulaire standardisé, généré automatiquement. Près de dix-huit mille requêtes ont d'ores et déjà été adressées à la Cour dans le cadre de cette démarche. Exprimé en des termes exempts d'ambiguïté, l'objectif poursuivi n'est pas d'obtenir gain de cause, mais au contraire de provoquer « l'embouteillage, l'engorgement, l'inondation » de la Cour, de « paralyser son fonctionnement », de « créer un rapport de force » pour « négocier » avec la Cour et « de faire dérailler le système » dont la Cour serait un « maillon ».

Or la Cour fait face depuis près de vingt ans à un contentieux de masse découlant de différents problèmes structurels ou systémiques dans les États contractants. Elle veille malgré cela à l'efficacité à long terme du système de protection des droits de l'homme, tout en préservant le droit à un recours individuel, la clé de voûte dudit système, et l'accès à la justice. Il est évident qu'un afflux massif de requêtes telles que celles promouvant l'objectif recherché par le requérant risque de peser sur la capacité de la Cour à remplir la mission que lui assigne l'article 19 relativement à d'autres requêtes, introduites par d'autres requérants, qui remplissent les conditions pour être attribuées à des formations judiciaires et, *prima facie*, les conditions de recevabilité. La protection du mécanisme de la Convention est d'ailleurs une préoccupation à laquelle renvoient également les dispositions de l'article 17 de la Convention. Compte tenu notamment des objectifs ouvertement poursuivis par le requérant, la démarche de ce dernier est manifestement contraire à la vocation du droit de recours individuel. En l'espèce, il vise délibérément à nuire au mécanisme de la Convention et au fonctionnement de la Cour, dans le cadre de ce qu'il qualifie de « stratégie judiciaire » et qui s'avère en réalité contraire à l'esprit de la Convention et aux objectifs qu'elle poursuit.

Article 34 (qualité de victime) : Tout d'abord, le requérant se plaint *in abstracto* de l'insuffisance et de l'inadéquation des mesures prises par l'État français pour lutter contre la propagation du virus covid-19. Il ne fournit pas d'informations sur sa situation personnelle et n'explique pas concrètement en quoi les législations litigieuses et les manquements allégués des autorités nationales seraient susceptibles de l'affecter directement et de le viser en raison d'éventuelles caractéristiques individuelles.

S'agissant plus particulièrement du grief tiré de l'article 3, il ne démontre pas l'existence d'une contrainte exercée à son égard en tant que personne ne souhaitant pas se faire vacciner et susceptible de rentrer dans le champ d'application de cette disposition. Les lois litigieuses ne prévoient aucune obligation générale de se faire vacciner. En outre, le requérant ne justifie pas exercer l'une des professions spécifiques dont les membres sont soumis à l'obligation vaccinale par application de la loi n° 2021-1040 (voir, à cet égard, *Thevenon c. France*). Cette dernière loi n'impose pas davantage la vaccination aux personnes souhaitant effectuer certains déplacements ou accéder à certains lieux, établissements, services ou événements. Elle prévoit au contraire expressément la possibilité de présenter le document de son choix parmi trois possibilités : le résultat d'un examen de dépistage virologique ne concluant pas à une contamination par la covid-19, un justificatif de statut vaccinal concernant la covid-19 ou un certificat de rétablissement à la suite d'une contamination par la covid-19. Enfin, la loi envisage également la possibilité de se faire délivrer un document attestant d'une contre-indication médicale faisant obstacle à la vaccination.

Toutefois, la Cour n'estime pas nécessaire de trancher définitivement la question de savoir si le requérant peut prétendre avoir la qualité de victime. Quant à l'article 1 du Protocole n° 12 invoqué par le requérant, la France n'a pas ratifié ce protocole.

Conclusion : irrecevable (non-épuisement des voies de recours internes ; abus du droit de recours).

À propos des requêtes introduites à l'initiative du requérant

Les éventuelles conclusions de la Cour sur la recevabilité de la présente requête sont susceptibles de s'appliquer aux milliers d'autres requêtes standardisées. Le caractère abstrait du recours ressort de ces requêtes qui n'indiquent aucun détail personnel et correspondent en réalité à un document identique, rempli automatiquement. De plus, ces milliers de requêtes ne remplissent pas toutes les conditions posées par l'article 47 § 1 du règlement de la Cour. À cet égard, par une lettre et un courrier électronique du 17 août 2021, le requérant, dès lors qu'il a été désigné automatiquement comme représentant dans toutes ces requêtes, a été invité, en vertu de l'article 47 § 5.2 du règle-

ment, à compléter les dossiers et averti qu'à défaut, lesdites requêtes risquaient de ne pas être examinées. Les correspondances du greffe sont demeurées sans réponse.

(Voir *Charron et Merle-Montet c. France* (déc.), 22612/15, § 30, 16 janvier 2018; *Graner c. France* (déc.), 84536/17, 5 mai 2020; et *Thevenon c. France*, 46061/21, affaire communiquée, Résumé juridique)

ARTICLE 37

Striking out applications/Radiation du rôle

Matter before the Court resolved by adequate remedial measures by domestic courts ending routine handcuffing: *striking out of Article 3 complaint*

Question soumise à la Cour résolue par des mesures de redressement adéquates consistant en la suppression par les juridictions internes du menottage systématique : *radiation du grief de violation de l'article 3*

Danilevich – Russia/Russie, 31469/08, Judgment/Arrêt 19.10.2021 [Section III]

(See Article 8 above/Voir l'article 8 ci-dessus, page 18)

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

Article 2 § 2

Freedom to leave a country/Liberté de quitter un pays

Imposition of a travel ban in connection with an alleged tax debt, without any measures taken to collect it: *violation*

Imposition d'une interdiction de voyager liée à une dette fiscale alléguée, en l'absence de mesures de recouvrement : *violation*

Democracy and Human Rights Resource Centre and Mustafayev/Centre de ressources sur la démocratie et les droits de l'homme et Mustafayev – Azerbaijan/Azerbaïdjan, 74288/14 and/et 64568/16, Judgment/Arrêt 14.10.2021 [Section V]

(See Article 18 above/Voir l'article 18 ci-dessus, page 34)

ARTICLE 2 OF PROTOCOL No. 7/ DU PROTOCOLE N° 7

Right of appeal in criminal matters/Droit à un double degré de juridiction en matière pénale

Offence punishable by a fine, or imprisonment in default of its payment, regarded as "minor" in view of procedural safeguards governing enforcement of the latter sanction: *no violation*

Infraction passible d'une amende, ou d'une peine d'emprisonnement à défaut de paiement de celle-ci, qualifiée de « mineure » compte tenu des garanties procédurales attachées à l'exécution de cette dernière peine : *non-violation*

Kindlhofer – Austria/Autriche, 20962/15, Judgment/Arrêt 26.10.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – A fine of 200 euros or four days' imprisonment in default of payment was imposed on the applicant by the police for failure to inform the latter of an accident in which only material damage had been caused. Under the relevant provision of the Road Traffic Act, this offence was punishable by "a fine of up to 726 euros [and], in the event that the amount of the fine cannot be recovered ... imprisonment of up to two weeks".

The Regional Administrative Court upheld this sanction. This decision was not amenable to appeal before the Supreme Administrative Court, as the fine the applicant risked incurring had not exceeded 750 euros, no primary prison sentence could be imposed, and the fine actually imposed had not exceeded 400 euros.

Law – Article 2 of Protocol No. 7: The Court examined whether the offence the applicant had been convicted of might be regarded as one of a "minor character" so as to fall under one of the exceptions to the right of a review by a higher tribunal. For the Court, if the law prescribed a custodial sentence as the main punishment, an offence could not be described as "minor" within the meaning of the second paragraph of Article 2 of Protocol No. 7. And the Court had also found that an offence concerning a petty theft and not punishable by imprisonment was of a minor nature, falling within the exceptions permitted. However, the absence of a prison term, though an important factor for the assessment of the minor character of an offence, was not decisive in itself. The Court had to take into account the specific circumstances of the case before it (see *Saquetti Iglesias v. Spain*).

The offence of which the applicant had been convicted did not carry a custodial sentence as the main punishment. The Court therefore had to determine whether an offence for which the law prescribes a term of up to two weeks' imprisonment in default of payment could be considered "minor" for the purposes of Article 2 § 2 of Protocol No. 7, a question which it had not yet dealt with.

In order to examine whether imprisonment in default of payment had an impact on whether an offence might be regarded as one of a minor character, the Court had to take into account the particular circumstances of the case, in particular whether it was likely that the imprisonment in default would actually be enforced. Therefore, it had to have regard to the legal framework for the enforcement of imprisonment in default. Once a conviction for an administrative fine became final, it was not within the discretion of the authorities to order imprisonment in lieu of payment of the fine. On the contrary, the authority first had to attempt to enforce payment of the fine or make comprehensive enquiries into the financial situation of the convicted person. Furthermore, that person had to be informed of the imminent enforcement of the prison sentence and be given the opportunity to avoid it by paying the amount of the fine due and to also request to pay the fine in instalments.

Consequently, imprisonment in default of payment constituted an exceptional measure under domestic law, the enforcement of which was subject to a number of procedural safeguards. In particular, the convicted person had to be clearly made aware of that risk and given the appropriate means to avoid it. In such circumstances, it had to be considered a measure substantially different from imprisonment as the primary sanction and therefore did not prevent the offence the applicant had been convicted of being regarded as minor. Neither the amount of the fine imposed nor the maximum fine the applicant had risked incurring appeared in themselves sufficient to consider that the offence was not minor. Indeed, within the gradation of the penal sanctions provided for in the law, the maximum sentence in issue was clearly one of the least serious ones. Within the domestic administrative criminal system, the underlying offence was not considered to be of serious nature. The applicant had also not claimed that he had not been able to pay the fine or that the amount of the fine imposed had not sufficiently taken into consideration his financial situation.

Conclusion: no violation (six votes to one).

(See also *Galstyan v. Armenia*, 26986/03, 15 November 2007, Legal summary, and *Saquetti Iglesias v. Spain*, 50514/13, 30 June 2020, Legal summary)

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

General prohibition of discrimination/ Interdiction générale de la discrimination

Discriminatory refusal to allow internally displaced persons to vote in local elections at their place of actual residence: *violation*

Refus discriminatoire d'autoriser des personnes déplacées à l'intérieur du pays à voter aux élections locales de leur lieu de résidence effectif : *violation*

Selygenenko and Others/et autres – Ukraine, 24919/16 and/et 28658/16, Judgment/Arrêt 21.10.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The four applicants had lived respectively in Crimea (application 24919/16) and Donetsk (application 28658/16) and had had their registered places of residence there. After Crimea came under *de facto* Russian jurisdiction and the conflict in Eastern Ukraine started, the applicants moved to Kyiv on various dates in 2014 and 2015 prior to the local elections held in October-November 2015. They registered there as internally displaced persons (IDPs) and were issued with IDP certificates that indicated Kyiv as the place of their actual residence. All of them maintained that their respective registered places of residence continued to be located in Crimea and Donetsk, as was indicated in their "internal passports" (identity documents for use in Ukraine). They all lodged applications to be included in the lists of voters who would participate in the local elections, but their applications were dismissed on the grounds that their respective registered places of residence were not in Kyiv. The applicants unsuccessfully challenged the domestic decisions.

Law – Article 1 of Protocol No. 12: The applicants had a general right set forth by the Constitution – namely the right to vote – and they met the general conditions for the exercise of that right. They had been treated in the same way as any other person residing outside their registered place of residence, in so far as the right to vote in local elections was concerned. The domestic law and practice that applied at the material time clearly provided that persons who did not have a registered place of residence and, hence an electoral address, in the constituency where they actually lived were not allowed to participate in local elections, regardless of any other factors or circumstances.

The participation of IDPs in local elections had been guaranteed by the IDP Act but subject to the proviso that they changed the place of voting without

changing the electoral address. This was not fully in line with the relevant legislation on local elections which consistently provided that the mentioned procedure of changing a voting address did not apply to such elections. In practice, therefore, IDPs were not treated in this respect any differently from any other group of people who lived outside their registered places of residence and could not participate in local elections at the places of their actual residence. The question was therefore whether the applicants, as IDPs, had been in a significantly different situation and therefore required treatment that would put them, *de facto*, on an equal footing with other citizens of Ukraine in respect of the enjoyment of their right to vote in local elections, as guaranteed by the national law. The Court replied in the affirmative finding as follows:

The Court took note of the applicants' arguments as to why they had to be allowed to keep their registered places of residence and the fact that they would have risked losing their IDP status if they had changed their registered residential addresses. Further, the applicants had been forced to leave their registered places of residence where no local elections had been held, those territories being outside of the Government's control. Therefore, despite the provisions of the IDP Act, in practice they had not been entitled to participate in local elections without changing their electoral addresses which had been linked exclusively to their registered places of residence at the material time. Thus, the applicants, as well as any other IDPs, had been in a significantly different situation from citizens living at their registered places as well as other mobile population groups who could come back to their registered places of residence and vote in local elections there.

As to the measures taken in order to avoid discriminating against them, despite the enactment of the IDP Act aiming to guarantee, *inter alia*, the right of IDPs to participate in local elections, that Act had not been supported at the material time by further amendments to the relevant local election legislation, which required that the citizens should "belong" to a local community in order to be able to participate in local elections. As a result, the intended guarantee did not materialise. In these circumstances, the requirement of "belonging" to a local community, which was undoubtedly legitimate in principle, could only be satisfied via the registration of one's place of residence as being located within the local community in question. There was no exception to this rule and no alternative means existed of proving that the person in question was sufficiently integrated into the local community and "belonged" to it. Therefore, the adoption of the IDP Act did not in itself put the applicants on an equal footing as others in the enjoyment of the right to vote in local elections.

As a result, even though the applicants had resided in Kyiv for about a year or more, had been payers of local taxes and consumers of local services and were thus concerned with the community's day-to-day problems and had sufficient knowledge of them, they had had no possibility to participate in the local affairs of their new communities for the period of their enforced absence from their permanent homes. This had been despite the fact such participation had been deemed to constitute an important element of IDPs' integration.

The amendments to the relevant legislation unlinking the electoral address from the registered place of residence upon a voter's request, and thus allowing IDPs to be included in the voters' list for local elections, could not affect the above findings as they had taken place more than four years after the impugned events.

In sum, at the material time, by failing to take into consideration the applicants' particular different situation, the authorities had discriminated against them in the enjoyment of their right to vote in local elections.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 to each of the applicants in respect of non-pecuniary damage.

General prohibition of discrimination/ Interdiction générale de la discrimination

Adequate positive measures enabling disabled applicants to exercise their right to vote freely and by secret ballot at a national referendum: *no violation*

Mesures positives adéquates permettant aux requérants handicapés d'exercer librement leur droit de vote par bulletin secret lors d'un référendum national : *non-violation*

Toplak and/et Mrak – Slovenia/Slovénie, 34591/19 and/et 42545/19, Judgment/Arrêt 26.10.2021 [Section II]

(See Article 13 above/Voir l'article 13 ci-dessus, page 28)

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

Referrals/Renvois

Hurbain – Belgium/Belgique, 57292/16, Judgment/ Arrêt 22.6.2021 [Section III]

(See Article 10 above/Voir l'article 10 ci-dessus, page 20)

Relinquishments/Dessaisissements

Sanchez-Sanchez – United Kingdom/Royaume-Uni, 22854/20

(See Article 3 above/Voir l'article 3 ci-dessus, page 9)

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

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

Italian/Italien

Guide agli articoli 1, 2, 5, 6 civile, 11, 13, 15, 17 e 18 della Convenzione, agli articoli 1 e 3 del protocollo n. 1, all'articolo 4 del protocollo n. 4 e all'articolo 4 del protocollo n. 7

Guida sulla giurisprudenza della CEDU – Immigrazione

Guida sulla giurisprudenza della CEDU – Terrorismo

Romanian/Roumain

Art. 3 și art. 5 § 1 lit. e) Tratamentul aplicat alienaților și legalitatea detenției în temeiul art. 5 din Convenție

Ghid privind art. 18 din Convenție – Limitarea folosirii restrângerii drepturilor