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September
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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

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

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

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

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

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Couverture : vue intérieure du Palais des droits de l'homme (architectes : Richard Rogers Partnership et Atelier Claude Bucher)

The Court's Knowledge Sharing platform (ECHR-KS) will be available to the public as of 18 October 2022.

Having regard to the content of ECHR-KS which will be updated weekly, the monthly compilation of Legal Summaries (the Case-Law Information Note or "CLIN") will no longer be published by the Court.

The individual Legal Summaries will remain accessible as before on HUDOC and will also be referenced on ECHR-KS.

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La plateforme Partage des Connaissances de la Cour (CEDH-KS) sera accessible au public à partir du 18 octobre 2022.

Dans la mesure où le contenu de CEDH-KS sera mis à jour chaque semaine, la compilation mensuelle des résumés juridiques (CLIN) ne sera plus publiée par la Cour.

Les résumés juridiques individuels seront toujours accessibles sur HUDOC et également référencés sur CEDH-KS.

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ARTICLE 3

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Failure to effectively investigate alleged death threats against vulnerable rape victim by her abuser and father, in breach of domestic law: *violation*

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J.I. – Croatia/Croatie, 35898/16, Judgment/Arrêt 8.9.2022 [Section I]

Traduction française – Printable version

Facts – The applicant's father, B.S., was convicted and imprisoned on several counts of rape and incest against her. During his prison leave, he allegedly threatened to kill the applicant through their relatives. The applicant contacted the police on several occasions, including after seeing B.S. at a bus station. The police intervened at the scene but no further action was taken. The applicant complained about the police conduct, resulting in an ultimately unsuccessful internal inquiry at the Ministry of the Interior, and lodged an unsuccessful complaint before the Constitutional Court.

Law – Article 3

(a) *Whether the applicant had been subjected to treatment contravening Article 3* – The applicant was a highly traumatised young woman of Roma origin, who had endured previous physical suffering and excessive psychological trauma. The Court could not doubt that her fear of further abuse and retaliation by B.S., stemming from the indirect threat to her life she had received, had been both genuine and intense. Coupled with the anxiety and feelings of powerlessness that she had experienced in the circumstances, the Court concluded that she had suffered inhuman treatment within the meaning of Article 3.

(b) *Whether the authorities had discharged their obligations under Article 3* – The applicant had contacted the police on three separate occasions, informing them about a serious threat by B.S. Although the authorities had had the duty to investigate the allegations of serious threat to the applicant's life, at none of those occasions had they started a proper criminal investigation, as they had been obliged to do under domestic law:

– The Court could not conclude whether the applicant had clearly stated that B.S. had uttered serious threats against her life during the first occasion of contact, when she had called the emergency helpline.

– During the second occasion, when the police had intervened at the bus station, the relevant police report had made clear that the applicant had told them that B.S. had threatened to kill her. Under domestic law, no particular form was required for a criminal complaint, which could be submitted orally or in writing. The police were obliged by law to conduct a criminal inquiry whenever they learned of allegations that a criminal offence might have been committed for which prosecution was conducted *ex officio.* A serious threat by a family member being a criminal act to be prosecuted *ex officio*, the police should have at least at that point begun criminal inquiries concerning the applicant's allegations. The police had further been required to inform the competent State Attorney's Office of the results of their criminal inquiries on the matter. Moreover, even if the authorities had concluded that the applicant's allegations concerned a criminal of-

fence prosecuted by private prosecution or that the acts complained of did not have the characteristics of a criminal offence, the police should have informed her accordingly.

– The applicant had contacted the police a third time through a letter written by her lawyer, complaining about the police failure to react to her concerns and requesting them to take adequate measures to protect her physical integrity. The applicant had expressly requested that her complaint about the alleged serious threat by B.S. be forwarded to the competent State Attorney's Office. That was never done, and instead her letter had been perceived as a mere complaint about police work, resulting in an internal inquiry.

The applicant's claim that the foregoing dismissive police behaviour had been the result of her Roma ethnic origin was not substantiated. Nevertheless, in a case such as the present one, where the authorities had been well aware of the applicant's particular vulnerability on account of her sex, ethnic origin and past traumas, they should have reacted promptly and efficiently to her criminal complaints in order to protect her from the realisation of that threat, as well as from intimidation, retaliation and repeat victimisation

While B.S.'s prison leave had ultimately been discontinued and he had been expelled from Croatia immediately upon his release, it could not be disregarded that the police had never even commenced criminal inquiries, let alone a serious investigation in the applicant's allegations, prior to the application being communicated to the respondent Government. The authorities had also never made a serious attempt to take a comprehensive view of the applicant's case as a whole, including the domestic violence to which she had previously been exposed, as was required in this type of case.

The authorities had therefore failed to effectively investigate a particularly vulnerable rape victim's allegation of a serious threat to her life.

Conclusion: violation (six votes to one).

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

(See also *Volodina v. Russia*, 41261/17, 9 July 2019, Legal Summary; *Tunikova and Others v. Russia*, 55974/16 et al., 14 December 2021, Legal Summary)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention / Arrestation ou détention régulières

Several months' detention in the extraditing State lawful, despite 30-day period indicated in the detention order of the receiving State and counted from the date of extradition: *no violation*

Détention de plusieurs mois dans l'État extradant jugée régulière bien que la durée fixée dans l'ordonnance de détention ait été de trente jours et calculée à compter de la date d'extradition : *non-violation*

Gilanov – Republic of Moldova/République de Moldova, 44719/10, Judgment/Arrêt 13.9.2022 [Section II]

Traduction française – Printable version

Facts – The applicant had, for years, obtained temporary residence permits in Moldova, during which time he opened a foundation for cultural exchanges with North Korea. In 2006 he officially left Moldova and, on an unknown date, entered Belarus.

In 2007 a criminal investigation was opened into alleged fraud committed by the applicant during his time within the foundation. An arrest warrant was issued and a Moldovan court ordered the applicant's detention for 30 days, starting from the moment of his arrest. The applicant was arrested by the Belarus authorities in May 2010 and was detained there for several months. He was extradited to Moldova in December 2010. His detention was extended pending trial and he was convicted in 2014. The judgment was subsequently quashed and sent for re-examination.

Law – Article 5 § 1: The applicant had argued that his detention in Belarus for more than 30 days had not been taken into account for the purpose of calculating the period of validity of his detention order.

The domestic court order for the applicant's arrest had mentioned its validity for 30 days from the date of arrest. In the applicant's view, that had implied that it had expired one month after he had been deprived of his liberty in Belarus. The Government had submitted that the usual practice of the courts had been to take the date of effective detention by the Moldovan authorities as the beginning of detention sanctioned by a detention order issued by a Moldovan court, regardless of the length of extradition procedures. That interpretation had been implicitly supported by the court of appeal when it had

rejected the applicant's appeal against the order, and was both reasonable and practical. It took into account the particular difficulty for the domestic courts – before being able to directly question the person – to verify such elements as the person's character, morals, assets, links with the State in which they were being prosecuted and their international contacts.

To accept the applicant's position would also have meant that the Moldovan courts would have had to extend the arrest warrant – again without ever seeing the person involved – at regular intervals. Moreover, since under Moldovan law a person could only be held in detention pending trial for a maximum of 12 months, in the case of any extradition process exceeding that period, the Moldovan authorities would have had to ask the authorities of the State in which the person was detained pending extradition to release him, without the courts ever having the possibility of questioning him. It was only after the Moldovan authorities had the applicant under their control that they could have assumed the full spectrum of their obligations towards him in the context of his pre-trial detention.

Accordingly, the practice of the domestic courts to count the period of "detention" as starting from the moment when a person was deprived of liberty by the domestic authorities (i.e. from the moment of extradition in the present case) was consistent with the requirements of Article 5 § 1.

Conclusion: no violation (four votes to three).

The Court also held, unanimously, that there had been a violation of Article 5 § 3, on the basis that the domestic court's decision ordering the applicant's detention pending trial had been stereotyped and abstract. The Court also found, unanimously, a violation of Article 5 § 4, for the decision in respect of his appeal against the detention order having been taken in the absence of a lawyer of his choice.

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

(See also *Buzadji v. the Republic of Moldova* [GC], 23755/07, 5 July 2016, Legal Summary)

ARTICLE 8

Respect for private life / Respect de la vie privée

Applicant's conviction and fine for manufacturing cannabis for personal treatment of chronic pain, without prescription, within State's wide margin of appreciation: *no violation*

Décision, relevant de l'ample marge d'appréciation de l'État, de condamner le requérant au paiement d'une amende pour avoir cultivé du cannabis sans ordonnance à des fins personnelles dans le but de soulager des douleurs chroniques : *non-violation*

Thorn – Sweden/Suède, 24547/18, Judgment/Arrêt 1.9.2022 [Section I]

Traduction française – Printable version

Facts – The applicant suffered serious injuries after a traffic accident that confined him to a wheelchair and left him with severe chronic pain. After having tried a form of medical cannabis authorised on the Swedish market without noticeable effects, he decided to treat himself by illegally growing his own cannabis for his own consumption. Its use improved his quality of life significantly. Criminal proceedings were brought against the applicant, the case being appealed up to the Supreme Court. He was eventually convicted of manufacturing narcotics and a fine of approximately EUR 520 was imposed on him.

Law – Article 8: Both the conviction and the fine had entailed an interference with the applicant's right to respect for his private life. In this context the Court's case-law on the inability of patients to access certain medical treatments, which it had examined under Article 8, was relevant. Further, the interference had been in accordance with the law and had pursued the legitimate aims of "the prevention of disorder or crime" and "the protection of health or morals".

As to whether it had been "necessary in a democratic society", the Court noted that the issue to be examined was whether the domestic authorities had violated the applicant's right to respect for his private life when not exempting him from the general criminal liability that would normally attach to the acts in issue relating to the production and consumption of narcotics, on the basis of the grounds that he had invoked for being exempt; namely that his acts had been within the scope of the necessity defence under Swedish law: he had acted out of "necessity" and his acts had not been otherwise "unjustifiable" within the meaning of the Criminal Code.

In so far as the domestic courts might at all be said to have carried out a balancing exercise with regard to the applicant's conviction as such, this had been effectively limited to pointing out that, although he might have acted out of necessity, his acts had in any event been unjustifiable. This was because the matter had been regulated by the existing domestic legislation on the control of narcotics and on approving and licensing medicines and had thus been contrary to the balancing of the interests already carried out by the legislature. Instead, the individual circumstances of the applicant's case had been tak-

en into account when deciding on the punishment, at which point the Supreme Court had made an overall assessment of the circumstances of the case.

The question before the Court, in contrast to the foregoing, was whether, viewing the domestic proceedings as a whole, the authorities had struck a sufficiently fair balance between the competing interests. The authorities' interest in the applicant's specific case had been principally to ensure the observance and enforcement of the domestic legislation relating to narcotics and medicines, whereas the applicant's interest had lain in finding a way to alleviate his pain. However, the case did not concern the freedom to accept or refuse specific medical treatment, or to select an alternative form of treatment, which was vital to the principles of self-determination and personal autonomy. It concerned the unlicenced production and use of narcotics, an area in which the domestic authorities had a wide margin of appreciation.

The Supreme Court had not called into question the applicant's submissions about his pain and that the cannabis that he had produced had helped against it; nor that the medicines he otherwise had had access to had been either less effective at alleviating his pain, had side-effects that he had reasonably wished to avoid, or had been costly. At the same time, it had found it understandable that the applicant had turned to cultivating and using cannabis and that the offence had been in a way excusable. It had also considered that this had not been a case with any particular risk of dissemination of narcotics and, in that context, that the cannabis in question did not contain high levels of THC (and therefore deemed of limited interest for any person seeking intoxication). Consequently, the Supreme Court had classified the applicant's acts as only a minor offence and had set the fine at an amount which was less than what would normally be considered a fair punishment for an offence involving the amount of cannabis in issue. It had taken the applicant's interest in finding effective pain relief into account and had reflected it principally in setting the fine at the level that it did.

There was no indication that the applicant had lacked the means to pay that fine, that its payment would for other reasons have been particularly burdensome to him or that the punishment had had other negative consequences. In that context, it was relevant to the Court's overall assessment that although the authorities of the respondent State had punished the applicant for his unauthorised cannabis production, while the domestic proceedings had been pending, they had also licenced a prescription for him of a lawful medicine that had apparently been effective in alleviating his pain.

The Court emphasised that the issue to be determined was not whether a different, less rigid, policy might have been adopted but rather whether, in striking the particular balance between the competing interests, the Swedish authorities had remained within their wide margin of appreciation. Against the above background, the Court found that those authorities had not overstepped that margin.

Conclusion: no violation (unanimously).

(See also *Hristozov and Others v. Bulgaria*, 47039/11 and 358/12, 13 November 2012, Legal Summary; *Durisotto v. Italy* (dec.), 62804/13, 28 May 2014)

Respect for private life / Respect de la vie privée

Collection of data on sexual behaviour of potential blood donor based on speculation, and excessive length of data retention by public body: *violation*

Collecte des données relatives aux pratiques sexuelles d'un donneur du sang potentiel basée sur une spéculation et durée excessive de leur conservation par un établissement public : *violation*

Drelon – France, 3153/16 et 27758/18, Judgment/Arrêt 8.9.2022 [Section V]

English translation – Version imprimable

En fait – En 2004, le requérant chercha à donner son sang mais refusa, à cette occasion, de répondre aux questions relatives à ses pratiques sexuelles qui lui avaient été posées au cours d'un entretien médical. Par ailleurs, et de ce seul fait, il fut renseigné dans le traitement de l'Établissement français du sang (ÉFS), qui est un établissement public de l'État, qu'il était visé par la contre-indication au don alors prévue de manière permanente pour les hommes ayant eu un rapport sexuel avec un homme. Sa candidature fut rejetée pour ce motif. La requête n° 3153/16 a été présentée à la suite du contentieux pénal qui a suivi la plainte déposée par le requérant pour discrimination qui aboutit à un non-lieu. Les recours du requérant n'aboutirent pas.

En droit – Article 8 : L'ÉFS étant un établissement public de l'État, ce grief sera examiné sous l'angle des obligations négatives.

1. *Sur l'existence d'une ingérence* – Ont été collectées et conservées dans une base de données initialement exploitée par l'un des établissements de l'ÉFS des données personnelles selon lesquelles le requérant était concerné par la contre-indication au don de sang alors prévue pour les hommes ayant eu un rapport sexuel avec un homme en droit interne. De telles données comportent des indications explicites sur la vie sexuelle et sur l'orientation sexuelle supposée du requérant. À cet égard, le fait que cette contre-indication ait été conservée avec la simple référence à un code et non la description

explicite d'un comportement sexuel n'est pas déterminant. Il était en outre prévu que les données saisies en 2004 soient conservées jusqu'en 2278. Dès lors, il y a eu ingérence dans le droit au respect de la vie privée du requérant.

2. *Sur la base légale de l'ingérence* – La loi faisait exception, en matière médicale, à l'interdiction de collecter et de traiter des données relatives à la santé ou à la vie sexuelle des personnes. La mise en œuvre de traitements comportant de telles données était autorisée en cas de nécessité pour la « gestion de services de santé », en conférant aux autorités internes un pouvoir d'appréciation s'agissant de la création de tels fichiers.

La prévisibilité de cette base légale doit être appréciée dans son contexte juridique. Or, à la date des faits litigieux, l'article 18 de la directive 2002/98/CE imposait l'enregistrement des résultats des procédures d'évaluation et d'examen des donneurs. L'arrêté du 10 septembre 2003 prévoyait la tenue d'un « dossier informatisé du donneur » comprenant « les éventuelles contre-indications au don temporaires ou définitives, indiquées de façon codée » le concernant. Ce cadre légal, pris dans son ensemble, définissait avec suffisamment de précision l'étendue et les modalités d'exercice du pouvoir d'appréciation conféré aux autorités internes et permettait ainsi au requérant de régler sa conduite, c'est-à-dire de poursuivre ou de renoncer à sa démarche de don de sang en connaissance de cause. L'ingérence litigieuse était donc « prévue par la loi ».

3. *Sur la poursuite d'un but légitime* – L'ingérence litigieuse poursuivait le but légitime de la protection de la santé. À cet égard, un grand nombre de personnes ont été contaminées par le VIH ou par des virus hépatiques par voie de transfusion de produits sanguins insuffisamment sécurisés, en France comme dans de nombreux États contractants, avant que des techniques de détection, d'inactivation et d'élimination des agents pathogènes soient développées et généralisées. Les instruments de droit international ont été adoptés pour répondre à cette crise sanitaire majeure et poursuivent ce même objectif de protection de la santé publique. Au demeurant, les obligations positives découlant de l'article 2 de la Convention impliquent la mise en place d'un cadre réglementaire imposant aux hôpitaux l'adoption de mesures propres à assurer la protection de la vie de leurs malades.

4. *Sur la nécessité de l'ingérence* – La collecte et la conservation de données personnelles relatives aux résultats des procédures de sélection des candidats au don du sang, et en particulier aux motifs d'exclusion du don éventuellement retenus, contribuent à garantir la sécurité transfusionnelle. Sans qu'il soit besoin de rechercher si d'autres critères de sélection des donneurs étaient envisageables, la collecte et la conservation des données litigieuses reposaient sur des motifs pertinents et suffisants.

Eu égard à la sensibilité des données personnelles litigieuses, qui comportent des indications sur les pratiques et l'orientation sexuelles du requérant, il est particulièrement important qu'elles répondent aux exigences de qualité prévues à l'article 5 de la Convention pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel du Conseil de l'Europe. Il importe en particulier qu'elles soient exactes et, le cas échéant, mises à jour, qu'elles soient adéquates, pertinentes et non excessives par rapport aux finalités du traitement, et que leur durée de conservation n'excède pas celle qui est nécessaire. Par ailleurs, les données litigieuses, qui touchaient à l'intimité du requérant, ont été collectées et conservées sans le consentement explicite du requérant. En conséquence, la Cour se doit de procéder à cet examen de façon rigoureuse.

En premier lieu, s'agissant de l'exactitude des données personnelles, celle-ci doit être appréciée au regard de la finalité pour laquelle ces données ont été collectées. Dans le traitement litigieux, cette catégorie de données avait pour finalité d'assurer le respect d'une contre-indication au don spécifique, que le droit interne prévoyait alors de façon permanente. À cette fin, elle devait reposer sur une base factuelle précise et exacte. Or, le requérant s'est vu appliquer une contre-indication propre aux hommes ayant eu un rapport sexuel avec un homme au seul motif qu'il avait refusé de répondre à des questions relatives à sa sexualité lors de l'entretien médical préalable au don. Aucun des éléments soumis à l'appréciation du médecin ne lui permettait de tirer une telle conclusion sur ses pratiques sexuelles. C'est pourtant ce motif d'exclusion du don qui fut renseigné et conservé. Les données collectées se fondaient sur de simples spéculations et ne reposaient sur aucune base factuelle avérée. Or, c'est aux autorités qu'il incombe de démontrer l'exactitude des données collectées. De surcroît, elles n'ont pas avoir été mises à jour à la suite des protestations et de la plainte du requérant.

Par ailleurs, il est inadéquat de collecter une donnée personnelle relative aux pratiques et à l'orientation sexuelles sur le seul fondement de spéculations ou de présomptions. Au surplus, il aurait suffi, pour atteindre l'objectif de sécurité transfusionnelle recherché, de garder trace du refus du requérant de répondre aux questions relatives à sa sexualité, cet élément étant de nature à justifier, à lui seul, un refus de la candidature au don de sang.

En second lieu, le Gouvernement ne démontre pas qu'à l'époque des faits, la durée de conservation des données litigieuses était encadrée de telle sorte qu'elle ne puisse pas excéder celle nécessaire aux finalités pour lesquelles elles ont été collectées. Au

moment de la collecte de ces données en 2004, l'outil informatique employé par l'ÉFS prévoyait leur conservation jusqu'en 2278, rendant ainsi possible leur utilisation de manière répétée. À la date du 26 mai 2016, soit près de douze ans après leur collecte, les données relatives au motif d'exclusion étaient encore conservées. À cet égard, la durée de conservation des données doit être encadrée pour chacune des catégories de données concernées et elle doit être révisée si les finalités pour lesquelles elles ont été collectées ont évolué. Au vu de la pratique constante de l'ÉFS, la durée excessive de conservation des données litigieuses a rendu possible leur utilisation répétée à l'encontre du requérant, entraînant son exclusion automatique du don de sang.

Au vu de l'ensemble des éléments qui précèdent, l'État défendeur a outrepassé sa marge d'appréciation en la matière.

Conclusion : violation (unanimité).

Article 41 : 3 000 EUR pour préjudice moral.

Respect for private life / Respect de la vie privée

No legal basis for disciplinary sanctions leading to imposition of stricter prison regime and repeated prison transfers: *violation*

Absence de base légale concernant des sanctions disciplinaires ayant conduit à l'imposition d'un régime de détention plus strict et des transfèrements répétés d'une prison à l'autre : *violation*

Stanislav Lutsenko – Ukraine (no. 2/n° 2), 483/10, Judgment/Arrêt 15.9.2022 [Section V]

Traduction française – Printable version

Facts – The applicant was serving a prison sentence at the relevant time. In 2008, this Court found that the domestic court proceedings concerning his conviction for murder had violated Article 6 § 1 of the Convention (fair hearing). After publication of that judgment, the applicant was, *inter alia* subjected to a number of disciplinary sanctions, leading to the imposition of a stricter prison regime. He was also transferred on three occasions to other prisons which were situated further away from his home. The applicant complained about the sanctions, some of which were quashed by the prosecutor's office. In May 2011 the domestic court granted the applicant early and immediate release, referring to his exemplary behaviour during imprisonment. Although that decision was quashed, upon remittal the domestic court once again ordered his early release.

Law – Article 8: The impugned measures had affected the applicant's daily life in prison in a very significant manner. For instance, he had no longer been allowed to benefit from temporary release or to visit family, keep money or wear civilian clothes. Article 8 was accordingly applicable and the measures had constituted an interference with his private life. The Court had to determine whether the interference had been lawful:

Regarding the disciplinary sanctions and the imposition of a strict prison regime, it was noted that, immediately prior to the publication of the Court's judgment, the applicant had been commended by the prison authority on numerous occasions for his good behaviour and been placed under a less severe regime of detention. Thereafter, however, he had been placed in a disciplinary cell for periods between ten and fifteen days for breaches of prison rules and had subsequently faced an adverse change in his detention conditions after transfer to a unit with a stricter regime. The applicable domestic legislation had provided that a change of prison regime had only been possible in the event of a flagrant breach of the prison rules. The Government had not claimed that the applicant's misconduct which had led to the imposition of a stricter regime (absence from the working place and possession of a mobile phone) had constituted flagrant breaches within the meaning of the applicable law.

As to the transfers between prisons, the applicant had initially served his sentence in a prison located 18 km from his home. After the Court's judgment, however, between 2009 and 2011 he had been transferred to three different prisons, located between 72 km and 1,390 km from his home. Under domestic law, transfers were permitted only under exceptional circumstances.

The only available document addressing the sanctions and transfers was the decision of the domestic court in May 2011 ordering the applicant's early release for the first time. It had described the sanctions as "groundless and incomprehensible" and underlined the exceptional nature of transfers. It had also stated that the prosecutor had annulled the sanctions as biased and baseless, and that, later, the head of one of the prisons had cancelled sanctions following an internal review, which had proved them to be unreasonable and unlawful. Although the decision had been quashed for reasons unknown, and the case had been remitted for fresh examination, the validity of the decisions of the prosecutor and head of prison had not been affected. After the remittal, the domestic court had again ordered the applicant's release on the basis of his commendations for good behaviour, his positive attitude towards work and studies, and lack of any unfavourable comments from the administration of the fourth prison regarding his behaviour or adherence to prison rules. That decision, which had not

stated that the May 2011 judgment's findings had been incorrect, had become final.

The above was sufficient for the Court to conclude that the impugned disciplinary sanctions, leading to the imposition of a stricter prison regime, and decisions to transfer the applicant repeatedly to other prisons, had had no legal basis.

Conclusion: violation (unanimously).

The applicant complained, under Article 18, that he was subjected to reprisals while in prison, in retaliation for the successful outcome of his application to the Court. The Court rejected this complaint as manifestly ill-founded: both the applicant's and the Government's submissions lacked sufficient details on that matter, preventing the Court from examining and deciding on the purpose of the disputed treatment.

Article 41: EUR 4,500 in respect of non-pecuniary damage.

(See also *Lutsenko v. Ukraine*, 30663/04, 18 December 2008)

Respect for private life / Respect de la vie privée

Sterilisation without consent in breach of domestic law, failure of domestic courts to establish responsibility and provide redress: *violation*

Stérilisation non consentie pratiquée en violation du droit interne, manquement des juridictions internes à leur devoir d'établir les responsabilités et de fournir une réparation : *violation*

Y.P. – Russia/Russie, 43399/13, Judgment/Arrêt 20.9.2022 [Section III]

Traduction française – Printable version

Facts – The applicant, who was pregnant at the relevant time, underwent an emergency Caesarean section in a public hospital. During the intervention, doctors identified a rupture of the uterus. A medical panel was urgently convened and decided that the applicant should be sterilised, to avoid the real and life-threatening risk of the uterus rupturing again in a future pregnancy. The applicant became aware of the sterilisation only after the procedure had been performed.

The applicant brought an unsuccessful civil claim against the hospital, seeking compensation in respect of non-pecuniary damage in connection with her sterilisation. She appealed without success.

Law – Article 3: The applicant complained that she had been subjected to inhuman and degrading treatment as a result of being sterilised without her consent.

The Court was mindful that sterilisation constituted a major interference with a person's reproductive health status and concerned one of the essential bodily functions of human beings (*V.C. v. Slovakia*). It had had psychological and emotional effects on the applicant and her relationship with her husband, and she had felt humiliated and degraded.

At the same time, the health professionals in question had, during a routine medical intervention, suddenly been faced with a situation (ruptured uterus) where they had had to decide as a matter of urgency on the scope of the surgery, and where even a hysterectomy (removal of the uterus) could have been justified. The decision to keep the uterus, suture the rupture and sterilise the applicant had been taken by a panel of doctors, including the chief medical officer, after a thorough consideration, on medical grounds confirmed by a subsequent expert report, and considered by those professionals to be necessary to prevent a future risk to the applicant's life. The doctors had not acted in bad faith, let alone with an intent of ill-treating or degrading the applicant, but had been driven by genuine concerns for health and safety. There were also no additional elements, such as, for instance, the applicant's particular vulnerability, to enable the Court to conclude that the requisite threshold of severity had been reached, in the particular circumstances of the present case, to bring Article 3 into play.

Conclusion: inadmissible (*ratione materiae*).

Article 8 – The domestic courts had dismissed the applicant's claim for compensation at two levels of jurisdiction, based on the following arguments, which had also been relied upon by the government:

(a) *The applicant had consented to the sterilisation as that intervention had been performed as an expansion of the scope of the Caesarean section* – However, the relevant consent form, which the applicant had signed, had explicitly excluded sterilisation. Moreover, the expert report and first-instance court had pointed to the applicant's lack of informed consent for her sterilisation. Sterilisation was not a procedure that could be routinely carried out as part, or as an expansion, of any medical intervention, unless the patient had given express, free and informed consent to that particular procedure. The only exception concerned emergency situations where medical treatment could not be delayed and appropriate consent could not be obtained;

(b) *An unexpected complication had required urgent action to save the applicant's life, and even more radical action would have been justified* – However, such a threat was not imminent and was only likely to materialise in the event of a future pregnancy. It could also have been prevented by means of alternative, less intrusive methods. In those circumstances, the applicant's informed consent could

not be dispensed with on the basis of an assumption on the part of the hospital staff that she would act in an irresponsible manner with regard to her health in the future;

(c) *It had in any event been open to the applicant to have recourse to* in vitro *fertilisation* – The Court could not accept the argument to the effect that no damage had been inflicted on the applicant's health as a result of the procedure under this consideration. It could not be reconciled with the alleged necessity to sterilise the applicant with a view to preventing future pregnancies so as to avoid any possibly life-threatening deterioration of her health. Moreover, at the relevant time the applicant had been at her full reproductive age and had been permanently deprived of her natural reproductive capacity, thereby causing serious damage to her health.

It was therefore clear that the applicant had suffered an infringement of her right to respect for her private life as a result of the doctors' failure to seek and obtain her express, free and informed consent as regards her sterilisation, in line with domestic law.

Moreover, the national courts had refused to establish the doctors' responsibility for the sterilisation, thereby endorsing the approach which had stood in conflict with the principle of the patient's autonomy, established both in domestic law and at the international level. The medical intervention with such serious consequences had been performed without respecting the rules and safeguards created by the domestic system itself, which was difficult to reconcile with the procedural safeguards enshrined in Article 8. The applicant had also not been afforded any redress for the infringement of her right to respect for private life.

Conclusion: violation (unanimously).

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

(See also *V.C. v. Slovakia*, 18968/07, 8 November 2011, Legal Summary; *N.B. v. Slovakia*, 29518/10, 12 June 2012)

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

Refusal of a civil claim by the applicants, accused of criminal conduct in respect of their missing daughter by a former police officer who had been responsible for the extensively publicised investigation, which was discontinued for lack of evidence: *no violation*

Rejet de l'action civile des requérants accusés du crime contre leur fille disparue par un ancien policier chargé de l'enquête médiatisée classée sans suite pour défaut de preuves : *non-violation*

McCann and/et Healy – Portugal, 57195/17, Judgment/Arrêt 20.9.2022 [Section IV]

English translation – Version imprimable

En fait – Suite à la disparition de Madeleine McCann dans la nuit du 3 mai 2007 dans le sud du Portugal, ses parents (les requérants) avaient fait l'objet d'une enquête.

Le 2 octobre 2007, l'inspecteur de la police judiciaire qui en avait eu la charge (G.A.) en fut écarté.

Le 21 juillet 2008, le parquet rendit une décision de classement sans suite de l'enquête par manque de preuves contre les requérants.

Le 24 juillet 2008, G.A. publia un livre, basé sur le dossier d'enquête public, dans lequel il accusa les parents d'être impliqués dans la disparition de leur fille. G.A. donna un entretien qui fut publié dans un journal le jour du lancement du livre. Et celui-ci fit l'objet d'une adaptation en documentaire qui fut diffusé à la télévision puis commercialisé.

Les procédures des requérants n'aboutirent pas.

Ils reprochent aux juridictions nationales d'avoir manqué à l'obligation positive de protéger leur droit à la présomption d'innocence et leur réputation.

En droit – Article 8

1. Applicabilité – Les affirmations litigieuses formulées par G.A. dans le livre, le documentaire et l'entretien en cause portent sur l'implication alléguée des requérants dans la dissimulation du corps de leur fille, sur l'hypothèse selon laquelle ils auraient mis en scène un enlèvement et sur des actes de négligence présumés à l'égard de leur fille. Ces affirmations sont d'une gravité suffisante pour appeler l'application de l'article 8.

Conclusion : article 8 applicable.

2. Au fond – Les juridictions nationales ont bien cerné les intérêts qui étaient en jeu, à savoir, d'une part, la liberté d'expression et la liberté d'opinion de G.A. et, d'autre part, le droit au respect de la réputation qui était lié au droit à la présomption d'innocence des requérants, et elles ont fait prévaloir les droits du premier sur ceux des seconds. Elles ont également observé que ces droits méritaient une égale protection et que, dans ces conditions, il était nécessaire de les mettre en balance. La question qui se pose est donc celle de savoir si les juridictions nationales ont procédé à une mise en balance de ces droits dans le respect des critères établis par la jurisprudence de la Cour.

a) *La contribution à un débat d'intérêt général* – Pour la Cour, tel que la Cour suprême l'a conclu, le

livre de G.A., son adaptation en documentaire et l'entretien accordé par ce dernier dans un journal concernaient un débat qui présentait un intérêt public. En effet, l'importante couverture médiatique qu'a reçue l'affaire témoigne bien de l'intérêt qu'elle avait suscité tant au niveau national qu'international.

b) *Le comportement antérieur et la notoriété des requérants* – La Cour comprend que, en ayant fait appel aux médias les requérants aient voulu exploiter tous les moyens possibles pour retrouver leur fille. Il n'empêche que, alors qu'ils étaient inconnus du public avant les faits, ils ont, du fait de leur exposition aux médias, fini par acquérir une notoriété publique certaine et par entrer dans la sphère publique. Ils se sont, par voie de conséquence, exposés inévitablement et consciemment à un contrôle attentif de leurs faits et gestes.

c) *L'objet du livre, du documentaire et de l'entretien et le mode d'obtention des informations* – Aux yeux de la Cour, les informations contenues dans le livre, le documentaire et l'entretien provenaient du dossier relatif à l'enquête pénale qui était public.

d) *Le contenu des affirmations litigieuses et leurs répercussions* – Eu égard au contexte de l'affaire et tel qu'affirmé par les juridictions internes, les affirmations litigieuses constituaient des jugements de valeur fondés sur une base factuelle suffisante à savoir les éléments recueillis au cours de l'enquête et portés à la connaissance du public. En outre, cette thèse avait été envisagée dans le cadre de l'enquête pénale et avait même déterminé la mise en examen des requérants en septembre 2007.

Par ailleurs, l'affaire pénale a passionné l'opinion publique tant nationale qu'internationale et elle a suscité de nombreux débats et discussions. Comme l'ont relevé la cour d'appel et la Cour suprême, les affirmations litigieuses s'inscrivaient incontestablement dans un débat d'intérêt public et la thèse de G.A. constituait dès lors une opinion parmi d'autres.

L'affaire pénale a été classée sans suite par le parquet. À cet égard, si le livre avait été publié avant la décision de classement sans suite du parquet, les affirmations litigieuses auraient pu porter atteinte à la présomption d'innocence des requérants, garantie par l'article 6 § 2 de la Convention, en préjugeant l'appréciation des faits par l'autorité d'enquête. Puisque ces affirmations ont été formulées après le classement sans suite, c'est la réputation des requérants, garantie par l'article 8, et la manière dont ceux-ci sont perçus par le public qui sont en jeu. Il y va également de la confiance du public dans le fonctionnement de la justice.

À supposer même que la réputation des requérants avait été atteinte, ce n'est pas à cause de la thèse défendue par G.A. mais à cause des soupçons qui avaient été émis à leur égard, lesquels avaient déterminé leur mise en examen au cours de l'enquête et avaient fait l'objet d'une couverture médiatique très importante ainsi que de nombreux débats. Il s'agissait d'informations dont le public avait pris amplement connaissance, avant même la mise à disposition du dossier d'enquête auprès des médias et la publication du livre litigieux.

Le livre a été publié trois jours après le classement sans suite de l'affaire ce qui indique qu'il a été rédigé puis imprimé alors que l'enquête était encore en cours. G.A. aurait pu, par prudence, ajouter une note alertant le lecteur quant à l'issue de la procédure. L'absence d'une telle mention ne saurait toutefois, à elle seule, prouver la mauvaise foi de G.A. D'ailleurs, le documentaire fait, quant à lui, bien référence au classement sans suite de l'affaire.

Après la publication du livre, les requérants ont poursuivi leurs actions auprès des médias. Ils ont notamment réalisé un documentaire au sujet de la disparition de leur fille et continué à accorder des entretiens à des médias au niveau international. Même si la Cour comprend que la publication du livre ait indéniablement causé colère, angoisse et inquiétude chez les requérants, il n'apparaît pas que cet ouvrage ou la diffusion du documentaire aient eu des répercussions sérieuses sur les relations sociales des intéressés ou sur les recherches légitimes qu'ils poursuivent toujours pour retrouver leur fille.

e) *Les circonstances particulières de l'espèce* – La Cour peut souscrire à l'analyse de la cour d'appel et de la Cour suprême. Certes, les affirmations litigieuses se fondent sur la connaissance approfondie du dossier que détenait G.A. du fait de ses fonctions. Cependant, elles étaient déjà connues du public compte tenu de l'importante couverture médiatique de l'affaire suivie de la mise disposition du dossier d'enquête des médias après la clôture de l'enquête. Ainsi les éléments litigieux ne sont que l'expression de l'interprétation de G.A. au sujet d'une affaire médiatique qui avait déjà été amplement débattue. En outre, il n'apparaît pas que G.A. était mû par une animosité personnelle à l'égard des requérants.

Eu égard aux circonstances particulières de la présente espèce, une condamnation aurait eu un effet dissuasif pour la liberté d'expression au sujet d'affaires d'intérêt public.

f) *Conclusion* – La Cour suprême a procédé à une évaluation circonstanciée de l'équilibre à ménager entre le droit des requérants au respect de leur vie privée et le droit de G.A. à la liberté d'expression, en les appréciant à l'aune des critères se dégageant de sa jurisprudence et en se référant amplement à la jurisprudence de la Cour. Compte tenu de la marge d'appréciation dont jouissaient en l'espèce les autorités nationales, la Cour n'aperçoit aucune raison sérieuse de substituer son avis à celui de la Cour

suprême. Les autorités nationales n'ont donc pas manqué à l'obligation positive qui leur incombait de protéger le droit des requérants au respect de leur vie privée.

Conclusion : non-violation (unanimité).

(Voir aussi *Von Hannover c. Allemagne n° 2* [GC], 59320/00, 7 février 2004, Résumé juridique)

Respect for home / Respect du domicile
Positive obligations / Obligations positives

Failure to protect applicant against new owner who unlawfully and forcibly entered his home preventing further access to it; interference through unlawful eviction by bailiff: *violation*

Défaut de protection du requérant face à un nouveau propriétaire qui, après s'être introduit de force et de manière illégale dans son domicile, en a interdit l'accès à l'intéressé ; expulsion illégale par un huissier, constitutive d'une ingérence : *violation*

Jansons – Latvia/Lettonie, 1434/14,
Judgment/Arrêt 8.9.2022 [Section V]

Traduction française – Printable version

Facts – The applicant lived in an apartment of a residential building on the basis of an agreement on "the use of premises". The agreement had been concluded with the then-owner of the building, was extended several times and granted the applicant priority in the conclusion of a new agreement. The property was subsequently sold to another private entity. After the sale, the applicant made payments to the new owner for the use of the premises and continued to do so after the expiry of the agreement, assuming that it had been *de facto* extended. When he refused to sign a short-term tenancy agreement without the right to seek extension, the new owner sent him a letter requesting him to vacate the premises and stopped accepting his payments. The applicant refused to move out and brought civil proceedings against the new owner, seeking recognition of the fact that the agreement on "the use of premises" had been a tenancy agreement, and that there had therefore been a *de facto* tenancy relationship between him and the new owner.

The new owner, with the help of armed private security guards, then forcibly opened the first door to the applicant's home. The applicant called the police who arrived at the scene but subsequently left, having informed him that he had to submit his complaint at the police station. When the applicant left his apartment the next day, *inter alia* to make a criminal complaint, the outside door lock was changed and the guards then prevented him from entering the apartment over the following weeks. Despite the applicant's persistent pleas, the police did not intervene.

Subsequently, a bailiff enforced the new owner's court order on entry into possession against the previous owner. The second door to the apartment was forcibly opened in the presence of police. The applicant arrived after the police had left and the bailiff continued to enforce the order, despite the applicant informing him of his identity and the fact that he was the tenant of the apartment. The applicant called the police in relation to the incident, who did not intervene. All movable property and belongings were removed from the apartment in front of the applicant and taken to a storage facility, where he could retrieve them.

The applicant's attempts to bring criminal and civil proceedings against both the new owner and the bailiff were ultimately unsuccessful. Disciplinary proceedings requested by the State police and in relation to the bailiff's actions concluded through finding no grounds for disciplinary liability.

Law – Article 8

(a) *Applicability* – The applicant had had sufficient and continuous links with the apartment for it to be regarded as his "home". It had been his actual place of residence for more than three years until he had been denied further access to it. At least for a certain period of time, he had had a lawful basis to reside there and at the time of the interference, a legal claim concerning his rights to reside there had been pending before the domestic courts. The fact that he had been forced out of the apartment – one of the aspects complained of before the Court – could not be invoked to argue that the apartment had thereby ceased to be his "home". The absence of registration was also insufficient to conclude that the applicant had not established his home there.

(b) *Positive obligations to protect the applicant against the actions of the new owner* – A private entity had owned the apartment and, without any decision by a public authority empowering it to do so, it had forcibly entered into the applicant's home and prevented him from further access to it. The police had been well aware of the situation as it had been developing as the applicant had called them numerous times and they had come and inspected the scene, and been able to observe that he, in all likelihood, had been living there. In those circumstances, the respondent State's positive obligations to ensure effective protection of the applicant's right to respect for his home had been triggered. Nevertheless, the police had refused to intervene.

The protection of the right to respect for one's home was not limited to lawfully occupied premises. Under domestic law, too, no person could be

evicted without a valid eviction order from a court, including those occupying residential premises arbitrarily (i.e. without a valid tenancy agreement). The police had even explained that fact to the representatives of the private entity but had not undertaken any further actions.

Furthermore, despite the applicant's pleas, the police had failed to undertake any practical steps also at a later stage of the dispute, even though he had remained permanently locked out of his home and even after the institution of criminal proceedings. The police inactivity, which had apparently been a common practice at the given time, had not only failed to prevent but also indirectly encouraged further unlawful actions on the part of the private entity.

The Court's case-law did not suggest that the positive obligation in this context required a criminal-law remedy. Nonetheless, a criminal investigation had been carried out to determine, *inter alia*, whether the offence of breaching the inviolability of the home had been committed. The investigation, in its relevant part, had been discontinued, with the conclusion that the applicant had not been the tenant of the apartment but rather "the person using the premises". The decisions had included no analysis of whether the applicant had in fact lived in the apartment and whether it might have constituted his "home", meriting the protection of its inviolability. Since the applicant's right to his home had not been considered to be engaged, the lawfulness of the private entity's actions had not been assessed. Accordingly, the criminal investigation had not analysed all the pertinent facts of the case and therefore had been too limited in scope, effectively offering no protection in a situation where the tenancy rights with respect to the person's home had been in dispute.

In consequence, the public authorities had not taken appropriate steps to secure the applicant's right to respect for his home.

(c) *The lawfulness of the eviction from the applicant's home by the bailiff* – The bailiff's actions had amounted to an eviction, resulting in the applicant's loss of his home, which was the most extreme form of interference with the right to respect for one's home. It was not plausible, in the circumstances, that the bailiff had been unaware that the applicant had been living in the apartment, and of the ongoing dispute about his tenancy rights, Nonetheless, he had proceeded to carry out the enforcement of the order on entry into possession. Further, in the absence of a valid eviction order, the impugned interference had not had a lawful basis.

The present case had to be distinguished from those where the eviction had been based on possession orders (*McCann v. the United Kingdom*, *Ćosić v. Croatia*) as the order on entry into possession had addressed only the relationship between the previous owner and the new one, the applicant's right to reside having no relevance.

The Government had further argued that the applicant could have sought restoration of his physical possession of the apartment by bringing civil proceedings. However, such a mechanism placed a disproportionate burden on tenants, who were forced to defend their rights through civil litigation after having already lost their home, could not be regarded as an adequate procedural safeguard. A legal dispute had clearly existed between the applicant and the new owner, and the domestic law had required such disputes to be decided by a court prior to the eviction, which had not happened. In that respect, the case had to be distinguished from case-law involving court-ordered evictions (*Vrzić v. Croatia*, *F.J.M. v. the United Kingdom (dec.)*), where the Convention did not require that the tenants be entitled to seek a proportionality assessment where possession was being sought by private-sector property owners. In contrast, the applicant in the present case had been evicted without the lawfulness of the interference having been determined, and moreover where the requirement of a prior judicial review had been expressly laid out in domestic law.

The domestic regulatory framework had had some procedural safeguards, including the need for a court order for evictions and the presence of police during the entry into possession procedure. However, those had been effectively rendered inoperative, as the domestic authorities had failed to adhere to them. Furthermore, the mere existence of a regulatory framework for disciplinary and criminal liability could not be viewed as a procedural safeguard capable of preventing justified interferences or ensuring that due respect be afforded to interests protected by the Convention.

Conclusion: violation (six votes to one).

The Court also held, by six votes to one, that there had been a violation of Article 13 taken in conjunction with Article 8, on account of the fact that the applicant had had no effective remedy.

Article 41: EUR 8,000 in respect of non-pecuniary damage. Claim in respect of pecuniary damage dismissed.

(See also *McCann v. the United Kingdom,* 19009/04, 13 May 2008, Legal Summary; *Ćosić v.* Croatia, 28261/06, 15 January 2009, Legal Summary; *Vrzić v. Croatia*, 43777/13, 12 July 2016; *F.J.M. v. the United Kingdom (dec.),* 76202/16, 6 November 2018, Legal Summary)

ARTICLE 10

Freedom of expression / Liberté d'expression

Applicant convicted of propagandising for a terrorist organisation for cutting and handing out slices of cake in celebration of PKK leader's birthday: *violation*

Condamnation pénale pour propagande en faveur d'une organisation terroriste pour avoir coupé et distribué un gâteau célébrant l'anniversaire du leader du PKK : *violation*

Ete – Türkiye, 28154/20, Judgment/Arrêt 6.9.2022 [Section II]

English translation – Version imprimable

En fait – La requérante a été condamnée pénalement à une peine d'emprisonnement de dix mois, dont il a été sursis à l'exécution, du chef de propagande en faveur d'une organisation terroriste pour avoir coupé un gâteau d'anniversaire et l'avoir distribué en assiettes lors d'une manifestation qui aurait été organisée afin de célébrer l'anniversaire du leader du PKK.

En droit – Article 10 : La procédure pénale engagée à l'encontre de la requérante ainsi que sa condamnation pour propagande en faveur d'une organisation terroriste à l'issue de celle-ci s'analysent en une ingérence dans l'exercice par l'intéressée de son droit à la liberté d'expression, poursuivant les buts légitimes de la protection de la sécurité nationale et de l'intégrité territoriale, la défense de l'ordre et la prévention du crime.

Les actes retenus par la cour d'assises à l'appui de sa condamnation pénale sont de couper un gâteau qui aurait été préparé afin de célébrer l'anniversaire du leader du PKK et de le distribuer en assiettes. Ces actes, pris dans leur ensemble, ne peuvent être perçus comme contenant un appel à l'usage de la violence, à la résistance armée ou au soulèvement, ni comme constituant un discours de haine, ce qui est l'élément essentiel à prendre en compte.

Par conséquent, dans les circonstances de l'espèce, le Gouvernement n'a pas démontré que la mesure incriminée répondait à un besoin social impérieux, qu'elle était proportionnée aux buts légitimes visés et qu'elle était nécessaire dans une société démocratique.

Conclusion : violation (unanimité).

Article 41 : 2 000 EUR pour préjudice moral ; demande de dommage matériel rejetée.

Freedom of expression / Liberté d'expression

No relevant and sufficient reasons provided by domestic authorities for removing election observer from polling station: *violation*

Manquement des autorités internes à l'obligation de justifier par des motifs pertinents et suffisants la décision d'expulser un observateur électoral d'un bureau de vote : *violation*

Timur Sharipov – Russia/Russie, 15758/13, Judgment/Arrêt 13.9.2022 [Section III]

Traduction française – Printable version

Facts – The applicant was an election observer appointed by a political party to observe Russian legislative elections at a precinct polling station in Moscow.

On polling day, the precinct electoral commission of that polling station ("the PEC") issued a decision setting out rules restricting the filming of officials and of the events there. The applicant filmed the poll and was filming the vote counting when the PEC noted that he had repeatedly breached the rules. It prepared two formal records and subsequently ordered a police officer to remove the applicant from the station for his misconduct. The applicant alleged that he had been removed for filming grave procedural violations by the PEC's members and that the PEC had also ordered the remaining observers to be removed thereafter.

The applicant brought an unsuccessful court action challenging the lawfulness of his removal from the station. He appealed without success.

Law – Article 10

(a) *Applicability* – The applicant had gathered information by overseeing the election in his capacity as an election observer appointed by a political party to convey that information to the public. It had been an essential part of his duties which had served the important public interest in free and transparent elections. Given the fundamental importance of such elections in any democratic society and the essential role of political parties in the electoral process, the Court considered that the applicant had exercised his freedom of expression as a "public watchdog" in a democratic society and that Article 10 protection therefore applied to his activity, which was of similar importance to that of the press.

(b) *Merits* – There had been an interference through the applicant's removal from the polling station, which had prevented him from carrying out his function as an election observer. The Court did not need to determine whether the interference had been prescribed by law, since, even assuming that it had pursued the legitimate aims of preventing disorder and protecting the rights of others, it

had not been "necessary in a democratic society", as shown below.

Given the importance of the applicant's role as election observer in enhancing the democratic electoral process and promoting human rights protection, his status had conferred on him enhanced protection under Article 10, which was essential for the effective performance of his task of purveyor of information and public watchdog. That protection was not absolute, however, and could not exempt election observers from such "duties and responsibilities" as may follow from Article 10 § 2. The Court therefore had to examine whether the reasons adduced by the authorities had been "relevant and sufficient" to justify the applicant's removal from the polling station:

– The PEC's decision had not contained even basic details of the applicant's misconduct. Although there were objective difficulties on account of the PEC drafting its decision on the spot, that could not exempt them from describing the factual circumstances of the decision taken. Such a description was required for maintaining a clear audit trail, which was an important guarantee against arbitrariness and a necessary precondition for the thorough examination of the case;

– The domestic courts had not made good the lack of factual details. In particular, it had not been shown in what way that applicant had obstructed the PEC's work. They had also not assessed the degree to which the alleged misconduct had obstructed the process, whether any disruption had been sufficiently serious to justify an observer's removal, or whether it would have been possible, for example, to simply bar the applicant from filming.

Accordingly, no "relevant and sufficient" reasons for the application of the impugned measures had been put forward by the authorities.

Conclusion: violation (six votes to one).

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

(See also *Pentikäinen v. Finland* [GC], 11882/10, 20 October 2015, Legal Summary; *Magyar Helsinki Bizottság v. Hungary* [GC], 18030/11, 8 November 2016, Legal Summary; *Szurovecz v. Hungary*, 15428/16, 8 October 2019, Legal Summary; *Mándli and Others v. Hungary*, 63164/16, 26 May 2020, Legal Summary)

Freedom of expression / Liberté d'expression

Lack of sufficient reasons for conviction and fine for offending religious feelings of others through publicly insulting the Bible: *violation*

Absence de raisons suffisantes propres à justifier la condamnation de la requérante à une amende pour avoir offensé les sentiments religieux d'autrui par des propos insultants sur la Bible : *violation*

Rabczewska – Poland/Pologne, 8257/13, Judgment/Arrêt 15.9.2022 [Section I]

Traduction française – Printable version

Facts – The applicant is a popular pop singer. In an interview for a news website, subsequently reprinted in a tabloid, she made statements relating to the Bible and its authors. In particular, she stated that she was more convinced by scientific discoveries, and not by what she described as "the writings of someone wasted from drinking wine and smoking some weed". Two individuals complained to a public prosecutor that the applicant's statements had amounted to an offence under the Criminal Code (offending the religious feelings of other persons by publicly insulting an object of religious worship). The applicant was convicted and fined. She appealed unsuccessfully.

Law – Article 10: The applicant's criminal conviction had amounted to an interference with her right to freedom of expression, which had been prescribed by law and pursued the aim of protecting religious feelings, which corresponded to protecting the rights of others within the meaning of Article 10 § 2. The issue before the Court involved weighing up the conflicting interests, regard being had to the wide margin of appreciation left to the domestic authorities in the instant case.

With regard to the applicant's statements, she had not argued that they had been part of a debate on a question of public interest, nor had she claimed to be an expert on the matter, a journalist or a historian. She had been answering a journalist's question about her private life, addressing her audience in a language consistent with her style of communication, deliberately frivolous and colourful, with the intention of sparking interest.

The domestic courts had failed to assess properly – on the basis of a detailed analysis of the wording – whether the applicant's statements had constituted factual statements or value judgments. They had failed to identify and carefully weigh the competing interests at stake. They had also not discussed the permissible limits of criticism of religious doctrines under the Convention versus their disparagement. In particular, the domestic courts had not assessed whether the applicant's statements had been capable of arousing justified indignation or whether they had been of a nature to incite to hatred or otherwise disturb religious peace and tolerance in Poland.

It had not been argued before the domestic courts, or before the Court, that the applicant's statements

had amounted to hate speech and the domestic courts had not examined whether the actions in question could have led to any harmful consequences. It appeared that the relevant domestic legislative provision incriminated all behaviour likely to hurt religious feelings, with no additional criterion that it should threaten public order.

It had not been demonstrated that the interference in the instant case had been required, in accordance with the State's positive obligations under Article 9, to ensure the peaceful coexistence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. Moreover, the Court considered that the expressions under examination had not amounted to an improper or abusive attack on an object of religious veneration, likely to incite religious intolerance or violating the spirit of tolerance, which was one of the bases of a democratic society.

Lastly, the applicant had been convicted in criminal proceedings originating from a bill of indictment lodged by a public prosecutor upon a complaint by two individuals. The criminal proceedings had thus been continued even after the applicant had reached a friendly settlement with one of the complainants. She had been sentenced to a fine equivalent to 1,160 euros, fifty times the minimum. It could not therefore be concluded that the sanction imposed on the applicant had been insignificant.

Accordingly, and despite the wide margin of appreciation, the domestic authorities had failed to put forward sufficient reasons capable of justifying the interference with the applicant's freedom of speech.

Conclusion: violation (six votes to one).

Article 41: EUR 10,000 in respect of non-pecuniary damage.

(See also *E.S. v. Austria*, 38450/12, 25 October 2018, Legal Summary)

ARTICLE 11

Freedom of peaceful assembly / Liberté de réunion pacifique

Blanket ban on public meetings for two and a half months at the start of the COVID-19 pandemic, with associated criminal sanctions and no judicial review of proportionality: *case referred to the Grand Chamber*

Interdiction générale des réunions publiques, pendant deux mois et demi au début de la pandémie de Covid-19, assortie de sanctions pénales et sans contrôle juridictionnel de proportionnalité : *affaire renvoyée devant la Grande Chambre*

Communauté genevoise d'action syndicale (CGAS) – Switzerland/Suisse, 21881/20, Judgment/Arrêt 15.3.2022 [Section III]

On 5 September 2022 the case was referred to the Grand Chamber at the applicant association's request (see the Legal Summary of the Chamber Judgment).

Le 5 septembre 2022, cette affaire a été renvoyée devant la Grande Chambre à la demande de l'association requérante (voir le Résumé juridique de l'arrêt de chambre).

Freedom of association / Liberté d'association

Disciplinary sanctions on teachers for having breached constitutional ban on civil servants striking: *relinquishment in favour of the Grand Chamber*

Sanctions disciplinaires infligées à des enseignants pour violation de l'interdiction constitutionnelle de faire grève faite aux fonctionnaires : *dessaisissement au profit de la Grande Chambre*

Humpert and Others/et autres – Germany/Allemagne, 59433/18 et al. [Section III]

Traduction française – Printable version

The applicants are teachers, all employed by different *Bundesländer* as civil servants. As an expression of their support for a social movement requesting an improvement of learning conditions, including an improvement of the working conditions for teachers, they did not appear at work for between one hour and three days in 2009 and 2010. They were subsequently subjected to disciplinary sanctions for having been on strike.

Domestic remedies before different administrative courts and the Federal Constitutional Court were to no avail. The Federal Constitutional Court held that the Basic Law obliged civil servants not to strike, which it considered compatible with the exigencies of the European Convention of Human Rights and the Court's case-law.

The applicants complain under Articles 11 and 14 of the Convention that the obligation not to strike was not prescribed by law, disproportionate and, in comparison with teachers employed on a contractual basis, discriminatory. They moreover complain under Article 6 § 1 of the Convention that the Fed-

eral Constitutional Court had failed to consider international treaties on the matter.

On 6 September 2022 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

(See also *Demir and Baykara v. Turkey* [GC], 34503/97, 11 November 2008, Legal summary; *Enerji Yapı-Yol Sen v. Turkey*, 68959/01, 21 April 2009, Legal summary; *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 31045/10, 8 April 2014, Legal summary; *Association of Academics v. Iceland* (dec.), 2451/16, 15 May 2018, Legal summary)

ARTICLE 14

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

No discrimination against convicted prisoner statutorily disqualified from old-age pension payments while incarcerated: *no violation*

Pas de discrimination à l'égard d'un condamné privé par la loi de sa pension de retraite pendant son incarcération : *non-violation*

P.C. – Ireland/Irlande, 26922/19, Judgment/Arrêt 1.9.2022 [Section V]

Traduction française – Printable version

Facts – The applicant, a convicted prisoner, was disqualified from receiving his State Pension (Contributory) ("SPC") for the duration of his sentence of imprisonment. The disqualification was based on domestic legislation applicable to all persons undergoing imprisonment or detention in legal custody and covering a number of benefits, including the SPC.

The applicant argued before the domestic courts that the impugned legislative provision was incompatible with one or more articles of the Constitution and that the stoppage of his pension was contrary to one or more provisions under the Convention. He appealed up to the Supreme Court, which delivered two judgments, upholding the applicant's constitutional complaint in the first and providing remedies in the second (namely, a declaration of invalidity of the provision, and damages approximating the value of the pension payments corresponding only to the duration of the appellate proceedings). It did not find it necessary to proceed with a full consideration of the Convention arguments raised by the applicant.

Law – *Article 1 of Protocol No. 1:* The pension payments withheld from the applicant due to his statutory disqualification from receipt of the SPC, and on account of his imprisonment, could not be regarded as "possessions" within the meaning of this provision. However, they constituted a "proprietary interest" falling within the ambit of the provision and thereby engaging Article 14.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 14 in conjunction with Article 1 of Protocol No. 1

(a) *The complaint of age-discrimination* – There was no question of a difference in treatment based directly on age: the relevant domestic legislation had applied to many types of benefit available to persons of working age and did not specifically target the SPC. Moreover, the applicant's claim of indirect discrimination based on age had not been substantiated. He had referred to evidence about how various age-related ailments had rendered him unable to work in prison. However, the evidence required to substantiate a complaint of indirect discrimination against a particular group – here, older prisoners – had to relate to the group as such, rather than just one member of it. The fact that some prisoners in the applicant's age group had been performing paid work in the same prison rather spoke against the applicant's complaint of indirect discrimination based on age.

(b) *The complaint of discrimination linked to source or level of income* – The applicant had complained about the more severe impact of the disqualification from the SPC benefit on prisoners who, like him, had had no other source of income, compared to those who had had additional sources of revenue that had not been stopped or reduced on account of incarceration. While prisoners in the former group had been near-destitute, those in the latter group had had means to improve the quality of their lives in prison, and this, according to the applicant, had disclosed indirect discrimination against those in his situation.

The applicant had argued that a person's level of income and its source qualified as "other status". However, his complaint concerned more specifically differing financial entitlements, i.e. under the general social welfare system and other benefit schemes linked to professional activity or private investments. The different impact that the disqualification had had on prisoners with and without other social security entitlements or other forms of income was not related to an aspect of their personal status within the meaning of Article 14. Accordingly, that aspect of the applicant's complaint of discrimination was not cognisable under that provision.

(c) *The complaint of discrimination based on status as a convicted prisoner* – The Court recalled that the fact of being a prisoner could constitute "other status" within the meaning of Article 14. It therefore had to establish whether the comparisons put forward by the applicant were valid, i.e. whether he had been in a relevantly similar situation to (i) per-

sons detained for treatment of mental illness; and/or (ii) remand prisoners:

(i) Concerning persons detained for treatment of mental illness, the Court recalled that in *S.S. and Others v. the United Kingdom* (dec.), it had accepted the comparison between the applicants in that case (conviction for very serious offences, given lengthy sentences then later transferred to secure psychiatric hospitals for treatment) and other psychiatric patients (convicted but sent directly to hospital). However, in the present case, the element of severe mental illness was lacking. Further, in *S.S. and Others*, both groups had been subject to the criminal process, whereas in the present case, the applicant had sought to establish a comparison with mental patients detained under civil law powers. The defining characteristic of persons placed in psychiatric facilities was that they were patients, not prisoners. Their physical liberty was restricted under civil law for the purpose of treatment; convicted prisoners, by contrast, were detained under criminal law mainly for a punitive purpose. The applicant was therefore not in a relevantly similar situation to persons in this group, given the significant legal and factual differences between them.

(ii) Remand prisoners were closer to the applicant's situation, in that they were also subject to the criminal process and detained in prison pending trial, and the Court had accepted comparisons, for the purposes of Article 14, between the two categories of prisoner in certain respects. However, elements that characterised each group had to be assessed in light of the subject-matter and purpose of the impugned measure. The defining characteristic of remand prisoners was their status for the purposes of the criminal law – although detained, they were presumed innocent. In cases concerning difference in treatment of remand prisoners *vis-à-vis* convicted ones, the Court had placed some emphasis on the fact that the applicants had had to be presumed innocent. The difference in legal status was significant: there was neither certainty nor finality about detention on remand, in contrast to the status and situation of a convicted prisoner. The difference was also shown by what the end of detention meant for each category. For the unconvicted, they simply regained their liberty, whereas for the serving prisoner, especially a long-serving prisoner like the applicant, regaining freedom might be more of a process involving rehabilitation efforts, conditional release and social support following return to the community. In light of those considerations, the Court strongly doubted that the subject-matter of the applicant's complaint (continuity of payment of the social security benefit at issue) could bring the two groups into an analogous position so as to permit the alleged comparison

As to the purpose of the measure, the Supreme Court had found that the disqualification of convicted prisoners had originally been punitive. While the Supreme Court had engaged briefly with the Government's explanation of the reasons for the impugned disqualification – namely, the avoidance of unjust enrichment in the social welfare system – it had not had to decide the issue. However, the prevention of double maintenance of individuals was an objective which the Commission had previously accepted (*Szrabjet and Clarke v. the United Kingdom*), and that public interest had found implicit support in the Supreme Court's approach in its second judgment.

In any event, the Court had identified the above significant differences between the two groups. It further observed that remand prisoners would also have been subject to disqualification from the SPC and other benefits had it not been for an exception in their favour in later domestic legislation. That measure made the distinction between the two groups. The Government had submitted that that exception reflected the fact that persons detained pending trial were presumed innocent.

Remand and convicted prisoners therefore could not be regarded as being in a relevantly similar situation with respect to the continuance of the benefit at issue.

Conclusion: no violation (unanimously).

Article 13 (in conjunction with Article 14 taken together with Article 1 of Protocol No. 1): The applicant's challenge had been successful and his claim for pecuniary relief had been upheld in part. The fact that the Supreme Court had found it unnecessary to proceed to a full consideration of the Convention arguments raised before it, since it had upheld the applicant's challenge to the statutory disqualification on another ground relied upon by him, could not, be regarded as an omission on its part. The margin of appreciation granted to domestic authorities in conforming with their Article 13 obligations encompassed the discretion of a domestic court, competent to determine constitutional issues alongside Convention issues, to uphold a challenge to legislation on some but not all of the grounds raised before it.

As to the level of the award of damages, in not accepting the applicant's claim to recoup in full the unpaid benefits, the Supreme Court had extensively considered the relevant case-law and practice of the Irish courts. Treating the applicant's pecuniary claim as an automatic consequence would, according to the Supreme Court, have had the effect of creating a new form of legislative entitlement to benefit, not approved by the legislature and moreover plainly running counter to legislative intention. Rather, the features of the case pointed to an obligation to fashion an appropriate remedy and led it to make an

award approximating to the value of the pension payments corresponding to the duration of the appellate proceedings.

The Court also recalled that the immediate effect of the Supreme Court's second judgment was that the applicant had been rendered eligible once more for receipt of the SPC. The applicant had complained that the interval between the two Supreme Court rulings had delayed that remedy and thus diminished its effectiveness. The domestic court could not, however, be criticised for the manner in which it had decided to manage and structure the proceedings. The remedial aspect of the case had thrown up complex issues of constitutional principle that had called for further submissions from the parties and deliberation by the court.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Szrabjet and Clarke v. the United Kingdom*, 27004/95 and 27011/95, 23 October 1997*; Laduna v. Slovakia,* 31827/02, 13 December 2011, Legal Summary*; Varnas v. Lithuania*, 42615/06, 9 July 2013, Legal Summary*; S.S. and Others v. the United Kingdom* (dec.), 40356/10 and 54466/10, 21 April 2015, Legal Summary, *Béláné Nagy v. Hungary* [GC], 53080/13, 13 December 2016, Legal Summary)

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

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

Unreasoned dismissal of copyright infringement claim against a private party, who published a digital version of the applicant's book online, without authorisation or paying royalties: *violation*

Rejet non motivé d'une action en violation du droit d'auteur dirigée contre un particulier qui avait publié sur Internet, sans autorisation et sans s'acquitter des droits d'auteur, une version numérique de l'ouvrage du requérant : *violation*

Safarov – Azerbaijan/Azerbaïdjan, 885/12, Judgment/Arrêt 1.9.2022 [Section V]

Traduction française – Printable version

Facts – The applicant is the author of a book which was published online on the website of an NGO (the defendant). The book has since been removed from the website. The applicant lodged an unsuccessful civil claim with the domestic courts, arguing under domestic copyright law that the defendant had reproduced a digital version of his book and published it on its website without his authorisation or paying him any royalties. He appealed up to the Supreme Court without success.

Law – Article 1 of Protocol No. 1: The reproduction of the applicant's book and its online publication, without his consent, had affected his right to peaceful enjoyment of his possessions. Although the dispute in the present case had been between private parties, the State had a positive obligation to take necessary measures to protect the right to property.

The applicant had not claimed that the rights of authors had not been sufficiently protected by domestic law, but that the application of existing law by the courts in his case had been unlawful and arbitrary. Under domestic law, as a general rule, authorisation by the author and payment of royalties had been required in order to use his or her work. However, the domestic courts had justified the defendant's actions relying mainly on several domestic law articles providing for exceptions to that general rule, namely:

– *Reproduction for exclusively personal purposes:* in the present case, however, the defendant had been a legal person and had not used the applicant's book exclusively for personal purposes but had made it available online for an unlimited number of readers. In addition, that domestic law exemption did not apply to reproduction of books in their entirety, and the domestic courts had not established that the applicant's book had not been reproduced in its entirety.

– *Reproduction by archives and education institutions in specific cases:* the Supreme Court had not elaborated on the applicant's argument that the defendant did not belong to any of the said categories, noting only that his book had been published under the library section of the defendant's website with the purpose to provide information on the country's history. Similarly, the Government submitted that there had been no commercial purpose. While the lack of such a purpose had been relevant in application of the relevant domestic provision, it had not been the only element to be considered. It had been incumbent on the domestic courts to interpret the relevant provision as covering the online services offered by the defendant under the notion of "libraries". Even assuming that those services could be regarded as covered by that notion, the courts had failed to mention which specific case, provided for under the domestic provision, could justify the book's reproduction without authorisation. Since the defendant had made the applicant's book freely available online and therefore practically to a world-wide audience, not to visitors of a library building, elaborate reasoning by the courts had been needed to justify the application of that domestic provision.

– *Exhaustion of right to distribution:* The rule on exhaustion of right to distribution had referred to lawfully published and fixed copies of works put into circulation by sale as tangible objects. While the applicant had published his book and physical copies had been available in the book market, nothing suggested that he had ever authorised its reproduction and communication to the public in a digital form. The Supreme Court had not explained why it had considered that domestic provision relevant to the circumstances of the case.

Overall, the domestic courts had failed to provide reasons establishing that the above-mentioned domestic law exceptions could constitute legal grounds for the situation at hand. The respondent State had therefore failed to discharge its positive obligation.

Conclusion: violation (unanimously).

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

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

Protracted retention of applicant company's merchandise after acquittal of director and associate in criminal proceedings in the context of which it had been seized: *case referred to the Grand Chamber*

Rétention de marchandises de la société requérante après l'acquittement de son dirigeant et d'un de ses associés dans la procédure dans le cadre de laquelle la saisie des marchandises en question avait été ordonnée : *affaire renvoyée devant la Grande Chambre*

FU QUAN, S.R.O. – Czech Republic/République tchèque, 24827/14, Judgment/Arrêt 17.3.2022 [Section I]

Traduction française – Printable version

The applicant company's merchandise was seized in the context of criminal proceedings against its managing director and associate. It was however, retained by the authorities for almost a year and a half following their acquittal.

In a judgment of 17 March 2022, a Chamber of the Court dismissed the Government's preliminary objection on exhaustion of domestic remedies and held, by five votes to two, that the retention of the merchandise following the judgment of acquittal had constituted an unlawful interference with the applicant's property rights in breach of Article 1 of Protocol No. 1. It held, in particular, that the legal basis on which the seizure had been made had ceased to be relevant after that judgment and that no justifiable reasons had been put forward for its protracted retention after the end of the proceedings.

On 5 September 2022 the case was referred to the Grand Chamber at the Government's request.

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

Article 3 § 2

Enter own country / Entrer dans son pays

Lack of review with safeguards against arbitrariness for refusal to repatriate nationals held with their young children in Kurdish-run camps after the fall of "Islamic State": *violation*

Absence d'examen entouré de garanties contre l'arbitraire du refus de rapatrier des nationaux placés en détention avec leurs jeunes enfants dans des camps sous contrôle kurde après la chute de l'« État islamique » : *violation*

H.F. and Others/et autres – France, 24384/19 and/et 44234/20, Judgment/Arrêt 14.9.2022 [GC]

Traduction française – Printable version

Facts – In 2014-15, the applicants' daughters, L. and M., French nationals, left France for Syria with their partners. They gave birth to children there. Since early 2019, after the military fall of the so-called Islamic State ("ISIS"), they have reportedly been detained, with their young children, in camps and/or a prison in north-eastern Syria run by the Syrian Democratic Forces (the "SDF"), a local force engaged in the fight against ISIS dominated by the Kurdish militia. The applicants unsuccessfully sought urgent repatriation of their daughters and grandchildren. The domestic courts refused to entertain jurisdiction on the grounds that the requests concerned acts that could not be detached from the conduct by France of its international relations.

Law – Admissibility

(a) *Locus Standi* – There were exceptional circumstances enabling the Court to conclude that the applicants had *locus standi* to raise the complaints as representatives of their daughters and grandchildren, the direct victims who were prevented from lodging applications with the Court.

(b) *Jurisdiction* – The Court had to ascertain whether it could be considered that on account, first, of the bond of nationality between the family members concerned and the respondent State and, second, the decision of the latter not to repatriate

them, and therefore not to exercise its diplomatic or consular jurisdiction in respect of them, they were capable of falling within its jurisdiction for the purposes of Article 3 and Article 3 § 2 of Protocol No. 4. In this regard, the present case required the Court to address the possibility that the State's obligation under Article 1 to recognise Convention rights may be "divided and tailored".

The Court's case-law had recognised a number of special features capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. The existence of such features had to be determined with reference to the particular facts of a case. In the present case, in order to determine whether the Convention and the Protocols thereto were applicable, the Court addressed three aspects finding as follows:

(i) *Whether France exercised control over the relevant area* – France neither exercised "effective control" over the territory of north-eastern Syria nor had any "authority" or "control" over the applicants' family members who were being held in the camps in that region.

(ii) *Whether a jurisdictional link was created by the opening of domestic proceedings* – The criminal proceedings brought by the French authorities against L. and M. for participation in a terrorist association did not relate to the alleged violations and therefore had no bearing on whether the facts complained of fell within France's jurisdiction. An interpretation to the contrary would dissuade States from opening investigations in this context. Further, in view of the substance of the complaints raised, the repatriation proceedings had no direct impact on the question whether those fell within France's jurisdiction and thus could not suffice for an extraterritorial jurisdictional link to be triggered.

(iii) *Whether there were connecting ties with the respondent State*

(1) Article 3 – Neither the French nationality of the applicants' family members, nor the mere decision of the French authorities not to repatriate them had the effect of bringing them within the scope of France's jurisdiction as regards the ill-treatment to which they were subjected in Syrian camps under Kurdish control. Such an extension of the Convention's scope found no support in the case-law. First, the mere fact that decisions taken at national level have had an impact on the situation of persons residing abroad is not such as to establish the jurisdiction of the State concerned over them outside its territory. Secondly, neither domestic nor international law required the State to act on behalf of its nationals and to repatriate them. Moreover, the Convention did not guarantee the right to diplomatic or consular protection. Thirdly, and in spite of the stated desire of local non-State authorities that the States concerned should repatriate their nationals, France would have to negotiate with them as to the principle and conditions of any such operation and to organise its implementation, which would inevitably take place in Syria.

Conclusion: inadmissible (outside jurisdiction).

(2) Article 3 of Protocol No. 4 – This was the first time that the Court had been called upon to decide on the existence of a jurisdictional link between a State and its "nationals" in respect of a complaint under this provision. The fact that the latter applied only to nationals could not be regarded as a sufficient circumstance for the purpose of establishing France's jurisdiction within the meaning of Article 1. Nationality, albeit a factor ordinarily taken into account as a basis for the extraterritorial exercise of jurisdiction by a State, could not constitute an autonomous basis of jurisdiction. In the present case, the protection by France of the applicants' family members would require negotiation with the Kurdish authorities which were holding them, or even an intervention on Kurdish-administered territory.

The refusal to grant the applicants' request had not formally deprived their family members of the right to enter France, nor had it prevented them from doing so. Nevertheless, the question arose as to whether their cross-border situation might have consequences for France's jurisdiction *ratione loci* and *ratione personae*. In this connection, both the subject matter and scope of the right guaranteed by Article 3 § 2 of Protocol No. 4 implied that it should benefit a State Party's nationals who were outside its jurisdiction. The Court also emphasised that the interpretation of the provisions of Article 3 of Protocol No. 4, had to consider the context of the contemporary phenomena of increasing globalisation and international mobility, which presented States with new challenges in terms of security and defence in the fields of diplomatic and consular protection, international humanitarian law and international cooperation. The right to enter a State lay at the heart of current issues related to the combat against terrorism and to national security. If Article 3 § 2 of Protocol No. 4 were to apply only to nationals who arrived at the national border or who had no travel documents it would be deprived of effectiveness in the contemporary context.

It could not be excluded therefore that certain circumstances relating to the situation of individuals who wished to enter the State of which they were nationals, relying on the rights they derived from Article 3 § 2 of Protocol No. 4, might give rise to a jurisdictional link with that State for the purposes of Article 1. However, it was not necessary to define those circumstances *in abstracto* since they would necessarily depend on the specific features of each case and might vary considerably from one case to another.

In the present case, in addition to the legal link between the State and its nationals, there were a number of special features which related to the situation of the camps in north-eastern Syria and enabled France's jurisdiction, within the meaning of Article 1, to be established in respect of the complaint raised under Article 3 § 2 of Protocol No. 4: the applicants had made official repatriation and assistance requests; those requests had had been made on the basis of the fundamental values of the democratic societies, while their family members had been facing a real and immediate threat to their lives and physical well-being, on account both of the living conditions and safety concerns in the camps, which were incompatible with respect for human dignity, and of the health of those family members and the extreme vulnerability of the children, in particular, in view of their young age; it had been materially impossible for them to leave the camps, or any other place where they might be held incommunicado, in order to reach the French or any other State border without the assistance of the French authorities; and the Kurdish authorities had indicated their willingness to hand over French female detainees and their children to the national authorities.

Conclusion: admissible (within jurisdiction).

Merits

(a) *Interpretation of Article 3 § 2 of Protocol No. 4* – The Court took the opportunity to clarify the meaning and examine the scope of this provision, including with regard to the procedural rights of those concerned and/or any corresponding procedural obligations of the State in the context of a refusal to repatriate.

The application of Article 3 § 2 of Protocol No. 4 did not exclude situations where the national had either voluntarily left the national territory and was then denied the right to re-enter, or where the person had never even set foot in the country concerned, as in the case of children born abroad who wished to enter for the first time. Indeed, there was no support for such a limitation in its wording or the preparatory work.

Article 3 § 1 of Protocol No. 4 prohibited only the expulsion of nationals and not their extradition. The right to enter a State of which one was a national must not therefore be confused with the right to remain on its territory and it did not confer an absolute right to remain there. The right to enter the territory of which one was a national under Article 3 § 2 of Protocol No. 4 was absolute as was the freedom from expulsion of a national under its first paragraph. However, the right to enter national territory could not be used to negate the effects of an extradition order. Moreover, as Article 3 § 2 recognised this right without defining it, admittedly there might be room for implied limitations, where appropriate, in the form of exceptional measures that were merely temporary (for example, the situation envisaged in the context of the global health crisis caused by the Covid 19 pandemic).

Taken literally, the scope of Article 3 § 2 of Protocol No. 4 corresponded to a negative obligation of the State and was limited to purely formal measures prohibiting citizens from returning to national territory. However, it could not be ruled out that informal or indirect measures which *de facto* deprived the national of the effective enjoyment of his or her right to return might, depending on the circumstances, be incompatible with this provision.

Certain positive obligations inherent in Article 3 § 2 of Protocol No. 4 had long been imposed on States for the purpose of effectively guaranteeing entry to national territory. These corresponded to measures which stemmed traditionally from the State's obligation to issue travel documents to nationals, to ensure that they could cross the border. As regards the implementation of the right to enter, as in other contexts, the scope of any positive obligations would inevitably vary, depending on the diverse situations in the Contracting States and the choices to be made in terms of priorities and resources. Those obligations must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities. Where the State was required to take positive measures, the choice of means was in principle a matter that fell within its margin of appreciation.

(b) *Whether there was a right to repatriation (notably for those unable to reach State border as a result of material situation)* – The Convention did not guarantee a right to diplomatic protection by a Contracting State for the benefit of any person within its jurisdiction. The States themselves remained the protagonists of consular assistance as governed by the relevant Vienna Convention. Pursuant to this, individuals such as the applicants' family members, who were being held in camps under the control of a non-State armed group and whose State of nationality had no consular presence in Syria, were not in principle entitled to claim a right to consular assistance. The fact that the SDF had called upon the States concerned to repatriate their nationals and had shown cooperation in connection with a number of repatriations, which have been carried out in particular by France, albeit relevant, did not provide a basis for a right to repatriation to be conferred upon the applicants' family members. Nor could such a basis be found in current international law on diplomatic protection. Lastly, there was no consensus at European level in support of a general right to repatriation for the purposes of entering national territory within the meaning of Article 3 § 2 of Protocol No. 4. In sum, there was no obligation under international law for States to repatriate their na-

tionals. Consequently, French citizens being held in the camps in north-eastern Syria could not claim a general right to repatriation on the basis of the right to enter national territory.

(c) *Other obligations stemming from Article 3 § 2 of Protocol No. 4 in the context of the present case* – As could be seen from the preparatory work on Protocol No. 4, the object of the right to enter the territory of a State of which one was a national was to prohibit the exile of nationals. Seen from this perspective, Article 3 § 2 of Protocol No. 4 might impose a positive obligation on the State where, in view of the specificities of a given case, a refusal by that State to take any action would leave the national concerned in a situation comparable, *de facto*, to that of exile. However, any such requirement under that provision must be interpreted narrowly and would be binding on States only in exceptional circumstances, for example where extraterritorial factors directly threatened the life and physical well-being of a child in a situation of extreme vulnerability. In addition, when examining whether a State had failed to fulfil its positive obligation to guarantee the effective exercise of the right to enter its territory, under Article 3 § 2 of Protocol No. 4, where such exceptional circumstances existed, the requisite review would be confined to ensuring effective protection against arbitrariness in the State's discharge of its positive obligation under that provision. The inability for anyone to exercise his or her right to enter national territory must be assessed also in the light of the State's return policy and its consequences. The Court therefore had to ascertain whether the situation of the applicants' family members was such that there were exceptional circumstances in the present case (i) and, if so, proceed to address the question whether the decision-making process had been surrounded by appropriate safeguards against arbitrariness (ii).

(i) *Whether there were exceptional circumstances*

The Court replied in the affirmative, having regard to the extraterritorial factors which had contributed to the existence of a risk to the life and physical well-being of the applicants' family members, in particular their grandchildren, as well as to the following points:

– The situation in the impugned camps under the control of a non-State armed group was distinguishable from classic cases of diplomatic or consular protection and criminal-law cooperation mechanisms; it verged on a legal vacuum. The only protection afforded to the applicants' family members was under common Article 3 of the four Geneva Conventions and under customary international humanitarian law.

– The general conditions in the camps were incompatible with applicable standards under international humanitarian law. Pursuant to common Article 1 of the four Geneva Conventions, all States parties to the instruments in question – including France – were obliged to ensure that the Kurdish local authorities who were directly responsible for the living conditions in the camps, complied with their obligations under common Article 3, by doing everything "reasonably within their power" to put an end to violations of international humanitarian law.

– On the one hand, to date no tribunal or other international investigative body had been established to deal with the female detainees in the camps and the creation of an *ad hoc* international criminal tribunal had been left in abeyance. There was also no prospect of these women being tried in north-eastern Syria. On the other hand, the criminal proceedings initiated against L. and M. in France were in part related to that State's international obligations and duty to investigate and, where appropriate, prosecute individuals involved in terrorism abroad.

– The Kurdish authorities had repeatedly called on States to repatriate their nationals, citing their inability to ensure proper living conditions, organisation of detention and trial, and the security risks. They had also demonstrated, in practice, their cooperation in this regard, including with France.

– A number of international and regional organisations had called upon European States to repatriate their nationals being held in the camps and the United Nations Committee on the Rights of the Child had, for its part, stated that France must assume responsibility for the protection of the French children there and that its refusal to repatriate them entailed a breach of the right to life and the prohibition of inhuman or degrading treatment. Lastly, France had officially stated that French minors in Iraq or Syria were entitled to its protection and could be repatriated.

(ii) Safeguards against arbitrariness

The Court was acutely conscious of the very real difficulties faced by States in the protection of their populations against terrorist violence and the serious concerns triggered by attacks in recent years. Notwithstanding, the examination of an individual request for repatriation, in exceptional circumstances such as those set out above, fell in principle within the category of operational aspects of the authorities' actions that had a direct bearing on respect for the protected rights in contrast to political choices made in the course of fighting terrorism that remained outside of the Court's supervision).

The applicants' family members had been in a situation of a humanitarian emergency, which had required an individual examination of their requests. It had been incumbent upon the French authorities to surround the decision-making process, concerning those requests, by appropriate *safeguards against arbitrariness*. The concepts of lawfulness and the rule of law required that measures affecting funda-

mental rights had to be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information where national security was at stake.

In the present case, it had to be possible for the rejection of a request for repatriation, in the context at issue, to give rise to an appropriate individual examination, by an independent body, separate from the executive authorities of the State, but not necessarily by a judicial authority. This examination had to ensure an assessment of the factual and other evidence which had led those authorities to decide that it was not appropriate to grant the request. The independent body in question must therefore be able to review the lawfulness of the decision denying the request, whether the competent authority refused to grant it or had been unsuccessful in any steps it had taken to act upon it. Such review should also enable the applicant to be made aware, even summarily, of the grounds for the decision and thus to verify that those grounds had a sufficient and reasonable factual basis. Where, as in the present case, the request for repatriation was made on behalf of minors, the review should ensure in particular that the competent authorities had taken due account, while having regard for the principle of equality applying to the exercise of the right to enter national territory, of the children's best interests, together with their particular vulnerability and specific needs. In sum, there must be a review mechanism through which it could be ascertained that there was no arbitrariness in *any* of the grounds that might legitimately be relied upon by the executive authorities, whether derived from compelling public interest considerations or from any legal, diplomatic or material difficulties.

In the Court's view, the safeguards afforded to the applicants had not been appropriate.

The applicants had not received any explanation for the choice underlying the decision taken by the executive in respect of their requests, except for the implicit suggestion that it stemmed from the implementation of the policy pursued by France, albeit that a number of minors had previously been repatriated. There was no evidence that the refusals could not have been dealt with in specific individual decisions or have been reasoned according to considerations tailored to the facts of the case, if necessary complying with a requirement of secrecy in defence matters. Nor had the applicants obtained any information which might have contributed to the transparency of the decision-making process. In view of the domestic courts' decisions referring to the lack of jurisdiction, the applicants had had no access to a form of independent review of the tacit decisions to refuse their repatriation requests.

In the absence of any formal decision on the part of the competent authorities to refuse to grant the applicants' requests, the jurisdictional immunity raised against them by the domestic courts, in relation to their claims relying on respect for the right guaranteed by Article 3 § 2 of Protocol No. 4 and the positive obligations imposed on the State by that provision, had deprived them of any possibility of meaningfully challenging the grounds relied upon by those authorities and of verifying that those grounds were legitimate, reasonable and not arbitrary. The possibility of such a review would not necessarily mean that the court in question would then have jurisdiction to order, if appropriate, the requested repatriation.

Conclusion: violation (fourteen votes to three).

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

Article 46: The Government had to re-examine the repatriation requests, in a prompt manner, while ensuring that appropriate safeguards were afforded against any arbitrariness.

(See also *M.N. and Others v. Belgium* (dec.) [GC], 3599/18, 5 May 2020, Legal Summary; *Georgia v. Russia (II)* [GC], 38263/08, 21 January 2021, Legal Summary)

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

Referrals / Renvois

Communauté genevoise d'action syndicale (CGAS) – Switzerland/Suisse, 21881/20, Judgment/Arrêt 15.3.2022 [Section III]

See under Article 11 – Voir sous l'article 11

FU QUAN, S.R.O. – Czech Republic/République tchèque, 24827/14, Judgment/Arrêt 17.3.2022 [Section I]

See under Article 1 of Protocol No. 1 – Voir sous l'article 1 du Protocole n° 1

Relinquishments / Dessaisissements

Humpert and Others/et autres – Germany/Allemagne, 59433/18 et al. [Section III]

See under Article 11 – Voir sous l'article 11

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Síofra O'Leary, judge in respect of Ireland, elected President of the European Court of Human Rights

Síofra O'Leary, juge au titre de l'Irlande, élue Présidente de la Cour européenne des droits de l'homme

ECHR Press release – Communiqué de presse CEDH

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Election of two new Vice-Presidents of the Court and two new Section Presidents

Élection de deux nouveaux Vice-Présidents de la Cour et de deux nouveaux Présidents de Section

ECHR Press release – Communiqué de presse CEDH

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Spanish – Espagnol

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