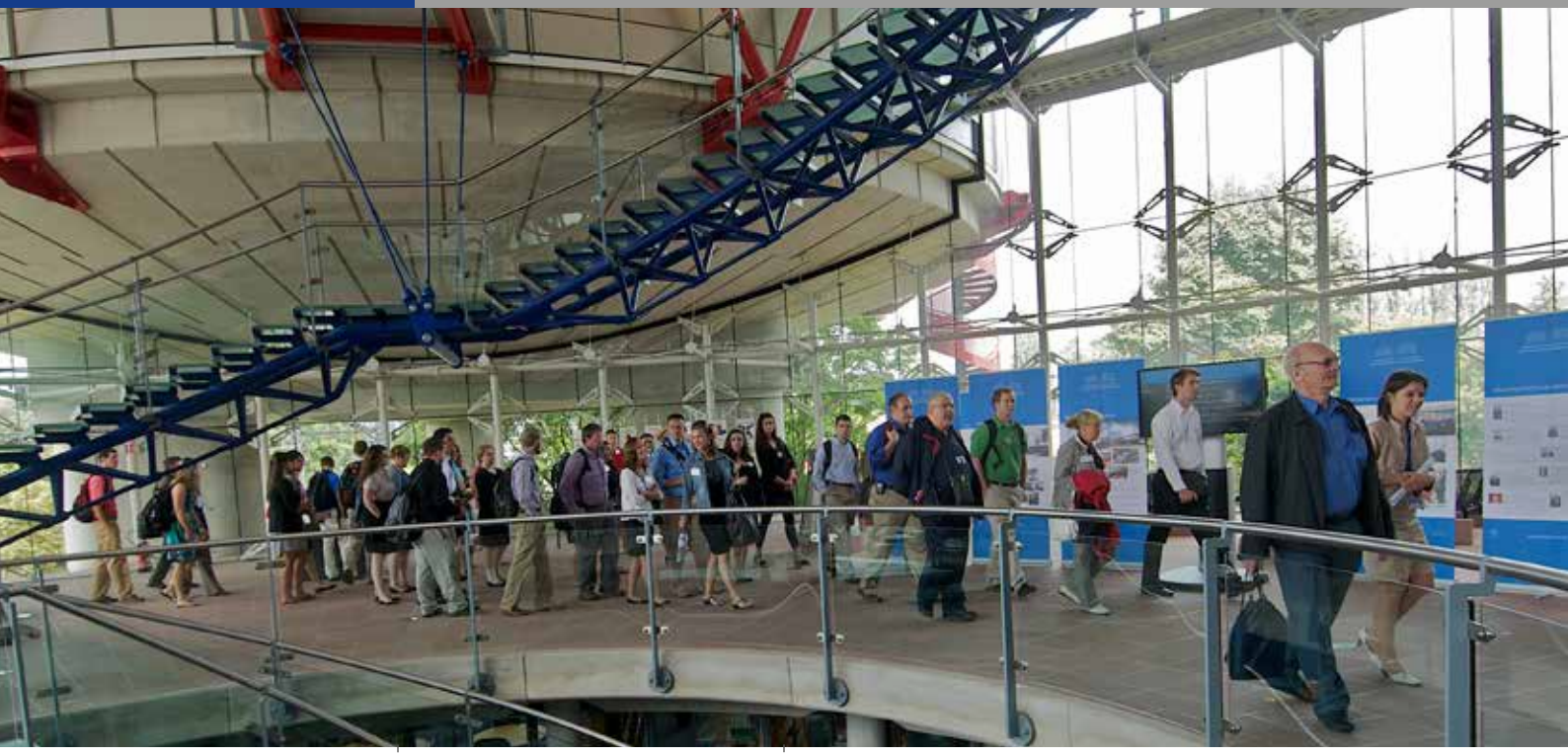
212

November
2017
Novembre

INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

PROVISIONAL/PROVISOIRE



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Cour européenne des droits de l'homme

EUROPEAN COURT OF HUMAN RIGHTS
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Layout/Mise en page: Case-Law Information Unit/Unité de l'information sur la jurisprudence

Photograph: Council of Europe / Photo : Conseil de l'Europe
Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)
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Décès d'un homme souffrant d'une maladie psychiatrique à l'occasion de son interpellation par les policiers : *non-violation*

Boukrourou and Others/et autres – France, 30059/15, judgment/arrêt 16.11.2017 [Section V]

En fait – Un homme souffrant d'une maladie psychiatrique est décédé à l'occasion de son interpellation dans une pharmacie par les policiers. Ces derniers étaient intervenus à la suite de l'appel du pharmacien leur ayant signalé la présence dans son établissement d'une personne agitée et souffrant de troubles psychiatriques. Les juges d'instruction rendirent une ordonnance de non-lieu à statuer contre les policiers. Les recours des requérants n'aboutirent pas.

En droit

Article 2 : La force infligée par les agents qui essayaient d'immobiliser l'intéressé a pu provoquer l'issue fatale. Or les policiers, qui avaient uniquement connaissance du suivi psychiatrique de l'intéressé, ne pouvaient envisager le danger encouru par l'accumulation de la pathologie cardiaque de l'interpellé et du stress qu'il subissait. Ainsi, s'il existe un certain lien de causalité entre la force utilisée par les policiers et la mort de l'intéressé, cette conséquence n'était quant à elle pas prévisible dans les circonstances de l'espèce.

Les forces de l'ordre ne pouvaient ignorer la vulnérabilité de l'intéressé en ce qu'elles avaient été averties par téléphone lors de leur demande d'intervention de sa pathologie psychiatrique. Les policiers se devaient alors de s'assurer de l'état de santé de l'intéressé, placé par la contrainte sous leur responsabilité. Cependant, la demande rapide d'assistance de la part des fonctionnaires de police et la prompte intervention des services de secours sur les lieux permettent d'exclure tout manquement des autorités quant à leur obligation de protéger la vie de l'intéressé.

Conclusion : non-violation (unanimité).

Article 3 : Les lésions sur le corps de l'intéressé, constatées par les experts médicaux, ont été causées par les fonctionnaires de police qui ont procédé à son interpellation. Elles correspondent aux gestes décrits et reconnus par les policiers.

Si l'intéressé avait eu un accès d'énervement dans la pharmacie, il s'était ensuite assis sur une chaise et n'était pas particulièrement agité lors de l'arrivée des forces de l'ordre. Si les policiers lui ont bien demandé de sortir à plusieurs reprises, devant son refus, ils ont ensuite décidé de passer directement à un mode coercitif en tentant de le faire sortir par la force alors qu'il ne s'agissait pas d'une intervention nécessaire pour maîtriser une personne qui constituait une menace pour la vie ou l'intégrité physique d'autres personnes ou de lui-même. Les difficultés rencontrées pour parvenir à faire sortir et menotter l'intéressé ont conduit les forces de l'ordre à lui porter deux coups de poing au plexus. Ceux-ci constituent un traitement ni justifié ni strictement nécessaire, infligé à une personne vulnérable et qui ont eu pour effet que d'amplifier son agitation et sa résistance, renforçant son sentiment d'exaspération et, à tout le moins, d'incompréhension dans le déroulement des faits.

À l'intérieur du fourgon de police, l'intéressé, bien que placé dans une situation de vulnérabilité tant en raison de sa maladie psychiatrique que de sa qualité de personne privée de sa liberté, a été maintenu sur le ventre, menotté à un point fixe et avec trois policiers debout et pesant de tout leur poids sur différentes parties de son corps. Ces derniers sont clairement apparus dans l'incapacité de faire face à la situation, qui a semblé leur échapper.

Rien ne laisse supposer que ces violences infligées à l'intéressé auraient été inspirées par une quelconque intention des policiers de l'humilier ou de lui infliger des souffrances, mais elles pourraient s'expliquer par un manque de préparation, d'expérience, de formation adéquate ou d'équipement. Il ne semble pas y avoir eu une réflexion des policiers sur la manière dont ils allaient aborder l'intéressé et éventuellement réagir face à une réaction négative ou agressive de celui-ci, alors qu'il ressort du dossier qu'ils connaissaient sa problématique psychiatrique. Il n'en demeure pas moins que ces gestes, violents, répétés et inefficaces, pratiqués sur une personne vulnérable, sont constitutifs d'une atteinte à la dignité humaine et atteignent un seuil de gravité les rendant incompatibles avec l'article 3 de la Convention.

Conclusion : violation (unanimité).

Article 41 : 30 000 EUR pour le préjudice moral, soit 6 000 EUR pour l'épouse de la victime, 6 000 EUR pour chacun de ses parents, et 4 000 EUR pour chacun de ses deux frères et sa sœur.

(Voir aussi *Scavuzzo-Hager et autres c. Suisse*, 41773/98, 7 février 2006, Note d'information 83, et *Tekın et Arslan c. Belgique*, 37795/13, 5 septembre 2017, Note d'information 210)

Effective investigation/Enquête effective

Death of detainee during hunger strike: *no violation*

Décès d'un détenu lors d'une grève de la faim : *non-violation*

Ceesay – Austria/Autriche, 72126/14, judgment/arrêt 16.11.2017 [Section V]

Facts – The applicant's brother, Y.C., died in detention while on hunger strike. On the day of his death, he had been taken to hospital for examination and his fitness for detention had been confirmed. On his return at around 11 a.m. he was placed alone in a security cell, which did not contain a water outlet. A police officer checked on him every fifteen to thirty minutes. At 1.20 p.m. he was declared dead by an emergency doctor. The autopsy concluded that Y.C. had died of dehydration, combined with the fact that he had been a carrier of sickle cell trait,[1] a fact of which he had been unaware.

The applicant alleged that there had been no effective or comprehensive investigation into his brother's death. He further complained that the treatment of his brother during his hunger strike had not been in accordance with the law and that he had been subjected to inhuman and degrading treatment. In particular, he alleged that the doctor at the detention centre had inaccurately calculated his brother's critical weight.

Law

Article 2 (*procedural aspect*): There was no indication of shortcomings in the public prosecutor's investigation, which had been closed as no sufficient evidence had been found to indicate misconduct on the part of the persons in charge. The public prosecutor had relied on the comprehensive autopsy report and expert medical report, which had clearly stated that death through the use of force could be excluded, and that Y.C. had died of dehydration, combined with the fact that he had been a carrier of sickle cell trait.

The applicant had instituted administrative proceedings before the Independent Administrative Panel ("IAP"), in the course of which several witnesses and experts were questioned. The IAP examined the evidence and delivered three decisions, two of which were quashed by the Administrative Court. While the IAP found that the authorities should have known that Y.C. came

1. Sickle cell disease describes a group of inherited red blood cell disorders. Sickle cell trait is a usually asymptomatic condition that occurs when a person inherits from only one parent the abnormal hemoglobin gene characteristic of sickle cell disease.

from a country whose inhabitants bore a high likelihood of being a carrier of sickle cell disease and therefore should have informed Y.C. of this potential risk after he had started his hunger strike, the Administrative Court held that the mere fact that a person came from a country with a high rate of such disease did not mean that the State had a duty to test every person from a certain area for that genetic predisposition. After obtaining a second expert report, the IAP dismissed the applicant's complaints, in accordance with the legal opinion of the Administrative Court. The IAP also considered an expert report submitted by the applicant, focusing on the calculation of Y.C.'s critical weight and mistakes allegedly made in that respect, but preferred the evidence of other experts who had concluded that the calculation of the critical weight had had no bearing on Y.C.'s death.

Conclusion: no violation (unanimously).

Article 3 (*substantive aspect*): As regards the steps to be taken in the event of a hunger strike, clear instructions had been issued by the Ministry of the Interior to the authorities, which had been prepared after consultations with its medical service and various NGOs. There was no indication that those instructions were in themselves insufficient or unclear, or that overall in the instant case they were not sufficiently followed. Furthermore there had been no indications that Y.C. suffered from sickle cell disease and he had not been aware of it himself. At the time, even hospitals did not conduct standardised tests for that blood anomaly. The authorities could not be blamed for not having given appropriate instructions at the outset to conduct such a test for the applicant's late brother.

On the morning of his death, Y.C.'s external appearance had been that of a physically fit man who was aggressive because he did not want to be examined. While his behaviour might, with hindsight, be considered a sign of already advanced dehydration and a consequent disintegration of his blood cells owing to sickle cell disease that was not foreseeable at the time of the events. The doctor who drew up the autopsy report, found no signs of classic dehydration in Y.C.´s body and, moreover, no malnutrition and no long-term abstinence from food.

As regards the calculation and registration of Y.C.'s weight, the Court considered the possible mistake in recording particularly regrettable as the correct recording of a detainee's weight could be critical for determining when and what medical care was made available during detention in the course of a hunger strike. Given the protocol in place in Austria for the treatment of detainees on hunger strike, it fell to the competent authorities to follow the instructions it contained with due diligence. However, on the basis of the experts' reports, which were examined in detail by the domestic investigative authorities, the Court could not discern any causal link between the possible mistake in recording Y.C.'s weight and his death.

In the light of those facts and the witness and expert statements there was no reason to question the domestic courts' conclusion that the authorities could not have been aware that Y.C. was in a life-threatening situation requiring urgent medical attention. It was not foreseeable that, if his health declined, the rate of decline would be precipitous due to the undetected sickle cell disease.

Further, the Court observed that while it was true that Y.C. could have requested a water bottle at any time, it would clearly have been advisable given the situation to provide him with direct access to water in the cell and to advise him to take in fluids. However, as it was not possible either for the hospital or the authorities at the detention centre to detect the critical state of the applicant's health and the fact that he might go into rapid decline due to the sickle cell disease, the failure to take such measures could not, under the circumstances, be considered as inhuman or degrading.

Conclusion: no violation (unanimously).

ARTICLE 3

Inhuman or degrading treatment/Traitement inhumain ou dégradant

Death of mentally ill man following during arrest by police officers: *violation*

Décès d'un homme souffrant d'une maladie psychiatrique à l'occasion de son interpellation par les policiers : *violation*

Boukrourou and Others/et autres – France, 30059/15, judgment/arrêt 16.11.2017 [Section V]

(See Article 2 above/Voir l'article 2 ci-dessus, page 7)

Treatment of detainee during hunger strike: *no violation*

Traitement d'un détenu lors d'une grève de la faim: *non-violation*

Ceesay – Austria/Autriche, 72126/14, judgment/arrêt 16.11.2017 [Section V]

(See Article 2 above/Voir l'article 2 ci-dessus, page 8)

Inhuman treatment/Traitement inhumain

Conditions of detention of convicted prisoner with terminal cancer: *violation*

Conditions de détention d'un condamné souffrant d'un cancer en phase terminale : *violation*

Dorneanu – Romania/Roumanie, 55089/13, judgment/arrêt 28.11.2017 [Section IV]

En fait – Visé depuis 2002 par des poursuites pénales, le requérant fut définitivement condamné en février 2013 à une peine de trois ans et quatre mois de prison.

Bien que souffrant d'un cancer avancé de la prostate diagnostiqué en novembre 2012, il fut incarcéré en mars 2013 pour commencer l'exécution de sa peine. Il demanda aussitôt et à plusieurs reprises l'interruption de l'exécution de la peine. En juin 2013, le tribunal accepta pour une période de trois mois, mais en août 2013 la cour d'appel estima que le traitement médical à suivre pouvait être administré en prison. Pour recevoir son traitement, le requérant fit l'objet de nombreux transferts d'un hôpital ou d'une prison à l'autre, parfois sur de très longues distances. La chimiothérapie finit par être remplacée par des soins palliatifs, et le requérant décéda à l'hôpital en décembre 2013.

En droit – Article 3 (*volet matériel*)

(a) *Les conditions générales de détention* : Les conditions de détention du requérant l'ont soumis à une épreuve d'une intensité qui excédait le niveau inévitable de souffrance inhérent à la détention. En dépit de la courte durée de l'incarcération du requérant dans un espace personnel inférieur à 3 m², les cellules ordinaires (entre 3 et 4 m²) n'étaient pas adaptées au lourd handicap du requérant, devenu vers la fin aveugle, sourd et souffrant de douleurs osseuses.

(b) *Les transferts répétés* : Si la majorité des transferts étaient justifiés par des raisons médicales, il reste que ces établissements étaient éloignés les uns des autres et distants pour certains de plusieurs centaines de kilomètres. Eu égard à l'état de santé du requérant, de plus en plus dégradé, ces changements répétés étaient de nature à créer et à exacerber chez lui des sentiments d'angoisse quant à son adaptation dans les différents lieux de détention, à la mise en œuvre du protocole médical du traitement et au maintien de contacts avec sa famille. L'intensité de pareille épreuve excède également le niveau inévitable de souffrance inhérent à la détention.

(c) *La qualité des soins et de l'assistance* : Le requérant souffrait déjà, lors de son incarcération d'une maladie fatale à court terme. Certes, il a été traité conformément aux prescriptions des médecins. Cependant, les autorités internes ne semble à aucun moment avoir envisagé la possibilité de regrouper ces soins dans un même lieu, ce qui aurait permis d'épargner au requérant un certain nombre de transferts ou, du moins, d'en limiter le nombre et les conséquences préjudiciables pour le bien-être du malade. Par ailleurs, pendant les derniers stades de la maladie, où plus aucun espoir de rémission n'est permis, le stress inhérent à la vie en milieu carcéral peut avoir des répercussions sur l'espérance de vie et sur l'état de santé du détenu.

Il est arrivé un moment où le requérant était si affaibli et diminué, tant physiquement que psychiquement, qu'il ne pouvait plus accomplir les actes élémentaires de sa vie quotidienne sans assistance et qu'un détenu a été nommé pour l'assister. Rien ne permet de vérifier que le détenu qui avait accepté d'assister le requérant était qualifié pour accompagner un malade en fin de vie ni que l'intéressé avait reçu un véritable soutien moral ou social, ni que le requérant ait bénéficié de conseils psychologiques adéquats, alors qu'il présentait un syndrome dépressif.

(d) *Le maintien de l'incarcération dans des conditions de détention inadaptées* : Le requérant était incarcéré alors qu'il était en fin de vie et qu'il subissait les effets d'un traitement médical lourd dans des conditions carcérales difficiles. Dans un tel contexte, le manque de diligence des autorités rend la personne encore plus vulnérable et la place dans l'impossibilité de conserver sa dignité face à l'issue vers laquelle sa maladie progressait fatalement et inévitablement.

Au fur et à mesure que sa maladie progressait, le requérant ne pouvait plus y faire face en milieu carcéral. Il appartenait alors aux autorités nationales de prendre des mesures particulières sur le fondement de considérations humanitaires

Quant à l'opportunité de maintenir le requérant en détention, la Cour ne saurait substituer son point de vue à celui des juridictions internes, mais note cependant que la cour d'appel n'a avancé aucun motif lié à l'éventuelle menace pour la protection sociale que la remise en liberté du requérant aurait pu présenter, eu égard à son état de santé. Or le requérant, dont c'était seulement la première condamnation et pour une peine de prison relativement faible, avait exécuté un tiers de celle-ci ; il avait fait preuve de bonne conduite au cours du procès ; on lui avait accordé le régime de détention le plus favorable ; et, en raison de son état de santé, le risque de récidive ne pouvait qu'être minime.

Les autorités n'ont pas examiné l'aptitude concrète de l'intéressé à demeurer incarcéré dans les conditions de détention en cause. La cour d'appel ait retenu que le traitement prescrit pouvait être administré en détention mais ne s'est pas penchée sur les conditions et les modalités concrètes de l'administration de ce traitement lourd dans la situation propre à l'intéressé, sur les conditions des transferts vers les différents prisons et hôpitaux, les distances à parcourir entre ces établissements ou le nombre d'hôpitaux fréquentés par le requérant pour recevoir son traitement, ni sur l'impact de ces éléments combinés sur l'état déjà très vulnérable de ce dernier. Or, vu le caractère exceptionnel des circonstances de l'espèce, ces éléments auraient dû, ne serait-ce que pour des raisons humanitaires, être examinés pour apprécier la compatibilité de l'état de santé du requérant avec les conditions de sa détention.

Aucun argument n'a été avancé selon lequel les autorités nationales étaient dans l'impossibilité de faire face à ces circonstances exceptionnelles en tenant dûment compte des considérations humanitaires impérieuses en jeu. Au contraire, les procédures appliquées l'ont été en privilégiant les formalités et ont ainsi empêché le requérant, alors mourant, de vivre ses derniers jours dans la dignité. En outre, la durée de la procédure afin d'obtenir l'interruption de l'exécution de la peine pour des raisons de santé était trop longue, pour un malade en phase terminale. Et les réponses données par les autorités pénitentiaires aux demandes d'aide du requérant pour obtenir sa libération se caractérisaient par leur peu de considération pour sa situation.

En conclusion, les conditions de détention infligées au requérant, malade terminal, ont constitué un traitement inhumain.

Conclusion : violation (unanimité).

Article 41 : 9 000 EUR au fils du requérant, pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir également *Gülay Çetin c. Turquie*, 44084/10, 5 mars 2013, Note d'information 161 ; voir aussi la fiche thématique : Droits des détenus en matière de santé)

ARTICLE 5

Article 5 § 1 (e)

Persons of unsound mind/Aliéné

Extension of compulsory admission to psychiatric hospital without sufficient assessment of level of danger presented by patient: *violation*

Internement psychiatrique prolongé sans appréciation suffisante de l'état actuel de dangerosité : *violation*

N. – Romania/Roumanie, 59152/08, judgment/arrêt 28.11.2017 [Section IV]

(See Article 46 below/Voir l'article 46 ci-dessous, page 36)

Article 5 § 4

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

Lack of regular reviews of grounds for compulsory admission to psychiatric hospital and of effective legal assistance: *violation*

Périodicité insuffisante du contrôle de la justification d'un internement psychiatrique, et manque d'assistance juridique effective: *violation*

N. – Romania/Roumanie, 59152/08, judgment/arrêt 28.11.2017 [Section IV]

(See Article 46 below/Voir l'article 46 ci-dessous, page 36)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Uncertainty regarding starting point of time-limit for appeals in absence of system identifying date when impugned decision was available: *violation*

Absence d'un système permettant de fixer la date de disponibilité de la décision attaquée, qui servait de point de départ du délai d'appel : *violation*

Cherednichenko and Others/et autres – Russia/Russie, 35082/13 et al., judgment/arrêt 7.11.2017 [Section III]

En fait – Les cinq requérants ont souhaité faire appel d'une décision de district. Ils ont tous, sauf un, déposé leurs déclarations et/ou conclusions d'appel, lesquelles ont été déclarées tardives. Or le point de départ du délai d'appel était différemment interprété au niveau national : il s'agissait soit de la date du prononcé de la décision en forme succincte à l'audience, soit de la date de la finalisation du texte intégral de la décision par le juge, soit de la date du dépôt de la décision finalisée au greffe du tribunal ou encore de date de réception de la décision par la poste.

Les requérants se plaignent d'une violation de leur droit d'accès à un tribunal au motif que leurs recours, par une application selon eux erronée des règles de procédure, ont été déclarés irrecevables pour tardiveté.

En droit – Article 6 § 1 : Le problème soulevé résulte d'un défaut systémique dû à l'absence, sur le plan interne, d'un système uniforme permettant de fixer de manière objective la date à partir de laquelle le texte intégral de la décision est disponible pour les parties au litige, dans la mesure où cette date déclenche le délai d'appel. Les autorités nationales pourraient y remédier en réglant ce défaut dans le droit procédural. Néanmoins, en l'absence d'un tel système, la Cour a retenu comme point de départ du délai d'appel les dates indiquées par les requérants, à moins que le Gouvernement ne prouve le contraire.

Dès lors trois des requérants ont exercé leur droit de recours dans le délai imparti, à compter de la date où ils ont effectivement pris connaissance des décisions de justice dans leur version intégrale. En rejetant leurs appels pour tardiveté, les juridictions internes ont procédé à une interprétation excessivement formaliste du droit interne qui a eu pour conséquence de mettre à la charge des requérants une obligation que ceux-ci n'étaient pas en mesure de respecter, même en faisant preuve d'une diligence particulière. Compte tenu de la gravité de la sanction qui a frappé les requérants pour non-respect des délais ainsi calculés, la mesure contestée n'a pas été proportionnée au but de garantir la sécurité juridique et la bonne administration de la justice.

Concernant un autre requérant, la non-notification du texte de la décision l'a privé de son droit d'accès à l'instance d'appel.

Conclusion : violation (unanimité).

Article 41 : 2 500 EUR chacun pour préjudice moral.

(Voir aussi *Ivanova et Ivashova c. Russie*, 797/14 et 67755/14, 26 janvier 2017, Note d'information 203)

Dismissal of appeals by appellants who had asked for the appeals to be heard in their absence: *violation*

Refus d'examiner des recours de plaignants ayant demandé l'examen de leurs causes en leur absence : *violation*

Sukhanov and Others/ et autres – Russia/Russie, 56251/12 et al., judgment/arrêt 7.11.2017 [Section III]

En fait – Les tribunaux refusèrent d'examiner les recours sur le fond des trois requérants au motif que ces derniers s'étaient désistés. En effet, selon le Gouvernement, les requérants n'ont ni comparu ni demandé l'examen de leurs causes en leur absence. Il estime que pareille situation signifie un désistement implicite des demandeurs et entraîne une extinction d'instance, et ce conformément à l'article 222 § 8 du code de procédure civile[2].

2. Selon l'article 222 § 8 du code de procédure civile, l'instance s'éteint lorsque le demandeur, n'ayant pas demandé l'examen de l'affaire en son absence, ne s'est pas présenté deux fois à l'audience du tribunal et que le défendeur n'insiste pas pour que l'affaire soit examinée sur le fond.

Les requérants allèguent que leurs recours judiciaires n'ont pas été examinés sur le fond, portant ainsi atteinte à leur droit d'accès à un tribunal.

En droit – Article 6 § 1 : La comparution devant le tribunal, en matière civile, est un droit et non une obligation du demandeur. Le tribunal est en mesure de considérer la non-comparution répétée du demandeur comme un désistement implicite et de prononcer, en conséquence, l'extinction d'instance. Cette dernière décision est possible si les deux conditions suivantes sont réunies : le demandeur a été dûment informé de la date d'audience, et il n'a pas demandé l'examen de l'affaire en son absence.

Les deux requérants dont les requêtes ont été déclarées recevables (M. Sukhanov et M. Mazunin) ont sollicité l'examen de leurs causes en leur absence. Ces démarches démontrent qu'ils ne se sont désistés ni expressément ni implicitement. Ainsi, l'application par les tribunaux de l'article 222 § 8 du code de procédure civile paraît manifestement arbitraire, puisqu'elle ne fait pas de lien entre les faits établis, la disposition applicable et l'issue des procès.

Dès lors il serait inutile pour la Cour de rechercher *in abstracto* si l'extinction de l'instance, telle que conçue par le législateur dans l'article 222 § 8 du code de procédure civile, poursuivait un but légitime, dans la mesure où son application, manifestement arbitraire, a détourné le sens de cette disposition. Pour la même raison, la Cour ne trouve pas nécessaire d'examiner la proportionnalité de la mesure contestée, notamment quant à la question de savoir si les requérants susmentionnés ont la possibilité, suggérée par le Gouvernement, de réintroduire la même demande pour réaliser leur droit au tribunal.

Les décisions de justice concernant les deux requérants revêtaient un caractère arbitraire et s'analysent donc en un « déni de justice ».

Conclusion : violation (unanimité).

Article 41 : 2 000 EUR à M. Mazunin pour préjudice moral ; aucune demande formulée par M. Sukhanov.

(Voir aussi *Anđelković c. Serbie*, 1401/08, 9 avril 2013, Note d'information 162)

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Conviction for currency counterfeiting following an operation by undercover police agents: *violation*

Condamnation pour faux-monnayage à la suite d'une opération conduite par des policiers infiltrés : *violation*

Grba – Croatia/Croatie, 47074/12, judgment/arrêt 23.11.2017 [Section I]

Facts – The applicant had been convicted of currency counterfeiting in connection with four occasions on which he had sold counterfeit euros to undercover police agents. He challenged the first-instance judgment arguing, in particular, that the circumstances of his entrapment had not been properly examined. His appeals were dismissed.

Before the European Court the applicant complained of, *inter alia*, entrapment and the use of evidence thereby obtained in the criminal proceedings against him.

Law – Article 6 § 1: Recourse to an operation technique involving the arrangement of multiple illicit transactions with a suspect by the State authorities was a recognised and permissible means of investigating a crime when the criminal activity was not a one-off, isolated criminal incident but a continuing illegal enterprise. In practice such an operation technique might be aimed at gaining the

trust of an individual with the aim of establishing the scope of his or her criminal activity or working up to a larger source of criminal enterprise, namely to disclose a larger crime circle.

However, in keeping with the general prohibition of entrapment, the actions of undercover agents had to seek to investigate on-going criminal activity in an essentially passive manner and not exert an influence such as to incite the commission of a greater offence than the one the individual had already been planning to commit without such incitement. It followed that in cases concerning recourse to such an operational technique, any extension of the investigation had to be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the State authorities might be found to be engaging in activities which had improperly enlarged the scope or scale of the crime and might unfairly subject the defendant to increased penalties either within the prescribed range of penalties or for an aggravated offence. Although normally the issues concerning appropriate sentencing fell outside the scope of the Convention, as a matter of fairness, the sentence imposed should reflect the offence which the defendant had actually been planning to commit. In these situations although it would not be unfair to convict the person, it would be unfair for him or her to be punished for that part of the criminal activity which was the result of improper conduct on the part of the State authorities.

It was undisputed between the parties that the applicant had been involved in four encounters during which he had succeeded in uttering a significant quantity of counterfeit euros by selling them to the undercover police agents. The first illicit transaction had been the result of the applicant's own deliberate conduct and there was nothing suggesting that he would not have uttered the counterfeit currency on that occasion had an "ordinary" customer approached him instead of the police.

However, there was no conclusive evidence as to who had taken the initiative in arranging the further meetings between the applicant and the undercover agents. There was no indication that, during the period concerned, the applicant was selling counterfeit currency to anybody other than the undercover agents. During the domestic proceedings, the undercover agents had been unable to explain why the applicant had not been arrested after the first illicit transfer of euros or the reasons for the decision to engage in multiple illicit transactions with him in the first place. It was therefore unclear under what form of practical guidance, if any, they were acting. There was no indication that any further activities had been undertaken by the authorities to secure the evidence that would have been necessary to prosecute an illegal business enterprise engaged in counterfeiting currency, and which might have warranted recourse to an operational technique involving the arrangement of multiple illicit transactions with the applicant.

Since it was impossible to establish with a sufficient degree of certainty whether or not the applicant had been the victim of entrapment contrary to Article 6 it was essential to examine the procedure whereby the plea of entrapment had been assessed in his case, to ensure that the rights of the defence had been adequately protected.

The applicant had raised an arguable plea of entrapment. The competent criminal courts should have investigated why the police had decided to launch the operation, what evidentiary material they had had in their possession, and the manner in which they had interacted with the applicant. That was particularly important in view of the lack of proper scrutiny by the investigating judge when authorising the undercover operation in question and the inconclusive statements of the undercover agents concerning the decision-making process as regards the conduct of the undercover operation. When scrutinising the conduct of the undercover agents, the domestic courts had mostly limited their inquiry to ascertaining whether the undercover agents had been acting on the basis of an order from an investigating judge. The Supreme Court had reiterated and endorsed the reasoning of the lower courts and had failed to thoroughly analyse and to provide the relevant reasoning for

accepting or refusing the applicant's contention that he had been prompted to engage in one of the subsequent illicit transfers.

In the light of the above considerations, the domestic courts had failed to comply with their obligation to examine effectively the applicant's plea of entrapment, as required under the procedural test of incitement under Article 6 § 1. Accordingly, the decision-making procedure leading to the applicant's more serious sentencing for multiple uttering of counterfeit currency had failed to comply with the requirements of fairness. That did not imply that he had been wrongly convicted for uttering counterfeit currency but rather that the domestic courts had failed to establish whether, by his participation in the subsequent illicit transactions, the scope of his criminal activity had been extended as a result of improper conduct on the part of the authorities.

Conclusion: violation (unanimously).

The Court also found a violation of Article 8 as regards covert surveillance of the applicant.

Art 41: EUR 1,500 in respect of non-pecuniary damage.

(See also *Matanović v. Croatia*, 2742/12, 4 April 2017, Information Note 206; and *Milinienė v. Lithuania*, 74355/01, 24 June 2008, Information Note 109)

Fair hearing/Procès équitable
Independent and impartial tribunal/Tribunal indépendant et impartial

Alleged unfairness of proceedings to impeach the prime minister: *no violation*

Manque d'équité allégué de la procédure de mise en accusation du premier ministre : *non-violation*

Haarde – Iceland/Islande, 66847/12, judgment/arrêt 23.11.2017 [Section I]

Facts – The applicant was prime minister of Iceland between 2006 and 2009. In December 2008 the Icelandic Parliament set up a Special Investigation Commission (SIC) to investigate and analyse the collapse of the Icelandic banking system in October 2008. It also formed an *ad hoc* parliamentary review committee (PRC) to examine the SIC's report and decide whether there were grounds for impeachment proceedings. The SIC's report blamed the applicant and two other former ministers for failing to respond appropriately to the economic danger caused by the banks' deteriorating situation. The PRC subsequently submitted a proposal for impeachment proceedings on the basis of which Parliament passed a resolution for the applicant's impeachment for negligent conduct. It also appointed a prosecutor, who was one of the persons the PRC had heard evidence from when deciding whether sufficient grounds for prosecution existed.

The applicant was tried by a Court of Impeachment and convicted of one count of gross negligence under Article 17 of the Constitution in conjunction with section 8(c) of the Ministerial Accountability Act for failing to hold ministerial meetings on "important government matters" ahead of the crisis. He was not sentenced to any punishment and the State was ordered to bear all the legal costs.

In the Convention proceedings the applicant complained under Articles 6 and 7, *inter alia*, that the pre-trial investigation had been deficient, that the court which had tried him had not been impartial and that the provisions under which he had been found guilty of criminal conduct were not clear and foreseeable.

Law

Article 6: In view of the number and nature of the violations alleged by the applicant, the Court dealt with the Article 6 complaints together following, so far as possible, the chronology of the domestic proceedings.

(a) *Pre-trial stage* – The Court reiterated that the manner in which Article 6 was to be applied during the investigation stage depended on the special features of the proceedings involved and on the circumstances of the case. In the instant case, none of the measures taken or events occurring during the handling of the case by the PRC, Parliament and the prosecutor had affected the applicant's position in a manner that could render the subsequent stages of the proceedings unfair. Nor could the pre-trial proceedings be considered to have had such an effect when examined as a whole.

In reaching that conclusion, the Court found that (i) the pre-trial collection of the evidence could not be said to have been deficient to the applicant's detriment; (ii) the applicant had had ample opportunity to acquaint himself with the case materials and prepare his defence and there was no indication that he and his counsel were given insufficient information to understand the charges; (iii) there was nothing to indicate that the rules of procedure were applied in a manner that prejudiced the fairness of the applicant's trial; and (iv) the prosecutor's involvement during the examination of the case by the PRC had not breached the principle of the presumption of innocence as her role had been to establish whether there were sufficient grounds for prosecution and she had not given any statements to the public or taken any judicial decisions in the case.

As to the applicant's allegation that the process of deciding whether to bring charges had been arbitrary and political, the Court noted that the Contracting States had adopted varied approaches to the important and sensitive questions concerning the criminal liability of members of government for acts or omissions that have taken place in the exercise of their official duties. It was not for the Court to seek to impose any particular model. Its task was to conduct a review of the concrete circumstances of the case on the basis of the complaints brought before it.

The Court was mindful of the fact that while the purpose of the relevant constitutional, legislative and procedural frameworks on this subject should be to seek a balance between political accountability and criminal liability, and to avoid both the risk of impunity and the risk of ill-founded recourse to criminal proceedings, there may be risks of abuse or dysfunctionalities, which had to be avoided. The Court was aware of the importance of ensuring that criminal proceedings were not misused for the purpose of harming political opponents or as instruments in political conflict. It therefore had to bear in mind the need to ensure that the necessary standards of fairness were upheld regardless of the special features of the proceedings.

The impeachment proceedings in the applicant's case were based on a decision of Parliament. From a comparative perspective, parliamentary involvement was not uncommon in the context of decisions as to whether criminal proceedings should be brought against a member of government for acts undertaken in the exercise of ministerial functions and was not in itself sufficient to raise an issue under Article 6, bearing in mind that the charges brought by Parliament were examined and adjudicated upon by a court of law. Furthermore, the negligence imputed to the applicant concerned an objective legal obligation and there was no indication that Parliament's decision to bring charges was based on insufficient information.

Thus, while party preferences may have played a role in the parliamentary vote, the process leading to the applicant's indictment had not been arbitrary or political to such an extent that the fairness of his trial was prejudiced.

(b) *Independence and impartiality of the Court of Impeachment* – The applicant had complained that the eight lay judges who had sat with the seven professional judges on the Court of Impeachment had been appointed by Parliament, which was also the prosecuting authority in his case. He also complained that Parliament had interfered with the composition of the court during the proceedings by prolonging the terms of the lay judges.

Although political sympathies could play a part in the process of appointment of lay judges to the Court of Impeachment, the Court did not consider that that alone raised legitimate doubts as to

their independence and impartiality. In that connection, it noted that, prior to taking seat on the court for the first time, judges were required to sign an oath that they would act conscientiously and impartially. It had not been shown that the lay judges sitting in the applicant's case had declared any political affiliations concerning the subject-matter in issue or that there existed other links between them and Parliament which could give rise to misgivings as to their independence and impartiality.

The fact that the lay judges made up a majority had had no impact either as the applicant was convicted by nine votes to six, where five out of the nine judges giving a guilty verdict were professional judges.

Likewise, the decision of Parliament to extend the term of the sitting lay judges was, in the circumstances, fully justified. The only alternative would have been to appoint new lay judges. As, effectively, they would have been appointed specifically for the case at hand, their participation could have given rise to justifiable doubts with regard to independence and impartiality. Conversely, the lay judges already sitting on the Court of Impeachment had been appointed years before the relevant events of the case took place and before the proceedings against the applicant started. Furthermore, there had been parliamentary elections in the meantime and the sitting lay judges had thus not been appointed by the same Parliament that had decided to prosecute the applicant.

Accordingly, having regard to the particular circumstances of the case and the special character of the Court of Impeachment, there was nothing to show that it had failed to meet the requirements of independence and impartiality under Article 6 § 1.

(c) *Trial and judgment* – The applicant had asserted that uncertainty concerning the details of the charges against him and the arguments on which the prosecution intended to base them had persisted until the end of the proceedings and had given the Court of Impeachment an excessive margin of appreciation as to the grounds on which it would base its verdict.

The Court disagreed. The offence of which the applicant was found guilty was sufficiently described in the indictment and was furthermore covered by the prosecution's pleadings before the Court of Impeachment; the applicant had been fully able to respond to the indictment, the pleadings and the evidence presented, and the Court of Impeachment had set out the factual and legal reasoning for the conviction at length without straying beyond the prosecution case or a reasonable reading of the legal provisions applied. Accordingly, neither the trial before the Court of Impeachment nor the reasoning given in its judgment had breached the guarantees set out in Article 6.

Conclusion: no violation (unanimously).

Article 7: Article 17 of the Icelandic Constitution was a provision of central importance in the constitutional order, in that it set out important principles on how the Government were expected to function, as a collegial organ for important matters of State governance and policy-making. The applicant as Prime Minister and Head of Government was responsible for ensuring that the requirements of Article 17 were complied with. The Court agreed with the Court of Impeachment that that provision could not be regarded as lacking in sufficient clarity, even though the notion of "important government matters" the former prime minister had been found guilty of neglecting could necessarily be a matter of interpretation. The conclusions drawn by the Court of Impeachment as regards the meaning to be given to the relevant provisions and their application to the conduct of the applicant had to be considered to have been well within its remit to interpret and apply national law and the offence for which the applicant was convicted was sufficiently defined in law. Accordingly, the applicant could reasonably have foreseen that his conduct would render him criminally liable under the Constitution and the Ministerial Accountability Act.

Conclusion: no violation (six votes to one).

ARTICLE 7

Nullum crimen sine lege

Alleged lack of clarity of legal provisions governing impeachment: *no violation*

Imprécision alléguée de dispositions légales régissant la mise en accusation : *non-violation*

Haarde – Iceland/Islande, 66847/12, judgment/arrêt 23.11.2017 [Section I]

(See Article 6 § 1 (criminal) above/Voir l'article 6 § 1 (pénal) ci-dessus, page 16)

ARTICLE 8

Respect for private life/Respect de la vie privée
Respect for correspondence/Respect de la correspondance

Covert surveillance without adequate legal safeguards: *violations*

Surveillance secrète en l'absence de garanties judiciaires adéquates : *violations*

Dudchenko – Russia/Russie, 37717/05, judgment/arrêt 7.11.2017 [Section III]

Facts – The applicant complained, *inter alia*, about being subjected to covert surveillance, in particular, the interception of telephone communications with an accomplice in criminal proceedings and his counsel. He alleged a violation of his right to respect for his private life and correspondence.

Law – Article 8

(a) *Telephone conversations with accomplice* – The interception of the applicant's telephone communications amounted to an interference with the exercise of his rights as set out in Article 8 of the Convention.

As to whether the interference was "in accordance with the law", the Court had found in *Roman Zakharov* that the judicial authorisation procedures provided for by Russian law were not capable of ensuring that covert surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration. One of the issues identified in that case was that in their everyday practice the Russian courts did not verify whether there was a "reasonable suspicion" against the person concerned and did not apply the "necessity" and "proportionality" tests.

The Government had not produced any evidence to demonstrate that the Russian courts had acted differently in the applicant's case. There was no evidence that any information or documents confirming the suspicion against the applicant had actually been submitted to the judge. The only reason advanced by the court to justify the surveillance measures was that it "seem[ed] impossible to obtain the information necessary to expose [the applicant's] unlawful activities by overt investigation", without explaining how it had come to that conclusion. Such a vague and unsubstantiated statement was insufficient to justify the decision to authorise a lengthy (180 days) covert surveillance operation, which entailed a serious interference with the right to respect for the applicant's private life and correspondence.

Conclusion: violation (six votes to one).

(b) *Telephone conversations with counsel* – In order to avoid abuses of power in cases where legally privileged material had been acquired through measures of secret surveillance, the following minimum safeguards needed to be set out in law. Firstly, the law had to clearly define the scope of the legal professional privilege and state how, under what conditions and by whom the distinction

was to be drawn between privileged and non-privileged material. Given that the confidential relations between a lawyer and his clients belonged to an especially sensitive area which directly concerned the rights of the defence, it was unacceptable that that task should be assigned to a member of the executive, without supervision by an independent judge. Secondly, the legal provisions concerning the examination, use and storage of the material obtained; the precautions to be taken when communicating the material to other parties; and the circumstances in which recordings may or must be erased or the material destroyed had to provide sufficient safeguards for the protection of the legally privileged material obtained by covert surveillance. In particular, the national law should set out with sufficient clarity and detail: procedures for reporting to an independent supervisory authority for review of cases where material subject to legal professional privilege had been acquired as a result of secret surveillance; procedures for secure destruction of such material; conditions under which it may be retained and used in criminal proceedings and law-enforcement investigations; and, in that case, procedures for safe storage, dissemination of such material and its subsequent destruction as soon as it was no longer required for any of the authorised purposes.

Russian law proclaimed protection of legal professional privilege, which was understood as covering any information relating to legal representation of a client by an advocate. It did not, however, contain any specific safeguards applicable to interception of lawyers' communications; lawyers were subject to the same legal provisions on interception of communications as anyone else. The Court had already found in *Roman Zakharov* that those legal provisions did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse and were therefore incapable of keeping the "interference" to what is "necessary in a democratic society". Most importantly for the case at hand, the domestic law did not provide for any safeguards to be applied or any procedures to be followed in cases where, while tapping a suspect's telephone, the authorities accidentally intercepted the suspect's conversations with his or her counsel.

Conclusion: violation (six votes to one).

The Court also found, unanimously, violations of Article 3 on account of the conditions of the applicant's detention pending trial and the conditions in which the applicant was transported between detention facilities and, by six votes to one, a violation of Article 5 § 3, finding that his detention had not been based on sufficient reasons. Finally, the Court found, unanimously, that there had been no violation of Article 6 §§ 1 and 3 (c) on the basis that the removal of the applicant's chosen counsel had not irretrievably prejudiced the applicant's defence rights or undermined the fairness of the proceedings as a whole.

Article 41: EUR 14,000 in respect of non-pecuniary damage.

(See *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191; see also the Factsheet on Mass surveillance)

Covert surveillance without adequate legal safeguards: *violation*

Surveillance secrète en l'absence de garanties judiciaires adéquates : *violation*

Zubkov and Others/et autres – Russia/Russie, 29431/05 et al., judgment/arrêt 7.11.2017 [Section III]
Akhlyustin – Russia/Russie, 21200/05, judgment/arrêt 7.11.2017 [Section III]
Moskalev – Russia/Russie, 44045/05, judgment/arrêt 7.11.2017 [Section III]
Konstantin Moskalev – Russia/Russie, 59589/10, judgment/arrêt 7.11.2017 [Section III]

Facts – The applicants complained, *inter alia*, about being subjected to covert surveillance, in particular, the interception of their telephone communications. One of the applicants complained about the covert filming of meetings with acquaintances in a rented flat and another about the

audio-visual surveillance of his office. They alleged violations of their right to respect for their private life, home and correspondence.

Law – Article 8

(a) *Admissibility*

(i) *Exhaustion of domestic remedies* – The Government submitted that the applicants in the cases of *Zubkov and Others*, *Aklyustin* and *Moskalev* had not exhausted domestic remedies as they had not complained to a court under section 5 of the Operational-Search Activities Act (OSAA).

The Court noted that the scope of a judicial review complaint under section 5 of the OSAA – irrespective of whether it was lodged in proceedings under Article 125 of the Code of Criminal Procedure (where the criminal investigation was still pending) or under the Judicial Review Act and Chapter 25 of the Code of Civil Procedure – was limited to reviewing whether or not State officials performing surveillance activities had carried out the surveillance in a manner compatible with the applicable legal requirements and whether they had abided by the terms of the judicial authorisation. The review did not touch upon the legal and factual grounds for the underlying judicial authorisation, that is, whether there were relevant and sufficient reasons for authorising covert surveillance.

The courts were not required by law to examine the issues of "necessity in a democratic society", in particular whether the contested actions answered a pressing social need and were proportionate to any legitimate aims pursued, principles which lay at the heart of the Court's analysis of complaints under Article 8 of the Convention.

In the context of Article 8, a judicial review remedy incapable of examining whether the contested interference answered a pressing social need and was proportionate to the aims pursued could not be considered an effective remedy. In view of the above considerations, a judicial review complaint under section 5 of the OSAA was not an effective remedy to be exhausted.

Conclusion: preliminary objection dismissed.

(ii) *Compliance with the six-month time-limit* – All but one of the applicants had introduced their applications within six months of the final judgment in the criminal proceedings against them. It was significant that they had learned about the covert surveillance during those criminal proceedings.

Setting out the position in the *Zubkov and Others* case, the Court observed that this was the first time it had undertaken an examination of remedies existing in the Russian legal system for complaints about covert surveillance of which the surveillance subjects had learned in the course of the criminal proceedings against them. Given the uncertainty as to the effectiveness of those remedies – and in particular given that at the material time it could not have been presumed that raising the issue of covert surveillance in the criminal proceedings was a clearly ineffective remedy – it was not unreasonable for the applicants to have attempted to use an available remedy in order to give the domestic courts an opportunity to put matters right through the national legal system, thereby respecting the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights.

The applicants had only learned about the covert surveillance during the criminal proceedings, when the prosecution used the intercepted material as evidence to substantiate the cases against them. It was reasonable, in such circumstances, for them to try to bring their grievances to the attention of the domestic courts through the remedies provided by the criminal procedural law. There was nothing in the parties' submissions to suggest that the applicants were aware, or should have become aware, of the futility of such a course of action. Moreover, given the secret nature of surveillance, the defendants may have difficulties in obtaining access to documents relating to it. This in turn could prevent them from having a detailed understanding of the circumstances in which the surveillance was carried out and, most importantly, the grounds on which it was ordered. It was

therefore not unreasonable for applicants to wait until they had received documents establishing the facts essential for an application to the Court before introducing such an application.

The applicants had thus complied with the six-month rule.

Conclusion: admissible (unanimously).

(b) *Merits* – The measures aimed at the interception of the applicants' telephone communications amounted to an interference with the exercise of their rights set out in Article 8 of the Convention.

As to whether the interference was "in accordance with the law", the Court had found in *Roman Zakharov* that the judicial authorisation procedures provided for by Russian law were not capable of ensuring that covert surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration. One of the issues identified in that case was that in their everyday practice the Russian courts did not verify whether there was a "reasonable suspicion" against the person concerned and did not apply the "necessity" and "proportionality" tests. The Government had not produced any evidence to demonstrate that the Russian courts had acted differently in the applicants' cases. In particular, they had failed to submit copies of the surveillance authorisations in respect of the applicants and thereby made it impossible for the Court to verify whether the authorisations were based on a reasonable suspicion or whether "relevant" and "sufficient" reasons had been adduced to justify the surveillance measures.

It was also significant that the applicants had been refused access to the surveillance authorisations. While there might be good reasons to keep all or part of a covert surveillance authorisation secret from its subject even after he or she becomes aware of its existence (for example, to avoid revealing working methods, fields of operation and the identity of agents), at the same time, the information contained in the authorisation decision might be critical for legal proceedings challenging the legal and factual grounds for the surveillance. Accordingly, when dealing with a request for the disclosure of a covert surveillance authorisation, the domestic courts were required to ensure a proper balance between the subject's interests and the public interest and the surveillance subject should be granted access to the documents in question unless there are compelling concerns to prevent such a decision.

In the cases of *Zubkov and Others*, *Konstantin Moskalev* and *Moskalev* the Court found that it had not been demonstrated that the domestic courts which had authorised the covert surveillance against the applicants had verified whether there was a "reasonable suspicion" against them and had applied the "necessity in a democratic society" and "proportionality" tests.

In *Zubkhov* the domestic authorities had relied solely on the confidentiality of the authorisations for refusing access and had not carried out any balancing exercise between the applicants' interests and the public interest. Moreover, they had failed to specify why disclosure of the authorisations, after the surveillance had stopped and the recordings had been disclosed, would have jeopardised the effective administration of justice or any other legitimate public interests. That refusal, without any valid reason, to disclose the authorisations had deprived the applicants of any possibility to have the lawfulness of and necessity for the measure reviewed by an independent tribunal in the light of the relevant principles of Article 8.

In *Konstantin Moskalev* the Court noted that in *Roman Zakharov* it had found that the "urgent procedure" under section 8(3) of the OSAA did not provide sufficient safeguards to ensure that it was used sparingly and only in duly justified cases. In particular, although Russian law required that a judge be immediately informed of each instance of urgent interception, the judge had no power to assess whether the use of the urgent procedure was justified. Those defects were also present in Mr Konstantin Moskalev's case. The judge notified about the urgent interception of the telephone communications did not carry out any judicial review of the police's decision to tap his telephone and no independent authority had assessed whether the use of the urgent procedure had been justified and was based on reasonable suspicion.

In *Moskalev* there was no evidence that any information or documents confirming the suspicion against the applicant had been submitted to the judge. Furthermore, there was no indication that the court had assessed the proportionality of the surveillance measures or performed a balancing exercise weighing the right to respect for private life and correspondence against the need for surveillance. The only reason advanced by the court to justify the surveillance was that the applicant was suspected of a serious criminal offence. Although that reason was undoubtedly relevant it was not in itself sufficient to justify the lengthy and extensive covert surveillance.

Conclusion: violations (unanimously).

The Court also found a breach of the "quality of law" requirement in the *Akhlyustin* case, which concerned the audio-visual surveillance of the applicant's office.

As in the *Bykov v. Russia* case, which concerned the interception of the applicant's conversation through a hidden radio transmitter, Mr Akhlyustin had enjoyed very few, if any, safeguards in the procedure by which the surveillance measures against him were ordered and implemented. In particular, the legal discretion of the authorities to order the "surveillance" was not subject to any conditions, and its scope and the manner in which it was exercised were not defined; no other specific safeguards were provided for. Given the absence of specific regulations providing safeguards, the Court was not satisfied that the possibility provided by Russian law for the applicant to bring court proceedings for an order declaring the surveillance unlawful or to request the exclusion of its results as unlawfully obtained evidence met the "quality of law" requirements.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 13 in conjunction with Article 8 in the *Konstantin Moskalev* case as the applicant did not have at his disposal an effective remedy which would allow the assessment of whether the surveillance measures against him had been in "accordance with the law" and "necessary in a democratic society" and a violation of Article 5 § 4 in respect of one of the applicants in the *Zubkov and Others* case, finding that his appeal against his detention order had not been examined speedily.

(See *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191; and *Bykov v. Russia* [GC], 4378/02, 10 March 2009, Information Note 117; see also the Factsheet on Mass surveillance)

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

Dismissal of defamation proceedings against a public figure accused of being a "rapist": *violation*

Échec d'une action en diffamation contre une personnalité publique accusée d'être un « violeur » : *violation*

Egill Einarsson – Iceland/Islande, 24703/15, judgment/arrêt 7.11.2017 [Section II]

Facts – The applicant was a well-known figure in Iceland who had published articles, blogs and books and appeared in films, on television and other media. Following rape and sexual assault accusations against the applicant by two women a police investigation was opened, but both cases were later discontinued by the public prosecutor for lack of evidence. Shortly after the second case was dropped the applicant gave an interview about the accusations to a magazine. On the day the interview was published, a third party (X) published an altered version of the applicant's magazine picture with the caption "Fuck you rapist bastard" on his account on Instagram, an online picture-sharing application. The applicant brought defamation proceedings against X but the case was dismissed at first instance after the Supreme Court found that the Instagram caption constituted

invective and was therefore a value judgment, not a factual statement that the applicant was in fact guilty of rape.

In the Convention proceedings, the applicant alleged a violation of his right to respect for his private life in breach of Article 8.

Law – Article 8: The Court had to determine whether a fair balance had been struck between the applicant's right to the protection of his private life under Article 8 of the Convention and X's right to freedom of expression as guaranteed by Article 10.

The domestic courts had found that the applicant was a well-known figure whose views, including his attitudes towards women and their sexual freedom, had attracted attention and controversy. The complaints against him of sexual violence had led to public discussions in which he had participated. In these circumstances the Court accepted that the limits to acceptable criticism had to be wider in his case than in the case of an individual who was not well-known.

The Court also agreed with the domestic courts that, in the light of the fact that the applicant was well-known and the impugned publication was a part of a debate concerning accusations of a serious criminal act, the caption concerned an issue of general interest.

The crux of the matter before the domestic courts was whether or not the caption "Fuck you rapist bastard" was a statement of fact or a value judgment. The Supreme Court had taken took the view that this was a case of invective in a ruthless public debate which the applicant had instigated, and was therefore a value judgment. The Court disagreed with that assessment. The term "rapist" was objective and factual in nature, referring directly to a person who has committed the act of rape, which was a criminal offence under Icelandic law. The veracity of an allegation of rape could therefore be proven. Although the Court did not exclude the possibility that an objective statement of fact, such as the one impugned in the applicant's case, could contextually be classified as a value judgment the contextual elements justifying such a conclusion had to be convincing.

The factual context in which the caption alleging the applicant was a "rapist" was published was the criminal proceedings in which the applicant had been accused of the very same criminal act to which the caption referred. Those proceedings had been discontinued a short time before. The Supreme Court had, however, failed to take adequate account of that important chronological link. Given the discontinuance of the criminal proceedings against the applicant just prior to the publication of the applicant's newspaper interview, the Supreme Court had failed to explain sufficiently the factual basis that could have justified assessing the use of the term "rapist" as a value judgment.

Article 8 of the Convention had to be interpreted to mean that persons, even disputed public figures that have instigated a heated debate due to their behaviour and public comments, do not have to tolerate being publicly accused of violent criminal acts without such statements being supported by facts.

In sum, the domestic courts had failed to strike a fair balance between the applicant's right to respect for private life under Article 8 of the Convention and X's right to freedom of expression under Article 10.

Conclusion: violation (five votes to two).

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

Domestic courts' failure to balance freedom of expression against right to protection of reputation: *violation*

Absence de mise en balance de la liberté d'expression et du droit à la protection de la réputation par les tribunaux : *violation*

Tarman – Turkey/Turquie, 63903/10, judgment/arrêt 21.11.2017 [Section II]

En fait – La requérante fit l'objet de deux articles de presse la présentant comme une kamikaze préparant un attentat suicide, avec son nom et sa photographie. Son action ultérieure en dommages et intérêts contre les deux journaux fut rejetée au motif que le contenu des articles litigieux était « conforme aux apparences à la date de leur publication ».

En droit – Article 8 : La requérante ne se plaint pas ici d'une action de l'État, mais du manquement de celui-ci à protéger sa vie privée contre l'ingérence de tiers.

Dans le cadre des obligations positives de l'État au titre de l'article 8, il incombait aux autorités nationales de procéder à une mise en balance adéquate, conforme aux critères établis par la jurisprudence de la Cour, entre le droit de la requérante au respect de sa vie privée et le droit de la partie adverse à la liberté d'expression.

Or, cette mise en balance a manqué en l'espèce :

– les tribunaux se sont bornés à se référer aux apparences, en se fondant sur les pièces du dossier d'une enquête pénale concernant la requérante au moment de la publication, sans donner de qualification explicite (déclaration de fait ou jugement de valeur) au contenu des articles litigieux ;

– les jugements rendus n'apportent pas de réponse satisfaisante à la question de savoir si la liberté de la presse pouvait en l'espèce justifier l'atteinte portée au droit de la requérante à la protection de sa réputation par la forme et le contenu des articles litigieux, qui révélaient l'identité et la photo de l'intéressée en la présentant comme une terroriste dangereuse, alors que les soupçons à son encontre selon le dossier d'enquête pénale étaient d'une nature différente.

Conclusion : violation (unanimité).

Article 41 : 1 500 EUR pour préjudice moral.

Respect for private life/Respect de la vie privée

Unlawful video surveillance of university amphitheatres: *Article 8 applicable; violation*

Surveillance vidéo illégale d'amphithéâtres universitaires: *article 8 applicable ; violation*

Antović and/et Mirković – Montenegro/Monténégro, 70838/13, judgment/arrêt 28.11.2017 [Section II]

Facts – The applicants were university lecturers. Following a decision by the dean to introduce video surveillance in a number of the university amphitheatres, they lodged a complaint with Personal Data Protection Agency. The Agency upheld their complaint and ordered the removal of the cameras, notably on the grounds that the reasons for the introduction of video surveillance provided for by section 36 of the Personal Data Protection Act had not been met, as there was no evidence that there was any danger to the safety of people and property and the university-s further stated aim of surveillance of teaching was not among the legitimate grounds for video surveillance. That decision was overturned by the domestic courts on the grounds that the university was a public institution performing activities of public interest, including teaching. Amphitheatres were a working area, just like a courtroom or parliament, where professors were never alone, and therefore they could not invoke any right to privacy that could be violated. Nor could the data that had been collected be considered personal data.

Law – Article 8

(a) *Applicability* – University amphitheatres were the workplaces of teachers. It was where they not only taught students, but also interacted with them, thus developing mutual relations and constructing their social identity. The Court had already held that covert video surveillance of

employees at their workplace must be considered, as such, as a considerable intrusion into their private life, entailing the recorded and reproducible documentation of conduct at the workplace which the employees, who were contractually bound to work in that place, could not evade. There was no reason for the Court to depart from that finding even in cases of non-covert video surveillance of employees at their workplace. Furthermore, the Court had also held that even where the employer's regulations in respect of the employees' private social life in the workplace were restrictive they could not reduce it to zero. Respect for private life continued to exist, even if it might be restricted in so far as necessary.

The data collected by the impugned video surveillance related to the applicants' "private life", and Article 8 was thus applicable.

(b) *Merits* – The relevant legislation (section 36 of the Personal Data Protection Act) explicitly provided for certain conditions to be met before camera surveillance was resorted to. However, in the instant case, those conditions had not been met as the Personal Data Protection Agency had indeed found. In this regard (in the absence of any examination of that question by the domestic courts), the Court could not but conclude that the interference with the applicants' private life constituted by the video surveillance of their workplace was not "in accordance with the law" for the purposes of Article 8.

Conclusion: violation (four votes to three).

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

(See also the Factsheet on Surveillance at workplace)

Respect for family life/Respect de la vie familiale

Decision by domestic authorities to allow adoption of psychologically vulnerable child by foster parents: *no violation*

Autorisation par les autorités internes de l'adoption d'un enfant psychologiquement vulnérable par ses parents d'accueil : *non-violation*

Strand Lobben and Others/et autres – Norway/Norvège, 37283/13, judgment/arrêt 30.11.2017 [Section V]

Facts – In 2008 the first applicant, who was single and had been identified by the child welfare authorities as being in need of guidance on motherhood, gave birth to a baby boy (the second applicant). After the birth she moved into a family centre with her son so that her ability to give him adequate care could be monitored. Three weeks later she withdrew her consent to stay in the centre. Concerned about her parenting skills, the child welfare authorities obtained an emergency care order and the child was placed with foster parents. The authorities later obtained a full care order. In 2011 they successfully sought an order by the County Social Welfare Board for the first applicant to be deprived of her parental responsibility and for the child's foster parents to be allowed to adopt him. That order was upheld by the City Court, which found that particularly weighty reasons existed for consenting to the proposed adoption. Although the first applicant's general situation had improved (she had married and had a baby daughter for whom she appeared to be able to care), the situation was different with her son, whom several experts had described as a vulnerable child who was easily stressed and needed a lot of quiet, security and support. In the City Court's view, the first applicant would not be sufficiently able to see or understand his special care needs which, if not met, would give rise to a considerable risk of abnormal development. The child's fundamental attachment was to his foster parents, with whom he had been living almost since birth, and adoption would give him a sense of belonging and security for longer than the period a foster-home relationship would last. The first applicant was refused leave to appeal against the City Court's decision.

Law – Article 8: The Court reiterated that measures replacing a foster-home arrangement with a more far-reaching measure, such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are broken, should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests.

The City Court had been faced with the difficult and sensitive task of striking a fair balance between the relevant competing interests in a complex case. It had clearly been guided by the interests of the child, notably his particular need for security in his foster-home environment, given his psychological vulnerability. Taking also into account the City Court's conclusion that there had been no positive development in the mother's competence in contact situations throughout the three years in which she had had rights of access, that the decision-making process was fair, and having regard to the fact that the domestic authorities had the benefit of direct contact with all the persons concerned, the Court was satisfied that there were such exceptional circumstances in the present case as could justify the measures in question and that they were motivated by an overriding requirement pertaining to the child's best interests.

Conclusion: no violation (four votes to three).

(See also the Factsheet on Children's rights)

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

Unforeseeable conviction for membership of an illegal organisation: *violation*

Imprévisibilité d'une condamnation pour appartenance à une organisation illégale : *violation*

Işıkırık – Turkey/Turquie, 41226/09, judgment/arrêt 14.11.2017 [Section II]

Facts – In 2007 the applicant was convicted of "membership" of an illegal armed organisation (the PKK) and sentenced to more than six years' imprisonment on the basis of Article 220 § 6 of the Criminal Code on the grounds that he had attended the funeral of four PKK militants, had walked in front of one of the coffins during the funeral and made a "V" sign, and that he had applauded while other demonstrators chanted slogans in support of Abdullah Öcalan during a gathering at his university.

The courts considered that since both the funeral and the demonstration had been held following calls and instructions issued by the PKK, the applicant, who had participated in those events, had to be considered as having acted "on behalf" of that organisation.

According to Article 220 § 6 of the Turkish Criminal Code, anyone who commits a crime "on behalf" of an illegal organisation will be punished as a "member" of that organisation under Article 314 § 2, without the prosecution having to prove the material elements of actual membership.

Law – Article 11: The applicant's conviction for membership of an illegal organisation under Articles 220 § 6 and 314 § 2 of the Criminal Code, based on his participation in a funeral and a demonstration, could be considered as an interference with his right to freedom of assembly.

The wording of Article 220 § 6 of the Criminal Code did not itself define the meaning of the expression "on behalf of an illegal organisation".

The domestic courts had interpreted the notion of "membership" of an illegal organisation under Article 220 § 6 in extensive terms. The mere fact of being present at a demonstration, called for by an illegal organisation, and openly acting in a manner expressing a positive opinion towards the

organisation in question, was found sufficient to be considered acting "on behalf of" the organisation and thus liable to punishment as an actual member.

In contrast, when Article 314 of the Criminal Code was applied alone as regards "membership" of an illegal organisation, the courts had to have regard to the "continuity, diversity and intensity" of the accused's acts . Similarly, they would also assess whether the accused had committed offences within the "hierarchical structure" of the organisation, whereas when the same article was applied with reference to Article 220 § 6, the question of acting within a hierarchy became irrelevant.

In sum, the array of acts that potentially constituted a basis for the application of a severe criminal sanction in the form of imprisonment, under Article 220 § 6, was so vast that the wording of the provision, including its extensive interpretation by the domestic courts, did not afford a sufficient measure of protection against arbitrary interference by the public authorities.

Furthermore, and importantly, on account of his conviction for acts which fell within the scope of Article 11 of the Convention, there remained no distinction between the applicant, a peaceful demonstrator, and an individual who had committed offences within the structure of the PKK.

Such extensive interpretation of a legal norm could not be justified when it had the effect of equating the mere exercise of fundamental freedoms with membership of an illegal organisation in the absence of any concrete evidence of such membership.

Article 220 § 6 of the Criminal Code was thus not "foreseeable" in its application since it did not afford the applicant legal protection against arbitrary interference with his right under Article 11 of the Convention. Hence, the interference was not prescribed by law.

Moreover, when demonstrators faced the charge of membership of an illegal armed organisation, they risked an additional sentence of between five and ten years in prison, a sanction which was strikingly severe and grossly disproportionate to their conduct.

Therefore, Article 220 § 6 of the Criminal Code, as applied in the instant case, would inevitably have a particularly chilling effect on the exercise of the rights to freedom of expression and assembly.

Moreover, the application of the provision at issue was not only likely to deter those who were found criminally liable from re-exercising their rights under Articles 10 and 11 of the Convention, but also had a great deal of potential to deter other members of the public from attending demonstrations and, more generally, from participating in open political debate.

Therefore, the very essence of the right to freedom of peaceful assembly and, thereby, the foundations of a democratic society, was undermined when the applicant was held criminally liable under Articles 220 § 6 and 314 of the Criminal Code for the mere fact of attending a public meeting and expressing his views thereat.

Conclusion: violation (unanimously).

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

Freedom of association/Liberté d'association

Refusal to register association as a religious entity: *violation*

Refus d'enregistrer une association comme entité religieuse : *violation*

"Orthodox Ohrid Archdiocese (Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy)"/ « Archidiocèse orthodoxe d'Ohrid (Archidiocèse orthodoxe grec d'Ohrid du patriarcat de Peć) » – the former Yugoslav Republic of Macedonia/l'ex-République yougoslave de Macédoine, 3532/07, judgment/arrêt 16.11.2017 [Section I]

Facts – The applicant association's applications for registration as a religious group had been refused and their appeals dismissed. Before the European Court it alleged, *inter alia*, that the refusal of the respondent State to register it violated its rights to freedom of religion and association.

Law – Article 11 interpreted in the light of Article 9: It was accepted that there had been an interference with the applicant association's rights under Article 11, interpreted in the light of Article 9. The interference in question had been "prescribed by law" and pursued a "legitimate aim", namely that of the protection of the rights and freedoms of others. The central issue was whether the non-recognition by the respondent State of the applicant association as a religious entity had been "necessary in a democratic society".

(a) *Alleged formal deficiencies* – The domestic authorities had referred to several formal deficiencies in justification of the refusal to register the applicant association. Those included: that the application for registration had been submitted by an unauthorised person outside the statutory time-limit; that the property-related provisions of the applicant's Charter had been contrary to the relevant legislation; that the applicant association had not specified whether it would operate as a church, community or a group and that it had not described itself as a voluntary association of physical persons. The decisions of the national courts had been focused on purely formalistic aspects, not on the substance of the application and, moreover, did not make clear what their exact import was for allowing the applicant's registration. The reasons adduced regarding the formal deficiencies for registration were not "relevant and sufficient".

(b) *The applicant association's "foreign origin"* – The Court had not been presented with any evidence in support of the Government's assertion that the applicant association had been set up by a foreign church or State. Despite the fact that the applicant's leader had been appointed by the Serbian Orthodox Church, the founders were nationals of the respondent State. In any event, it did not appear that the relevant legislation precluded registration of a religious organisation founded by a foreign church or State.

(c) *The applicant association's intended name* – The applicant initially sought registration as "Orthodox Ohrid Archdiocese" and later as "Greek-Orthodox Ohrid Archdiocese of the Peć Patriarchy". Under domestic law the relevant authorities were required to examine the application in the light of the statutory requirement precluding registration of a religious entity whose name did not (substantially) differ from the name of an already registered organisation. In the context of the freedom of association this was a relevant component since the name was among the most important elements identifying an association, be it religious or otherwise, and distinguished it from other such organisations. However, in the present case the name chosen for the applicant was sufficiently specific as to distinguish it from the Macedonian Orthodox Church-Ohrid Archdiocese. Furthermore, there was nothing to suggest that the applicant association intended to identify itself with the Macedonian Orthodox Church. On the contrary, during the impugned proceedings it had continuously and expressly refused to be confused or associated with it. Despite the domestic finding that only the Macedonian Orthodox Church had the "historical, religious, moral and substantive right" to use the name "Ohrid Archdiocese", there was no suggestion that the use of that name by the applicant association would violate the rights and freedoms, in particular the religious ones, of others.

(d) *The applicant association's alleged intention to become a parallel religious entity to the Macedonian Orthodox Church* – The State's duty of neutrality and impartiality, as defined in the Court's case-law, was incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs were expressed. While it was apparent that the autocephaly and unity of the Macedonian Orthodox Church was a matter of utmost importance for adherents and believers of that Church, and for society in general, that could not justify, in a democratic society, the use of measures which, as in the present case, went so far as to prevent the applicant association comprehensively and unconditionally from even commencing any activity.

The role of the authorities in a situation of conflict between or within religious groups was not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerated each other. Furthermore, there could be no justification for measures of a preventive nature to suppress freedom of assembly and expression, other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used might appear to the authorities, and however illegitimate the demands made might be. At no stage in the registration proceedings or in the proceedings before the Court was it alleged that the applicant association advocated the use of violence or any anti-democratic means in pursuing its aims.

(e) *Conclusion* – In view of the foregoing, it could not be said that the reasons provided by the national authorities, taken as a whole, were "relevant and sufficient" to justify the interference and the manner in which the domestic authorities refused the recognition of the applicant association as a religious organisation could not be accepted as necessary in a democratic society.

Conclusion: violation (unanimously).

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

ARTICLE 18

Restriction for unauthorised purposes/Restrictions dans un but non prévu

Extension of leader of opposition's pre-trial detention with primary purpose of obtaining information on matters unrelated to suspected offence: *violation*

Maintien en détention provisoire d'un dirigeant d'un parti d'opposition dans le but principal de recueillir des informations sur des sujets différents de l'infraction dont il était soupçonné: *violation*

Merabishvili – Georgia/Géorgie, 72508/13, judgment/arrêt 28.11.2017 [GC]

En fait – Ancien Premier ministre, le requérant était à l'époque des faits le dirigeant du plus grand parti d'opposition (le MNU). Entre 2012 et 2013, peu après l'alternance ayant porté au gouvernement le mouvement « Rêve géorgien » en octobre 2012, une procédure pénale fut engagée contre lui pour abus de pouvoir et autres infractions. Maintenu en détention provisoire jusqu'à son procès, le requérant se plaint d'avoir été ainsi écarté de la vie politique ; il affirme aussi avoir, une nuit de décembre 2013, été secrètement extrait de sa cellule pour être interrogé par le procureur général sur le décès d'un ancien Premier ministre en 2005 et sur les activités financières de l'ancien chef de l'État. En 2014, il fut déclaré coupable de la plupart des chefs d'accusation portés contre lui.

Dans un arrêt du 14 juin 2016, une chambre de la Cour a conclu en particulier à la violation de l'article 18 combiné avec l'article 5 § 1, au motif que la détention provisoire n'avait pas été utilisée seulement aux fins de le traduire devant l'autorité judiciaire compétente en raison de soupçons raisonnables d'infractions à son encontre, mais également pour faire pression sur lui relativement à une enquête sans lien avec les infractions le concernant (voir la Note d'information 197).

En droit – La Grande Chambre conclut, à l'unanimité, à la non-violation de l'article 5 § 1 concernant l'arrestation et la détention provisoire du requérant, ainsi de l'article 5 § 3 s'agissant des premières décisions judiciaires ayant ordonné son placement en détention, mais à la violation de l'article 5 § 3 en ce que, par la suite, le maintien de la détention n'était plus fondé sur des motifs suffisants.

Article 18, combiné avec l'article 5 § 1 : La Cour estime nécessaire de préciser sa jurisprudence comme suit.

a) *Précisions liminaires – la relation de l'article 18 avec les autres clauses de la Convention* – La cohérence justifie d'aligner l'utilisation des mots « indépendant » et « autonome » dans le cadre de l'article 18 sur celle pratiquée dans le contexte de l'article 14.

En premier lieu, comme l'article 14, l'article 18 de la Convention n'a pas d'existence indépendante ; il ne peut être appliqué que combiné avec un article de la Convention ou de ses Protocoles énonçant l'un des droits et libertés garantis ou définissant les conditions dans lesquelles il peut y être dérogé.

Cette règle découle, d'une part, du libellé de l'article 18, qui complète des dispositions telles que la deuxième phrase de l'article 5 § 1 ou les deuxièmes paragraphes des articles 8 à 11, et, d'autre part, de sa place dans la Convention, à la fin du titre I, qui énumère les droits et libertés garantis ou définit les possibilités d'y déroger.

En second lieu, toutefois, l'article 18 n'est pas seulement destiné à préciser la portée des clauses de restriction. Il interdit aussi expressément de restreindre les droits et libertés garantis dans des buts autres que ceux prévus par la Convention elle-même. Dans cette mesure, il possède une portée autonome. Par conséquent, comme l'article 14, il peut être violé sans pour autant qu'il y ait violation de l'article avec lequel il se combine.

Il découle également du libellé de l'article 18 qu'il ne peut y avoir violation que si le droit ou la liberté en question peuvent faire l'objet de restrictions autorisées par la Convention. Mais le simple fait qu'une restriction apportée à une liberté ou à un droit protégé par la Convention ne remplit pas toutes les conditions de la clause qui la permet ne soulève pas nécessairement une question sous l'angle de l'article 18. L'examen séparé d'un grief tiré de cette disposition ne se justifie que si l'allégation selon laquelle une restriction a été imposée dans un but non prévu par la Convention se révèle être un aspect fondamental de l'affaire.

b) *Le cas d'une pluralité de buts* – Lorsqu'une restriction poursuit plusieurs buts, il se peut que cette restriction soit compatible avec la disposition normative de la Convention qui l'autorise, parce qu'elle poursuit un des buts énoncés par cette disposition, tout en étant incompatible avec l'article 18, parce qu'elle vise principalement un autre but qui n'est pas prévu par la Convention – autrement dit, parce que cet autre but est prédominant. À l'inverse, si le but prévu par la Convention est le but principal, la restriction ne méconnaît pas l'article 18 même si elle poursuit également un autre but.

Cette interprétation est conforme à la jurisprudence des juridictions internes des États contractants et à celle de la Cour de justice de l'Union européenne, dont la Cour peut tenir compte lorsqu'elle interprète la Convention ; d'autant plus que les travaux préparatoires de la Convention montrent clairement que l'article 18 était censé être la version conventionnelle de la notion de « détournement de pouvoir » issue du droit administratif.

Le point de savoir quel but est prédominant dans une affaire donnée dépend de l'ensemble des circonstances de la cause, notamment la nature et le degré de répréhensibilité du but inavoué censé avoir été poursuivi. En cas de situation continue, on ne saurait exclure que la réponse à cette question varie avec le temps. Il convient également de garder à l'esprit que la Convention est destinée à sauvegarder et promouvoir les idéaux et valeurs d'une société démocratique régie par le principe de la primauté du droit.

c) *L'administration de la preuve* – Pour établir s'il existait un but non affiché et si celui-ci revêtait un caractère prédominant, la Cour n'a pas à suivre des règles spéciales mais peut, et doit, s'en tenir à son approche habituelle de la question de la preuve, laquelle comporte trois aspects : i. La charge de la preuve ne pèse pas *a priori* sur l'une ou l'autre des parties et la Cour peut notamment tenir compte des difficultés auxquelles peuvent être confrontés les requérants et, inversement, en tirer des conclusions si le gouvernement défendeur s'abstient ou refuse de communiquer des

informations sans s'en expliquer de façon satisfaisante ; ii. le critère appliqué est celui de la preuve « au-delà de tout doute raisonnable » ; et iii. la Cour apprécie en toute liberté non seulement la recevabilité et la pertinence, mais aussi la valeur probante de chaque élément du dossier. En conclusion, lorsqu'est en cause l'article 18, la Cour n'a aucune raison de se limiter aux preuves directes ou d'appliquer un critère spécial de preuve.

Selon le requérant, les autorités ont, en l'espèce, utilisé la détention provisoire dans deux buts inavoués. La Cour examine tour à tour si l'un des deux buts revêtait un caractère prédominant.

i. *Sur le but d'exclure le requérant de la scène politique* – La Convention ne consacre pas en tant que tel un droit à ne pas être poursuivi pénalement. La question principale est donc celle du but de la détention provisoire du requérant. Or la Cour n'estime ici probants :

– ni le fait que des poursuites pénales avaient été engagées contre un certain nombre d'anciens ministres et autres hauts responsables du MNU (d'une part, les membres des gouvernements antérieurs ne pouvaient voir leur responsabilité engagée alors qu'ils étaient au pouvoir ; d'autre part et surtout, aucun élément du dossier n'indique un manque d'indépendance des tribunaux ayant statué sur la détention provisoire) ;

– ni le lieu de la procédure, que rien ne suggère de voir comme une marque de *forum shopping* (sa conformité au droit interne n'a d'ailleurs pas été contestée) ;

– ni les lacunes des décisions rendues sur le terrain de l'article 5 § 3 ;

– ni le fait que des juridictions d'autres États membres aient refusé l'extradition d'autres responsables du MNU en considérant que les poursuites étaient d'inspiration politique (d'une part, les faits n'étaient pas identiques ; d'autre part, ces juridictions étaient appelées à évaluer un risque futur, alors que la Cour s'intéresse à des faits passés, ce qui a une incidence sur leur appréciation respective d'éléments circonstanciels non concluants). De même pour les décisions d'Interpol concernant l'ancien Président.

ii. *Sur le but de faire pression sur le requérant pour obtenir des informations étrangères aux motifs de la détention*

α) *Preuve de ce but* : Sensible à la nature subsidiaire de sa mission, la Cour ne peut sans de bonnes raisons assumer le rôle de juge principal du fait, mais peut prendre en compte la qualité des investigations internes et toute déficience propre à vicier le processus décisionnel.

De son côté, le récit du requérant – qui est détaillé, précis, toujours demeuré cohérent, et corroboré par certains éléments indirects – se prêtait en partie à une vérification par des moyens objectifs (parade d'identification, examen des relevés d'appels téléphoniques ou des données d'antennes-relais, enregistrements vidéos) ou en recueillant les témoignages de tiers. Or, ces pistes n'ont pas été explorées.

De leur côté, les éléments avancés par le Gouvernement ne sont pas suffisamment convaincants :

– sur le plan général, il faut aborder avec prudence les deux enquêtes menées : la première l'a été par des agents de l'administration dans la foulée d'un démenti formel de leur ministre ; la deuxième ne l'a été qu'après le prononcé de l'arrêt de la chambre ;

– au terme d'un examen concret, le doute apparaît, entre autres : quant à l'affirmation selon laquelle les enregistrements de certaines caméras de surveillance avaient été automatiquement détruits après vingt-quatre heures ; quant à la méthode exacte employée pour visionner d'autres enregistrements (auxquels l'avocat du requérant n'a pas eu accès) ; quant aux diverses déclarations produites (qui émanaient soit de subordonnés des accusés soit de personnes risquant de se voir elles-mêmes mises en cause) ; quant au caractère probant des données de connexion au système informatique des autorités de poursuite durant la nuit de l'incident ;

– l'absence dans les registres pénitentiaires de mention de l'extraction du requérant de sa cellule est en ligne avec le caractère secret de l'opération alléguée.

Tirant des conclusions de ces éléments et de la conduite des autorités, la Cour est convaincue que le requérant a bien été secrètement extrait de sa cellule de prison.

β) *Caractère prédominant de ce but* : Si l'on envisage dans son ensemble la restriction apportée au droit à la liberté du requérant, il est difficile de considérer que l'obtention d'informations sur la mort de l'ancien Premier ministre et sur les comptes bancaires de l'ancien Président était le but principal de la mesure. En effet, aucun élément ne suggère que la détention provisoire du requérant ait été utilisée dans un tel but durant ses sept premiers mois.

En l'espèce, toutefois, la restriction en cause s'analyse en une situation continue. Or, les éléments ci-après mènent la Cour à la conclusion que son but initial a fini par être supplanté par un autre : alors qu'au début il s'agissait d'enquêter sur la base de raisons plausibles de soupçonner le requérant d'avoir commis des infractions, il s'est agi par la suite d'obtenir des informations sur la mort d'un ancien Premier ministre et sur les comptes bancaires du chef de l'État.

Certains de ces éléments sont relatifs au moment de l'incident : les raisons de maintenir le requérant en détention provisoire avaient perdu de leur pertinence ; l'ancien Président, visé par plusieurs procédures pénales, venait de quitter la Géorgie après le terme de son mandat ; l'enquête sur la mort de l'ancien Premier ministre n'avait apparemment connu aucun progrès significatif.

D'autres éléments montrent l'importance considérable des questions concernant ces deux hommes pour les autorités. Ainsi, le Gouvernement a déclaré à l'audience devant la Grande Chambre qu'une « question cruciale » demeurait posée au requérant à ce sujet. Le parquet avait le pouvoir d'abandonner les poursuites à l'encontre du requérant et lui avait promis de le faire s'il livrait les informations demandées, auquel cas les tribunaux auraient dû clore la procédure pénale. Le requérant a été conduit en secret et de façon apparemment irrégulière, dans le cadre d'une opération clandestine menée au milieu de la nuit, devant une personne nommée à son poste trois semaines plus tôt. Les autorités ont initialement opposé un démenti formel, et les enquêtes qui ont suivi étaient entachées d'une série d'omissions dont on peut déduire que les autorités étaient désireuses de passer l'incident sous silence : les protagonistes n'ont pas été entendus au cours de l'enquête initiale mais seulement près de trois ans après les événements, et les éléments de preuve cruciaux de l'affaire, à savoir les enregistrements des caméras de surveillance de la prison, n'ont pas été obtenus.

Conclusion : violation (neuf voix contre huit).

Article 41 : 4 000 EUR pour préjudice moral.

(Voir également *Lutsenko c. Ukraine*, 6492/11, 3 juillet 2012, Note d'information 154 ; *Tymoshenko c. Ukraine*, 49872/11, 30 avril 2013, Note d'information 162 ; *Khodorkovskiy et Lebedev c. Russie*, 11082/06 et 13772/05, 25 juillet 2013, Note d'information 165 ; *Ilgar Mammadov c. Azerbaïdjan*, 15172/13, 22 mai 2014, Note d'information 174 ; *Rasul Jafarov c. Azerbaïdjan*, 69981/14, 17 mars 2016, Note d'information 194)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/Épuisement des voies de recours internes
Effective domestic remedy/Recours interne effectif – Hungary/Hongrie

Application lodged while domestic proceedings were pending under new legislation introduced to deal with prison overcrowding following *Varga and Others* pilot judgment: *inadmissible*

Requête introduite alors que la procédure interne était en cours sous l'empire d'une nouvelle législation visant à régler le problème de la surpopulation carcérale à la suite de l'arrêt pilote *Varga et autres* : *irrecevable*

Domján – Hungary/Hongrie, 5433/17, decision/décision 14.11.2017 [Section IV]

Facts – In its pilot judgment regarding conditions of detention in Hungary (*Varga and Others v. Hungary*, 14097/12 et al., 10 March 2015, Information Note 183), the Court found violations of Articles 3 and 13 of the Convention originating in a widespread problem resulting from a malfunctioning of the Hungarian penitentiary system and, under Article 46 of the Convention, required Hungary to put in practice preventive and compensatory remedies. On 25 October 2016 the Hungarian Parliament adopted Act No. CX of 2016 which enabled complaints concerning conditions of detention to be presented to the prison governor, who could take action to improve the conditions or counterbalance the injury suffered (for instance through relocation, increasing the time allowed for visits or the time spent in the open air, and improvement of the sanitary facilities).

In the instant case, the applicant complained under Articles 3 and 13 of the Convention that he had been kept in overcrowded cells in various prisons between December 2010 and July 2016 and did not have an effective domestic remedy.

Law – Article 35 § 1: The Court was satisfied that the 2016 Act provided a combination of remedies, both preventive and compensatory in nature, guaranteeing in principle genuine redress for Convention violations originating in prison overcrowding and other unsuitable conditions of detention in Hungary.

As to the preventive remedy, complaints by prison inmates or their representatives about conditions of detention allegedly in violation of fundamental rights were to be submitted to the governor of a penal institution. If the latter found the complaint to be well-founded he or she was to decide, within 15 days, about necessary actions such as relocation within the institution or transfer to another institution. A further judicial review of the prison governor's decision was explicitly provided for by the 2016 Act. In the Court's view nothing proved that the new complaint mechanism would not offer realistic perspectives of improving unsuitable conditions of detention. As to the compensatory remedy, the award offered – between EUR 4 and EUR 5.30 per day of unsuitable conditions of detention – was not unreasonable, having regard to economic realities.

In view of its finding that the 2016 Act met, in principle, the standards set out by the pilot judgment, the Court considered that the applicant and all others in his position had to use the remedies introduced by the Act. In the instant case, the applicant had made use of the remedies but the proceedings were still pending. His complaint was thus premature.

The Court went on to point out that it was ready to change its approach as to the potential effectiveness of the remedies should the practice of the domestic authorities show, in the long run, that detainees were being refused relocation and/or compensation on formalistic grounds, that the domestic proceedings were excessively long or that the domestic case-law was not in compliance with the requirements of the Convention. Any such future review would involve determining

whether the national authorities had applied the 2016 Act in a manner that was in conformity with the pilot judgment and the Convention standards in general.

Conclusion: inadmissible (application premature).

Exhaustion of domestic remedies/Épuisement des voies de recours internes
Six-month period/Délai de six mois

Use by applicants of domestic remedies that were not clearly ineffective: *admissible*

Usage par les requérants de voies de recours n'étant pas manifestement ineffectives : *recevable*

Zubkov and Others/et autres – Russia/Russie, 29431/05 et al., judgment/arrêt 7.11.2017 [Section III]
Akhlyustin – Russia/Russie, 21200/05, judgment/arrêt 7.11.2017 [Section III]
Moskalev – Russia/Russie, 44045/05, judgment/arrêt 7.11.2017 [Section III]
Konstantin Moskalev – Russia/Russie, 59589/10, judgment/arrêt 7.11.2017 [Section III]

(See Article 8 above/Voir l'article 8 ci-dessus, page 20)

ARTICLE 46

Execution of judgment – General and individual measures/Exécution de l'arrêt – Mesures générales et individuelles

Respondent State to take measures to resolve problems relating to prolonged non-enforcement of final judgments

État défendeur tenu de prendre des mesures afin de régler les problèmes d'inexécution prolongée de jugements définitifs

Kunić and Others/et autres – Bosnia and Herzegovina/Bosnie-Herzégovine, 68955/12 et al., judgment/arrêt 14.11.2017 [Section IV]
Spahić and Others/et autres – Bosnia and Herzegovina/Bosnie-Herzégovine, 20514/15 et al., judgment/arrêt 14.11.2017 [Section IV]

Facts – The applicants were awarded different sums in respect of unpaid work-related benefits. The Constitutional Court subsequently found a violation of Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 on account of the prolonged non-enforcement of the final judgments in the applicants' favour. However, the final judgments remained unenforced on account of public debt.

Law – Article 6 § 1 of the Convention and Article 1 of Protocol No. 1: It was not open to authorities to cite a lack of funds as an excuse for not honouring a judgment debt. In its decisions the Constitutional Court had held, in particular, that the relevant cantonal governments should identify the exact number of unenforced judgments and the amount of aggregate debt, and set up a centralised, chronological and transparent database which should include the enforcement time-frame and help avoid abuses of the enforcement procedure. While it appeared that some of the general measures ordered by the Constitutional Court had been implemented, the applicants' situation remained unchanged. By failing for a considerable period of time to take the necessary measures to comply with the final judgments in the instant case, the authorities had deprived the provisions of Article 6 § 1 of all useful effect and had also prevented the applicants from receiving the money to which they were entitled. That failure further amounted to a disproportionate interference with their peaceful enjoyment of their possessions.

Conclusion: violations (unanimously).

Article 46: By virtue of Article 46 the High Contracting Parties had undertaken to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers of the Council of Europe. It followed that a judgment in which the Court had found a breach, imposed on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures. The State was obliged to take such measures also in respect of other persons in the applicants' position, notably by implementing the general measures indicated by the Constitutional Court in their decisions.

There were already more than 400 similar applications pending before the Court. Subject to their notification to the Government under Rule 54 § 2 (b) of the Rules of the Court, the respondent State was obliged to grant adequate and sufficient redress to all such applicants. Such redress might be achieved through *ad hoc* solutions such as friendly settlements or unilateral remedial offers in line with the Convention requirements.

Article 41: In respect of pecuniary damage, the applicants sought the payment of the outstanding judgment debts. The most appropriate form of redress in non-enforcement cases was indeed to ensure full enforcement of the domestic judgments in question. That principle equally applied to the present case. The applicants had suffered distress, anxiety and frustration as a result of the respondent State's failure to enforce final domestic judgments in their favour. EUR 1,000 in respect of non-pecuniary damage.

Respondent State to provide procedural guarantees against arbitrariness in respect of compulsory admission to psychiatric hospital

Etat défendeur devrait fournir des garanties procédurales contre l'arbitraire en matière d'internement psychiatrique

N. – Romania/Roumanie, 59152/08, judgment/arrêt 28.11.2017 [Section IV]

En fait – En janvier 2001, des poursuites pénales furent ouvertes à l'encontre du requérant, soupçonné d'inceste et de corruption sexuelle à l'encontre de ses deux filles mineures (ces poursuites furent abandonnées en février 2002). Il fut interné dans un hôpital psychiatrique, mesure qui fut confirmée par un tribunal en avril 2002, en l'absence du requérant. A la suite de changements législatifs tendant à la consolidation des droits des personnes handicapées, un contrôle périodique de la légalité de l'internement prolongé du requérant eut lieu à partir de septembre 2007. Mais l'internement fut toujours maintenu ; selon les expertises médicales, le requérant souffrait de schizophrénie paranoïde. En août 2016, le tribunal départemental déclara qu'en principe l'internement devait cesser, mais qu'il continuerait à titre transitoire dans l'attente d'une place disponible dans une structure appropriée. En février 2017, le tribunal de première instance ordonna le remplacement de l'internement par un traitement obligatoire du requérant jusqu'à son rétablissement, mais les recherches en vue de sa remise en liberté restèrent infructueuses.

En droit – Article 5 § 1 : La privation de liberté du requérant relève de l'alinéa e), ses troubles mentaux ayant été confirmés par un bon nombre d'expertises médico-légales.

a) *Sur le maintien de l'internement après 2007* – La législation nationale requiert que la maladie mentale rende la personne concernée dangereuse pour la société. De plus, l'article 5 § 1 e) requiert qu'en l'absence de traitement médical en vue, le placement d'une personne atteinte de troubles mentaux doit être spécialement justifié par la gravité des desdits troubles et la nécessité d'assurer sa propre protection ou la protection d'autrui.

En l'espèce, lors du premier contrôle de la mesure d'internement, le tribunal de première instance a fondé sa décision sur le simple renvoi à deux éléments principaux : les accusations pénales portées initialement contre le requérant (inceste et corruption sexuelle) ; et sa schizophrénie paranoïde (selon l'expertise de juillet 2007).

En ce qui concerne les accusations, le tribunal s'est reposé entièrement sur le dossier du parquet. Or le procureur avait écarté l'accusation d'inceste pour défaut de preuves. L'accusation de corruption sexuelle fut elle-même ultérieurement classée en raison de l'absence de discernement du requérant. Ce classement n'a jamais été soumis à un contrôle juridictionnel. Les accusations n'ont pas fait l'objet d'un examen contradictoire par une juridiction. Aussi ce renvoi ne suffit pas à établir la dangerosité du requérant.

En ce qui concerne les troubles mentaux, au lieu d'apprécier la dangerosité du requérant, le tribunal s'est ici référé purement et simplement aux conclusions de l'expertise médico-légale (qui proposait le maintien de l'internement), approche que la Cour a déjà critiquée. Du reste, ni le tribunal ni les autorités médicales ne rapportent d'actes de violence de la part du requérant pendant son internement. Tout au contraire, selon l'examen de juillet 2007, le requérant avait un comportement calme, ne s'opposait pas au traitement, ne déclenchait pas de conflit parmi les autres patients et ne présentait qu'un faible degré d'hostilité au cours du traitement.

Les contrôles ultérieurs n'ont pas apporté de clarification quant à la potentielle dangerosité du requérant, la même approche formaliste et superficielle ayant été suivie ; les recours du requérant contre les décisions du premier tribunal ou les procédures qu'il a engagées séparément non plus.

Qui plus est, ni les autorités médicales ni le tribunal lui-même n'ont examiné la possibilité de mesures alternatives.

Ainsi, faute d'appréciation de la dangerosité du requérant, l'internement du requérant n'avait pas de base légale et n'était pas justifié par l'alinéa e) de l'article 5 § 1. Il était de surcroît sujet à caution au vu de l'article 14 § 1 b) de la Convention des Nations unies relative aux droits des personnes handicapées (CDPH), qui énonce qu'en aucun cas l'existence d'un handicap ne justifie en soi une privation de liberté.

Si la dangerosité du requérant a fini par faire l'objet d'un contrôle par la suite, les autorités nationales n'ont pas mis en évidence les éléments factuels à l'origine du changement d'appréciation des experts médicaux.

b) *Sur la nécessité de prolonger l'internement du requérant après la décision judiciaire ordonnant sa libération* – Dans son arrêt d'août 2016, tout en soulignant la nécessité d'y mettre fin, le tribunal départemental a maintenu l'internement du requérant, sans indiquer sur quelle base légale.

De plus, après l'adoption du jugement définitif de février 2017 ordonnant la mise en liberté du requérant, ni les autorités nationales ni le Gouvernement n'ont indiqué l'éventuelle procédure applicable à la situation du requérant, permettant d'abord l'évaluation de ses besoins et, ensuite, sa mise en liberté ou son transfert vers un autre centre adapté à ses besoins ainsi identifiés. La possibilité d'une libération graduelle ou conditionnelle n'a pas été évoquée non plus.

Même si le requérant a consenti à rester interné aussi longtemps que les services sociaux n'auraient pas trouvé de solution adaptée à sa situation, il aurait dû bénéficier de garanties adéquates de protection, propres à mener sans retard injustifié à sa libération.

Certes, les décisions rendues ci-dessus s'inspirent des pratiques qui tendent à être adoptées ces dernières années au niveau international et qui militent pour que les personnes handicapées soient traitées et soignées, dans la mesure du possible, au sein de la société (voir l'article 19 de la CDPH, les Lignes directrices du Comité des droits des personnes handicapées, ou la Stratégie du Conseil de l'Europe sur le handicap 2017-2023).

Toutefois, leur mise à exécution soulève des problèmes supplémentaires sur le terrain de l'article 5 § 1. En pratique, la libération du requérant ne s'est pas réalisée. En tout état de cause, aucune évaluation rigoureuse des besoins concrets du requérant et des mesures appropriées de protection sociale n'a encore été effectuée à ce jour. De plus, les démarches effectuées par les autorités nationales se sont révélées infructueuses en raison du manque de structures d'accueil.

Cette situation reflète des réalités ayant cours en Roumanie et qui ont déjà été décrites par des organismes internationaux (tels que le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) ou le Commissaire aux droits de l'homme du Conseil de l'Europe).

Ainsi, le maintien de l'internement du requérant après l'arrêt du 29 août 2016 était arbitraire.

Conclusion : violation (unanimité).

Article 5 § 4 : La législation roumaine pertinente, entrée en vigueur en septembre 2006, n'a pas été mise en œuvre d'une manière adéquate pour garantir les droits du requérant.

a) *La périodicité des contrôles* : En l'espèce, les contrôles judiciaires de la nécessité de l'internement ont été séparés par des intervalles de temps de quinze mois (février 2015 – mai 2016), de seize mois (octobre 2008 – février 2010) voire de trois ans et huit mois (avril 2010 – décembre 2013). Aucun motif exceptionnel de nature à le justifier n'a été démontré. Ces délais étaient d'ailleurs largement supérieurs à ceux prescrits par le droit interne (six mois, puis douze mois à partir de 2014).

En outre, la Cour observe avec inquiétude la pratique consistant à vérifier la nécessité du maintien de la mesure d'internement de manière rétrospective, sur la base d'éléments médicaux obtenus longtemps à l'avance (par exemple plus de un, deux ou trois ans auparavant) et ne reflétant donc pas nécessairement l'état de la personne internée au moment de la décision. Pareil intervalle entre l'examen médico-légal et la décision subséquente peut se heurter en soi au principe qui sous-tend l'article 5 de la Convention, à savoir prémunir l'individu contre l'arbitraire.

Enfin, pour autant que les retards susmentionnés puissent être expliqués par la nécessité d'obtenir les expertises médico-légales requises, il ne semble pas que le tribunal se soit enquis de l'avancement du travail des experts ni ait fait usage de son pouvoir d'infliger des amendes à ceux qui n'auraient pas respecté leur obligation de remettre un rapport.

Ainsi, l'exigence d'un contrôle à « bref délai » n'a pas été respectée.

b) *L'assistance juridique* : Le requérant, qui présentait des troubles mentaux qui l'empêchaient de mener une instance judiciaire de manière adéquate, a certes bénéficié d'avocats commis d'office. Toutefois, lors de chaque procédure, le requérant a été représenté par un avocat différent, et cela sans concertation, faute de toute entrevue avec ses différents avocats avant les audiences tenues par les tribunaux. Dans la grande majorité des cas, ses avocats ont plaidé en faveur de l'internement ou s'en sont remis à la sagesse des tribunaux.

Loin de dicter la manière dont un avocat devrait traiter les affaires dans lesquelles il représente une personne atteinte de troubles mentaux, la Cour considère qu'il y a eu un manque d'assistance effective.

Conclusion : violation (unanimité)

Article 46

Mesures individuelles : Pour effacer les conséquences de la violation des droits garantis au requérant par l'article 5, les autorités devraient mettre à exécution sans retard l'arrêt définitif du tribunal départemental ordonnant la mise en liberté du requérant dans des conditions adaptées à ses besoins.

Mesures générales : Les lacunes identifiées dans la présente affaire étant susceptibles de donner lieu à l'avenir à d'autres requêtes bien fondées, la Cour recommande à l'État défendeur d'envisager des mesures générales garantissant : que l'internement des individus dans des hôpitaux psychiatriques soit légal, justifié et dépourvu d'arbitraire ; et que les personnes internées bénéficient devant un tribunal d'un recours présentant des garanties adéquates, afin que celui-ci statue à bref délai sur la légalité de la détention.

Article 41 : 30 000 EUR pour préjudice moral.

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

Article 2 § 1

Freedom to choose residence/Liberté de choisir sa résidence

Policy imposing length-of-residence and type of income conditions on persons wishing to settle in inner-city area of Rotterdam: *no violation*

Imposition de conditions de durée de résidence et de type de revenus aux personnes désirant s'établir dans une zone centrale de Rotterdam : *non-violation*

Garib – Netherlands/Pays-Bas, 43494/09, judgment/arrêt 6.11.2017 [GC]

Facts – The Inner City Problems (Special Measures) Act, which entered into force on 1 January 2006, empowered a number of named municipalities, including Rotterdam, to take measures in certain designated areas including the granting of partial tax exemptions to small business owners and the selecting of new residents based on their sources of income. In 2005 the applicant moved to the city of Rotterdam and took up residence in a rented property in the Tarwewijk district. Following the entry into force of the Inner City Problems (Special Measures) Act, Tarwewijk became a designated area under a Rotterdam by-law. After being asked by her landlord to move to another property he was letting in the same district, the applicant applied for a housing permit as required by the new legislation. However, her application was rejected on the grounds that she had not been resident in the Rotterdam Metropolitan Region for the requisite period and did not meet the income requirement. Her subsequent appeals were unsuccessful. In 2010 the applicant moved to the municipality of Vlaardingen, which was also part of the Rotterdam Metropolitan Region.

In a judgment of 23 February 2016 (see Information Note 193), a Chamber of the Court found, by five votes to two, that there had been no breach of Article 2 of Protocol No. 4. In particular, the Chamber held that, in principle, the State had been entitled to adopt the impugned legislation and policy and in the circumstances the domestic authorities had been under no obligation to accommodate the applicant's preferences.

On 12 September 2016 the case was referred to the Grand Chamber at the applicant's request.

Law – Article 2 of Protocol No. 4: In an area as complex and difficult as that of the development of large cities, the State enjoyed a wide margin of appreciation in order to implement their town-planning policy. The margin extended, in principle, to both the decision to intervene in the subject area and, having intervened, to the detailed rules laid down in order to achieve a balance between the competing interests of the State and those directly affected by the legislative choices.

(a) *Legislative and policy framework* – The domestic authorities had found themselves called upon to address increasing social problems in inner-city areas of Rotterdam resulting from impoverishment caused by unemployment and a tendency for gainful economic activity to be transferred elsewhere. They sought to reverse those trends by favouring new residents whose income was related to gainful economic activity of their own. The intention was to foster diversity

and counter the stigmatisation of particular inner-city areas as fit only for the most deprived social groups. The Inner City Problems (Special Measures) Act did not deprive a person of housing or force any person to leave their dwelling. The measures only affected relatively new settlers: residents of the Rotterdam Metropolitan Region of at least six years' standing were eligible for a housing permit whatever their source of income. In the circumstances, that waiting time did not appear to be excessive.

The legislative history of the Act showed that the legislative proposals had been scrutinised by the Council of State, whose concerns had been addressed by the Government, and that Parliament itself had been concerned to limit any detrimental effects. The entitlement of individuals unable to find suitable housing had been recognised. The restriction in issue remained subject to temporal as well as geographical limitation. The competent Minister was required by the Act to report to Parliament every five years on the effectiveness of the Act and its effects in practice. The individual hardship clause allowed derogation from the length-of-residence requirement in cases where strict application of it would be excessively harsh. Procedural safeguards comprised of the availability of administrative objection proceedings and of judicial review before two levels of jurisdiction, both before tribunals invested with full competence to review the facts and the law and which met the requirements of Article 6 of the Convention.

(b) *The applicant's individual case* – It was undisputed that the applicant was of good behaviour and constituted no threat to public order. Nonetheless, her personal conduct could not be decisive on its own when weighed in the balance against the public interest which was served by the consistent application of legitimate public policy. The system of the Inner City Problems (Special Measures) Act was not called into question by the mere fact that it did not make an exception in respect of persons already residing in a designated area, such as the applicant. The applicant had been resident in a dwelling in Vlaardingen let to her by a Government-funded social housing body since 27 September 2010. She had not explained her reasons for choosing to move to Vlaardingen instead of remaining in the dwelling in Tarwewijk for the final eight months needed to complete six years' residence in the Rotterdam Metropolitan Region. Nor had she suggested that her dwelling in Vlaardingen was inadequate for her needs or in any way less congenial or convenient than the one she had hoped to occupy in Tarwewijk. In addition, it had not been stated that the applicant had expressed the wish to move back to Tarwewijk. The information submitted did not allow the Court to find that the consequences for the applicant of the refusal of a housing permit amounted to such disproportionate hardship that her interest should outweigh the general interest served by the consistent application of the measure in issue. An unspecified personal preference for which no justification was offered could not override public decision-making.

Conclusion: no violation (twelve votes to five).

OTHER JURISDICTIONS / AUTRES JURIDICTIONS

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

State obligations with respect to the investigation of violence against women

Obligations pesant sur l'État en matière d'enquêtes sur des violences contre des femmes

Case of *Gutiérrez Hernández et al. v. Guatemala* / Affaire *Gutiérrez Hernández et al. c. Guatemala*, Series C No. 339/Série C n° 339, judgment/arrêt 24.8.2017

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

Facts – Mayra Angelina Gutiérrez Hernández was a university professor. On 7 April 2000 she did not undertake her usual Friday work trip to another city. Two days later, a colleague and her brother

reported her missing to the National Civil Police and her brother indicated that a man with whom she had had a relationship might be responsible. The public prosecutor´s office began an investigation which remained open as of the date of the Inter-American Court´s judgment. In April and May 2000 the victim´s representative submitted two *habeas corpus* petitions to a court, which granted the petitions and ordered an investigation by the public prosecutor. The public prosecutor submitted a third *habeas corpus* petition but this was refused as the investigation was already under way. Finally, in December 2000 the Supreme Court ordered the Human Rights Ombudsperson to carry out a special investigation, granting him the same powers and duties as the public prosecutor. The Ombudsperson´s mandate ended in 2013. All of the investigations focused their efforts on establishing the possible responsibility of the victim´s former partner, leaving aside other possible hypotheses as to her disappearance, in particular, those that might implicate the participation or acquiescence of State agents.

Law

(a) Articles 3 (right to juridical personality), 4 (right to life), 5 (right to personal integrity) and 7 (right to personal liberty) of the American Convention on Human Rights (ACHR), in relation to Articles I and II of the Inter-American Convention on Forced Disappearance of Persons: The Inter-American Court analysed the reasons given by the representatives in support of their hypothesis that Ms Gutiérrez had been the victim of an enforced disappearance: (i) in 1982 and 1985, during the Guatemalan internal armed conflict, two members of her family had been forcibly disappeared; (ii) her name had appeared in a military log that had been declassified in the year 2000; and (iii) she had participated in an investigation relating to child trafficking in Guatemala that had been used in a report by the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. The Inter-American Court found that, on their own, those elements were insufficient to establish that Ms Gutiérrez had been deprived of her freedom by State agents or with their acquiescence. Therefore, it did not declare the State responsible for the alleged enforced disappearance and found no violation therefor.

Furthermore, the Court found no violation of the State´s duty to prevent violations of Ms Gutiérrez´s rights to life and personal integrity, given that: (i) it was not proven that at the time of her disappearance the State was aware or should have been aware of rising rates of violence against women and femicide in Guatemala; thus, there was no obligation of strict due diligence in her search on the part of the State; and (ii) State agents had not been notified of prior threats, risks, or requests for protection in favour of Ms Gutiérrez; thus, at the time of her disappearance, there were insufficient elements to establish that she was in real and imminent risk of harm. Therefore, the Court found no violation of Articles 4 and 5 of the ACHR and held that the authorities' response to her disappearance would be analysed in relation to the effectiveness of the investigations.

Conclusion: no violation (unanimously).

(b) Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection), in relation to Articles 1(1) (obligation to respect and ensure rights and non-discrimination) and 24 (equality before the law) of the ACHR, as well as Article 7(b) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ("Belém do Pará Convention"), to the detriment of Ms Gutiérrez Hernández and her family: First, the Inter-American Court concluded that from the initial phases of the investigation there had been a lack of due diligence on the part of the authorities in following up on the information gathered. Additionally, the authorities had used stereotyped language when referring to Ms Gutiérrez and these stereotypes and prejudices had affected their objectivity, as they had centred their investigation on her personal relationships and lifestyle, setting aside other lines of investigation. In particular, the authorities had focused on the possibility that this was a "crime of passion," a term that shifted the blame for the disappearance from the aggressor to the victim. The lack of a rigorous and exhaustive investigation had allowed for impunity for the unreasonable period of time over seventeen years. Additionally, this was not an isolated case in

Guatemala, as other cases had shown a tendency on the part of the authorities to discredit victims and blame their fates on their lifestyle, mode of dress, personal relationships or sexuality. Thus, the State had violated Articles 24 and 1(1), as well as Articles 8(1) and 25 of the ACHR, in relation to Article 1(1) thereof and to Article 7(b) of the Belém do Pará Convention.

Second, the Court found that despite the fact that three *habeas corpus* petitions had been filed on behalf of Ms Gutiérrez, the public prosecutor had been put on notice of her disappearance, and a special investigation had been undertaken by the Human Rights Ombudsperson, the State had not had a diligent strategy of investigation that took into account the complexities of the case. Therefore, the State had violated Articles 8(1) and 25 of the ACHR, in relation to Article 1(1) thereof.

Conclusion: violation (unanimously).

(c) *Reparations*: The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) effectively conduct the investigation within a reasonable time, free from gender stereotypes, and continue and/or open the appropriate criminal proceedings in order to identify, prosecute, and if applicable, sanction those responsible for Ms Gutiérrez's disappearance, as well as determine her whereabouts; (ii) publish the judgment and its official summary; and (iii) pay compensation in respect of non-pecuniary damage, as well as costs and expenses.

United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/ Comité des Nations unies pour la protection des droits de tous les travailleurs migrants et des membres de leur famille
United Nations Committee on the Rights of the Child/ Comité des droits de l'enfant des Nations unies

Joint general comments on the human rights of children in the context of international migration

Observations générales communes sur les droits de l'enfant dans le cadre de la migration internationale

Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration (CMW/C/GC/3-CRC/C/GC/22)
16.11.2017
Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (CMW/C/GC/4-CRC/C/GC/23)
16.11.2017

The objective of the joint general comments was to provide authoritative guidance on legislative, policy and other appropriate measures that should be taken to ensure full compliance with the obligations under the Conventions to fully protect the rights of children in the context of international migration.[3] The obligations of the State parties applied to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders. Those obligations could not be arbitrarily and unilaterally curtailed either by excluding zones or areas from the territory of a State or by defining particular zones or areas as not or only partly under the jurisdiction of the State. Comprehensive child protection systems at the national and local levels should mainstream into their programmes the situation of all children in the context

[3] The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990; and the Convention on the Rights of the Child, 20 November 1989.

of migration, including in countries of origin, transit, destination and return. Children's personal data, in particular biometric data, should only be used for child protection purposes, with strict enforcement of appropriate rules on collection, use and retention of, and access to, data.

In all actions concerning children, States should be guided by the overarching principles of the Conventions and the legal obligations of State parties to protect the rights of children in the context of international migration in their territory which included:

(a) *Non-discrimination (Articles 1 and 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); Article 2 of the Convention on the Rights of the Child (CRC))*: The principle of non-discrimination should be at the centre of all migration policies and procedures, including border control measures, and regardless of the migration status of children of their parents. State parties should ensure that migrant children and their families were integrated into receiving societies through effective realisation of their human rights and access to services in an equal manner with nationals. State parties should strengthen efforts to combat xenophobia, racism and discrimination and adopt measures to prevent, diminish and eliminate the conditions and attitudes that caused or perpetuated *de facto* discrimination against them.

(b) *Best interests of the child (Article 3 CRC)*: State parties should ensure that the best interests of the child were taken fully into consideration in immigration law, planning, implementation and assessment of migration policies and decision-making on individual cases and were obliged to ensure that any decision to return a child to his or her country of origin was based on evidentiary considerations on a case-by-case basis and pursuant to procedure with appropriate due process safeguards.

(c) *Right to be heard, express his or her views and participation (Article 12 CRC)*: Article 12 underscored the importance of children's participation, providing for children to express their views freely and to have those views taken into account with due weight, according to their age, maturity and the evolving capacity of the child. States should adopt measures aimed at empowering children affected by international migration to participate on different levels.

(d) *Right to life, survival and development (Article 9 ICRMW; Article 6 CRC)*: The lack of regular and safe channels for children and families to migrate contributed to children taking life-threatening and extremely dangerous migration journeys. States, especially those of transit and destination should devote special attention to the protection of undocumented children and to the protection of asylum-seeing children, stateless children and child victims of transnational organised crime, including trafficking, sale of children, commercial sexual exploitation of children and child marriage.

(e) *Non-refoulement, prohibition of collective expulsion (Articles 9, 10 and 22 ICRMW; Articles 6, 22 and 37 CRC)*: State parties should respect non-refoulement obligations deriving from international human rights, humanitarian, refugee and customary international law.

(f) *Right to liberty (Articles 16 and 17 ICRMW; Article 37 CRC)*: Every child, at all times, had a fundamental right to liberty and freedom from immigration detention. Children should never be detained for reasons related to their or their parents' migration status. Children should not be criminalised or subject to punitive measures, such as detention, because of their or their parents' migration status nor be deprived of their liberty solely on the basis of being unaccompanied or separated. A child may be deprived of liberty only as a last resort and for the shortest appropriate period of time.

(g) *Due process guarantees and access to justice (Articles 16, 17 and 18 ICRMW; Articles 12 and 40 CRC)*: All children should be treated as individual rights holders, their child-specific needs considered equally and individually and their views appropriately heard. Children should be able to bring complaints before the courts, administrative tribunals or other bodies at lower levels that were easily accessible to them.

(h) *Right to a name, identity, and a nationality (Article 29 ICRMW; Articles 7 and 8 CRC)*: State parties should take all necessary measures to ensure that all children were immediately registered at birth and issued birth certificates. While States were not obliged to grant their nationality to every child born in their territory, they were required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child had a nationality when he or she was born.

(i) *Family life (Articles 14, 17 and 44 ICRMW; Articles 9, 10, 11, 16, 18, 19, 20 and 27(4) CRC)*: States should comply with their international legal obligations in terms of maintaining family unity. The rupture of a family unit by the expulsion of one of both parents based on a breach of immigration law was disproportionate, as the sacrifice inherent in the restriction of family life and the impact on the life and development of the child was not outweighed by the advantages obtained by forcing the parent to leave the territory because of an immigration-related offence. Financial and material poverty should never be the sole justification for removing a child from parental care. States should provide appropriate assistance, including by providing social benefits and child allowances regardless of the migration status of the parents or the child. Applications for family reunification should be dealt with in a positive, humane and expeditious manner, including facilitating the reunification of children with their parents.

(j) *Protection from all forms of violence and abuse, including exploitation, child labour and abduction, and sale of traffic in children (Articles 11 and 27 ICRMW; Articles 19, 26, 32, 34, 35 and 36 CRC)*: States should establish early identification measures to detect victims and carry out mandatory training for social workers, border police, lawyers, medical professionals and all other staff who come into contact with children and take effective measures to protect migrant children from all forms of violence and abuse, regardless of their migration status. States should ensure comprehensive protection, support services and access to effective redress mechanisms.

(k) *Right to protection from economic exploitation (Articles 11 and 27 ICRMW; Articles 19, 26, 32, 34, 35 and 36 CRC)*: States should take all appropriate legislative and administrative measures to regulate and protect the employment of migrant children with respect to the minimum age of employment and hazardous work. In cases of necessity, States should provide emergency social assistance to migrant children and their families regardless of their migration status, without any discrimination.

(l) *Right to an adequate standard of living (Article 45 ICRMW; Article 27 CRC)*: States should ensure that children in the context of international migration have an adequate standard of living adequate for their physical, mental, spiritual and moral development. States should develop guidelines on standards of reception facilities, assuring adequate space and privacy for children and their families.

(m) *Right to health (Articles 28 and 45 ICRMW; Articles 23, 24 and 39 CRC)*: Migrant and refugee children may experience severe emotional distress and may have particular and often urgent mental health needs. Children should therefore have access to specific care and psychological support. Every migrant child should have access to health care equal to that of nationals regardless of their migration status.

(n) *Right to education and professional training (Articles 30, 43 and 45 ICRMW; Articles 28, 29 and 30 CRC)*: States should ensure equal access to quality and inclusive education for all migrant children. Migrant children should have access to alternative learning programmes where necessary and participate fully in examinations and receive certification of their studies.

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The Committees reaffirmed the need to address international migration through international, regional or bilateral cooperation and dialogue, and through a comprehensive and balanced approach, recognising the responsibilities of countries of origin, transit, destination and return in promoting and protecting the human rights of children in the context of international migration, so

as to ensure safe, orderly and regular migration, with full respect for human rights and avoiding approaches that might aggravate their vulnerability. In particular, cross-border case management procedures should be established in an expeditious manner and in conformity with the relevant Convention. All practices should be fully in line with international human rights and refugee law obligations.

COURT NEWS / DERNIÈRES NOUVELLES DE LA COUR

Spanish version of the HUDOC database and agreement to increase case-law translations in Spanish/Version espagnole de la base de données HUDOC et accord en vue de l'augmentation du nombre de traductions en espagnol

On 23 November 2017 a ceremony was organised in Spain for the launch of a Spanish version of the Court's case-law database HUDOC which can be found at: http://hudoc.echr.coe.int/spa. The Spanish user interface joins the existing English, French, Russian and Turkish versions, with Georgian, Bulgarian and Ukrainian interfaces to follow.

At the ceremony an agreement was signed between the Court, the Spanish Government and the *Universidad Nacional de Educación a Distancia (UNED)* aimed at increasing the number of Spanish translations of the Court's case-law and publications in cooperation with the said university.

As a reminder the HUDOC database is increasingly serving as a one-stop-shop for translations of the Court's case-law in languages other than its official ones (English and French). It now contains 23,500 case-law translations in 31 languages other than English and French. Some 1,150 texts are in Spanish, number which will soon be increasing thanks to the agreement.

Press release (eng)

Communiqué de presse (fre)

Comunicado de prensa (esp)

Le 23 novembre 2017 a eu lieu en Espagne une cérémonie officielle pour le lancement de la version espagnole de HUDOC, la base de données de jurisprudence de la Cour, qui est accessible à partir de l'adresse internet : http://hudoc.echr.coe.int/spa. La version espagnole de l'interface s'ajoute aux versions anglaise, française, russe et turque et sera suivie des versions géorgienne, bulgare et ukrainienne.

Lors de la cérémonie, un accord a été signé entre la Cour, le gouvernement espagnol et l'*Universidad Nacional de Educación a Distancia (UNED)* visant à l'augmentation du nombre de traductions de la jurisprudence et des publications de la Cour en espagnol en collaboration avec cette université.

Pour rappel, la base de données HUDOC est de plus en plus utilisée comme un guichet unique pour la publication des traductions de la jurisprudence de la Cour dans d'autres langues que les langues officielles (l'anglais et le français). À ce jour, elle héberge quelque 23 500 traductions de jurisprudence dans 31 langues autres que l'anglais et le français. Environ 1 150 textes sont en espagnol, nombre qui augmentera bientôt grâce à l'accord.

Film on the ECHR: new versions/Film sur la CEDH : nouvelles versions

The film presenting the Court is now also available in Bulgarian, Dutch, Finnish, Greek and Slovak. It explains how the Court works, describes the challenges faced by it and shows the scope of its activity through examples from the case-law.

This film is currently available in 22 languages of the Council of Europe member States. The videos accessible via the Court's Internet site (www.echr.coe.int – The Court) and its YouTube channel (https://www.youtube.com/user/EuropeanCourt).

Le film de présentation de la Cour est désormais disponible en version bulgare, grecque, finnoise, néerlandaise et slovaque. Il explique le fonctionnement de la Cour, rappelle les enjeux auxquels elle doit faire face et démontre l'étendue de son domaine d'activité à travers des exemples d'affaires.

Ce film est dorénavant disponible dans 22 langues officielles des États membres du Conseil de l'Europe. Les vidéos sont accessibles à partir du site internet de la Cour (www.echr.coe.int – La Cour) ou de sa chaîne YouTube (https://www.youtube.com/user/EuropeanCourt).

RECENT PUBLICATIONS / PUBLICATIONS RÉCENTES

Case-Law Guides: new translations/Guides sur la jurisprudence : nouvelles traductions

The Court has recently published on its Internet site (www.echr.coe.int – Case-law) / La Cour vient de publier sur son site internet (www.echr.coe.int – Jurisprudence) :

– Albanian translations of the Guide on Article 7 of the Convention (no punishment without law) and of the Guide on Article 15 of the Convention (derogation in time of emergency);

Udhëzues rreth nenit 7 të Konventës – Nuk ka dënim pa ligj (alb)

Udhëzues rreth nenit 15 të Konventës – Derogimi në rastet e gjendjes së jashtëzakonshme (alb)

– des traductions en albanais du Guide sur l'article 7 de la Convention (pas de peine sans loi) et du Guide sur l'article 15 de la Convention (dérogation en cas d'état d'urgence) ;

-ooOoo-

– Armenian translations of the Guide on Article 5 of the Convention (right to liberty and security) and of the Guide on Article 6 (civil limb) of the Convention (right to a fair trial);

Ուղեցույց 5-րդ հոդվածի վերաբերյալ- ազատության եվ անձնական անձեռնմխելիության իրավունք (arm)

Ուղեցույց Կոնվենցիայի 6-րդ հոդվածի վերաբերյալ. Արդար դատաքննության իրավունք (քաղաքացիաիրավական հայեցակետ) (arm)

– des traductions en arménien du Guide sur l'article 5 de la Convention (droit à la liberté et à la sûreté) et du Guide sur l'article 6 (volet civil) de la Convention (droit à un procès équitable).

-ooOoo-

– Spanish translations of the Guides on the civil limb and on the criminal limb of Article 6 of the Convention (right to a fair trial);

Guía del artículo 6 del Convenio – Derecho a un proceso equitativo (parte civil) (esp)

Guía del artículo 6 del Convenio – Derecho a un proceso equitativo (parte penal) (esp)

– des traductions en espagnol des Guides sur le volet civil et sur le volet pénal de l'article 6 de la Convention (droit à un procès équitable).

-ooOoo-

– a Serbian translation of the Guide on Article 9 of the Convention (freedom of thought, conscience and religion);

Sloboda mišljenja, savesti i veroispovesti član 9 Konvencije (srb)

– une traduction en serbe du Guide sur l'article 9 de la Convention (Droit à la liberté de pensée, de conscience et de religion).