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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

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

European Court of Human Rights

Cour européenne des droits de l'homme

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

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

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

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

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

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- Alleged failure of State to address bullying at school of child with mental disorder: *communicated*
- Manquement allégué de l'État à l'obligation d'agir face aux brimades qu'aurait subies à l'école un enfant atteint de troubles mentaux : *affaire communiquée*

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1) The recording and publication on a website of a video of policy officers unwittingly filmed in a police station constitute personal data processing
2) In order to come under the specific rules on balancing journalistic purposes with the protection of private life, such a video must have the sole object of disclosing information, opinions or ideas to the public

1) L'enregistrement et la publication sur internet d'une vidéo montrant des policiers filmés à leur insu dans un commissariat constituent un traitement de données à caractère personnel
2) Pour bénéficier du régime propre au journalisme dans la mise en balance avec la vie privée, une telle vidéo doit avoir pour finalité exclusive la divulgation au public d'informations, d'opinions ou d'idées

- Possible loss of nationality of a member State and of EU citizenship in the event of a lengthy interruption of the genuine link between the individual and that member State
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- Le transfert vers un autre État membre d'un demandeur d'asile au titre du règlement Dublin III est inhumain et dégradant s'il l'expose à un dénuement matériel extrême

- The lack of subsistence allowances in a member State which had granted subsidiary protection does not in itself demonstrate that the rejection of an asylum application by another member State would expose the person concerned to inhuman or degrading living conditions
- L'absence de prestations de subsistance dans un État membre ayant accordé la protection subsidiaire n'établit pas en soi que le rejet d'une demande d'asile par un autre État membre exposerait l'intéressé à des conditions de vie inhumaines ou dégradantes

- The Algerian *kafala* system does not create a direct parent-child relationship between a minor and his guardian, an EU citizen, but it is an important factor in terms of family reunification
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- In the selection procedure for European Union staff, differences of treatment based on language must be justified by the real needs of the service and be foreseeable through clear criteria
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COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

RECENT PUBLICATIONS/PUBLICATIONS RÉCENTES

ARTICLE 3

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

Presidential clemency only possibility for mitigating life sentences and shortage of tuberculosis medication: *violations*

Clémence présidentielle comme unique possibilité de réduction des peines perpétuelles et pénurie de médicaments contre la tuberculose : *violations*

Petukhov – Ukraine (no. 2/n° 2), 41216/13, Judgment | Arrêt 12.3.2019 [Section IV]

Traduction française du résumé | Printable version

Facts – The applicant had been sentenced to life imprisonment. He complained, *inter alia*, that he had not been provided with adequate medical assistance in detention and that his life sentence was *de jure* and *de facto* irreducible.

Law – Article 3 (*substantive limb*)

(a) *Medical care in detention* – The applicant had suffered an irreversible deterioration in his health. During the period under consideration he had suffered a recurrence of his pulmonary tuberculosis and further medical treatment had been found to be devoid of any prospect of success.

It had not been disputed that the applicant had been regularly examined by various doctors and subjected to various screening and laboratory tests. It could not therefore be said that the respondent State had left him unattended. However, the question remained as to whether the State's response to the applicant's disease had proved to be an effective one. The domestic authorities had acknowledged, on several occasions, that there had been a shortage of anti-tuberculosis medication in the prison. The authorities' inability to assure a regular, uninterrupted supply of essential anti-tuberculosis drugs to patients was a key factor in the failure of tuberculosis treatment.

The Court had previously noted evidence of poor medical assistance and protection against tuberculosis in Ukrainian detention facilities. Ukraine was among the countries reporting the highest rate of failure in tuberculosis treatment. Drug-resistant tuberculosis had continued to spread and the reasons for that included continued shortages of first-line drugs and lack of access to second-line full treatment schemes, especially in prison settings. Further, there was an absence of any legal framework for ensuring palliative care in prisons and no particular medical arrangements had been made for the applicant in that regard.

Conclusion: violation (unanimously).

(b) *Irreducible life sentence* – Life prisoners in Ukraine could expect to regain their liberty in two cases: firstly, if they had a serious illness preventing their further imprisonment, or, secondly, if they were granted presidential clemency.

The commutation of life imprisonment because of terminal illness, which meant that a prisoner was allowed to die at home or in a hospice rather than behind prison walls, could not be considered as a "prospect of release", as the notion was understood by the Court. Accordingly, the regulation and practice of presidential clemency, being the only possibility for mitigating life sentences in Ukraine, called for stricter scrutiny.

The Clemency Procedure Regulations provided guidance as to the criteria and conditions for review of a life sentence and could be construed as referring to legitimate penological grounds for the continuing incarceration of prisoners. It was noteworthy, however, that those considerations were applicable in the context of a broader restriction. Namely, that "persons convicted for serious or particularly serious crimes, or having two or more criminal records in respect of the commission of premeditated crimes ... may be granted clemency in exceptional cases and subject to extraordinary circumstances". All life prisoners clearly fell within that category. It was not known what was meant by "exceptional cases" or "extraordinary circumstances". Prisoners who had received a whole-life sentence did not therefore know from the outset what they might have to do in order to be considered for release and under what conditions.

There was a lack of sufficient clarity and certainty in the applicable criteria and conditions for a life-sentence review under the presidential clemency procedure. The procedure did not require reasons to be given in decisions regarding requests for clemency and no activity reports had been published detailing the examination of requests for clemency. The absence of an obligation to give reasons was further aggravated by the lack of any judicial review of those decisions. In such circumstances, the exercise by life prisoners of their right to a review of their life sentence by way of presidential clemency could not be regarded as being surrounded by sufficient procedural guarantees.

European penal policy placed emphasis on the rehabilitative aim of imprisonment. Though States were not responsible for achieving the rehabilitation of life prisoners, they nevertheless had a duty to make it possible for such prisoners to rehabili-

tate themselves. The obligation to offer a possibility of rehabilitation was to be seen as an obligation of means, not one of result. However, it entailed a positive obligation to secure prison regimes to life prisoners which were compatible with the aim of rehabilitation and enabled such prisoners to make progress towards their rehabilitation. Life prisoners in Ukraine were segregated from other prisoners and spent up to twenty-three hours per day in their cells, which were usually double or triple occupancy, with little in terms of organised activities and association. The existing regime for life prisoners in Ukraine was incompatible with the aim of rehabilitation.

Conclusion: violation (unanimously).

Article 46: The applicant's case, in so far as it concerned the irreducibility of a life sentence, disclosed a systemic problem calling for the implementation of measures of a general character. There were already over sixty similar applications pending before the Court and many more could follow.

Contracting States enjoyed a wide margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. The mere fact that a life sentence might eventually be served in full did not make it contrary to Article 3. Accordingly, review of whole-life sentences did not necessarily need to lead to the release of the prisoner in question. For the proper execution of the judgment, the respondent State would need to put in place a reform of the system of review of whole-life sentences. The mechanism of such a review had to guarantee the examination in each case of whether continued detention was justified on legitimate penological grounds and had to enable whole-life prisoners to foresee, with some degree of precision, what they had to do to be considered for release and under what conditions, in accordance with the standards developed in the Court's case-law.

Article 41: EUR 750 in respect of pecuniary damage; EUR 10,000 in respect of non-pecuniary damage sustained on account of the lack of adequate medical care; finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage sustained by the applicant in relation to his complaint concerning his irreducible life sentence.

(See also *Blokhin v. Russia* [GC], 47152/06, 23 March 2016, Information Note 194; *Hutchinson v. the United Kingdom* [GC], 57592/08, 17 January 2017, Information Note 203; *Vinter and Others v. the United Kingdom* [GC], 66069/09 et al., 9 July 2013, Information Note 165; *Matiošaitis and Others v. Lithuania*, 22662/13 et al., 23 May 2017, Information Note 207; and *Murray v. the Netherlands* [GC], 10511/10, 26 April 2016, Information Note 195)

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Alleged failure of State to address bullying at school of child with mental disorder: *communicated*

Manquement allégué de l'État à l'obligation d'agir face aux brimades qu'aurait subies à l'école un enfant atteint de troubles mentaux : *affaire communiquée*

M.C. and Others/et autres – Romania/Roumanie, 44654/18, Communication [Section IV]

Traduction française du résumé | Printable version

The application concerns the authorities' response to allegations that a child suffering from a mental disorder was ill-treated and bullied at school by teachers and other pupils. The child's parents also complain that they were blamed by the courts for having caused their son's problems and they were pressured to remove him from the State school.

Communicated under Articles 3, 6, 8 and 14 of the Convention and Article 2 of Protocol No. 1.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention/Arrestation ou détention régulières

Alteration of anticipated release date by procedure found to be in breach of Article 6: *no violation*

Modification d'une date de libération anticipée par une procédure déclarée contraire à l'article 6 : *non-violation*

Kereselidze – Georgia/Géorgie, 39718/09, Judgment | Arrêt 28.3.2019 [Section V]

(See Article 6 § 1 (criminal) below/Voir l'article 6 § 1 (pénal) ci-dessous, page 12)

ARTICLE 6

Article 6 § 1 (civil) (administrative/ administratif)

Access to a court/Accès à un tribunal

Retroactive reimbursement denied to taxpayers who had not challenged a social contribution before it was declared unconstitutional: *inadmissible*

Remboursement rétroactif refusé aux contribuables n'ayant pas contesté une

cotisation sociale avant qu'elle soit déclarée inconstitutionnelle : *irrecevable*

Frantzeskaki and Others/et autres – Greece/Grèce, 57275/17 et al., Decision | Décision 12.2.2019 [Section I]

English translation of the summary | Version imprimable

En fait – En 2010 fut instituée une « cotisation de solidarité des retraités », retenue chaque mois sur les pensions des retraités du secteur public, au profit d'un « fonds d'assurance de solidarité entre les générations ».

En 2017, saisie d'un recours concernant cette cotisation, la Cour des comptes rendit un arrêt pilote la déclarant inconstitutionnelle, avec effet immédiat dans toutes les instances déjà en cours, mais excluant en revanche toute action nouvelle en vue d'un remboursement rétroactif des retenues sur leurs pensions pour ceux des retraités qui n'avaient introduit aucun recours juridictionnel ou administratif à la date de la publication de l'arrêt.

Les présentes requêtes ont été introduites par plusieurs centaines de retraités ainsi exclus de tout remboursement des retenues effectuées sur leurs pensions entre 2010 et 2017.

En droit – Article 6, pris isolément ou en combinaison avec l'article 14 : La limitation du droit d'accès des requérants à un tribunal peut passer pour poursuivre un but légitime : éviter une surcharge incalculable du budget et la mise en péril de la possibilité pour l'État de continuer à payer les pensions de retraite dans une période particulièrement défavorable pour les finances publiques.

Pour ce qui est de la proportionnalité de cette mesure, la possibilité pour une juridiction suprême de moduler dans le temps les effets d'une déclaration d'inconstitutionnalité, lorsque, dans des circonstances exceptionnelles, des considérations tenant à l'intérêt général l'exigent, ne saurait être considérée comme une démarche arbitraire. Il peut, en effet, s'avérer nécessaire d'éviter les conséquences manifestement excessives que pourrait entraîner une telle déclaration d'inconstitutionnalité dans un domaine si sensible que la politique économique d'un pays en période de grave crise économique.

D'autre part, les requérants peuvent toujours agir en justice pour obtenir le remboursement des retenues effectuées sur leurs pensions postérieurement à la publication de l'arrêt de la Cour des comptes.

Quant à la discrimination alléguée, les requérants ne se trouvent pas dans une situation comparable avec celle des retraités qui avaient déjà saisi la Cour des comptes avant la publication de l'arrêt : ces derniers avaient pris le parti hardi de contester par la voie judiciaire la constitutionnalité des dispositions litigieuses et avaient encouru des frais de justice à cet égard. En tout état de cause, la mesure litigieuse avait une justification objective et raisonnable.

En conclusion, l'interprétation du droit interne par la Cour des comptes n'apparaît pas arbitraire ou manifestement déraisonnable ; il n'y a pas eu une entrave disproportionnée ayant porté atteinte à la substance même du droit d'accès des requérants à un tribunal ou ayant outrepassé la marge nationale d'appréciation.

Conclusion : irrecevable (défaut manifeste de fondement).

(Voir aussi *Walden c. Liechtenstein* (déc.), 33916/96, 16 mars 2000, Note d'information 16 ; *Henryk Urban et Ryszard Urban c. Pologne*, 23614/08, 30 novembre 2010, Note d'information 135 ; et *National & Provincial Building Society, Leeds Permanent Building Society et Yorkshire Building Society c. Royaume-Uni*, 21319/93 et al., 23 octobre 1997)

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès equitable

Rectification of starting date of cumulative prison sentence without an oral hearing: *violation*

Correction, sans audience, de la date de commencement d'une peine d'emprisonnement globale : *violation*

Kereselidze – Georgia/Géorgie, 39718/09, Judgment | Arrêt 28.3.2019 [Section V]

Traduction française du résumé | Printable version

Facts – The applicant had been convicted of murder and sentenced to twenty years' imprisonment ("the first conviction"). He was later convicted of attempting to escape and sentenced to four years and six months' imprisonment ("the second conviction"). The first-instance court indicated that the cumulative sentence was to run from the date of the commission of the second offence.

Following that decision, the provision of the Criminal Code regulating the imposition of cumulative sentences was amended and provided that a final sentence imposed should be calculated from the date of the imposition of the later sentence.

In subsequent proceedings the Supreme Court reduced the applicant's sentence for the first conviction to fifteen years' imprisonment and held that the cumulative sentence would start running from the date of commission of the second offence.

Accordingly the applicant's sentence would have expired on 29 September 2010.

The Court of Appeal upheld the applicant's second conviction and ruled that he had to serve a cumulative sentence which had started to run on the date of the commission of the second offence. While the applicant's appeal against that judgment on points of law was pending before the Supreme Court, the Court of Appeal adopted, by means of a written procedure and without the parties' involvement, a decision rectifying an error in its judgment. That decision corrected the starting date of the cumulative sentence to the later date of the imposition of the sentence.

The Supreme Court granted the applicant's appeal on points of law regarding his second conviction. It noted that the appellate court had failed to take account of the reduction of the applicant's first sentence. It took note of the rectified appellate decision and stated that the re-calculated cumulative sentence had started to run on the date of the imposition of the sentence for the second offence. That sentence had been due to expire on 12 April 2013 but the applicant was released earlier, in January 2013.

The applicant's request for the rectification of the decision of the Supreme Court in respect of the starting date of his cumulative sentence was rejected.

Law – Article 6 § 1

(a) *Applicability* – The rectification of the applicant's conviction by the appellate court, in respect of the starting date of his cumulative sentence, had had an impact on his anticipated release date. The question of whether the error made in the earlier judgments and decisions had been sufficiently obvious and had been capable of being remedied by means of the rectification procedure appeared, at the very least, to have been open to interpretation. Therefore, the rectification procedure, as applied in the applicant's case, had been of such a nature as to affect the determination of the applicant's sentence as part of the criminal proceedings pending against him. It followed that Article 6 § 1 was applicable.

(b) *Merits* – The applicant's arguments regarding the particular circumstances of his case – such as the existence of an earlier decision of the Supreme Court, concerning the starting date of his cumulative sentence (a decision which had never been explicitly set aside), whether the appellate court had exceeded the scope of Article 615 of the Code of Criminal Procedure (which regulated the scope of rectifications), and whether the rectified appellate decision had amounted to a worsening of his legal situation in breach of that Code – rendered his case against the rectification at least arguable and called for it to have been considered by the domestic courts as part of adversarial proceedings.

Against that background, the Court noted that the rectified appellate decision had not involved the applicant and had been served on him only after the Supreme Court had already reached a final decision. It was true that the Supreme Court had been aware of the rectified appellate decision and appeared to have endorsed it when expressly taking note of the corrected starting date of the applicant's cumulative sentence. However, at the time that the rectified appellate decision had been delivered by the appellate court, the applicant's appeal on points of law had already been sent to the Supreme Court. Furthermore, considering that the Supreme Court had decided the matter without holding an oral hearing, the applicant had effectively been precluded from becoming aware of the rectified appellate decision and from presenting his arguments, as part of his appeal or separately, regarding the revised starting date of his cumulative sentence and its compliance with domestic law.

Whether the matter was considered from the perspective of the right of access to a court or the right to an oral hearing, the crux of the matter was that the manner in which the rectification procedure had been implemented in respect of the applicant, depriving him of the opportunity to present his arguments regarding the alteration of the starting date of his cumulative sentence, either orally or in writing, had rendered the criminal proceedings against him unfair.

Conclusion: violation (unanimously).

Article 5: The applicant had been deprived of his liberty after conviction by a competent court. The question was whether the earlier alteration of the starting date of the applicant's cumulative sentence by an appellate court, by means of a procedure that the Court had already determined amounted to a breach of Article 6, was in breach of the "lawfulness" requirement under Article 5 § 1.

What was in issue was whether the applicant's detention, which, in effect, had been extended owing to the alteration of the starting date of the applicant's cumulative sentence, had been "lawful". The question was whether the error made by the domestic courts regarding the starting date of the cumulative sentence had been obvious and the rectification therefore both expected and permitted by law and practice in force at the material time, or whether the rectification had gone beyond the confines of the law in that respect.

On the one hand, the Criminal Code, as it stood at the time that the applicant had committed the second offence, had not explicitly specified the starting date of a cumulative sentence. On the other hand, the subsequent rectification appeared to have been based, albeit implicitly, on the Criminal Code as amended, which clearly set the date of the imposition of the later sentence as the starting date for any cumulative sentence. In a decision in a different case the Supreme Court had clarified that the relevant provision could have retroactive effect. That decision had predated both the rectification decision of the appellate court and the final decision of the Supreme Court in the applicant's case. Therefore, while the question regarding the foreseeability of the law in respect of the starting date of a cumulative sentence had not been addressed by the domestic courts, the rectification appeared to have followed a clarification offered by the Supreme Court in another case. In such circumstances, it was not for the Court to speculate on the legality of the applicant's detention beyond 29 September 2010, which had been ordered by the Supreme Court in accordance with the law and practice in force at the material time. Therefore, the applicant's detention was not *ex facie* in breach of the domestic law.

The Court had already rejected the argument that every Article 6 violation resulted in a violation of Article 5 § 1. While the Court had found a violation of Article 6, it did not consider that the violation was of such a nature as to have destroyed the very essence of the right guaranteed by that Article. Accordingly, the violation of Article 6 did not amount to a flagrant denial of justice.

It followed that the applicant's detention had been justified under Article 5 § 1 (a) of the Convention.

Conclusion: no violation (unanimously).

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

Tribunal established by law/Tribunal établi par la loi

Appointment of judges in flagrant breach of domestic law, as a result of undue discretion exerted by the executive: *violation*

Désignation de juges en violation flagrante du droit interne du fait de l'exercice indu par l'exécutif de son pouvoir discrétionnaire : *violation*

Guðmundur Andri Ástráðsson – Iceland/Islande, 26374/18, Judgment | Arrêt 12.3.2019 [Section II]

Traduction française du résumé | Printable version

Facts – The applicant's criminal appeal had been rejected by the Court of Appeal, a new judicial institution which had become operational in 2018. He complained to the Supreme Court that one of the judges on the bench had been appointed to the Court of Appeal in breach of the appointment procedures specified in the applicable legislation. The Supreme Court acknowledged that the judge's appointment had been irregular, but held that such irregularity could not be considered to have nullified the appointment. The Supreme Court therefore found that the applicant had received a fair trial.

Law – Article 6 § 1: Having regard to the general principle that it was for the national courts to interpret in the first place the provisions of domestic law, the Court could not question their interpretation unless there had been a flagrant violation of domestic law. The same test of a flagrant breach of domestic law should apply where, as in the applicant's case, the breach had been attributable to a branch of Government and had been acknowledged by the domestic courts. In that regard, the Court would consider whether the national courts had taken account of the general principles in the Court's case-law in their examination of a claim that the appointment of a judge had not been in accordance with the applicable domestic law, and in particular whether the courts had taken sufficient account of the flagrant nature of the breach in determining whether the tribunal in question had been "established by law".

The concept of a "flagrant" breach of domestic law related to the nature and gravity of the alleged breach. In its examination the Court would take into account whether the facts before it demonstrated that a breach of the domestic rules on the appointment of judges had been deliberate or, at a minimum, had constituted a manifest disregard of the applicable national law.

The mere fact that a judge, whose position is not established by law within the meaning of Article 6 § 1, determines a criminal charge, sufficed for a finding of a violation of that provision in conformity with the fundamental principle of the rule of law. No separate examination was required of whether the breach of the principle that a tribunal be established by law rendered a trial unfair.

The Supreme Court had found that both the Minister of Justice and Parliament had violated the applicable laws in the appointment of judges to the Court of Appeal. It remained for the Court to determine whether those established violations of domestic law had been, viewed as a whole, "flagrant" and therefore had had the result that the impugned judge's participation in the panel which

had determined the applicant's criminal charge had constituted a violation of Article 6 § 1, her appointment thus not being "established by law" under the Convention.

The domestic legal framework had been set up explicitly to limit the discretion of the executive in the appointment of judges by requiring that the competences of the candidates to the fifteen vacant judicial posts in the newly established Court of Appeal be assessed by a specially constituted Evaluation Committee composed of experts nominated by the Supreme Court, the Judicial Council, the Bar Association and Parliament. The statutory scheme, requiring the active participation of Parliament in voting on the candidates to the new Court of Appeal, a transformative change in the Icelandic judicial system, had been meant to serve the important public interest of safeguarding judicial independence *vis-à-vis* the executive branch. That legislative framework had been intended to minimise the risk of party-political interests unduly influencing the process by which the qualifications of each candidate to the newly established Court of Appeal were to be evaluated and ultimately confirmed by the legislative branch, the Parliament.

The Minister of Justice had removed from the list of fifteen candidates, assessed as the most qualified by the Committee, four candidates and had replaced them with four other candidates who had been ranked lower. Although the Minister had been statutorily authorised under domestic law to propose different candidates than those proposed by the Committee, she had proceeded in that manner without an independent examination of the merits of the candidates in question and without any further collection of evidence or other materials to substantiate her conclusions. She had failed to engage in a detailed comparison of the competences of the four candidates, ranked lower by the Committee, with the fifteen candidates considered the most qualified, as had been required by general principles of administrative law and the general principle of domestic law that, in the appointment of persons to office, only the most qualified should be selected. Those violations of national law lay at the core of the process of selecting the candidates for the vacant posts in the new Court of Appeal and thus constituted a defect of a fundamental nature in the overall process of appointment of the four judges.

The Supreme Court had considered that the Minister had acted "in complete disregard" of the danger to the reputational interests of the candidates who had been replaced and had served the interests of the other four she had favoured in the process. The breaches of national law by the Minister seemed not only to have constituted, objectively, a fundamental defect in the process, viewed as a whole, but also to have demonstrated her manifest disregard for the applicable rules in force at the material time.

The failure of Parliament to adhere to the national rule of separate voting on each candidate had also amounted to a serious defect in the appointment procedure, having an impact on the integrity of the process as a whole. Only by the Minister fulfilling her statutory duties could Parliament have sufficiently served its role in the process and taken a position on the Minister's assessment which had departed from the opinion of the Committee as regards the four candidates in question.

The process by which the impugned judge had been appointed had amounted to a flagrant breach of the applicable rules at the material time. The process was one in which the executive branch had exerted undue discretion, not envisaged by the legislation in force, on the choice of four judges to the new Court of Appeal, coupled with Parliament's failure to adhere to the legislative scheme previously enacted to secure an adequate balance between the executive and legislative branches in the appointment process. The Minister of Justice had acted in manifest disregard of the applicable rules. The process had therefore been to the detriment of the confidence that the judiciary in a democratic society had to inspire in the public and contravened the very essence of the principle that a tribunal had to be established by law, one of the fundamental principles of the rule of law.

Conclusion: violation (five votes to two).

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

(See also *Lavents v. Latvia*, 58442/00, 28 November 2002, Information Note 99; and *DMD Group, a.s., v. Slovakia*, 19334/03, 5 October 2010, Information Note 134)

Article 6 § 2

Presumption of innocence/ Présomption d'innocence

Finding of guilt for repeat offence while appeal against original offence still pending: *violation*

Verdict de culpabilité pour une récidive alors que le recours contre la décision relative à l'infraction initiale était toujours pendant : *violation*

Kangers – Latvia/Lettonie, 35726/10, Judgment | Arrêt 14.3.2019 [Section V]

Traduction française du résumé | Printable version

Facts – In February 2009 the applicant was handed a two-year driving ban for having committed the offence of driving under the influence of alcohol. In July 2009 the police drew up an administrative offence report stating that the applicant had driven a car while disqualified. The applicant appealed.

Before the appeal was decided, the police drew up,in September 2009, a further administrative offence report stating that the applicant had driven a car while disqualified and that the offence had been committed repeatedly within a year. The applicant's appeal was dismissed.

Law – Article 6 § 2: In the third set of administrative offence proceedings the domestic courts had established that the applicant had committed the offence of driving while disqualified repeatedly within a year. In doing so the courts had expressly referred to the administrative offence report of July 2009 in relation to which the appeal had still been pending. The conclusion that that initial offence had constituted the basis for repetitiveness unavoidably implied that the applicant had also committed that initial offence.

Presumptions of fact or of law operated in every legal system and the Convention did not prohibit them in principle. However States were required to confine them within reasonable limits which took into account the importance of what was at stake and maintained the rights of the defence. In cases where the Court had analysed presumptions of fact or of law in the context of criminal proceedings, it had had particular regard to the procedural guarantees and the means of defence available to the accused for rebutting such presumptions. Where the procedural guarantees available for rebutting the presumptions were considered to be lacking, the presumption of innocence had been found to be violated.

The applicant had been found guilty of a repeat offence rather than of simply driving while disqualified and as such, he had not only been given a higher fine but also a custodial sentence of five days which he had been required to serve before the proceedings concerning the initial offence had been completed. The presumption in the applicant's case concerned the fact that he had committed an offence that was the subject matter of a different set of proceedings. The domestic courts had considered themselves to be legally bound by the administrative offence report concerning the initial offence, regardless of the fact that it was being appealed. Accordingly, the applicant had been left without any means of defence with respect to that presumption.

Conclusion: violation (six votes to one).

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

Article 7

Nullum crimen sine lege

Conviction for 1950s genocide of Lithuanian partisans following Supreme Court clarification of domestic case-law: *no violation*

Condamnation pour génocide de partisans lituaniens commis dans les années 1950, après clarification par la Cour suprême de la jurisprudence interne : *non-violation*

Drėlingas – Lithuania/Lituanie, 28859/16, Judgment | Arrêt 12.3.2019 [Section IV]

Traduction française du résumé | Printable version

Facts – In its October 2015 judgment in the case of *Vasiliauskas v. Lithuania* the Grand Chamber of the Court held that the applicant's conviction for the crime of genocide could not be regarded as consistent with the essence of that offence as defined in international law at the material time and had not therefore been reasonably foreseeable by him. As such, there had been a violation of Article 7. The applicant in that case had been convicted under Article 99 of the new Lithuanian Criminal Code of the genocide of a political group in 1953 and had been sentenced to six years' imprisonment. Unlike the Convention on the Prevention and Punishment of the Crime of Genocide 1948, Article 99 included political groups among the range of protected groups. It was clear that international law in 1953 did not include "political groups" within the definition of genocide. The fact that certain States had later decided to criminalise genocide of a political group in their domestic laws did not alter the reality that the text of the 1948 Convention did not.

Meanwhile, in March 2015 the applicant in the current case had been convicted for being an accessory to genocide under Article 99 for having taken part in an operation during which two Lithuanian partisans had been captured, one of whom had been tortured and executed. The prosecutor noted that both partisans had been members of the "Lithuanian armed resistance to the Soviet occupation" and members of a "separate national-ethnic-political group". The applicant's appeal was dismissed by the Court of Appeal. Subsequently, the Supreme Court considered the position under Lithuanian law in the light of the *Vasiliauskas* judgment and on 12 April 2016 upheld the lower courts' decisions.

The applicant complained that his conviction for genocide had been in breach of Article 7, in particular because the national courts' broad interpre-

tation of that crime had no basis in international law.

Law – Article 7: The Government's submissions were essentially confined to the issue of whether, in view of the Supreme Court's ruling of 12 April 2016, the applicant's situation in relation to his conviction for genocide had been in keeping with the requirements of Article 7 as those had been laid down in the *Vasiliauskas* judgment. In that connection, the Court had to first examine whether the lack of clarity in the domestic case-law had been dispelled, and if so whether the relevant requirements had been met in the applicant's case.

In its reasoning in the ruling of 12 April 2016, the Supreme Court had analysed the content of the Court's judgment of October 2015. It had inferred from its reading of the latter judgment that the Court had found a violation of Article 7 on account of the fact that the Lithuanian courts had failed to adequately substantiate their conclusions that the Lithuanian partisans had constituted a significant part of a national group, that was, a group protected under the Genocide Convention. Such understanding of the Court's judgment by the Supreme Court had also been confirmed by its subsequent ruling in the reopened *Vasiliauskas* case, where it had pointed out that during the initial proceedings against him the domestic courts had not provided sufficient argumentation to justify the partisans' specific "mantle" with regard to the national group.

In the light of the principles governing the execution of judgments, it was unnecessary for the Court to express a position on the validity of that interpretation by the Supreme Court. It was sufficient for the Court to satisfy itself that the judgment of 12 April 2016 had not distorted or misrepresented the judgment delivered by the Court.

In the applicant's case the Supreme Court had provided an extensive explanation, elaborating upon the elements constituting the "nation" as well as elements which had led to the conclusion that the Lithuanian partisans had constituted "a significant part of the Lithuanian nation as a national and ethnic group". Among other things, the Supreme Court had noted that the Soviet repression had been targeted against the most active and prominent part of the Lithuanian nation, defined by the criteria of nationality and ethnicity. Those repressive acts had had the clear goal of creating an impact on the demographic situation of the Lithuanian nation. In turn, the members of the resistance – Lithuanian partisans, their liaison persons and their supporters – had represented a significant part of the Lithuanian population, as a national and ethnic group, because the partisans had played an essential role when protecting the national identity, culture and national self-awareness of the Lithuanian nation. The Supreme Court had therefore held that such characteristics led to the conclusion that the partisans as a group had been a significant part of a protected national and ethnic group, and that their extermination had therefore constituted genocide, both under Article 99 of the Criminal Code and under the Genocide Convention. The Supreme Court had therefore addressed the weakness identified by the Court in *Vasiliauskas*.

Having regard to the principle of subsidiarity and to the wording of the Court's 2015 judgment, the Supreme Court's finding that the applicant had been guilty of genocide, the partisans being significant for the survival of the entire national group (the Lithuanian nation) as defined by ethnic features, had provided plentiful indication of the grounds on which it was based. Those grounds did not distort the findings of the Court's judgment. On the contrary, that was a loyal interpretation of the Court's judgment, taken in good faith in order to comply with Lithuania's international obligations. Thus, the Supreme Court's interpretation of the Court's 2015 judgment was not, seen as a whole, the result of any manifest factual or legal error leading to the applicant's unforeseeable conviction for genocide.

In sum, the Supreme Court had drawn the necessary conclusions from the *Vasiliauskas* judgment and, by clarifying the domestic case-law, had addressed the cause of the Convention violation. The statutory obligation on the domestic courts to take into account the Supreme Court's case-law provided an important safeguard for the future. The applicant's conviction for genocide could be regarded as foreseeable.

Conclusion: no violation (five votes to two).

(See *Vasiliauskas v. Lithuania* [GC], 35343/05, 20 October 2015, Information Note 189; see also *Hutchinson v. the United Kingdom* [GC], 57592/08, 17 January 2017, Information Note 203)

ARTICLE 8

Respect for private life/Respect de la vie privée

Internet news portal found not liable for sexist remarks posted on its site by anonymous third parties: *no violation*

Portail internet d'information jugé non responsable de commentaires sexistes mis en ligne sur son site par des tiers anonymes : *non-violation*

Høiness – Norway/Norvège, 43624/14, Judgment | Arrêt 19.3.2019 [Section II]

Traduction française du résumé | Printable version

Facts – The applicant was a well-known lawyer in Norway. Following newspaper articles regarding her relationship with an elderly widow from whom she would inherit, an online news portal opened a thread discussion on the subject. The forum could be accessed via the online newspaper. There followed, *inter alia*, vulgar, sexist remarks about the applicant. Comments were deleted after notification, one on the moderators' own initiative. Following unsuccessful domestic proceedings, the applicant complained to the Court that there had been a breach to her right to respect for her private life.

Law – Article 8: The question was whether the State had struck a fair balance between the applicant's right to respect for her private life under Article 8 and the online news agency and forum host's right to freedom of expression guaranteed by Article 10. It was not necessary to examine in depth the nature of the impugned comments, as they in any event did not amount to hate speech or incitement to violence. There was no reason to contest the applicant's allegation that she would have faced considerable obstacles in attempting to pursue claims against the anonymous individual or individuals who had written the comments.

As to the context in which the comments had been made, the Court noted that the news portal was large and commercially run and the debate forums were popular. It did not appear, however, from the judgments of the domestic courts that the debate forums were particularly integrated into the presentation of news and thus could be taken to be a continuation of the editorial articles. With respect to the measures adopted by the news portal, it appeared that there had been an established system of moderators who monitored content. Readers could click on "warning" buttons on the website in order to react to comments. It appeared that a response could also be given to warnings by other means, such as email.

Two of the impugned comments had not been picked up by the moderators, but thirteen minutes after having notified them of concerns, the applicant's counsel received an email stating that the comments had been deleted. A further comment had been deleted on the moderators' own initiative. Upon an overall examination and assessment of the measures that had been put in place in order to monitor the forum comments and the specific responses to the applicant's notifications, the domestic court had found that the news portal company and its editor had acted appropriately.

The applicant's case had been considered on its merits by two judicial instances at the domestic level before the Supreme Court had refused leave to appeal. The domestic courts had reviewed the relevant aspects of the case and acted within their margin of appreciation when seeking to establish a balance between the applicant's rights and those of the news portal and host of the debate forums.

The Court noted the considerable amount of litigation costs imposed on the applicant. However, taking account of the nature of the claim lodged before the national courts and the subject matter, it did not consider that it could call into question the domestic courts' assessment as to the imposition of costs.

Conclusion: no violation (unanimously).

(See also *Delfi AS v. Estonia* [GC], 64569/09, 16 June 2015, Information Note 186; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, 22947/13, 2 February 2016, Information Note 193; and *Pihl v. Sweden* (dec.), 74742/14, 7 February 2017, Information Note 205)

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

Disclosure of the private email correspondence of two civil servants following management checks concerning the applicant's correspondent: *communicated*

Divulgation de la correspondance électronique privée de deux fonctionnaires après un contrôle hiérarchique visant l'interlocuteur du requérant : *affaire communiquée*

Kılıçoğlu – Turkey/Turquie, 38861/09, Communication [Section II]

Traduction française du résumé | Printable version

À l'époque des faits, le requérant était fonctionnaire. Suite au contrôle de l'un de ses collègues par sa hiérarchie, des messages électroniques privés qu'il avait échangés avec ce dernier furent divulgués.

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

Respect for family life/Respect de la vie familiale

Applicant excluded from his granddaughter's life after her adoption: *violation*

Requérant exclu de la vie de sa petite-fille après l'adoption de celle-ci : *violation*

Bogonosovy – Russia/Russie, 38201/16, Judgment | Arrêt 5.3.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The applicant complained of a violation of his right to maintain family ties with his granddaughter following her adoption.

Law – Article 8: It had not been disputed that there was family life between the applicant and his granddaughter. She had lived with him for five years and he had been her guardian.

The applicant had not made an application for post-adoption contact with his granddaughter before the first instance court examining the adoption case. That issue had not therefore been examined and no reference to post-adoption contact between them had been made in the judgment. The applicant had been aware of the adoption proceedings, having consented to the adoption in writing and having expressed the wish for the case to be heard in his absence. Nothing therefore suggested that he had been prevented from or unable to apply to the court for continued contact with his granddaughter after her adoption or that the adoption judgment had been unlawful.

Subsequently, when the consequences of the adoption proceedings entailing the permanent severance of family ties between the applicant and his granddaughter became clear to him, he had pursued two sets of proceedings seeking to restore his contact with her. In the first of those proceedings, he had succeeded in having restored the procedural time-limit for lodging his appeal against the adoption judgment and challenged that judgment on account of, in particular, the loss of contact with his granddaughter following her adoption. The City Court had, however, dismissed his appeal without discussing the question of whether it was appropriate for him to have contact with his granddaughter, at the same time stating that it remained open to him to apply to a court for the determination of his contact with his granddaughter in accordance with Article 67 of the Family Code.

However, when the applicant had brought proceedings under Article 67, the courts had discontinued the proceedings, holding that, since the adoption judgment had not contained an indication as to the continuation of family ties between the applicant and his granddaughter following the adoption, the former did not have a right to apply for contact.

A question therefore arose as to whether the domestic law governing the issue of post-adoption contact between the adopted child and his or her relatives was clear enough and foreseeable in its application in so far as it did not expressly provide that the rights of relatives of the adopted child would be transferred to the adoptive parents or otherwise ceased on adoption, unless an application by relatives had been made in the course of the adoption proceedings for continued relations, including contact, and specific provision made for them to this effect in the adoption judgment.

Presuming, however, that that was implied in the relevant provisions of the domestic law, once the applicant's request for restoration of the procedural time-limit for lodging his appeal against the adoption judgment had been granted, it was then for the City Court dealing with his appeal to examine the issue of whether he should have post-adoption contact with his granddaughter, in particular by deciding whether that was in the child's interests, and if so, to include the relevant provision in the operative part of the adoption judgment. Instead the City Court had upheld the adoption judgment and had led the applicant on to believe that it was open to him to have the issue of his post-adoption contact with his granddaughter settled after the termination of the adoption proceedings pursuant to the procedure provided by Article 67 of the Family Code. In reality, no such remedy was available to him because, as domestic courts had found in those proceedings, in the absence of a specific provision as to continued post-contact in the adoption judgment, no application for contact could be made.

As a result of the way the domestic courts had interpreted and applied the relevant provisions of domestic law in the re-opened adoption proceedings, the applicant had been entirely and automatically excluded from his granddaughter's life after her adoption.

Conclusion: violation (unanimously).

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

ARTICLE 9

Freedom of religion/Liberté de religion

Criminal conviction for subjecting children to purportedly excessive religious practices: *communicated*

Condamnation pénale pour avoir soumis des enfants à des pratiques religieuses prétendument excessives : *affaire communiquée*

Cupiał – Poland/Pologne, 67414/11, Communication [Section I]

Traduction française du résumé | Printable version

The applicant was charged with committing acts of domestic violence, namely psychological abuse of his three children. During the criminal proceedings the courts established that the applicant, a person of deep Catholic convictions, had subjected his children to allegedly excessive religious practices. The courts of two instances concluded that his actions, including, *inter alia*, waking his children up at night in order to conduct prayers, forcing them to confess their sins publicly and requiring them to take their meals at set times, had amounted to psychological abuse and had sentenced him to one year of imprisonment stayed for three years.

The applicant complains that he was convicted based on his religious beliefs and that he had been prevented from raising his children in compliance with those beliefs.

Communicated under Articles 6, 8, 9 and 14 of the Convention and Article 2 of Protocol No. 1.

ARTICLE 10

Freedom of expression/Liberté d'expression

Prolonging of numerous sets of criminal proceedings against a newspaper proprietor, subsequently acquitted, for publishing statements by terrorist organisations: *violation*

Maintien prolongé de multiples poursuites pénales contre le propriétaire d'un quotidien, acquitté par la suite, pour avoir publié des déclarations d'organisations terroristes : *violation*

Ali Gürbüz – Turkey/Turquie, 52497/08 et al., Judgment | Arrêt 12.3.2019 [Section II]

English translation of the summary | Version imprimable

En fait – Sept poursuites pénales ont été engagées contre le requérant entre juin 2004 et avril 2006, en raison de la publication d'articles contenant les déclarations des responsables d'organisations illégales dans le quotidien dont il était le propriétaire. Dans le cadre de ces procédures ayant duré jusqu'à sept ans, le requérant a été condamné à des amendes judiciaires, puis il a été acquitté en raison de l'abolition de la responsabilité pénale des propriétaires des organes de presse dans ces publications.

En droit – Article 10 : L'application automatique de la loi qui réprimait la publication de toute déclaration émanant d'organisations terroristes, indépendamment de son contenu et du contexte dans lequel elle s'inscrivait, avait engendré sur deux ans sept procédures pénales contre le requérant pour des faits similaires. Il se pose en l'espèce la question de savoir si les procédures litigieuses, en l'absence d'autres mesures répressives adoptées contre le requérant dans leur cadre, peuvent constituer en elles-mêmes une ingérence dans le droit du requérant à la liberté d'expression. Ces procédures, de par leur nombre et leur durée – jusqu'à sept ans–, étaient de nature à avoir un effet dissuasif sur la liberté d'expression et le débat public en intimidant le requérant et en le décourageant à publier des articles sur des questions d'intérêt général. Les poursuites pénales étaient donc en elles-mêmes des contraintes réelles et effectives. L'acquittement du requérant a seulement mis fin à l'existence de certains risques, mais n'a rien enlevé au fait que ceux-ci ont constitué une pression sur l'intéressé pendant un certain temps et l'ont conduit, en tant que professionnel de la presse, à une autocensure. Les poursuites constituent donc une « ingérence » dans l'exercice par celui-ci de son droit à la liberté d'expression.

L'ingérence en question était prévue par la loi et poursuivait le but légitime de la protection de la sécurité nationale et de l'intégrité territoriale, la défense de l'ordre et la prévention du crime.

Les autorités judiciaires ont engagé les poursuites en tenant compte exclusivement du fait que le quotidien du requérant avait publié des écrits émanant d'organisations qualifiées en droit turc de terroristes. Elles n'ont procédé à aucune analyse appropriée de la teneur des écrits litigieux ni du contexte dans lequel ils s'inscrivaient au regard des critères énoncés et mis en œuvre par la Cour dans les affaires relatives à la liberté d'expression. Il n'a pas été allégué par les autorités nationales que les écrits litigieux, pris dans leur ensemble, contenaient un appel à l'usage de la violence, à la résistance armée ou au soulèvement, ou qu'ils constituaient un discours de haine, ce qui est l'élément essentiel à prendre en considération.

Aussi, les écrits litigieux participaient à un débat public sur des questions d'intérêt général relatives au conflit entre les organisations en question et les forces de l'ordre.

Les poursuites pénales répétées peuvent également avoir pour effet de censurer partiellement les professionnels des médias et de limiter leur aptitude à exposer publiquement une opinion, sous réserve de ne pas préconiser directement ou indirectement la commission d'infractions terroristes, qui a sa place dans un débat public. La répression des professionnels des médias, exercée de manière mécanique à partir de la loi en question, sans tenir compte de l'objectif des intéressés ou du droit pour le public d'être informé d'un autre point de vue sur une situation conflictuelle, ne saurait se concilier

avec la liberté de recevoir ou de communiquer des informations ou des idées.

Le maintien pendant un laps de temps considérable des multiples poursuites pénales contre le requérant sur le fondement d'accusations pénales graves ne répondait pas à un besoin social impérieux. La mesure incriminée n'était pas proportionnée aux buts légitimes visés et, de ce fait, n'était pas nécessaire dans une société démocratique.

Conclusion : violation (unanimité).

Article 41 : 3 500 EUR pour préjudice moral.

(Voir aussi *Gözel et Özer c. Turquie*, 43453/04 et 31098/05, 6 juillet 2010, Note d'information 132 ; *Altuğ Taner Akçam c. Turquie*, 27520/07, 25 octobre 2011, Note d'information 145 ; *Nedim Şener c. Turquie*, 38270/11, 8 juillet 2014, Note d'information 176 ; *Şık c. Turquie*, 53413/11, 8 juillet 2014, Note d'information 176 ; *Dilipak c. Turquie*, 29680/05, 15 septembre 2015, Note d'information 188 ; et *Döner et autres c. Turquie*, 29994/02, 7 mars 2017, Note d'information 205 ; ainsi que la Recommandation CM/Rec(2016)4 du Comité des Ministres aux États membres sur la protection du journalisme et la sécurité des journalistes et autres acteurs des médias)

Freedom of expression/Liberté d'expression

Lifting of immunity of an MP allegedly on the basis of her political opinions: *communicated*

Levée de l'immunité d'une parlementaire sur le fondement allégué de ses opinions politiques : *affaire communiquée*

Kerestecioğlu Demir – Turkey/Turquie, 68136/16, Communication [Section II]

English translation of the summary | Version imprimable

En 2015, la requérante fut élue députée. Quelques mois plus tard, un procureur demanda à l'Assemblée nationale de lever son immunité parlementaire dans le cadre d'une enquête pénale à son encontre. Selon la requérante, cette demande était motivée par sa participation à une déclaration destinée à la presse. En mai 2016, l'Assemblée nationale adopta une modification constitutionnelle dont il résultait que l'immunité était automatiquement levée pour tous les députés visés par une demande en ce sens reçue avant la date d'adoption de la modification en question. La modification constitutionnelle concernait au total 154 députés.

Soixante-dix députés contestèrent la mesure devant la Cour constitutionnelle, selon la procédure applicable aux décisions de levée de l'immunité. Mais la Cour constitutionnelle estima que, s'agissant d'une modification de la Constitution, une demande en annulation n'était recevable qu'à condition d'émaner d'au moins un cinquième des 550 membres de l'Assemblée nationale, seuil qui n'était pas atteint. La mesure entra donc en vigueur et la requérante perdit son immunité vis-à-vis de l'enquête pénale susmentionnée. Aux élections législatives de 2018, la requérante fut reconduite dans son mandat.

La requérante dénonce la levée de son immunité comme fondée sur ses opinions politiques.

Affaire communiquée sous l'angle de l'article 10 de la Convention.

ARTICLE 14

Discrimination (Article 3)

Alleged failure of State to address bullying at school of child with mental disorder: *communicated*

Manquement allégué de l'État à l'obligation d'agir face aux brimades qu'aurait subies à l'école un enfant atteint de troubles mentaux : *affaire communiquée*

M.C. and Others/et autres – Romania/Roumanie, 44654/18, Communication [Section IV]

(See Article 3 above/voir l'article 3 ci-dessus, page 11)

Discrimination (Article 6)

Retroactive reimbursement denied to taxpayers who had not challenged a social contribution before it was declared unconstitutional: *inadmissible*

Remboursement rétroactif refusé aux contribuables n'ayant pas contesté une cotisation sociale avant qu'elle soit déclarée inconstitutionnelle : *irrecevable*

Frantzeskaki and Others/et autres – Greece/Grèce, 57275/17 et al., Decision | Décision 12.2.2019 [Section I]

(See Article 6 § 1 above/Voir l'article 6 § 1 ci-dessus, page 12)

Discrimination (Article 8)

Refusal to include child of same-sex couple in register of civil status: *communicated*

Refus d'inscrire l'enfant d'un couple homosexuel au registre d'état civil : *affaire communiquée*

A.D.-K. and Others/et autres – Poland/Pologne, 30806/15, Communication [Section I]

Traduction française du résumé | Printable version

The first two applicants are two women living in a civil partnership in the United Kingdom. The first applicant is a Polish national. The second applicant, the biological mother of the third applicant, is a British national. The child's original birth certificate indicates the second applicant as her mother and the first applicant as parent. The applicants complain about the refusal of the Polish authorities, on the basis of "the fundamental rules of legal order in Poland", to have the particulars of the third applicant's birth certificate recorded in the Polish register of civil status. The third applicant also complains that she remains in a state of uncertainty as regards her right to Polish citizenship and that this refusal has had consequences for her inheritance rights.

Communicated under Articles 8 and 14 of the Convention.

Discrimination (Article 8)

Alleged discrimination in refusal to grant custody to child's mother on grounds of her sexual orientation: *communicated*

Discrimination fondée sur l'orientation sexuelle alléguée par une mère s'étant vu refuser la garde de son enfant : *affaire communiquée*

A.S. – Poland/Pologne, 58012/10, Communication [Section I]

Traduction française du résumé | Printable version

The applicant complains that the domestic courts granted her former husband custody of her child, on the grounds of her homosexuality.

Communicated under Articles 8 and 14 of the Convention.

Discrimination (Article 8)

Refusal to grant Polish nationality to children of same-sex couple born through surrogacy in USA: *communicated*

Refus d'accorder la nationalité polonaise aux enfants d'un couple homosexuel nés d'une mère porteuse aux États-Unis : *affaire communiquée*

Schlittner-Hay – Poland/Pologne, 56846/15 and/et 56849/15, Communication [Section I]

Traduction française du résumé | Printable version

The applicants are twin brothers born in the USA through surrogacy. Their parents are two men, living together in a long-term same-sex relationship. One of their parents, the applicants' genetic father, has Polish citizenship.

The administrative authorities refused their application for Polish nationality on the basis that surrogacy was illegal in Poland and that their birth certificates, indicating two men as their parents, contravened the Polish legal system. Furthermore, according to the Polish legal system and the principle of presumption of paternity, the applicants' parents were the surrogate mother and her husband (USA nationals).

Communicated under Articles 8 and 14 of the Convention.

Discrimination (Article 8)

Alleged discrimination in removal of children from mother's custody on grounds of her sexual orientation: *communicated*

Discrimination fondée sur l'orientation sexuelle alléguée par une mère s'étant vu retirer la garde de ses enfants : *affaire communiquée*

X. – Poland/Pologne, 20741/10, Communication [Section I]

Traduction française du résumé | Printable version

The applicant alleges that the domestic authorities' decision to remove her children from her custody was based on grounds of her sexual orientation. She also complains that the judge in her case was not impartial.

Communicated under Articles 6 § 1, 8 and 14 of the Convention.

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Member of parliament prevented from discharging his duties as a result of his prolonged pre-trial detention, for the alleged purpose of stifling pluralism: *case referred to the Grand Chamber*

Parlementaire empêché d'exercer son mandat par son maintien prolongé en détention provisoire dans le but allégué d'étouffer le pluralisme : *affaire renvoyée devant la Grande Chambre*

Selahattin Demirtaş – Turkey/Turquie (no. 2/ n° 2), 14305/17, Judgment | Arrêt 20.11.2018 [Section II]

(See Article 3 of Protocol No. 1 below/Voir l'article 3 du Protocole n° 1 ci-dessous, page 27)

ARTICLE 34

Victim/Victime

Life prisoners not directly affected by statutory restrictions on family visits in absence of genuine attempt to maintain contact or in case of less frequent visits than permitted: *inadmissible*

Prisonniers à vie non directement touchés par des restrictions légales aux visites de la famille en l'absence d'efforts sincères de maintenir le contact ou en cas de visites moins fréquentes que ce qui est autorisé : *irrecevable*

Chernenko and Others/et autres – Russia/Russie, 4246/14, Decision | Décision 5.2.2019 [Section III]

Traduction française du résumé | Printable version

Facts – The applicants had all been convicted of serious criminal offences and sentenced to life imprisonment. All convicts sentenced to life imprisonment had to serve their sentences in special-regime correctional colonies. Upon arrival at a special regime correctional colony such convicts were placed under a strict regime, where they had to spend at least the first ten years of their sentence. Under that regime they were entitled to two short-term visits per year, and since November 2016 to one long-term visit per year. The applicants complained about severe restrictions on their contacts with the outside world during their detention following conviction.

Law – Article 34: In order to claim to be the victim of a breach of the right to respect for private and family life on account of statutory restrictions on visits from family members or other persons in the first ten years of lifelong imprisonment, an applicant had to demonstrate: firstly, that he had relatives or other persons with whom he genuinely wished and attempted to maintain contact in detention, and secondly, that he had used his right to visits as frequently as was permitted under domestic law.

In the applicants' case, two of the applicants had not demonstrated that they had relatives or other persons with whom they wished to maintain contact while in detention. In the absence of any such persons they could not be said to have been directly affected by the measure complained of. The remaining applicants had demonstrated the existence of relatives and their genuine attempts to maintain contacts with them by clearly specifying those relatives and providing an account of their attempts to maintain correspondence with them and to receive visits from them, or of actual visits from those relatives. They had not however used their right to visit as frequently as was permitted under domestic law. Only one of the applicants had been visited by a member of his family. However, the frequency of those family visits was substantially below that permitted. In the absence of any evidence that the lack of visits had been as a result of the authorities' refusal to allow them, those applicants could not be said to have been directly affected by the measure complained of.

Conclusion: inadmissible (incompatible *ratione personae*).

(See also *Khoroshenko v. Russia* [GC], 41418/04, 30 June 2015, Information Note 186)

ARTICLE 46

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

Systemic problem calling for reform of the system of review of whole-life sentences

Problème systémique appelant une réforme du régime de réexamen des peines de perpétuité réelle

Petukhov – Ukraine (no. 2/n° 2), 41216/13, Judgment | Arrêt 12.3.2019 [Section IV]

(See Article 3 above/Voir l'article 3 ci-dessus, page 10)

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

Peaceful enjoyment of possessions/ Respect des biens

Pensions halved following the transfer to the ordinary insurance scheme of contributors to an insolvent pension fund: *no violation*

Pensions abaissées de moitié par suite du transfert au régime général des affiliés d'une caisse de retraite déficitaire : *non-violation*

Yavaş and Others/et autres – Turkey/Turquie, 36366/06, Judgment | Arrêt 5.3.2019 [Section II]

English translation of the summary | Version imprimable

En fait – Les requérants sont des retraités. Ils relevaient autrefois d'un régime particulier de pensions, géré par une caisse de prévoyance spécifique (la Caisse de maladie et de retraite des fonctionnaires et employés de la société d'assurances « Ankara ») : moyennant des cotisations deux fois supérieures à celles du régime général durant leur

vie active, ils bénéficiaient d'un complément de pension significatif.

Au début des années 2000, au vu du lourd déficit engendré par l'insuffisance du nombre d'actifs cotisants pour le nombre de pensionnés (105 pour 180), la caisse fut liquidée. Ses pensionnés furent alors transférés à l'organisme en charge du régime général de sécurité sociale. Leurs pensions furent adaptées : pour une même durée de cotisation, la pension versée aux requérants était désormais d'un montant identique à celle d'un pensionné du régime général. Certains virent ainsi leur pension diminuée de près de la moitié. Ils dénoncent une atteinte à leurs droits acquis.

En droit – Article 1 du Protocole n° 1 : Que la caisse en question puisse ou non être considérée comme une institution à caractère public, les raisons qui suivent permettent de conclure que la mesure litigieuse n'était pas excessive ou disproportionnée.

La diminution des pensions des requérants avait pour but de les intégrer au régime général des pensions établi par la loi sur la sécurité sociale. L'objectif poursuivi par le Conseil des ministres était de limiter autant que possible l'éventuelle perte de la caisse des requérants et de leur permettre de pouvoir continuer à bénéficier d'allocations de retraite et de différents avantages sociaux. La méthode d'adaptation en question n'apparaît pas déraisonnable ou disproportionnée. S'il est vrai qu'à la suite de ce transfert et de l'adaptation de leurs pensions, les requérants ont perdu une partie du montant alloué – jusqu'à près de 50 %, dans certains cas –, il reste qu'ils continuent à bénéficier du régime général sans aucunement subir de discrimination ou être désavantagés par rapport à ceux qui perçoivent leur pension selon ce système. Par ailleurs, l'adaptation n'a pas eu d'effet rétroactif, et la durée du service auprès de leur ex-employeur a été assimilée aux périodes de cotisation au sens de la loi. Ainsi, les requérants n'ont pas perdu la pension qui leur était due au titre des versements effectués pendant leurs années de service, mais uniquement un avantage (le complément) dont ils avaient précédemment bénéficié de la part de la caisse liquidée.

Conclusion : non-violation (unanimité).

(Voir, *a contrario*, *Béláné Nagy c. Hongrie* [GC], 53080/13, 13 décembre 2016, Note d'information 202)

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

Preventive attachment of assets belonging to managers or relatives of executives of an insolvent bank, even after they were not found personally implicated: *violation*

Gel des avoirs des administrateurs ou de la famille des dirigeants d'une banque en faillite, même après mise hors de cause personnelle : *violation*

Uzan and Others/et autres – Turkey/Turquie, 19620/05 et al., Judgment | Arrêt 5.3.2019 [Section II]

English translation of the summary | Version imprimable

En fait – En 2003, l'autorité de régulation du secteur bancaire transféra la gestion d'une banque en faillite au fonds d'assurance des dépôts d'épargne (« le FADE »), organisme public. Le FADE indemnisa les déposants, pour plus de 4 milliards d'euros. Des poursuites pénales furent engagées contre les actionnaires majoritaires de la banque et certains gestionnaires ou contrôleurs. Ralenti par la fuite de certains accusés, le procès des dirigeants devant la cour d'assises n'est pas encore terminé à ce jour.

En août 2003, le tribunal de police décida à titre conservatoire le gel des avoirs, d'une part, des dirigeants et de certains administrateurs et, d'autre part, de leurs conjoints et enfants. Les requérants appartiennent à ces deux groupes de personnes. Les poursuites pénales leur furent initialement étendues, mais se soldèrent pour tous par un non-lieu en janvier 2004 ; les administrateurs furent acquittés de nouvelles accusations en 2008. L'essentiel des mesures conservatoires fut néanmoins maintenu, dans la perspective du procès principal et du recouvrement éventuel des créances publiques.

En droit – Article 1 du Protocole n° 1

a) *Existence d'un bien* – L'article 1 du Protocole n° 1 est applicable, y compris pour les deux requérants (nés en 1999 et 2003) qui étaient mineurs et ne possédaient aucun bien actuel à l'époque des faits. Les tribunaux ont reconnu leur aptitude à acquérir certains droits par le biais de l'héritage et des donations. Les jeunes requérants pouvaient donc nourrir une espérance légitime relevant de la notion de « bien », eu égard par ailleurs au caractère automatique, généralisé et inflexible des mesures conservatoires, et à leur durée incertaine.

b) *Nature de l'ingérence* – Les mesures conservatoires doivent être examinées comme une réglementation de l'usage des biens.

c) *Légalité* – Dans le contexte d'incertitude quant à l'issue de la procédure pénale contre les responsables présumés des pertes financières – étant donné la non-comparution des accusés –, la législation applicable laissait aux tribunaux tout loisir de décider le maintien des mesures conservatoires tant que toutes les sommes réclamées par le FADE n'avaient pas été recouvrées. Compte tenu des

conclusions auxquelles elle parvient ci-après sur le terrain de la proportionnalité, la Cour peut toutefois laisser de côté le point de savoir si un pouvoir discrétionnaire aussi vaste répond au critère de légalité.

d) *Légitimité du but poursuivi* – Les mesures litigieuses répondaient à un intérêt général : empêcher l'usage de biens susceptibles d'avoir été acquis avec des fonds provenant d'activités criminelles.

e) *Proportionnalité* – La Cour reconnaît l'importance et la complexité de cette affaire pour les autorités financières, administratives et judiciaires turques : il était nécessaire de prendre des mesures afin de protéger les droits des très nombreuses personnes affectées par la situation, de minorer les pertes éventuelles et de prévenir tout acte frauduleux, de recouvrer les fonds publics exposés et de trouver les responsables présumés des pertes financières. Destinées à empêcher les transferts frauduleux de fonds publics, les mesures conservatoires peuvent constituer une arme efficace et nécessaire pour combattre des actes frauduleux dans le milieu financier. L'imposition initiale des mesures litigieuses n'allait donc pas, en soi, à l'encontre du principe de proportionnalité.

Toutefois, si l'ordonnance de mesures provisoires peut être justifiée par l'intérêt général lorsqu'elle vise à prévenir les actes frauduleux afin de garantir la satisfaction du créancier, il faut y mettre fin dès qu'elles cessent d'être nécessaires, car leur impact augmente avec leur durée. En l'occurrence, le problème se pose surtout à partir de la date à laquelle les requérants ont bénéficié de la décision de non-lieu.

La gravité de la charge imposée aux requérants ressort des éléments suivants :

i. *La durée* du maintien des restrictions en cause : dix ans pour certains requérants ; jusqu'à quinze ans pour d'autres.

ii. *L'étendue* des restrictions en question : les deux jeunes requérants sont privés de la possibilité d'acquérir toutes sortes de biens ; les trois autres sont empêchés de disposer, respectivement, de leur salaire de professeur d'université, de leurs économies, ou de leur domicile (et pour chacune, de leur voiture).

iii. *Le caractère automatique*, généralisé et inflexible des restrictions en cause, sans contrôle régulier individuel. Or, non seulement les requérants n'ont jamais été condamnés au pénal, mais les ordres de paiement émis à leur encontre ont été annulés par les tribunaux compétents : ces derniers ont ainsi établi qu'ils ne pouvaient être tenus pour responsables du préjudice matériel subi par le FADE.

iv. *L'absence, dans le dossier, d'éléments* qui laisseraient à penser que les requérants pouvaient avoir été impliqués dans une quelconque fraude. Or, les autorités internes n'ont envisagé de mesures alternatives que très tardivement, voire jamais. Au demeurant, aucun élément du dossier n'indique que le recouvrement des créances publiques méritait une meilleure protection que les biens des requérants.

v. *Sur le plan des garanties procédurales*, l'attribution par la cour d'assises à certains des requérants d'une « qualité autre que celle de parties au procès » les a empêchés et les empêche toujours de participer à la procédure pénale principale, à laquelle est pourtant attaché le sort de leurs droits.

Sans autre justification que leur parenté avec les dirigeants de la banque ou l'exercice, à un moment donné, de responsabilités au sein de celle-ci, l'imposition des mesures conservatoires sur les biens des requérants et leur maintien automatique en dépit de décisions de non-lieu ou d'acquittement s'accordent mal avec les principes consacrés par la jurisprudence de la Cour : il conviendrait au contraire que le juge puisse évaluer quels sont les instruments les plus adaptés aux circonstances et, plus généralement, effectuer une mise en balance entre le but légitime sous-jacent et les droits des intéressés. De plus, les requérants n'ont bénéficié d'aucune des garanties procédurales pertinentes. Bref, le juste équilibre à ménager a été rompu.

Conclusion : violation (unanimité pour les requérants adultes ; six voix contre une pour les deux jeunes requérants).

Article 41 : question réservée.

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

Right to education/Droit à l'instruction

University admission system attaching greater weight to a student's previous field of study: *inadmissible*

Système d'admission à l'université attribuant une pondération plus forte au domaine d'études antérieur d'un étudiant : *irrecevable*

Kılıç – Turkey/Turquie, 29601/05,
Decision | Décision 5.3.2019 [Section II]

Traduction française du résumé | Printable version

Facts – In 1999 a new system for the admission to university was introduced. The new system consisted of a single exam and took into account the mark obtained together with the student's average school mark. If a student selected a university department that corresponded to his field of studies at high school, his average school mark was

multiplied by 0.5 and added to the result of the university exam. If a student preferred to study in a different field, his average school mark was multiplied by 0.2. The applicant complained that this scoring system had put him, a graduate of a vocational high school, at a disadvantage.

Law – Article 2 of Protocol No. 1: When regulating access to universities or colleges of higher education, member States enjoyed a wide margin of appreciation concerning the qualities required of candidates in order to select those who were liable to succeed in their higher-level studies. The Supreme Administrative Court had ruled that the new selection system for access to university took account of the requirements arising from the changes in the country's economic and social conditions in connection with university students' qualifications and that the system met the requirement of raising the standard of higher education. In a reasoned judgment, the Supreme Administrative Court had decided that the amendment had been necessary and the applicant's rights had not been prejudiced because of the new system. The selection system attaching greater weight to a student's field of study pursued the legitimate aim of improving the standard of university studies.

As to whether the means employed were proportionate to the aim sought to be achieved, the Court observed that the weighting introduced was applied to candidates in accordance with the study pathway which they had chosen on entering upper high school. The holders of vocational high school diplomas took the national entrance examination on an equal footing with candidates from general upper high schools, and their results were assessed in the same manner. The selection criteria could not thus be considered as disproportionate. Furthermore, in the applicant's case, even if his average school mark had been multiplied by 0.5, his score in the exam would not have been sufficient for admission. In any event, the applicant had succeeded twice in the university exams and had been admitted to two universities. Consequently, in the circumstances of the case, the applicant had not been deprived of his right of access to higher education (compare and contrast *Altınay v. Turkey*, 37222/04, 9 July 2013, Information Note 165).

Conclusion: inadmissible (manifestly ill-founded).

(See also *Leyla Şahin v. Turkey* [GC], 44774/98, 10 November 2005, Information Note 80)

Right to education/Droit à l'instruction

Alleged failure of State to address bullying at school of child with mental disorder: *communicated*

Manquement allégué de l'État à l'obligation d'agir face aux brimades qu'aurait subies à l'école un enfant atteint de troubles mentaux : *affaire communiquée*

M.C. and Others/et autres – Romania/Roumanie, 44654/18, Communication [Section IV]

(See Article 3 above/Voir l'article 3 ci-dessus, page 11)

Right to education/Droit à l'instruction

Delay in issuing military ID resulting in inability to sit university entrance examination: *communicated*

Retard dans la délivrance d'une carte d'identité militaire, s'étant traduit par l'impossibilité pour le requérant de se présenter à l'examen d'entrée à l'université : *affaire communiquée*

Musayev – Azerbaijan/Azerbaïdjan, 54567/13, Communication [Section V]

Traduction française du résumé | Printable version

The applicant complains that, as a result of a delay by the State authorities in issuing him his military ID, he was unable to sit a university entrance examination which required him to submit the ID with his application. He also complains that he and his representative were not duly informed of the date and the time of the hearings before the appellate court, which, as a result were held in his absence.

Communicated under Article 6 of the Convention and Article 2 of Protocol No. 1.

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

Criminal conviction for subjecting children to purportedly excessive religious practices: *communicated*

Condamnation pénale pour avoir soumis des enfants à des pratiques religieuses prétendument excessives : *affaire communiquée*

Cupiał – Poland/Pologne, 67414/11, Communication [Section I]

(See Article 9 above/Voir l'article 9 ci-dessus, page 19)

ARTICLE 3 OF PROTOCOL No. 1/ DU PROTOCOLE N° 1

Free expression of the opinion of the people/Libre expression de l'opinion du peuple
Stand for election/Se porter candidat aux élections

Member of parliament prevented from discharging his duties as a result of his prolonged pre-trial detention, for the alleged purpose of stifling pluralism: *case referred to the Grand Chamber*

Député tenu à l'écart des travaux parlementaires par son maintien prolongé en détention provisoire sans justification suffisante : *affaire renvoyée devant la Grande Chambre*

Selahattin Demirtaş – Turkey/Turquie (no. 2/ n° 2), 14305/17, Judgment | Arrêt 20.11.2018 [Section II]

English translation of the summary | Version imprimable

Durant l'été 2015, des violences meurtrières attribuées au PKK (Parti des travailleurs du Kurdistan) en lien avec la situation en Syrie entraînèrent une réaction des autorités : ce fut la fin du processus de « résolution » pacifique de la question kurde entamé en 2012-2013. Coprésident du HDP (parti pro-kurde de gauche), le requérant fut réélu député à l'Assemblée nationale en novembre 2015, pour un mandat de quatre ans. Dans divers discours en 2015 et 2016, le président de la République déclara que les députés du HDP devraient « payer le prix » d'événements meurtriers récents dont ils portaient à ses yeux la responsabilité. À la suite d'une révision constitutionnelle sur l'immunité des parlementaires, 154 députés (dont 55 appartenant au HDP) virent leur immunité levée. Quinze députés de l'opposition (dont quatorze du HDP) furent mis en détention provisoire. Accusé d'avoir dirigé une organisation clandestine et tenu des propos incitant au terrorisme, le requérant fut arrêté en novembre 2016. Il est depuis lors en détention provisoire.

Dans un arrêt du 20 novembre 2018 (voir la Note d'information 223), une chambre de la Cour a notamment conclu, à l'unanimité :

– à la non-violation de l'article 5 § 1, considérant que la détention provisoire du requérant reposait bien, à l'origine, sur des raisons plausibles de le soupçonner d'une infraction ; mais à la violation de l'article 5 § 3, considérant que les tribunaux n'avaient pas suffisamment et pertinemment justifié le risque de fuite et l'absence d'alternatives à la détention ;

– à la violation de l'article 3 du Protocole n° 1, considérant que, bien que le requérant ait conservé le statut de député et la rémunération correspondante, son maintien à l'écart des activités de l'Assemblée nationale constituait une atteinte injustifiée à la libre expression de l'opinion du peuple et au droit du requérant d'exercer le mandat pour lequel il avait été élu ;

et par six voix contre une :

– à la violation de l'article 18, combiné avec l'article 5 § 3, considérant établi au-delà de tout doute raisonnable que le maintien prolongé en détention du requérant dans le contexte politique du moment poursuivait le but inavoué et prédominant d'étouffer le pluralisme et de limiter le libre jeu du débat politique.

Eu égard à ces conclusions, la Cour n'a pas jugé nécessaire d'examiner également l'affaire sous l'angle de l'article 10 de la Convention.

Le 18 mars 2019, l'affaire a été renvoyée devant la Grande Chambre à la demande de chacune des parties.

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

General prohibition of discrimination/ Interdiction générale de la discrimination

Alleged discrimination in final high school exams of pupils belonging to national minorities who studied in their native tongue: *communicated*

Allégation selon laquelle des élèves appartenant à des minorités nationales et étudiant dans leur langue maternelle ont été victimes d'une discrimination lors d'examens de fin d'études secondaires : *affaire communiquée*

Ádám and Others/et autres – Romania/Roumanie, 81114/17, Communication [Section IV]

Traduction française du résumé | Printable version

The applicants, ethnic Hungarians, complain that they have to sit two additional exams (oral and written in their maternal tongue) during the same interval set for the final exams throughout the country. For that reason, they have less time than the Romanian pupils to prepare their exams and to rest between tests. They argue that they are thus more likely to fail their final exams.

Communicated under Article 1 of Protocol No. 12.

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

Referrals/Renvois

Selahattin Demirtaş – Turkey/Turquie (no. 2/ n° 2), 14305/17, Judgment | Arrêt 20.11.2018 [Section II]

(See Article 3 of Protocol No. 1 below/voir l'article 3 du Protocole nº 1 ci-dessus, page 27)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

1) Incompatibility with European Union law of national legislation prohibiting the pre-trial detention judge from staying proceedings pending a reply from the CJEU

2) Possibility for the pre-trial detention judge to reply to the detainee's defence counsel, comparing the incriminating and exculpatory evidence, without infringing the presumption of innocence

1) Incompatibilité avec le droit de l'Union d'une législation nationale interdisant au juge de la détention provisoire de surseoir à statuer dans l'attente d'une réponse de la CJUE

2) Possibilité pour le juge de la détention provisoire de répondre au défenseur du détenu en mettant en balance les éléments à charge et à décharge, sans enfreindre la présomption d'innocence

RH, C-8/19 PPU, Order | Ordonnance 12.2.2019 (CJEU/CJUE)

In the CJEU's opinion,

1) Article 267 of the Treaty on the functioning of the European Union and Article 47(2) of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national legislation, such as that at issue in the main proceedings which has the result that the national court is obliged to adjudicate on the legality of a pre-trial detention decision without the opportunity to make a request for a preliminary ruling to the Court of Justice or to wait for its reply.

2) Articles 4 and 6 of Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, read together with recital 16 thereof, must be interpreted as meaning that the requirements deriving from the presumption of innocence do not preclude, where the competent court examines the reasonable grounds for believing that the suspect or the accused person has committed the offence with which he is charged, in order to give a ruling on the legality of a pre-trial detention decision, that court from comparing the elements of incriminating and exculpatory evidence presented to it and giving reasons for its decision, not only stating the evidence relied on, but also ruling on the objections of the defence counsel of the person concerned, provided that that decision does not present the person detained as being guilty.

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La CJUE dit pour droit que :

1) L'article 267 du Traité sur le fonctionnement de l'Union européenne et l'article 47 § 2 de la Charte des droits fondamentaux de l'Union européenne doivent être interprétés en ce sens qu'ils s'opposent à une réglementation nationale, telle qu'interprétée par la jurisprudence, qui a pour conséquence que la juridiction nationale est tenue de se prononcer sur la légalité d'une décision de détention provisoire, sans possibilité d'introduire une demande de décision préjudicielle devant la CJUE ou d'attendre la réponse de celle-ci.

2) Les articles 4 et 6 de la directive (UE) 2016/343 du 9 mars 2016 portant renforcement de certains aspects de la présomption d'innocence et du droit d'assister à son procès dans le cadre des procédures pénales, lus en combinaison avec le considérant 16 de celle-ci, doivent être interprétés en ce sens que les exigences découlant de la présomption d'innocence ne s'opposent pas à ce que, lorsque la juridiction compétente examine les raisons plausibles permettant de soupçonner que le suspect ou la personne poursuivie a commis l'infraction reprochée, afin de se prononcer sur la légalité d'une décision de détention provisoire, cette juridiction procède à une mise en balance des éléments de preuve à charge et à décharge qui lui sont soumis et qu'elle motive sa décision non seulement en faisant apparaître les éléments retenus, mais aussi en se prononçant sur les objections du défenseur de la personne concernée, pourvu que cette décision ne présente pas la personne détenue comme étant coupable.

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

1) Possibility of maintaining the enforcement of a European arrest warrant beyond the 90-day limit set out in the Framework Decision where there is a very serious and unavoidable risk of the person absconding

2) Necessity to harmonise lengths of detention in the various jurisprudential cases of suspension of the period of enforcement of a European warrant (request to the CJEU for a

preliminary ruling or conditions of detention in the issuing State)

1) Possibilité de maintenir l'exécution d'un mandat d'arrêt européen au-delà du maximum de 90 jours prévu par la décision-cadre, en cas de risque très sérieux et inévitable de fuite

2) Nécessité de maintenir une harmonie des durées de détention entre les différents cas jurisprudentiels de suspension du délai d'exécution d'un mandat européen (question préjudicielle à la CJUE ou conditions de détention dans l'État d'émission)

TC, C-492/18 PPU, Judgment | Arrêt 12.2.2019 (CJEU/CJUE)

In the CJEU's opinion,

1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member States must be interpreted as precluding a national provision, such as that at issue in the main proceedings, which lays down a general and unconditional obligation to release a requested person arrested pursuant to a European arrest warrant as soon as a period of 90 days from that person's arrest has elapsed, where there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures.

2) Article 6 of the Charter of Fundamental Rights of the European Union must be interpreted as precluding national case-law which allows the requested person to be kept in detention beyond that 90-day period, on the basis of an interpretation of that national provision according to which that period is suspended when the executing judicial authority decides to refer a question to the CJEU for a preliminary ruling, or to await the reply to a request for a preliminary ruling made by another executing judicial authority, or to postpone the decision on surrender on the ground that there could be, in the issuing member State, a real risk of inhuman or degrading detention conditions, in so far as that case-law does not ensure that that national provision is interpreted in conformity with Framework Decision 2002/584 and entails variations that could result in different periods of continued detention.

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La CJUE dit pour droit que :

1) La décision-cadre 2002/584/JAI du Conseil du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre États membres doit être interprétée en ce sens qu'elle s'oppose à une disposition nationale, telle que celle en cause au principal, qui prévoit une obligation générale et inconditionnelle de remise en liberté d'une personne recherchée et arrêtée en vertu d'un mandat d'arrêt européen dès qu'un délai de 90 jours s'est écoulé à compter de son arrestation, lorsqu'il existe un risque très sérieux de fuite de celle-ci, qui ne peut pas être ramené à un niveau acceptable par l'imposition de mesures adéquates.

2) L'article 6 de la Charte des droits fondamentaux de l'Union européenne doit être interprété en ce sens qu'il s'oppose à une jurisprudence nationale permettant le maintien en détention de la personne recherchée au-delà de ce délai de 90 jours, sur le fondement d'une interprétation de cette disposition nationale selon laquelle ledit délai est suspendu lorsque l'autorité judiciaire d'exécution décide soit de saisir la CJUE d'une demande de décision préjudicielle, soit d'attendre la réponse à une demande de décision préjudicielle formée par une autre autorité judiciaire d'exécution, soit encore de reporter la décision sur la remise au motif qu'il pourrait exister, dans l'État membre d'émission, un risque réel de conditions de détention inhumaines ou dégradantes, pour autant que cette jurisprudence n'assure pas la conformité de ladite disposition nationale à la décision-cadre 2002/584 et présente des divergences susceptibles d'aboutir à des durées de maintien en détention différentes.

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

1) The recording and publication on a website of a video of policy officers unwittingly filmed in a police station constitute personal data processing

2) In order to come under the specific rules on balancing journalistic purposes with the protection of private life, such a video must have the sole object of disclosing information, opinions or ideas to the public

1) L'enregistrement et la publication sur internet d'une vidéo montrant des policiers filmés à leur insu dans un commissariat constituent un traitement de données à caractère personnel

2) Pour bénéficier du régime propre au journalisme dans la mise en balance avec la vie privée, une telle vidéo doit avoir pour finalité exclusive la divulgation au public d'informations, d'opinions ou d'idées

Sergejs Buivids – Datu valsts inspekcija, C-345/17, Judgment | Arrêt 14.2.2019 (CJEU/CJUE)

In the CJEU's opinion,

1) Article 3 of Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be interpreted as meaning that the recording of a video of police officers in a police station, while a statement is being made, and the publication of that video on a video website, on which users can send, watch and share videos, are matters which come within the scope of that directive.

2) Article 9 of Directive 95/46 must be interpreted as meaning that factual circumstances such as those of the case in the main proceedings, that is to say, the video recording of police officers in a police station, while a statement is being made, and the publication of that recorded video on a video website, on which users can send, watch and share videos, may constitute a processing of personal data solely for journalistic purposes, within the meaning of that provision, in so far as it is apparent from that video that the sole object of that recording and publication thereof is the disclosure of information, opinions or ideas to the public, this being a matter which it is for the referring court to determine.

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La CJUE dit pour droit que :

1) L'article 3 de la directive 95/46/CE du 24 octobre 1995, relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, doit être interprété en ce sens que relèvent du champ d'application de cette directive l'enregistrement vidéo de membres de la police dans un commissariat, lors d'une prise de déposition, et la publication de la vidéo ainsi enregistrée sur un site web de vidéos sur lequel les utilisateurs peuvent envoyer, regarder et partager celles-ci.

2) L'article 9 de la directive 95/46 doit être interprété en ce sens que des circonstances de fait telles que celles de l'affaire au principal, à savoir l'enregistrement vidéo de membres de la police dans un commissariat, lors d'une prise de déposition, et la publication de la vidéo ainsi enregistrée sur un site web de vidéos sur lequel les utilisateurs peuvent envoyer, regarder et partager celles-ci, peuvent constituer un traitement de données à caractère personnel aux seules fins de journalisme, au sens de cette disposition, pour autant qu'il ressorte de ladite vidéo que ledit enregistrement et ladite publication ont pour seule finalité la divulgation au public d'informations, d'opinions ou d'idées, ce qu'il incombe à la juridiction de renvoi de vérifier.

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

Possible loss of nationality of a member State and of EU citizenship in the event of a lengthy interruption of the genuine link between the individual and that member State

Possible perte de la nationalité d'un État membre et de la citoyenneté de l'UE en cas d'interruption durable du lien effectif entre la personne et cet État membre

Tjebbes e.a. – Minister van Buitenlandse Zaken, C-221/17, Judgment | Arrêt 12.3.2019 (CJEU, Grand Chamber/CJUE, grande chambre)

Press release | Communiqué de presse

In the CJEU's opinion, Article 20 of the Treaty on the functioning of the European Union, read in the light of Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a member State, which provides under certain conditions for the loss, by operation of law, of the nationality of that member State, which entails, in the case of persons who are not also nationals of another member State, the loss of their citizenship of the Union and the rights attaching thereto, in so far as the competent national authorities, including national courts where appropriate, are in a position to examine, as an ancillary issue, the consequences of the loss of that nationality and, where appropriate, to have the persons concerned recover their nationality *ex tunc* in the context of an application by those persons for a travel document or any other document showing their nationality. In the context of that examination, the authorities and the courts must determine whether the loss of the nationality of the member State concerned, when it entails the loss of citizenship of the Union and the rights attaching thereto, has due regard to the principle of proportionality so far as concerns the consequences of that loss for the situation of each person concerned and, if relevant, for that of the members of their family, from the point of view of EU law.

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Dans cette affaire, la CJUE dit pour droit que l'article 20 du Traité sur le fonctionnement de l'Union européenne, lu à la lumière des articles 7 et 24 de la Charte des droits fondamentaux de l'Union européenne, doit être interprété en ce sens qu'il ne s'oppose pas à une législation d'un État membre qui prévoit, sous certaines conditions, la perte de plein droit de la nationalité de cet État membre,

entraînant, s'agissant des personnes n'ayant pas également la nationalité d'un autre État membre, la perte de leur statut de citoyen de l'Union européenne et des droits qui y sont attachés, pour autant que les autorités nationales compétentes, y compris, le cas échéant, les juridictions nationales, sont en mesure d'examiner, de manière incidente, les conséquences de cette perte de nationalité et, éventuellement, de faire recouvrer *ex tunc* la nationalité aux personnes concernées, à l'occasion de la demande, par celles-ci, d'un document de voyage ou de tout autre document attestant de leur nationalité. Dans le cadre de cet examen, ces autorités et juridictions doivent vérifier si la perte de la nationalité de l'État membre concerné, qui emporte celle du statut de citoyen de l'Union, respecte le principe de proportionnalité en ce qui concerne les conséquences qu'elle comporte sur la situation de chaque personne concernée et, le cas échéant, sur celle des membres de sa famille au regard du droit de l'Union.

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

1) Necessity of individual examination of situations in cases of withdrawal of residence permits obtained in the context of family reunification based on falsified documents

2) Ignorance on the part of the beneficiary of a residence permit concerning the fraudulent nature of the documents produced for family reunification does not preclude its withdrawal

1) Nécessité d'un examen individuel des situations en cas de retrait de titres de séjour obtenus via un regroupement familial basé sur des documents falsifiés

2) Ignorance du bénéficiaire d'un titre de séjour quant au caractère frauduleux des documents présentés pour un regroupement familial ne faisant pas obstacle à son retrait

Staatssecretaris van Veiligheid en Justitie – Y.Z. and Others/e.a., C-557/17, Judgment | Arrêt 14.3.2019 (CJEU/CJUE)

Press release | Communiqué de presse

In the CJEU's view,

1) Article 16(2)(a) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification must be interpreted as meaning that, where falsified documents were produced for the issuing of residence permits to family members of a third-country national, the fact that those family members did not know of the fraudulent nature of those documents does not preclude the Member State concerned, in application of that provision, from withdrawing those permits. In accordance with Article 17 of that directive, it is however for the competent national authorities to carry out, beforehand, a case-by-case assessment of the situation of those family members, by making a balanced and reasonable assessment of all the interests in play.

2) Article 9(1)(a) of Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as meaning that, where long-term resident status has been granted to third-country nationals on the basis of falsified documents, the fact that those nationals did not know of the fraudulent nature of those documents does not preclude the member State concerned, in application of that provision, from withdrawing that status.

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La CJUE dit pour droit que :

1) L'article 16 § 2 a) de la directive 2003/86/CE du 22 septembre 2003 relative au droit au regroupement familial doit être interprété en ce sens que, dans le cas où des documents falsifiés ont été produits aux fins de la délivrance de titres de séjour aux membres de la famille d'un ressortissant d'un pays tiers, la circonstance que ces membres de la famille n'avaient pas connaissance du caractère frauduleux de ces documents ne fait pas obstacle à ce que l'État membre concerné procède, en application de cette disposition, au retrait de ces titres. Conformément à l'article 17 de cette directive, il incombe toutefois aux autorités nationales compétentes d'effectuer, au préalable, un examen individualisé de la situation de ces membres, en procédant à une appréciation équilibrée et raisonnable de l'ensemble des intérêts en présence.

2) L'article 9 § 1 a) de la directive 2003/109/CE du 25 novembre 2003 relative au statut des ressortissants de pays tiers résidents de longue durée doit être interprété en ce sens que, dans le cas où le statut de résident de longue durée a été accordé à des ressortissants de pays tiers sur la base de documents falsifiés, la circonstance que ces ressortissants n'avaient pas connaissance du caractère frauduleux de ces documents ne fait pas obstacle à ce que l'État membre concerné procède, en application de cette disposition, au retrait de ce statut.

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

Transfer to another member State of an asylum-seeker under the Dublin III Regulation is inhuman and degrading if it exposes him or her to a situation of extreme material poverty

Le transfert vers un autre État membre d'un demandeur d'asile au titre du règlement Dublin III est inhumain et dégradant s'il l'expose à un dénuement matériel extrême

Abubacarr Jawo – Bundesrepublik Deutschland, C-163/17, Judgment | Arrêt 19.3.2019 (CJEU, Grand Chamber/CJUE, grande chambre)

Press release | Communiqué de presse

In the CJUE's opinion,

– EU law must be interpreted as meaning that the question whether Article 4 of the Charter of Fundamental Rights of the European Union precludes the transfer, pursuant to Article 29 of Regulation No. 604/2013, of an applicant for international protection to the member State which, in accordance with that regulation, is normally responsible for examining his application for international protection, where, in the event of such protection being granted in that Member State, the applicant would be exposed to a substantial risk of suffering inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights, on account of the living conditions that he could be expected to encounter as a beneficiary of international protection in that member State, falls within its scope.

– Article 4 of the Charter of Fundamental Rights must be interpreted as not precluding such a transfer of an applicant for international protection, unless the court hearing an action challenging the transfer decision finds, on the basis of information that is objective, reliable, specific and properly updated and having regard to the standard of protection of fundamental rights guaranteed by EU law, that that risk is real for that applicant, on account of the fact that, should he be transferred, he would find himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty.

-ooOoo-

La CJUE dit pour droit, entre autres, que :

– Le droit de l'Union doit être interprété en ce sens que relève de son champ d'application la question de savoir si l'article 4 de la Charte des droits fondamentaux de l'Union européenne s'oppose à ce qu'un demandeur de protection internationale soit transféré, en application de l'article 29 du règlement n° 604/2013, vers l'État membre qui, conformément à ce règlement, est normalement responsable de l'examen de sa demande de protection internationale, lorsque, en cas d'octroi d'une telle protection dans cet État membre, ce demandeur encourrait un risque sérieux de subir un traitement inhumain ou dégradant, au sens de cet article 4, en raison des conditions de vie prévisibles qu'il rencontrerait en tant que bénéficiaire d'une protection internationale dans ledit État membre.

– L'article 4 de la Charte des droits fondamentaux doit être interprété en ce sens qu'il ne s'oppose pas à un tel transfert du demandeur de protection internationale, à moins que la juridiction saisie d'un recours contre la décision de transfert ne constate, sur la base d'éléments objectifs, fiables, précis et dûment actualisés et au regard du standard de protection des droits fondamentaux garanti par le droit de l'Union, la réalité de ce risque pour ce demandeur, en raison du fait que, en cas de transfert, celui-ci se trouverait, indépendamment de sa volonté et de ses choix personnels, dans une situation de dénuement matériel extrême.

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

The lack of subsistence allowances in a member State which had granted subsidiary protection does not in itself demonstrate that the rejection of an asylum application by another member State would expose the person concerned to inhuman or degrading living conditions

L'absence de prestations de subsistance dans un État membre ayant accordé la protection subsidiaire n'établit pas en soi que le rejet d'une demande d'asile par un autre État membre exposerait l'intéressé à des conditions de vie inhumaines ou dégradantes

Bashar Ibrahim and Others/e.a. – Bundesrepublik Deutschland (C-297/17, C-318/17, C-319/17) and/et *Bundesrepublik Deutschland – Taus Magamadov* (C-438/17), Judgment | Arrêt 19.3.2019 (CJEU, Grand Chamber/CJUE, grande chambre)

Press release | Communiqué de presse

In the CJEU's opinion, Article 33(2)(a) of Directive 2013/32 of 26 June 2013 on common procedures for granting and withdrawing international protection must be interpreted as not precluding a member State:

– from exercising the option granted by that provision to reject an application for the grant of refugee status as being inadmissible on the ground that the applicant has been previously granted subsidiary protection by another member State, where the living conditions that that applicant could be expected to encounter as the beneficiary of subsidiary protection in that other member State would not expose him to a substantial risk of

suffering inhuman or degrading treatment, within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union. The fact that the beneficiaries of such subsidiary protection do not receive, in that member State, any subsistence allowance, or that such allowance as they receive is markedly inferior to that in other member States, though they are not treated differently from nationals of that member State, can lead to the finding that that applicant would be exposed in that member State to such a risk only if the consequence is that that applicant would, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, be in a situation of extreme material poverty;

– from exercising that option, where the asylum procedure in the other member State that has granted subsidiary protection to the applicant leads to a systematic refusal, without real examination, to grant refugee status to applicants for international protection who satisfy the conditions laid down in Chapters II and III of Directive 2011/95/EU.

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La CJUE dit pour droit, entre autres, que l'article 33 § 2 a) de la directive 2013/32/UE du 26 juin 2013 relative à des procédures communes pour l'octroi et le retrait de la protection internationale doit être interprété en ce sens qu'il ne s'oppose pas :

– à ce qu'un État membre exerce la faculté offerte par cette disposition de rejeter une demande d'octroi du statut de réfugié comme irrecevable au motif que le demandeur s'est déjà vu accorder une protection subsidiaire par un autre État membre, lorsque les conditions de vie prévisibles que ledit demandeur rencontrerait en tant que bénéficiaire d'une protection subsidiaire dans cet autre État membre ne l'exposeraient pas à un risque sérieux de subir un traitement inhumain ou dégradant, au sens de l'article 4 de la Charte des droits fondamentaux de l'Union européenne. La circonstance que les bénéficiaires d'une telle protection subsidiaire ne reçoivent, dans ledit État membre, aucune prestation de subsistance, ou sont destinataires d'une telle prestation dans une mesure nettement moindre que dans d'autres États membres, sans être toutefois traités différemment des ressortissants de cet État membre, ne peut conduire à la constatation que ce demandeur y serait exposé à un tel risque que si elle a pour conséquence que celui-ci se trouverait, en raison de sa vulnérabilité particulière, indépendamment de sa volonté et de ses choix personnels, dans une situation de dénuement matériel extrême ;

– à ce qu'un État membre exerce cette même faculté, lorsque la procédure d'asile dans l'autre État membre ayant accordé une protection subsidiaire au demandeur conduit à refuser systématiquement, sans réel examen, l'octroi du statut de réfugié à des demandeurs de protection internationale qui remplissent les conditions prévues aux chapitres II et III de la directive 2011/95/UE.

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

The Algerian *kafala* system does not create a direct parent-child relationship between a minor and his guardian, an EU citizen, but it is an important factor in terms of family reunification

La *kafala* algérienne ne crée pas un lien de filiation directe entre un mineur et son tuteur, citoyen de l'Union, mais est un élément de poids en faveur du regroupement familial

SM – Entry Clearance Officer, UK Visa Section, C-129/18, Judgment | Arrêt 26.3.2019 (CJEU, Grand Chamber/CJUE, grande chambre)

Press release | Communiqué de presse

In the CJEU's view, the concept of a "direct descendant" of a citizen of the Union referred to in Article 2(2)(c) of Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States must be interpreted as not including a child who has been placed in the permanent legal guardianship of a citizen of the Union under the Algerian *kafala* system, because that placement does not create any parent-child relationship between them.

However, it is for the competent national authorities to facilitate the entry and residence of such a child as one of the other family members of a citizen of the Union pursuant to Article 3(2)(a) of that directive, read in the light of Articles 7 and 24(2) of the Charter of Fundamental Rights of the European Union, by carrying out a balanced and reasonable assessment of all the current and relevant circumstances of the case which takes account of the various interests in play and, in particular, of the best interests of the child concerned. In the event that it is established, following that assessment, that the child and its guardian, who is a citizen of the Union, are called to lead a genuine family life and that that child is dependent on its guardian, the requirements relating to the fundamental right to respect for family life, combined with the obligation to take account of the best interests of the child, demand, in principle, that that child be granted a right of entry and residence in order to enable it to live with its guardian in his or her host member State.

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La CJUE dit pour droit que la notion de « descendant direct » d'un citoyen de l'Union figurant à l'article 2 § 2 c) de la directive 2004/38/CE du 29 avril 2004, relative au droit des citoyens de l'Union et des membres de leurs familles de circuler et de séjourner librement sur le territoire des États membres, doit être interprétée en ce sens qu'elle n'inclut pas un enfant qui a été placé sous la tutelle légale permanente d'un citoyen de l'Union au titre de la *kafala* algérienne, dès lors que ce placement ne crée aucun lien de filiation entre eux.

Il appartient toutefois aux autorités nationales compétentes de favoriser l'entrée et le séjour d'un tel enfant en tant qu'autre membre de la famille d'un citoyen de l'Union, conformément à l'article 3 § 2 a) de cette directive, lu à la lumière de l'article 7 et de l'article 24 § 2 de la Charte des droits fondamentaux de l'Union européenne, en procédant à une appréciation équilibrée et raisonnable de l'ensemble des circonstances actuelles et pertinentes de l'espèce, qui tienne compte des différents intérêts en jeu et, en particulier, de l'intérêt supérieur de l'enfant concerné. Dans l'hypothèse où il est établi, au terme de cette appréciation, que l'enfant et son tuteur, citoyen de l'Union, sont appelés à mener une vie familiale effective et que l'enfant dépend de son tuteur, les exigences liées au droit fondamental au respect de la vie familiale, combinées à l'obligation de tenir compte de l'intérêt supérieur de l'enfant, requièrent, en principe, l'octroi, audit enfant, d'un droit d'entrée et de séjour afin de lui permettre de vivre avec son tuteur dans l'État membre d'accueil de ce dernier.

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

In the selection procedure for European Union staff, differences of treatment based on language must be justified by the real needs of the service and be foreseeable through clear criteria

Dans la sélection du personnel de l'Union, les différences de traitement linguistiques doivent être justifiées par des besoins réels du service et annoncées par des critères clairs

Spain/Espagne – European Parliament/Parlement européen, C-377/16, Judgment | Arrêt, *European Commission/Commission européenne – Italy/Italie*, C-621/16 P, Judgment | Arrêt, 26.3.2019 (CJEU, Grand Chamber/CJUE, grande chambre)

Press release | Communiqué de presse

In Case C-377/16, Spain asked the CJEU to annul, on grounds of discrimination based on language, the European Parliament's call for applications launched in 2016 for the establishment of a database of candidates to act as drivers. The application form was available only in English, French and German. In addition to a thorough knowledge of one of the 24 official EU languages as "language 1" of the selection procedure, candidates were required to have a satisfactory knowledge of English, French or German as "language 2". The Parliament justified that restriction on the choice of "language 2" by "the interests of the service, which require newly recruited staff to be immediately operational and able to communicate effectively in their daily work" and by the fact that those three languages are the most widely used within the institution.

In Case C-621/16P, the Commission brought an appeal before the CJEU seeking the annulment of the judgment of the General Court by which the General Court, as a result of actions brought by Italy, had annulled two notices of open competition of the European Personnel Selection Office (EPSO) on the grounds that it was unlawful to restrict the choice of "language 2" of the competition to English, French and German and to restrict to those three languages the choice of language of communication between candidates and EPSO.

By two judgments of 26 March 2019, the CJEU, in Case C-377/16, annulled the call for expressions of interest and declared the database established under that call void and, in Case C-621/16P, dismissed the Commission's appeal. (For the reasons of the judgments see the press release.)

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Dans l'affaire C-377/16, l'Espagne avait demandé à la CJUE l'annulation, pour discrimination linguistique, de l'appel à candidature lancé par le Parlement européen en 2016 pour la constitution d'une base de données de candidats pour exercer la fonction de chauffeur. Le formulaire d'inscription n'était disponible qu'en anglais, français et allemand. Les candidats devaient posséder, outre une connaissance approfondie de l'une des 24 langues officielles de l'Union en tant que « langue 1 » de la procédure de sélection, une connaissance satisfaisante de l'anglais, du français ou de l'allemand en tant que « langue 2 ». Le Parlement avait motivé cette limitation du choix de la « langue 2 » par « l'intérêt du service, qui exige que les nouveaux recrutés soient immédiatement opérationnels et capables de communiquer efficacement dans leur travail quotidien » et par le fait que ces trois langues sont les plus largement employées au sein de cette institution.

Dans l'affaire C-621/16P, la Commission avait saisi la CJUE d'un pourvoi visant à l'annulation d'un arrêt du Tribunal de l'UE par lequel celui-ci, sur recours de l'Italie, avait annulé deux avis de concours général de l'Office européen de sélection du personnel (EPSO), considérant que n'étaient justifiées ni la limitation du choix de la « langue 2 » du concours à l'anglais, au français et à l'allemand, ni la limitation à ces trois langues du choix de la langue de communication entre les candidats et l'EPSO.

Par deux arrêts du 26 mars 2019, la CJUE, dans l'affaire C-377/16, annule l'appel à manifestation d'intérêt ainsi que la base de données établie en vertu de cet appel et, dans l'affaire C-621/16 P, rejette le pourvoi de la Commission. (Pour les motifs de ces arrêts, voir le communiqué de presse.)

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

State obligations in cases of sexual torture by State security forces

Obligations incombant à l'État dans le cas d'actes de torture sexuelle perpétrés par des membres des forces de sécurité publiques

Women Victims of Sexual Torture in Atenco v. Mexico/Femmes victimes d'actes de torture sexuelle c. Mexique, Series C No. 371/Série C n° 371, Judgment | Arrêt 28.11.2018

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

[Le présent résumé a été fourni gracieusement (en anglais uniquement) par le Secrétariat de la Cour interaméricaine des droits de l'homme. Il porte uniquement sur les questions de fond et de réparation traitées dans l'arrêt. Un résumé officiel plus détaillé (en espagnol uniquement) est disponible sur le site web de cette cour : www.corteidh.or.cr.]

The facts of the case relate to the police operations that were carried out by the municipal police of Texcoco and San Salvador Atenco, the local police of the State of Mexico and the Federal Preventive Police in the municipalities of San Salvador Atenco, Texcoco and in the road Texcoco-Lechería with the purpose of repressing demonstrations that were taking place on 3 and 4 May 2006. In the framework of these police operations the eleven women of the present case were arrested. During their detention and while they were being transferred to the "Santiaguito" penitentiary centre they were subject to numerous methods of violence, including rape in the case of seven victims. Later, several victims were subject to degrading treatment by the doctors who attended them once they had arrived at the penitentiary centre, who refused to carry out medical checks, gynaecological exams and report or register the acts of sexual violence. Several criminal proceedings were initiated in order to investigate the facts reported by the victims of this case, yet they have not concluded, except for one of the proceedings which ended in the acquittal of the accused.

Merits

(a) Article 15 (right of assembly) of the American Convention on Human Rights (ACHR) in conjunction with Article 1(1) (obligation to respect and ensure rights without discrimination) of the ACHR – The Inter-American Court of Human Rights (hereafter "the Court") found that the acts of the security forces when carrying out the operations on 3 and 4 May 2006 were characterised by the use of force in an indiscriminate and excessive way against any person who was thought to be part of the demonstrations. It observed that the eleven women victims of the case, in accordance with the information provided, were either engaging in peaceful practices or seeking to protect their integrity when they were detained. Thus, the use of force on the part of the police authorities at the time they were detained was neither legitimate nor necessary. It was also considered excessive and unacceptable because of the sexual and discriminatory nature of the aggressions suffered by the victims.

Conclusion: violation (unanimously).

(b) Articles 5(1) (right to personal integrity), 5(2) (prohibition of torture or cruel, inhuman, or degrading treatment), and 11 (right to privacy) of the ACHR in conjunction with Articles 1(1) (obligation to respect and ensure rights without discrimination) and 2 (obligation to adopt measures) of the ACHR, Articles 1 and 6 of the Inter-American Convention to Prevent and Punish Torture, and Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women: Additionally, the Court determined that: (i) the eleven women were subject to sexual violence, through verbal and physical aggressions with sexual connotations or references; (ii) seven women were also victims of rape, which included penetration with a body part of the police officers or an object; and (iii) all the victims were subject to torture for the acts of abuse and aggressions suffered, including but not limiting to rape, in view of the intention and severity of the suffering infringed, and of the purpose of the police officers to humiliate and punish them. Furthermore, the Court found that (i) the acts of torture were used in this case as a method of social control, which increased the gravity of the violations committed; (ii) the victims were subject to several forms of verbal and psychological violence which were heavily stereotyped and discriminatory; and (iii) the way

the doctors treated them at the penitentiary centre represented an additional element of cruel and degrading treatment.

Finally, the Court considered that the acts of sexual violence and torture committed against the victims were also discriminatory on gender grounds.

Conclusion: violation (unanimously).

(c) Articles 8(1) (due process) and 25(1) (judicial remedy) in conjunction with Article 1(1) of the ACHR, Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and Article 7(b) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women: As regards the judicial investigations in relation to the acts of torture, violence and rape as reported by the victims of this case, the Court noted that the investigations were not carried out by the State with the required due diligence and gender perspective. Also, they limited themselves to investigate the participation of local agents, when there were signs indicating that federal agents had also participated in the events. Additionally, the Court observed that no investigations were carried out as regards all the possible forms of individual responsibility for the acts of torture committed against the victims, including command responsibility, even though there was evidence in this regard.

Conclusion: violation (unanimously).

Reparations – The Court established that the judgment constituted *per se* a form of reparation. It additionally ordered that the State to: (i) carry out systematic and thorough investigations including gender perspective and, if appropriate, punish all the persons responsible for the violence and sexual torture suffered by the eleven women of this case; (ii) provide immediate and free medical, psychological or psychiatric treatment to the victims; (iii) implement training programs for members of the Federal Police and the State of Mexico; (iv) implement a monitoring and control mechanism to measure and assess the effectiveness of the public policies and institutions which currently exist in charge of the accountability and monitoring of the use of force; (v) develop a strengthening plan of the Mechanism Monitoring Cases of Torture committed against Women; and (vi) pay pecuniary and non-pecuniary damages, as well as costs and expenses, among other measures.

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Film on the ECHR: 37 language versions/Film sur la CEDH : 37 versions linguistiques

Three new language versions of the film presenting the Court have been produced recently, in Armenian, Macedonian and Japanese. The film, which explains the workings of the ECHR, is now available in 37 languages on the Court's website (The Court> General presentation>Videos).

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Le film de présentation de la Cour vient d'être adapté dans trois nouvelles versions, à savoir en arménien, en macédonien et en japonais. Ce film expliquant le fonctionnement de la CEDH est ainsi disponible dans 37 langues sur le site web de la Cour (La Cour>Présentation générale>Vidéos).

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

Overview of the Court's case-law/ Aperçu de la jurisprudence de la Cour

The Court has recently published an Overview of its case-law for 2018. This annual *Overview* series, available in English and French, focuses on the most important cases the Court deals with each year and highlights judgments and decisions which raise either new issues or important matters of general interest.

The Overviews can be downloaded from the Court's website (www.echr.coe.int – Case-law>Case-law analysis>Overview of the Court's case-law). Moreover, a print edition of the 2018 Overview will also be available from Wolf Legal Publishers (the Netherlands) at coe@wolfpublishers.nl.

La Cour a publié récemment un Aperçu de sa jurisprudence pour 2018. Cette série, *Aperçu de la jurisprudence*, disponible en français et en anglais, se concentre sur les affaires les plus importantes qui sont traitées chaque année par la Cour, et met en exergue les arrêts et décisions qui traitent d'une question nouvelle ou d'un sujet important d'intérêt général.

Les Aperçus peuvent être téléchargés à partir du site web de la Cour (www.echr.coe.int – Jurisprudence>Analyse jurisprudentielle>Aperçu

de la jurisprudence). Par ailleurs, une version imprimée de l'Aperçu 2018 sera en vente auprès des Éditions juridiques Wolf (Pays-Bas) : coe@wolfpublishers.nl.

New Case-Law Guide/Nouveau Guide sur la jurisprudence

As part of its series on the case-law relating to particular Convention Articles the Court has recently published a Guide on Article 17 of the Convention (prohibition of abuse of rights). Translation into French is pending.

All Case-Law Guides can be downloaded from the Court's website (Case-law>Case-law analysis>Case-law guides).

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Dans le cadre de sa série sur la jurisprudence par article de la Convention, la Cour vient de publier un Guide sur l'article 17 de la Convention (interdiction de l'abus de droit). Une traduction vers le français de ce guide, disponible pour le moment uniquement en anglais, est en cours.

Tous les guides sur la jurisprudence peuvent être téléchargés à partir du site web de la Cour (Jurisprudence>Analyse jurisprudentielle>Guides sur la jurisprudence).

The Court in facts and figures 2018/ La Cour en faits et chiffres 2018

This document contains statistics on cases dealt with by the Court in 2018, particularly judgments delivered, the subject matter of the violations found and violations by Article and by State. It can be downloaded from the Court's website (The Court>General presentation>Information documents).

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Ce document contient des statistiques sur les affaires que la Cour a traitées en 2018, notamment sur les arrêts rendus, l'objet des violations constatées ainsi que les violations par article et par État. Il peut être téléchargé à partir du site web de la Cour (La Cour>Présentation générale>Documents d'information).

Overview 1959-2018/Aperçu 1959-2018

This document, which gives an overview of the Court's activities since it was established, has been updated. It can be downloaded from the Court's website (The Court>General presentation>Information documents).

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Ce document, qui donne un aperçu des activités de la Cour depuis sa création, vient d'être mis à jour. Il peut être téléchargé à partir du site web de la Cour (La Cour>Présentation générale>Documents d'information).

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

Translations into Albanian, Azerbaijani and Bosnian of some of the Case-Law Guides have recently been published on the Court's website (>Case-law>Case-law analysis>Case-law guides).

Udhëzues rreth nenit 6 të Konventës Evropiane të të Drejtave të Njeriut – E drejta për një proces të rregullt (pjesa penale) (alb)

Avropa İnsan Hüquqlari Konvensiyasinin 8-Ci Maddəsi Üzrə Təlimat – Şəxsi Və Ailə Həyatina Hörmət (aze)

Avropa İnsan Hüquqlari Konvensiyasinin 18-Ci Maddəsi Üzrə Təlimat – Hüquqlarla Bağli Məhdudiyyətlərdən İstifadənin (aze)

Vodič kroz član 6. Evropske konvencije o ljudskim pravima – Pravo na pravično suđenje (građanskopravni aspekt) (bos)

Des traductions en albanais, azerbaïdjanais et bosniaque de certains Guides sur la jurisprudence ont été récemment publiées sur le site web de la Cour (>Jurisprudence>Analyse jurisprudentielle>Guides sur la jurisprudence).