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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

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

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

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

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

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Kurt – Austria/Autriche, 62903/15, Judgment/Arrêt 15.6.2021 [GC]

Traduction française du résumé – Printable version

Facts – In June 2010, following a complaint by the applicant to the police of beatings by her husband, E., a barring and protection order was issued against him obliging him to stay away from their apartment, as well as from the applicant's parents' apartment and the surrounding areas for fourteen days. It appears he complied with the order. In January 2011 E. was convicted of causing bodily harm to her and making dangerous threats towards his relatives. After this, the applicant did not report any incidents to the police until 22 May 2012, when she filed for divorce and reported E. to the police for rape, choking her and for making dangerous threats on a daily basis in the preceding two months. She also stated that sometimes he had slapped their two children; when interviewed, their minor son and daughter confirmed this as well as that their mother had been beaten. On the same day a new barring and protection order was issued against E., prohibiting him from returning to their apartment, the applicant's parents' apartment and the surrounding areas. He was taken for questioning and his keys were seized. The public prosecutor's office also instituted criminal proceedings against him. Three days later, he shot their son at school and committed suicide by shooting himself. The boy subsequently died of his injuries. The applicant unsuccessfully brought official liability proceedings claiming that E. should have been held in pre-trial detention.

In a judgment of 4 July 2019 (see Legal Summary), a Chamber of the European Court found unanimously no violation of Article 2 in its substantive limb. The case was referred to the Grand Chamber at the applicants' request.

Law – Article 2 (substantive aspect)

1. *General principles*

The duty to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*) was an obligation of means, not of result. Thus, in circumstances where the competent authorities had responded to the identified risk by taking appropriate measures within their powers, the fact that such measures might nonetheless fail to achieve the desired result was not in itself capable of justifying the finding of a violation of the State's preventive operational obligation under Article 2. A given case in which a real and immediate risk materialised must be assessed from the point of view of what was known to the competent authorities at the relevant time.

On the other hand, in this context, the assessment of the nature and level of risk constituted an integral part of the duty to take preventive operational measures. Thus, an examination of the State's compliance with this duty under Article 2 had to comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and the adequacy of the preventive measures taken.

In the context of domestic violence, the obligations incumbent on the State authorities could be summarised as follows:

(i) An immediate response to allegations of domestic violence was required.

(ii) The authorities had to establish whether there existed a real and immediate risk to the life of one or more identified victims of domestic violence by taking due account of the particular context of domestic violence cases. Violence against children belonging to the common household, including deadly violence, could be used by perpetrators as the ultimate form of punishment against their partner.

The authorities were under a duty to carry out an autonomous, proactive and comprehensive risk assessment. The terms "autonomous" and "proactive" referred to the requirement for the authorities to not rely solely on the victim's perception of the risk, but to complement it by their own assessment, collecting and assessing information on all relevant risk factors and elements of the case. Furthermore, the use of standardised, internationally recognised checklists, which indicated specific risk factors and had been developed on the basis of sound criminological research and best practices in domestic violence cases, could contribute to the "comprehensiveness" of the risk assessment. It was important for the relevant authorities to receive regular training and awareness-raising, particularly in re-

spect of risk assessment tools, in order to understand the dynamics of domestic violence. Any risk assessment had to be apt to systematically identify and address all the potential – direct or indirect – victims, keeping in mind the possibility that the outcome could be a different level of risk for each of them.

The law-enforcement authorities should share information on risks and coordinate support with any other relevant stakeholders who came into regular contact with persons at risk, including, in the case of children, with teachers. The authorities should inform the victim(s) of the outcome of their risk assessment, and, where necessary, provide advice and guidance on available legal and operational protective measures. Some basic documenting of the conduct of the risk assessment was thus of importance.

Regarding the concept of "immediate risk", the Court had already applied it in a more flexible manner than in traditional *Osman*-type incident-based situations, taking into account the common trajectory of escalation in domestic violence cases, even if the exact time and place of an attack could not be predicted in a given case. The perpetrator's behaviour could become more predictable in situations of a clear escalation of such violence, with an increase in frequency, intensity and danger over time. The Court had observed in numerous other cases that a perpetrator with a record of domestic violence posed a significant risk of further and possibly deadly violence. This general knowledge and the comprehensive research available in that area had to be duly taken into account by the authorities when they assessed the risk of a further escalation of violence, even after the issuance of a barring and protection order. However, an impossible or disproportionate burden must not be imposed on the authorities.

(iii) If the outcome of this assessment was the existence of such a risk, the authorities' obligation to take preventive operational measures was triggered. Such measures had to be adequate and proportionate to the level of the risk assessed.

Whether sufficient operational measures were available in law and in practice at the critical moment was closely related to the question of the adequacy of the legal framework (the "measures within the scope of their powers" aspect of the *Osman* test). A proper preventive response often required coordination among multiple authorities, including the rapid sharing of information. If children were involved or found to be at risk, the child protection authorities should be informed as soon as possible, as well as schools and/or other childcare facilities. Risk management plans and coordinated support services for victims proved valuable in practice. Treatment programmes for perpetrators were desirable.

The choice of an operational measure inevitably required, at both general policy and individual level, a careful weighing of the competing rights at stake and other relevant constraints. On the one hand, any such measures had to offer an adequate and effective response to the risk to life as identified. On the other hand, and to the extent that they had an impact on the alleged perpetrator, any measures taken had to remain in compliance with the States' other obligations under the Convention, including the need to ensure that the police exercised their powers in a manner which fully respected due process and other safeguards, including the guarantees contained in Articles 5 and 8. The nature and severity of the assessed risk would always be an important factor with regard to the proportionality of any protective and preventive measures to be taken.

Regarding a deprivation of liberty in this context, the positive obligation to protect life arising under Article 2 might entail certain requirements for the domestic legal framework in terms of enabling necessary measures to be taken where specific circumstances so required. At the same time, however, any measure entailing a deprivation of liberty will have to fulfil the requirements of the relevant domestic law as well as the specific conditions set out in Article 5 and the Court's case-law pertaining to it.

2. *Application to the instant case*

(a) *Whether the authorities reacted immediately to the domestic violence allegations* – The applicant's complaint was only about the choice of the measures taken by the domestic authorities. Indeed, in the instant case, unlike in many other cases of domestic or gender-based violence before the Court, the authorities, both in 2010 and 2012, had responded immediately to the applicant's domestic violence allegations, had taken evidence and issued barring and protection orders; there had been no delays or inactivity. The police had also had a checklist of specific risk factors to consider in the event of an intervention under the relevant domestic law. The Grand Chamber thus endorsed the Chamber's findings in this regard. Moreover, the police had accompanied the applicant to the family home after she had made her report, ensuring thus that she would not have to encounter E. alone and had informed her, via a leaflet, about the possibility of applying for a temporary restraining order in order to be protected from him. The officers had taken E. to the police station for questioning and confiscated his keys to the family home. One of the officers who had responded to the applicant's alle-

gations of violence had been specially trained and experienced in handling domestic violence cases. The above measures, thus, demonstrated that the authorities had displayed the required special diligence in their immediate response to the applicant's allegations.

(b) *The quality of the risk assessment* – At the outset the Court reiterated that it had to look at the facts strictly as they had been known to the authorities at the material time, and not with the benefit of hindsight. It then found that the authorities' risk assessment, while not following any standardised risk assessment procedure, fulfilled the requirements of being autonomous, proactive and comprehensive. In particular:

First, the police's assessment had not just been on the basis of the factual account given by the applicant, who had been accompanied by her longstanding expert counsellor from the Centre for Protection from Violence, but also on several other factors and items of evidence. On the very day of the applicant's report, the police had questioned all the persons directly involved, drawn up detailed records of their statements and taken pictures of her visible injuries. The applicant had also undergone a medical examination. Further, they had carried out an online search of the records regarding the previous barring and protection orders and temporary restraining orders and injunctions issued against E. They had been aware of his previous conviction for domestic violence and dangerous threatening behaviour, and that he had been issued with a barring and protection order some two years earlier. Moreover, and importantly in the context, they had checked whether any weapons had been registered in E's name; this had produced a negative result.

Secondly, as could be seen from the police report, the risk assessment had identified and duly considered major known risk factors in the domestic violence context of the case. In particular, the police took into account the circumstances that a rape had been reported, the visible signs of violence in the form of haematomas on the applicant, her tearful and very scared state, that she had been subjected to threats and the children to violence, the known reported and unreported previous acts of violence, escalation, current stress factors such as unemployment, divorce and/or separation, E's strong tendency to trivialise violence, his behaviour when he had accompanied the officers to the station, and the fact that he had no firearms registered his name.

Thirdly, the death threats uttered by E. had all been targeted at the applicant, be it directly, or indirectly by threatening to hurt or kill her, those closest to her or himself. In that context such threats had to be taken seriously and assessed as to their credibility. It transpired from the police report sent to the public prosecutor's office that these threats and the fact that E. had choked the applicant had not been overlooked. The public prosecutor on duty had also had at his disposal the most relevant facts when deciding on the next steps to take: he had been informed by phone on the very same day of the allegations against E., the circumstances of the issuance of the barring and protection order immediately after it had been issued and had received the reports requested on the same evening. In his note for the file, he had summarised the main elements of the case, ordered further investigative steps (questioning of the children, submission of the reports on the investigations) and instituted criminal proceedings against E. for the crimes of which he had been suspected.

(c) *Whether the authorities knew or ought to have known that there was a real and immediate risk to the life of the applicant's son* – The authorities, on the basis of the evidence that had been available to them at the material time, had concluded that the applicant had been at risk of further violence and had issued a barring and protection order against E. Police officers with significant relevant experience and training had been involved in making this assessment, which the Court had to be careful not to question in a facile manner with the benefit of hindsight. Although no separate risk assessment had been explicitly carried out as to the children, this would not have changed the situation for the following reasons:

– While the fact that the children had been subjected to slaps by their father and to the mental strain of having to witness violence against their mother could in no way be underestimated, given the information the authorities had had, the children had not been the main target of E.'s violence or threats. The primary target had been the applicant, be it directly or indirectly.

– The predominant reason for the applicant's report to the police had been the alleged rape and choking the weekend before and the ongoing domestic violence and threats against her.

– Although the police report on the issuance of the barring and protection order had not explicitly listed the children as endangered persons, they had been explicitly mentioned as "victims" of the indicated crimes in the criminal investigation report forwarded to the prosecutor on the same day with their witness statements attached thereto.

– The authorities had legitimately assumed that the children had been protected in the domestic sphere from potential non-lethal forms of violence

and harassment by their father to the same extent as the applicant, through the barring and protection order. There had been no indication of a risk to the children at their school, and more specifically, a real and immediate risk of further violence against the applicant's son outside the areas for which a barring order had been issued, let alone a lethality risk.

– It also appeared – albeit not in itself decisive – that the applicant and her counsellor from the Centre for Protection from Violence had not themselves considered that the level of threat justified requesting a complete ban on contact between the father and the children.

– E.'s threats had not been deemed sufficiently serious or credible by the authorities to point to a lethality risk that would have justified pre-trial detention or other more stringent preventive measures than the barring and protection order. There was no reason to call into question the authorities' assessment that, on the basis of the information available to them at the time, it had not appeared likely that E. would obtain a firearm, go to his children's school and take his own son's life in such a rapid escalation of events.

– Although the authorities appeared to have placed some emphasis on E.'s calm demeanour towards the police - something potentially misleading in a domestic violence context and that should not be decisive in a risk assessment - this element was not sufficient to cast doubt on the conclusion that no lethality risk to the children had been discernible at the time. Similarly, while in retrospect providing speedy information to the children's school or the child protection authorities would have been desirable, it had not been foreseeable that such a measure had been required to prevent a lethal attack on the applicant's son. Thus the omission to share this information, which had not been provided for under domestic law at the time of the events, could not be regarded as a breach of their duty of special diligence in the context of the authorities' positive obligations under the *Osman* test.

Lastly, taking into account the requirements of the domestic criminal law and those flowing from Article 5 of the Convention safeguarding the rights of the accused, there was no reason to question the finding of the domestic courts that the authorities had acted lawfully in not taking E. into pre-trial detention. Under Article 5 no detention was permissible unless it was in compliance with domestic law and the applicant had raised no complaint regarding the domestic legal framework concerning grounds for detention in relation to the positive obligations under Article 2.

In view of the above, the measures ordered appeared, in the light of the risk assessment's result, to have been adequate to contain any risk of further violence against the children. The authorities had displayed the required special diligence in responding swiftly to the applicant's allegations of domestic violence and had duly taken into account the specific domestic violence context of the case. They had been thorough and conscientious in taking all necessary protective measures. They had conducted an autonomous, proactive and comprehensive risk assessment, the result of which had led them to issue a barring and protection order; from this assessment, no real and immediate risk of an attack on the children's lives had been discernible under the *Osman* test as applied in the context of domestic violence. Consequently, there had been no obligation incumbent on the authorities to take further preventive operational measures specifically with regard to the applicant's children, whether in private or public spaces, such as issuing a barring order for the children's school.

Conclusion: no violation (ten votes to seven).

(See *Osman v. the United Kingdom*, 28 October 1998, Legal Summary; see also *Bubbins v. the United Kingdom*, 50196/99, 17 March 2005, Legal Summary; *Kontrová v. Slovakia*, 7510/04, 31 May 2007, Legal Summary; *Branko Tomašić and Others v. Croatia*, 46598/06, 15 January 2009, Legal Summary; *Opuz v. Turkey*, 33401/02, 9 June 2009, Legal Summary; and *Talpis v. Italy*, 41237/14, 2 March 2017, Legal Summary)

ARTICLE 3

Inhuman or degrading treatment/ Traitement inhumain ou dégradant

Infection by the Covid-19 virus in an alleged context of prison overcrowding: *communicated*

Infection par le virus de la Covid-19 dans un contexte allégué de surpeuplement carcéral : *affaire communiquée*

Rus – Romania/Roumanie, 2621/21, Communication [Section IV]

English translation of the summary – Version imprimable

Le requérant se plaint d'avoir été infecté par le virus SARS CoV 2 alors qu'il se trouvait en prison (test positif en novembre 2020). Il en voit la cause dans ses conditions de détention, et notamment dans le surpeuplement carcéral, qui l'a empêché de respecter les règles de distanciation sociale.

Affaire communiquée sous l'angle de l'article 3 de la Convention, avec des questions aux parties sur les recours dont disposait éventuellement le requérant dans l'ordre juridique interne pour faire valoir son grief.

Inhuman treatment/Traitement inhumain

Excessive use of physical force by police officers while searching suspects' homes; no offence against the dignity of their family members: *violation; no violation*

Recours excessif par des policiers à la force physique contre les suspects lors de perquisitions à leurs domiciles ; absence d'atteinte à la dignité des membres de leurs familles : *violation ; non-violation*

Ilievi and/et Ganchevi – Bulgaria/Bulgarie, 69154/11 and/et 69163/11, Judgment/Arrêt 8.6.2021 [Section IV]

English translation of the summary – Version imprimable

En fait – En octobre 2010, le parquet régional ouvrit des poursuites pénales contre cinq personnes, y compris contre MM. Iliev et Ganchev, pour exercice illicite d'une activité financière et recel. En avril 2011, le tribunal régional autorisa la perquisition du domicile de chaque requérant, qui eut lieu le matin du 18 avril 2011.

Les cinq requérants – les époux Ilievi et leur fille qui à l'époque des faits avait dix-neuf ans, ainsi que les époux Ganchevi – se plaignent que l'intervention de la police à leur domicile les a soumis à des traitements inhumains et dégradants et que le droit interne ne leur offrait aucune voie de recours effective.

En droit – Article 3 : L'opération policière en cause poursuivait le but légitime d'effectuer une arrestation, une perquisition et une saisie ainsi que l'objectif d'intérêt général de la répression des infractions. Les requérants n'ont pas été physiquement blessés au cours des deux interventions policières contestées et les policiers n'ont pas pénétré par effraction dans leurs domiciles respectifs. Cependant, les interventions ont impliqué un certain recours à la force physique : plusieurs policiers cagoulés et armés se sont introduits, très tôt le matin et par surprise, aux domiciles des requérants et ils ont repoussé M^mes^ Ilieva et Gancheva, MM. Iliev et Ganchev ont été immobilisés à terre et menottés. La Cour se doit donc d'établir si ce recours à la force physique a été rendu strictement nécessaire par le comportement des requérants.

a) *Concernant les traitements subis par les deux requérants* – Le but des interventions policières aux domiciles respectifs de MM. Iliev et Ganchev était de les appréhender, tous deux étant soupçonnés d'avoir exercé de manière illicite une activité financière et de recel, et d'effectuer une perquisition dans les locaux pour rechercher des preuves matérielles et documentaires. L'enquête pénale avait été ouverte six mois auparavant et il y avait plusieurs suspects dans cette affaire, sans que ce soit un groupe d'individus soupçonnés d'avoir commis des actes criminels violents.

À la différence de l'affaire *Gutsanovi c. Bulgarie*, les autorités avaient reçu les autorisations préalables nécessaires pour procéder aux perquisitions des domiciles respectifs des requérants. Cependant, en exerçant la compétence que le droit interne leur attribue, les juges ayant délivré ces autorisations ont examiné la conformité des perquisitions demandées avec les dispositions du droit interne sans se pencher sur le mode opératoire que les policiers devraient adopter au cours des interventions planifiées.

En outre, aucun élément du dossier ne permet de conclure que les deux requérants avaient des antécédents violents et qu'ils auraient pu représenter un danger pour les agents de police amenés à intervenir à leurs domiciles.

De plus, aucun des deux n'a opposé de la résistance aux policiers lors des interventions à leurs domiciles respectifs.

Ce sont autant d'éléments qui indiquaient clairement le caractère excessif du comportement des policiers qui ont plaqué les deux requérants au sol, les ont menottés de force et ont braqué leurs armes sur eux. À la lumière de ces circonstances, le degré de force utilisé contre MM. Iliev et Ganchev, qui n'a pas été rendu strictement nécessaire par leur comportement, a porté atteinte à leur dignité humaine. De ce fait, ils ont été soumis à des traitements dégradants.

Conclusion : violation (unanimité).

b) *Concernant les traitements subis par les trois autres requérantes* – Les équipes d'intervention ont choisi de ne pas forcer les portes d'entrée des logements des requérants : les policiers ont sonné aux portes d'entrée et M^mes^ Ilieva et Gancheva sont allées leur ouvrir. De ce fait, ils se sont retrouvés face à face avec ces deux requérantes, qui ne s'y attendaient pas. C'est en entrant que les policiers ont repoussé les deux requérantes en question et qu'ils ont brièvement pointé leurs armes vers elles. L'interaction physique entre les policiers et M^mes^ Ilieva et Gancheva a donc été très brève et d'une intensité minime.

Ensuite, il n'y a eu aucun contact physique entre M^lle^ Ilieva et les policiers : l'intéressée a vu son père

se faire arrêter par les agents et elle a réagi de manière émotionnelle à cet événement.

Aucun élément ne permet de conclure que les policiers ont porté atteinte à la dignité humaine de ces trois requérantes. Les opérations policières impliquant l'intervention au domicile et l'arrestation des suspects engendrent inévitablement des émotions négatives chez les personnes visées par ces mesures, telles les requérantes. Cependant, aucune d'elles ne semble particulièrement affectée par les agissements des policiers en raison, par exemple, d'un état de santé particulièrement fragile ou du jeune âge de M[lle] Ilieva. À cet égard, aucune des trois requérantes n'a présenté des preuves permettant de conclure que l'une d'elles souffrait d'une pathologie pouvant être exacerbée par les agissements des policiers et, à l'époque des faits, M[lle] Ilieva n'était pas une jeune enfant mais avait dix-neuf ans.

À la lumière de ces éléments, et dans les circonstances spécifiques de l'espèce, les agissements des policiers à l'égard de ces trois requérantes, qui ont été très brefs et d'une faible intensité, n'apparaissent pas comme étant disproportionnés par rapport au comportement des trois requérantes face à un événement inattendu et stressant, telle que l'entrée de la police tôt le matin à leurs domiciles respectifs, et que agissements n'ont pas porté atteinte à leur dignité humaine.

Conclusion : non-violation (unanimité).

La Cour conclut aussi, à l'unanimité, à la violation de l'article 13 combiné avec l'article 3, car ni la procédure disciplinaire en vertu de la loi sur le ministère de l'Intérieur ni l'action en dommages et intérêts contre l'État ne constituaient des voies de recours internes suffisamment effectives pour que les cinq requérants puissent faire valoir leur droit à ne pas être soumis à des traitements contraires à l'article 3.

Article 41 : 3 000 EUR à MM. Iliev et Ganchev chacun pour préjudice moral ; constat de violation de l'article 13 suffisant pour le préjudice moral subi par les trois requérantes.

(Voir aussi *Gutsanovi c. Bulgarie*, 34529/10, 15 octobre 2013, Résumé juridique, et *Bouyid c. Belgique* [GC], 23380/09, 28 septembre 2015, Résumé juridique)

Effective investigation/Enquête effective
Positive obligations (procedural aspect)/ Obligations positives (volet procédural)

Failure to advise 4-year old child of her duty to tell the truth and her right not to testify against her father, leading to exclusion of her testimony and father's acquittal of sexual abuse: *violation*

Défaut d'information d'une enfant de 4 ans quant à son devoir de dire la vérité et à son droit de ne pas témoigner contre son père, ayant abouti à l'exclusion du témoignage de l'enfant et à l'acquittement du père des charges d'abus sexuels : *violation*

R.B. – Estonia/Estonie, 22597/16, Judgment/Arrêt 22.6.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, who was about four and a half years old at the relevant time, reported that she had been the victim of sexual abuse by her father. Two video-recorded interviews were conducted with the applicant during the pre-trial stage. In neither of them was she advised by the investigator of her right not to testify against a member of her family and of the duty to tell the truth, such instructions being required by the rules of criminal procedure in Estonia. Given her young age, she was not called to testify in court: the video-recorded statements were disclosed at the hearings and viewed by both first-instance and appellate courts. The applicant's father was subsequently convicted.

The applicant's father appealed to the Supreme Court contesting his conviction. The Supreme Court considered that the failure to advise the applicant before her interviews of the obligation to tell the truth and her right to refuse to testify against her father was of such importance as to render inadmissible her testimony, which was decisive evidence in the case. As the omission at issue could not be remedied by remitting the case to the lower-instance courts, where the child victim could not be heard, the exclusion of the main evidence resulted in the acquittal of the accused.

Law – Articles 3 and 8: The complaint concerned procedural deficiencies in the criminal proceedings as a whole, including the failure of the investigator to inform the applicant of her procedural rights and duties, and the reaction of the Supreme Court to that failure resulting in the exclusion of her testimony and the acquittal of the alleged perpetrator on procedural grounds.

In Estonia, the general rules set out in the law for questioning witnesses were also applicable to child witnesses. Nevertheless, in practice it had been recognised that when questioning child witnesses and advising them of their rights and duties, account had to be taken of their age and level of understanding. In that connection, under the relevant international instruments, investigations and criminal proceedings had to be carried out in a manner

which protected the best interests and rights of children, such protection requiring the adoption of child-friendly and protective measures for child victims in criminal proceedings. In that context it was important that the States had in place procedural rules guaranteeing and safeguarding children's testimony (see *G.U. v. Turkey*, 16143/10, 18 October 2016).

In the present case, it was undisputed that the investigator had not given the required instructions to the applicant when interviewing her as a child witness following the institution of the criminal proceedings. The whole criminal case had rested essentially on the credibility of the applicant's testimony. However, the Supreme Court had excluded that testimony entirely from the body of evidence on procedural grounds relating to the investigator's failure to provide the required warnings. Since the conviction had been to a decisive extent based on the testimony of the applicant and since there had been no way of remedying the failure associated with it, the accused had had to be acquitted.

Aside from the question whether such warnings could be considered appropriate at all in a case such as the present, the Supreme Court's decision, combined with the investigator's omission, had undermined the effective prosecution of the alleged offences. This was because, having regard to the impossibility to re-examine the case in the lower-instance courts, it had ultimately been incapable of establishing the facts of the case and determining the question of culpability of the alleged offender on the merits.

For the effective protection of children's rights in line with international standards, it was essential to safeguard their testimony both during the pre-trial investigation and trial. Estonian law, as regards the warnings to be given to witnesses, did not make a distinction between witnesses according to their age, and thus did not provide for exceptions or adaptions for child witnesses. According to the Council of Europe Committee of Ministers' Guidelines on child-friendly justice, where less strict rules on giving evidence or other child-friendly measures applied, such measures should not in themselves diminish the value given to a child's testimony or evidence, without prejudice to the rights of the defence. However, in the present case the applicant's testimony had been found to be inadmissible precisely because of the strict application of procedural rules which had made no distinction between adults and children.

In view of the above, there had been significant flaws in the domestic authorities' procedural response to the applicant's allegation of rape and sexual abuse by her father, which had not sufficiently taken into account her particular vulnerability and corresponding needs as a young child so as to afford her effective protection as the alleged victim of sexual crimes. Accordingly, without expressing an opinion on the guilt of the accused, the Court concluded that the manner in which the criminal-law mechanisms as a whole had been implemented in the present case, resulting in the disposal of the case on procedural grounds, had been defective to the point of constituting a violation of the respondent State's positive obligations under Articles 3 and 8.

Conclusion: violations (unanimously).

Article 41: EUR 16,300 in respect of non-pecuniary damage.

Extradition

Decision to extradite applicant unfit for travel, even with medical supervision, due to severe health condition: *extradition without proper assessment of transfer risks would entail a breach*

Décision d'extrader un requérant qui n'est pas en état de voyager, même sous surveillance médicale, en raison de son mauvais état de santé : *une extradition sans une évaluation appropriée des risques d'un transfert emporterait violation*

Khachaturov – Armenia/Arménie, 59687/17, Judgment/Arrêt 24.6.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant, a Russian national of Armenian origin, faced extradition from the Armenian authorities to Russia where criminal proceedings for attempted bribe-taking were pending against him. The applicant unsuccessfully challenged the extradition decision which became final on 30 November 2017. On that date the Court granted his request for an interim measure under Rule 39 of the Rules of Court and, after considering the parties' submissions on the issue, on 6 February 2018, decided to maintain the measure. Relying on Articles 2 and 3 of the Convention, the applicant claimed that his medical condition did not render him fit for being transferred either by air or land.

Law – Article 3: The core issue in the present case was whether the transfer for the purpose of extradition of the applicant, who was seriously ill, might, in itself, have resulted in a real risk of his being subjected to treatment contrary to Article 3. Indeed, the transfer of an individual whose state of health was particularly poor might, in itself, result in such a risk. However, the assessment of the transfer's impact required a case-by-case assessment of the

individual's medical condition as well as the specific medical risks relied upon and substantiated by specific medical evidence, in the light of the conditions of that particular transfer. This assessment had to be made in relation to the person's medical condition at a particular point in time, considering that the specific risks substantiated at a certain moment could, depending on whether they were of a temporary or permanent nature, be eliminated with the passage of time in view of developments in that person's state of health.

Taking into account the above, the Court observed as follows as to the present case:

As to the applicant's actual medical condition and medical risks – the applicant had provided detailed medical information obtained from different doctors, including the chief neurologist of Armenia, attesting to severe disorders of cardiovascular and nervous systems and the associated risks if he were to travel. Specifically, he had suffered from the effects of a past stroke and a further stroke or a heart attack had been considered as a possible development should he travel by air or land. This diagnosis and the potential travel risks had been subsequently confirmed by the head of the neurological department of a hospital in Yerevan. Following a later hospitalisation and a diagnosis with additional conditions, his unfitness for travel had been further confirmed. No evidence had been put forward to doubt the credibility of this information. The authorities, albeit expressing doubts as to the applicant's medical condition and the claimed risks, had not, *inter alia*, initiated their own assessment of his state of health, questioned the reliability of the medical certificates submitted or the credibility of the medical professionals who had issued them. The Court found it therefore established that the applicant suffered from serious cardiovascular and neurological disorders with associated conditions as described therein.

As to the specific medical risks his transfer could entail – there had been no indication that the Prosecutor General had had any medical documents on the applicant's state of health when taking his decision, although by then the applicant had already been transferred to the Central Prison Hospital due to the deterioration of his health. Notwithstanding, the applicant had submitted the relevant medical evidence before the Court of Appeal but his arguments concerning the risks of his transfer had been rejected with reliance on the assurances provided by the Russian authorities concerning availability of medical supervision during and after his transfer rather than as a result of a careful scrutiny of his medical condition and the alleged transfer risks. Notably, that court had refused his request for an appointment of a forensic medical expert to examine his state of health. In fact, the Government had admitted that the domestic courts had upheld the Prosecutor General's decision without having had in their possession an impartial and unbiased medical opinion concerning the potential risks of the applicant's transfer provided that constant medical supervision was ensured. Thus, despite objective medical evidence by the applicant showing the particular seriousness of his state of health and the possible significant and irreversible consequences to which his transfer might lead, the domestic courts had failed to properly assess the risks that such consequences could occur.

As to the subsequent factual information submitted by the parties, that had not been available at the time of the final extradition decision, about his medical condition and the risks of its deterioration if transferred – this had confirmed the applicant's unsuitableness for travel. Amongst other things, a medical panel convened by the Minister of Health had expressed the opinion that the high risks associated with the applicant's transfer by air or land were linked to his chronic diseases and their possible unpredictable aggravation whereas the presence of an accompanying doctor could not eliminate those risks since emergency medical care in a specialist medical institution might become necessary should his health sharply deteriorate. In connection to the latter, the Court noted that the Government's position with regard to the enforcement of the extradition decision in view of that panel's conclusion remained unclear, in particular as to whether or not its findings would have an impact on their decision to proceed with the applicant's extradition.

The Court also observed that the Government had not substantiated their claims of an "established practice" that an extradition decision would be executed only upon confirmation of the Central Prison Hospital that the person concerned was medically fit for travel; or that the extradition decision would only become final once the accompanying doctor of the receiving state had examined the applicant and confirmed that he was fit to travel. Further, in so far as the Government relied on the assurances by the Russian authorities, given that these seemed to have been limited merely to the availability of medical supervision during the applicant's transfer, they alone could not provide a sufficient basis for the Court to conclude that the anticipated conditions of the transfer would remove the existing risk of a significant deterioration in the applicant's health if his removal from Armenia were to be effected while his state of health was as indicated by the latest information before it.

In several previous cases concerning the enforcement of removal orders in respect of individuals

who could be exposed to risk during transfer, the Court had underlined the importance of the existence of a relevant domestic legal framework and procedure whereby the implementation of a removal order would depend on the assessment of the medical condition of the individual concerned. However, in the present case no such legal safeguards or procedure had been shown to exist. The Court was not convinced that such an assessment by the Russian authorities immediately before the transfer, even if carried out, would be capable of adequately addressing the risks to which the applicant could be exposed in the absence of any indication of the extent of such an assessment and – in the absence of any legal regulation of the matter – its effect on the binding nature of the final extradition decision.

Accordingly, as matters stood at the time of the finalisation of the parties' observations exchange, there had been sufficient information to conclude that, in view of the applicant's particularly poor state of health, his transfer, even in the presence of an accompanying doctor, would result in a real risk of him being subjected to treatment contrary to Article 3. In reaching this finding, the Court was mindful of the particular context of extradition and the importance of not undermining its foundations; in particular, the presence of third-party rights required that in the examination of whether there existed a concrete and individualised risk of ill-treatment, negating the requested State's ability to surrender a person, the requested State had to rely on a solid factual basis to support a finding that the required threshold of risk was met.

The Court concluded that there would be a violation of Article 3 of the Convention if the applicant was extradited to Russia without the Armenian authorities having assessed the risk faced by him during his transfer in view of the information as to his state of health.

Conclusion: violation in event of extradition without assessment of risk to health (unanimously).

The Court also found that there was no need to examine the complaint under Article 2.

Article 41: finding of violation sufficient in respect of non-pecuniary damage.

The interim measure indicated under Rule 39 would remain in force until the present judgment became final, unless the Court were to take a further decision in this connection.

(See also *Soering v. the United Kingdom*, 14038/88, 7 July 1989; *Paposhvili v. Belgium* [GC], 41738/10, 13 December 2016, Legal Summary; and *Romeo Castaño v. Belgium*, 8351/17, 9 July 2019, Legal Summary)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention/Arrestation ou détention régulières

Refusal to discharge offenders with persisting mental disorders from compulsory confinement after new law reserving its use for most serious offences: *no violation*

Refus de remettre en liberté des auteurs d'infractions internés atteints de troubles mentaux persistants, après l'adoption d'une nouvelle loi réservant l'internement à des infractions plus graves : *non-violation*

Denis and/et Irvine – Belgium/Belgique, 62819/17 and/et 63921/17, Judgment/Arrêt 1.6.2021 [GC]

Traduction française du résumé – Printable version

Facts – After committing, respectively, the offences of theft and attempted aggravated burglary, the applicants, who were mentally unstable, were placed in compulsory confinement by the criminal court under the Social Protection Act of 1930. On 1 October 2016 a new law, the Compulsory Confinement Act ("the CCA"), entered into force reserving compulsory confinement to the most serious categories of offences involving an assault on the "physical or mental integrity" of third parties. The applicants applied for permanent release, arguing that the acts they had committed no longer fulfilled the conditions for confinement under the new law. Their applications were dismissed on the ground that their mental disorders were not sufficiently stabilised and that they had not completed the three-year probation period prescribed by law in order to benefit from permanent release. The Court of Cassation dismissed their appeals on points of law.

In a judgment of 8 October 2019, a Chamber of the European Court found unanimously no violation of Article 5 §§ 1 and 4. The case was referred to the Grand Chamber at the applicants' request.

Law

Article 5 § 1: The Court found the applicants' detention continued to have a valid legal basis and that their deprivation of liberty was lawful. In particular:

(a) As to the ground for the deprivation of liberty – It had not been disputed that the applicants' deprivation of liberty fell within the scope of Article 5 § 1 (e): they had not been convicted of an offence and no penalty had been imposed but

had been found to lack criminal responsibility on account of the mental disorders from which they suffered; their compulsory confinement was a security measure of a preventive and not punitive nature.

(b) *As to the lawfulness of the deprivation of liberty* – the Court took into account the following:

(i) *The legislative amendment in issue and the question raised before the Court* – Although the CCA applied in principle to all pending cases it did not set out a specific transitional measure for persons, such as the applicants, who had been placed in confinement on the basis of the previous legal regime and who had committed acts which did not reach the new and higher threshold required. Accordingly, the question to be determined was whether this threshold affected the lawfulness of their detention, having regard to the requirements of Article 5 § 1 (e).

(ii) *The application of the new legislation by the domestic courts* – The domestic courts held that the lawfulness of the applicants' compulsory confinement had not been affected by the legislative amendment in issue. More specifically, the Court of Cassation held that the decisions in the applicants' cases had become *res judicata* and the compulsory confinement orders issued against them final. Article 5 § 1 did not mean that a final compulsory confinement measure was no longer lawfully or legally imposed due to a change of legislation during the execution phase. Moreover, the assessment of the mental state and the ensuing dangerousness of the person was not made solely on the basis of the offences for which he or she had been placed in confinement but also on account of a range of risk factors. It thus transpired that the domestic system envisaged two successive phases of compulsory confinement which were governed by different provisions and criteria. The first phase was that of the judicial proceedings resulting in the decision to impose compulsory confinement. This decision remained valid throughout that confinement so long as no final judgment for discharge was given. After the measure's imposition, the second phase began, during which the social protection divisions at the post-sentencing courts (CPS) reviewed the situation of persons in confinement at regular intervals and examined requests made by the detainees for a change in practical arrangements or their discharge. Different rules applied, in particular with regard to the conditions for final discharge, for which the CPS had to assess whether the mental disorder of the individual had stabilised sufficiently and, having regard to a range of risk factors, whether there was a risk that the punishable acts in question would be committed again. Having regard to the domestic law as interpreted by the Court of Cassation, given that the applicants had not been granted final discharge, their deprivation of liberty continued to be validly based on the court decisions which, though taken under the previous legislation, maintained their binding force.

With regard to individuals placed in compulsory confinement on the basis of a decision which had become *res judicata* prior to 1 October 2016, the effects of the CCA were limited to decisions on extending the measure, the practical arrangements of its execution and on those individuals' possible discharge. In the Court's view, the domestic courts' approach in the present case was neither arbitrary nor manifestly unreasonable.

(iii) *As to the compatibility of the approach taken with Article 5 § 1 (e)* – In the instant case, it had not been contested that the three conditions of the *Winterwerp v. the Netherlands* (1979) judgment were met: notably, it had been reliably shown that the applicants were of unsound mind, that their mental disorders were of a kind or degree warranting compulsory confinement, and that the disorders persisted throughout the entire period of the confinement. The Convention did not require the authorities, when assessing the persistence of the mental disorders, to take into account the nature of the acts committed by the individual concerned which had given rise to his or her compulsory confinement. As to the persistence of the disorder, domestic law introduced an automatic periodic review during which individuals in compulsory confinement were able, among other things, to argue that their mental-health condition had stabilised and that they no longer represented a danger to society as well as to request various practical arrangements for the execution of the order, including as in the applicants' case, their final discharge. Under section 66 of the CCA this could only be granted under two cumulative conditions: first, the completion of a three-year probationary period; and second, that the mental disorder had sufficiently stabilised, to ensure that it could no longer reasonably be feared that the person placed in confinement, on account of his or her mental disorder, possibly combined with other risk factors, would commit fresh offences causing harm to or threatening the physical or mental integrity of third parties. Thus, only the current, mental-health condition of the confined person and the current risk of reoffending, at the time that the review was carried out, were considered in deciding on an individual's release or continued placement in compulsory confinement. It was in the light of those considerations that the CPS had examined the applicants' requests for final discharge. The nature of the punishable acts that they had committed, which had formed the basis of their detention,

had not been taken into account. In contrast, the CPS had assessed whether their mental disorders had stabilised to a sufficient degree and found in view of the information available that they had not. In doing so, the CPS had examined whether the mental disorders persisted as required by Article 5 § 1 (e). In any event, during the most recent periodic review of the applicants' situation the CPS had considered that there still existed a high risk that they would commit violent crimes.

Conclusion: no violation (unanimously).

Article 5 § 4: Given the conclusion that the applicants' detention was lawful, Article 5 § 4 did not require in the present case that their immediate release should be ordered. Further, the applicants had benefited from annual automatic judicial review by the CPS, to which they had been able to submit, *inter alia*, their discharge requests, and had been able to appeal to the Court of Cassation. Less than a month had elapsed between the CPS's judgments and the appeal ones. The applicants had not argued that they did not have a judicial remedy at their disposal ruling promptly on the lawfulness of their detention and on their release applications. Their sole complaint was rather that it was impossible to secure their immediate and final discharge on account of the three-year probationary period imposed by the new law.

Indeed, that requirement seemed in principle to thwart the right, enshrined in Article 5 § 4, to obtain a judicial decision ordering the termination of detention if it proved unlawful. The Court, however, had to limit itself to verifying whether the manner in which the law had been applied in the particular circumstances of the case complied with the Convention and not to take a decision *in abstracto*. In the present case, the domestic courts had refused the applicants' request for final discharge on the grounds that neither of the two cumulative conditions under section 66 of the CCA had been met. The probation condition had, therefore, not been decisive as their state of mental health had also not improved sufficiently. Further, the Court welcomed the fact that, in the meantime, the Court of Cassation had interpreted section 66 in the light of Article 5 §§ 1 and 4, ruling that an individual who was no longer dangerous must be granted final discharge, even if the three-year probationary period had not yet been completed.

Conclusion: no violation (unanimously).

(See *Winterwerp v. the Netherlands*, 24 October 1979; see also *Radomilja and Others v. Croatia* [GC], 37685/10 and 22768/12, 20 March 2018, Legal Summary, and *Ilnseher v. Germany* [GC], 10211/12 and 27505/14, 4 December 2018, Legal Summary)

Lawful arrest or detention/Arrestation ou détention régulières

Absence of grounds for authorising continuation of detention during trial and for an uncertain duration: *violation*

Défaut de motivation d'une décision prolongeant la détention du requérant pendant son procès pour une durée indéterminée : *violation*

Vardan Martirosyan – Armenia/Arménie, 13610/12, Judgment/Arrêt 15.6.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant was taken into custody and charged with attempted drug smuggling. His pre-trial detention was extended on several occasions, including by decisions taken by the District Court in October and December 2011. The applicant appealed unsuccessfully against those decisions. He further alleged that statements regarding his guilt in those decisions had breached the presumption of innocence; a matter addressed and rectified by the Court of Appeal. In March 2012 Judge F. of the District Court took a decision setting the criminal case down for trial. The applicant remained in detention during trial and his application for release was dismissed in February 2013. In August 2013, the District Court, sitting in a single judge formation composed of Judge F., found the applicant guilty and sentenced him to a term of imprisonment.

Law

Article 5 § 1: As far as the applicant's detention during trial was concerned, the decision of March 2012 in that regard had been limited to a single phrase, finding that the preventive measure applied in respect of the applicant be left unchanged.

The absence of any grounds by the judicial authorities in their decisions authorising detention for a prolonged period of time might be incompatible with the principle of the protection from arbitrariness enshrined in Article 5 § 1. The Court had already found a violation on that ground in circumstances similar to those in the present case (see, for example, *Nakhmanovich v. Russia*, 55669/00, 2 March 2006; *Yeloyev v. Ukraine*, 17283/02, 6 November 2008; *Solovey and Zozulya v. Ukraine*, 40774/02 and 4048/03, 27 November 2008; and *Kharchenko v. Ukraine*, 40107/02, 10 February 2011). Similarly to those cases, the District Court in its decision of March 2012 had simply upheld the detention imposed on the applicant at the pre-trial stage without providing any reasons whatsoever for its decision or setting any time-limits for his continued detention. That had left the applicant in a state of

uncertainty as to the grounds and duration of his detention after that date. The later decision of February 2013, taken upon the applicant's application for release, had not contained any specific reasons justifying the applicant's detention and, moreover, had been taken almost one year after the decision of March 2012. It therefore could not be regarded as rectifying the flaws of that decision.

That appeared to have been the general practice at the material time, since the relevant provisions of domestic law had explicitly required the courts to provide reasons and to set time-limits for continued detention only during the pre-trial stage of the proceedings and it was not clear whether such requirements had applied to decisions taken at the preparatory stage of the trial, like in the present case. In those circumstances, the decision of March 2012 had not afforded the applicant an adequate protection from arbitrariness which was an essential element of the "lawfulness" of detention within the meaning of Article 5 § 1, and the applicant's detention from March 2012 to August 2013 had therefore failed to comply with the requirements of Article 5 § 1.

Conclusion: violation (unanimously).

Article 5 § 5: None of the domestic authorities had at any stage found – explicitly or implicitly – a breach of the applicant's rights guaranteed by Article 5. He had therefore had no grounds to claim compensation under domestic law. Moreover, even assuming that he had had such grounds, the Court had already found that the Armenian law, prior to the amendments of 2014 and at the time of the present case, had failed to comply with the requirements of Article 5 § 5 in view of the impossibility to claim compensation for damage of a non-pecuniary nature (see *Norik Poghosyan v. Armenia*).

The Armenian law had since been amended, introducing non-pecuniary damage as a type of compensation that could be claimed for a breach of Convention rights, including the right to liberty and security of the person. However, it had not been shown that the applicant would be able to avail himself of a right to compensation for the violation of his Article 5 rights after the delivery of the Court's judgment.

Conclusion: violation (unanimously).

Article 6 § 2: The applicant had complained that the wording of the decisions taken by the District Court in October and December 2011, examining whether the applicant's continued detention had been justified, had violated his right to be presumed innocent. The District Court had been called upon to determine whether there had been a reasonable suspicion and relevant grounds justifying the extension of the applicant's pre-trial detention. In so doing, it had referred to the nature and the dangerousness of the act "committed" by the applicant. Having regard to the impugned decisions and the context in which they had been taken, although the wording might be considered unfortunate, it could not be said to amount to an explicit and unqualified declaration of the applicant's guilt before he had been proved guilty according to the law. The court had not referred to the applicant as the perpetrator of the offence and, in fact, all extension decisions had contained concomitant statements clearly stating that the applicant had been charged with that offence. Furthermore, there had been a rectification made by the Court of Appeal.

The situation was different in so far as the District Court's decision of March 2012 committing the applicant to trial was concerned. That decision had been taken at the start of the applicant's trial by the Domestic Court which had been called upon to determine the merits of the charge against the applicant and which should have exercised particular caution in its choice of words. However, the domestic court had stated that it was committing the applicant for trial "in order to hold [the applicant] criminally liable". Such an explicit and unqualified statement, moreover made by the same judge who had eventually ruled on the applicant's guilt, had been well capable of being understood as meaning that the District Court had considered the applicant's guilt as an established fact and that the purpose of the trial had simply been to confirm that pre-determined outcome. While the District Court might have merely committed a technical error in poorly wording its decision, it had never acknowledged that any such error had been committed or attempted to correct it at any stage of the proceedings (see, *mutatis mutandis, Grubnyk v. Ukraine*). Nor had such a rectification been made by any other domestic authority. The fact that the applicant had ultimately been found guilty and sentenced to a term of imprisonment could not negate his initial right to be presumed innocent until proved guilty according to the law.

Conclusion: no violation as regards the decisions of 2011 and violation as regards the decision of 2012 (unanimously).

The Court also held, unanimously, that there had been a violation of Article 5 § 3 as regards the failure of the domestic courts to provide relevant and sufficient reasons for the applicant's continued detention on remand, and a violation of Article 5 § 4 in that the hearing of March 2012 had been conducted in violation of the principle of equality of arms.

Article 41: EUR 5,200 in respect of non-pecuniary damage.

(See also *Norik Poghosyan v. Armenia*, 63106/12, 22 October 2020, and *Grubnyk v. Ukraine*, 58444/15, 17 September 2020, Legal Summary)

Article 5 § 4

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

Three-year probationary period requisite for discharge from compulsory confinement not decisive in view of the offenders' persisting mental disorders: *no violation*

Délai d'épreuve obligatoire de trois ans pour la libération de personnes internées auteurs d'infractions n'étant pas déterminant au vu de la persistance de leurs troubles mentaux : *non-violation*

Denis and/et Irvine – Belgium/Belgique, 62819/17 and/et 63921/17, Judgment/Arrêt 1.6.2021 [GC]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 15)

Article 5 § 5

Compensation/Réparation

No enforceable right to compensation for non-pecuniary damage either prior to or after delivery of Court judgment: *violation*

Absence de droit exécutoire à réparation du préjudice moral avant ou après le prononcé d'un arrêt de la Cour : *violation*

Vardan Martirosyan – Armenia/Arménie, 13610/12, Judgment/Arrêt 15.6.2021 [Section IV]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 17)

ARTICLE 6

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Criminal conviction for refusal to disclose the security code to unlock a mobile phone during police custody: *communicated*

Condamnation pénale pour refus de communiquer le code de déverrouillage de son téléphone portable durant une garde à vue : *affaire communiquée*

Minteh – France, 23624/20, Communication [Section V]

English translation of the summary – Version imprimable

Le code pénal français incrimine « le fait, pour quiconque ayant connaissance de la convention secrète de déchiffrement d'un moyen de cryptologie susceptible d'avoir été utilisé pour préparer, faciliter ou commettre un crime ou un délit, de refuser de remettre ladite convention aux autorités judiciaires ou de la mettre en œuvre, sur les réquisitions de ces autorités (…) » (article 434-15-2).

Condamné sur le fondement de cette disposition pour avoir refusé de communiquer le code de déverrouillage de son téléphone portable aux policiers durant sa garde à vue, le requérant y voit une atteinte à son droit de garder le silence et de ne pas contribuer à sa propre incrimination, ainsi qu'une atteinte à sa vie privée et à l'intimité de sa correspondance.

Affaire communiquée sous l'angle des articles 6 § 1 et 8 de la Convention.

Article 6 § 2

Presumption of innocence/Présomption d'innocence

Wording used by court in decisions concerning applicant's continued detention and committing him to trial: *no violation; violation*

Formulation de décisions judiciaires portant prolongation de la détention du requérant et renvoi de celui-ci en jugement : *non-violation ; violation*

Vardan Martirosyan – Armenia/Arménie, 13610/12, Judgment/Arrêt 15.6.2021 [Section IV]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 17)

ARTICLE 7

Heavier penalty/Peine plus forte

Disqualification from standing for election and removal from elected office on account of criminal convictions for corruption and abuse of power, not equivalent to criminal penalties: *inadmissible*

Interdiction de se porter candidat aux élections et déchéance de mandat d'élu en raison des condamnations pénales pour corruption et abus de pouvoir, non assimilées à des sanctions pénales : *irrecevable*

Galan – Italy/Italie, 63772/16, Decision/Décision 18.5.2021 [Section I]
Miniscalco – Italy/Italie, 55093/13, Judgment/Arrêt 17.6.2021 [Section I]

English translation of the summary in the *Galan* and *Miniscalco* cases– Version imprimable dans les affaires *Galan* et *Miniscalco*

En fait – Dans l'affaire *Galan*, le requérant fut déchu de son mandat de député par le Parlement avec effet immédiat, en raison du constat de la survenance d'une cause d'inéligibilité consécutive à sa condamnation pour corruption. Le décret législatif n° 235/2012 (ci-après « le décret ») prévoyant ce type de sanctions était entré en vigueur peu avant l'élection, mais la condamnation du requérant avait eu lieu après son élection.

Dans l'affaire *Miniscalco*, l'interdiction de se porter candidat (l'*incandidabilità*) aux élections régionales a touché le requérant en raison de sa condamnation définitive pour le délit d'abus de pouvoir. Sa condamnation avait eu lieu avant l'entrée en vigueur du décret litigieux.

En droit

Article 7 : Les requérants affirment en substance que l'application du décret a entraîné l'infliction d'une nouvelle peine, en sus de la peine principale, ayant résulté de leurs condamnations définitives pour corruption et abus de pouvoir.

La question est donc de savoir si l'interdiction de se porter candidat aux élections et la déchéance litigieuses relèvent du champ d'application de l'article 7.

En principe, le domaine des droits politiques et électoraux, tels que l'inéligibilité ou la perte d'un mandat électif, ne relève pas de l'article 6 § 1 sous son volet pénal ni de l'article 7.

Afin de définir la nature des mesures fustigées par les requérants, la Cour prendra soin d'appliquer les critères fixés dans l'affaire *Del Río Prada c. Espagne* [GC] et la jurisprudence qui s'y trouve citée. Après avoir déterminé si l'*incandidabilità* et la déchéance du mandat électif ont été imposées à la suite de condamnations pénales, la Cour analysera leur nature et leur but, leur qualification en droit interne, les procédures associées à leur adoption et à leur exécution, ainsi que leur gravité.

a) *Mesures imposées à la suite de la condamnation pénale* – Les mesures subies par les requérants ont eu comme préalable nécessaire leurs condamnations pénales définitives. L'*incandidabilità* les a privés, en raison de leurs condamnations, du droit de se porter candidat aux élections aux fins du décret. Quant à la déchéance, imposée à la suite d'une procédure parlementaire régie par des dispositions spécifiques et ayant porté sur l'invalidation de l'élection de M. Galan prononcée par la Chambre des députés, en vertu de la Constitution, elle l'a écarté de ladite Assemblée.

b) *Nature et but des mesures* – Le choix de la condamnation définitive pour des délits prédéfinis comme base justifiant l'interdiction d'exercer des fonctions électives, avec le préalable de l'*incandidabilità*, reposait sur la volonté du législateur de se fonder sur des critères abstraits. Cette condamnation correspond à une inaptitude fonctionnelle irrévocable de la personne condamnée, le but étant de préserver le bon fonctionnement et la transparence de l'administration, et également la libre prise de décision des organes électifs. En outre, l'introduction d'un plan national de lutte contre la corruption était devenue une exigence compte tenu, d'une part, des conclusions de l'évaluation effectuée par le Groupe d'États contre la corruption (GRECO) en 2008 et en 2009 et, d'autre part, du constat selon lequel la plupart des États européens possédaient déjà un tel plan.

L'*incandidabilità* et la déchéance du mandat tendaient à renforcer l'action de lutte contre le phénomène de l'infiltration de la criminalité organisée au sein de l'administration.

c) *Qualification des mesures en droit interne* – La jurisprudence de la Cour constitutionnelle a établi que les mesures litigieuses ne sont ni des sanctions ni des effets de la condamnation relevant de la sphère pénale. Elles résultent de la perte de la condition subjective permettant l'accès aux fonctions électives et leur exercice. Le candidat déchu de ses fonctions ou dont le nom a été rayé de la liste de candidature à la suite de la perte de sa capacité électorale passive n'est pas sanctionné en fonction de la gravité des faits qui lui ont été reprochés et pour lesquels il a été condamné par les juridictions pénales ; il est exclu de la liste parce qu'il a perdu l'aptitude morale, condition essentielle pour pouvoir accéder aux fonctions de représentant des électeurs.

S'il est vrai que cette jurisprudence ne concerne pas des élus au Parlement ou l'exclusion d'un candidat d'une liste de candidature, la Cour constitutionnelle y précise que, comme la condamnation définitive peut justifier la déchéance du mandat en cours, une condamnation non définitive peut exiger que l'élu soit suspendu de ses fonctions. Il s'agit d'un choix qui ne dépasse pas les limites d'une évaluation raisonnable des intérêts constitutionnels en jeu. La juridiction constitutionnelle exclut également le but punitif des mesures prévues par le décret législatif pertinent.

Quant aux éléments de droit pénal matériel et procédural qui, selon M. Galan, seraient contenus dans la loi anticorruption de 2012 et le décret, la peine accessoire de l'interdiction d'exercer des fonctions publiques et l'*incandidabilità* ont certes des points communs, mais elles sont essentiellement différentes en ce qui concerne à la fois leur base légale, leur durée et leurs conséquences respectives pour les droits des individus.

L'interdiction d'exercer des fonctions publiques entraîne, selon l'article 28 du code pénal, la perte des droits électoraux, du droit d'exercer des fonctions publiques, du droit d'être tuteur, des titres académiques ainsi que des salaires, des pensions et des indemnités à la charge de l'État. Quant aux droits électoraux en leurs volets actif et passif, leur perte comporte l'impossibilité de voter pour le premier volet et de se faire élire pour le second volet.

L'interdiction de se porter candidat aux élections prévue par le décret entraîne la seule perte du droit de vote « passif », dans la mesure où une candidature déposée en dépit d'une interdiction sera rayée de la liste des candidatures par le bureau électoral compétent. Le volet actif du droit de vote ne se trouve en revanche nullement atteint. Cette interdiction correspond à l'incapacité absolue d'exercer des fonctions électives, car elle a une incidence sur une exigence objective (l'aptitude morale) dont l'absence conduit à priver une personne de ses droits électoraux sous leur volet passif.

L'inapplicabilité de l'*incandidabilità* à une procédure simplifiée dite *patteggiamento* (antérieure à l'entrée en vigueur du décret) se justifie par le fait que celle-ci n'est pas totalement comparable à une procédure pénale ordinaire : font par exemple défaut, dans la première, un constat complet de culpabilité, les peines accessoires, la condamnation au paiement des frais. Enfin, l'extinction de l'*incandidabilità* par la réhabilitation s'explique par la nécessité d'éliminer cette limitation du droit électoral passif dans la mesure où, tout en ayant son préalable nécessaire en une condamnation définitive, la mesure n'est pas appliquée par l'autorité judiciaire dans le cadre d'une procédure pénale et ne ressort pas des effets pénaux de celle-ci.

d) *Procédures ayant abouti au retrait du nom du requérant de la liste de candidatures* – La procédure ayant abouti à la perte du mandat électif du requérant dans l'affaire *Galan* s'est entièrement déroulée devant l'organe auquel appartenait l'intéressé, et ce en trois phases : la première devant le Comité permanent pour les incompatibilités, les inéligibilités et les déchéances, la deuxième devant la Junte des élections et la troisième devant la Chambre des députés. Elles ont toutes été marquées par des débats ayant porté sur la contestation de l'élection de l'intéressé et répondant à des règles précises fixées par la Constitution et le règlement de la Chambre des députés.

Le retrait litigieux dans l'affaire *Miniscalco* est intervenu à la suite de l'examen, par le Bureau central régional (« le BCR ») compétent, des listes de candidats sur la base des documents en sa possession. Le requérant a pu contester son exclusion devant le BCR puis les juridictions administratives – le tribunal administratif régional et le Conseil d'État –, devant lesquelles une procédure contradictoire a eu lieu.

e) *Gravité de la mesure* – L'inaptitude à exercer le mandat de député et la perte du droit de se porter candidat aux élections ont eu pour les requérants des conséquences sur le plan politique. Toutefois, cela ne saurait suffire à les qualifier de sanctions de nature pénale d'autant plus que le droit de vote sous le volet actif n'a pas été touché. En 2017, M. Miniscalco a pu se porter candidat à de nouvelles élections régionales après avoir obtenu sa réhabilitation.

Compte tenu de ce qui précède, l'interdiction de se porter candidat aux élections régionales et la déchéance de mandat de député ne sauraient être assimilées à une sanction pénale au sens de l'article 7.

Conclusion : irrecevable (incompatibilité *ratione materiae*).

Article 3 du Protocole n° 1 : Les griefs soulèvent des questions nouvelles quant au but de la mesure.

a) *Sur l'existence d'une ingérence dans l'exercice des droits du requérant* – Les mesures litigieuses ont entraîné des ingérences dans l'exercice des droits électoraux des requérants garantis par l'article 3 du Protocole n° 1.

b) *Le but de la mesure litigieuse* – Dans l'affaire *Galan*, l'interdiction de se porter candidat et la déchéance pour les parlementaires ont été introduites par le législateur italien avec la loi anticorruption de 2012 et par le gouvernement de l'époque, dans le cadre des pouvoirs délégués, au moyen du décret. L'interdiction de se porter candidat dans l'affaire *Miniscalco* a été introduite par la loi et le décret, qui entrèrent respectivement en vigueur en novembre 2012 et janvier 2013. Dans les deux affaires, il s'agissait de renforcer l'arsenal des restrictions des droits électoraux qui existaient déjà sur le plan local depuis la loi n° 50/1990. L'*incandidabilità*, tout comme la déchéance, répond à l'impératif d'assurer de manière générale le bon fonctionnement des administrations publiques, garantes de la gestion de la *res publica*. Elle règle l'accès à la vie publique et préserve la libre prise de décision des organes électifs. Il s'agit là d'un but

compatible avec le principe de la prééminence du droit et les objectifs généraux de la Convention.

c) *La proportionnalité de la mesure* – Lors de l'examen des questions relatives à l'aspect passif des droits garantis par l'article 3 du Protocole n° 1, la Cour suit une approche marquée par un contrôle circonscrit essentiellement à la vérification de l'absence d'arbitraire dans les procédures internes conduisant à priver un individu de l'éligibilité. Pour ce faire, concernant l'*incandidabilità*, elle se penche sur le cadre légal, en particulier la prévisibilité et l'application immédiate de la mesure, ainsi que sa durée.

d) *Le cadre légal*

i. L'*incandidabilità* – L'interdiction de se porter candidat aux élections régionales est entourée de garanties. Avant tout, cette interdiction a pour condition préalable l'existence d'une condamnation pénale définitive telle que celle prévue pour un certain nombre de délits graves strictement définis par la loi. Le choix de ce préalable spécifique a été effectué sur la base d'une appréciation abstraite. L'interdiction de se porter candidat aux élections est une conséquence automatique pour laquelle il n'est prévu ni pondération des situations individuelles ni appréciation discrétionnaire. En effet, dans le cadre des critères fixés par la loi, le décret indique, entre autres, le délit d'abus de pouvoir. La mesure litigieuse n'est pas applicable de manière indifférenciée à tous les condamnés du seul fait d'une condamnation, mais à une catégorie de personnes prédéfinie et en fonction de la nature des délits. Les requérants sont tombés sous le coup de la mesure en question en raison de leur condamnation définitive pour un délit contre l'administration.

En ce qui concerne la méconnaissance supposée du principe de prévisibilité de la loi en raison de l'application de l'*incandidabilità* à la suite de la condamnation des requérants pour des faits commis avant l'entrée en vigueur du décret, eu égard à l'ample marge d'appréciation dont bénéficient les États en matière de limitation de la capacité électorale passive des personnes, les exigences de l'article 3 du Protocole n° 1 sont moins strictes que celles relatives à l'article 7 de la Convention. En l'occurrence, il s'agissait pour l'État d'organiser son système de lutte contre l'illégalité et la corruption au sein de l'administration.

Dans ce contexte national, l'application immédiate de l'interdiction de se porter candidat aux élections régionales est cohérente avec le but affiché par le législateur, c'est-à-dire écarter des procédures électorales les personnes condamnées pour des délits graves et protéger ainsi l'intégrité du processus démocratique. La Cour accepte le choix du législateur, qui a pris comme base, pour l'application de l'interdiction, la date à laquelle la condamnation pénale devient définitive et non la date de la commission des faits poursuivis. En appliquant la mesure à toute personne condamnée pour les délits mentionnés dans le décret après l'entrée en vigueur de celui-ci, il entendait clairement compléter et renforcer l'arsenal législatif pour lutter contre la corruption et l'illégalité dans l'administration publique, objectif qui avait guidé les travaux parlementaires ayant abouti à l'adoption de la loi.

L'argument des requérants selon lequel la mesure serait contraire aux principes de prévisibilité ne saurait donc être retenu. En effet, leur condamnation définitive a constitué le préalable nécessaire à l'interdiction de se porter candidat aux élections, préalable prévu par le décret en question.

Enfin, l'interdiction de se porter candidat aux élections législatives est limitée dans le temps. Dans l'affaire *Galan*, le requérant a perdu sa capacité électorale passive pour six ans. Toutefois, en vertu du décret, il avait la faculté d'introduire devant le tribunal de l'application des peines compétent une demande de réhabilitation. Et dans l'affaire *Miniscalco*, s'il est vrai que l'interdiction de se porter candidat aux élections régionales n'est pas limitée dans le temps, le requérant, ainsi qu'il l'affirma devant le Conseil d'État, avait sollicité sa réhabilitation puis renoncé à la demande avant l'échéance électorale de 2013 au motif que le décret n'était pas encore en vigueur. Par ailleurs, l'intéressé a ensuite réitéré une telle demande en obtenant la réhabilitation et le droit de se présenter aux nouvelles élections régionales de 2017.

En conclusion, la mesure litigieuse n'était pas disproportionnée.

ii. *Déchéance du mandat dans l'affaire Galan* – La mesure litigieuse n'est pas destinée à aggraver les conséquences de la condamnation, mais à préserver l'organe électif auquel appartient un candidat élu. Il est tout à fait raisonnable que le Parlement soit doté, pour la défense de l'ordre démocratique, d'un pouvoir de contrôle de son fonctionnement et du droit d'exclure de son sein tout membre ayant failli, comme en l'espèce, par une conduite pénalement répréhensible, face à l'exigence du respect du principe de légalité. Dans son action de reconquête de la confiance de l'électorat vis-à-vis des institutions, un État doit pouvoir bénéficier d'une latitude assez ample.

Concernant le point de savoir si la perte du mandat électif était prévisible pour l'intéressé et son électorat, la situation dénoncée dans la présente affaire est différente de l'arrêt *Lykourezos c. Grèce* : le décret est entré en vigueur avant les élections législatives, tout comme la loi anticorruption de 2012 qui déléguait au gouvernement, dans un cadre strict et selon des principes clairement indi-

qués, le pouvoir de réunir en un texte les dispositions en matière d'*incandidabilità* aux fonctions, notamment, de député de la République. Comme la Cour constitutionnelle l'a souligné dans un arrêt de 2015, l'application immédiate de ce type de mesure aux mandats en cours n'est pas une création du décret. Il s'ensuit que, au moment des élections, tant le requérant que le corps électoral étaient à même de savoir qu'un élu condamné pour l'un des délits graves visés par le décret perdrait sa capacité électorale passive et s'exposerait à une procédure de contestation de l'élection susceptible de déboucher sur une décision du Parlement emportant invalidation de l'élection et déchéance du mandat. De plus, la date limite pour la présentation des listes électorales auprès des bureaux compétents ayant été fixée au 21 janvier 2013, le requérant a pu bénéficier d'un certain laps de temps qui lui a permis d'évaluer les conséquences éventuelles du maintien de sa candidature en cas de condamnation définitive.

Quant aux garanties procédurales, le requérant se plaint d'un pouvoir discrétionnaire que le législateur aurait conféré au Parlement. Il met l'accent sur les risques de manipulations politiques et d'abus de pouvoir que, faute de contrôle juridictionnel, cela pourrait selon lui engendrer.

La quasi-totalité des trente-cinq États membres du Conseil de l'Europe prévoit une procédure de déchéance du mandat ou de cessation anticipée. À l'exception d'un État, tous prévoient, parmi d'autres causes de déchéance, la condamnation pénale (en fonction soit de la nature de l'infraction soit des caractéristiques de la peine prononcée). Il existe donc un très large consensus européen en la matière. Il en va autrement des garanties procédurales. Le niveau de ces garanties accordées au cours de la procédure de déchéance varie grandement, allant de l'ensemble des garanties du procès équitable à aucune garantie. Compte tenu de la diversité observée quant à l'organe compétent et à la procédure applicable, on peut distinguer deux hypothèses principales : soit la décision est prise par les tribunaux, et parfois entérinée ensuite par le Parlement, soit c'est au Parlement lui-même qu'il appartient d'adopter la décision.

Enfin, selon la Commission de Venise, si les États se dotent de dispositions de loi sur la perte du mandat qui garantissent la proportionnalité de la mesure, il n'existe pas au regard de la Convention d'obligation de prévoir la garantie d'une procédure judiciaire. Dans les systèmes où le Parlement a une compétence discrétionnaire relativement à la déchéance, la décision parlementaire faisant suite à une condamnation définitive ne constitue pas une ingérence autonome dans l'exercice par l'élu du droit de garder son siège. Dans ce cas, un nombre limité de garanties procédurales s'appliquent : en particulier le droit de déposer des observations, d'être entendu en personne par le Parlement et de se faire assister par un conseil, la tenue d'une audition publique et la publicité de la décision du Parlement.

La Cour n'a toutefois pas pour tâche de porter un jugement abstrait sur les procédures de déchéance. Elle estime qu'il y a lieu de rechercher si, en l'espèce, la procédure de contestation de l'élection du requérant – ayant abouti à la perte du mandat de député – s'est déroulée de manière à garantir une protection suffisante contre l'arbitraire. Seule est donc en cause la conformité de ladite procédure aux exigences de l'article 3 du Protocole n° 1.

Dans le système italien, le Parlement peut, après avoir évalué l'existence des conditions requises – une condamnation définitive en l'occurrence –, décider d'exclure ou non de l'assemblée l'un de ses membres. Il s'agit certes d'un pouvoir largement discrétionnaire, mais qui, de l'avis de la Cour, ne saurait être déterminant eu égard à l'ample marge d'appréciation dont, selon sa jurisprudence, les États doivent pouvoir bénéficier en la matière. Le choix constitutionnel de confier la « validation » du mandat d'un élu à l'assemblée d'appartenance se justifie par la reconnaissance de la particularité et de l'indépendance du pouvoir législatif par rapport aux pouvoirs exécutif et judiciaire, en vertu du principe de séparation des pouvoirs, et est guidé par les facteurs historiques et politiques propres à l'État concerné.

Le cas de l'intéressé a fait l'objet d'un examen approfondi par la Chambre des députés et celui-ci a été informé de ce qu'il avait la faculté de déposer des observations et des documents, de se faire représenter par un avocat et de prendre la parole au cours de la procédure. Un débat a eu lieu d'abord devant le Comité permanent des incompatibilités, des immunités et des déchéances puis devant la Junte des élections, pendant lequel les membres dudit comité ont analysé les arguments et demandes du requérant.

À l'issue de ces discussions, un rapport exhaustif relatant le processus décisionnel et proposant l'invalidation de l'élection du requérant a été soumis à la Chambre des députés afin que celle-ci se prononce sur la question. L'Assemblée s'est ensuite réunie et a entendu l'exposé par le rapporteur des motifs concluant à la proposition de déchéance, ainsi que les points de vue des certains députés. La transparence a été assurée par le fait que la séance se déroulait en public. À l'issue des débats, et après avoir constaté que les conditions de l'invalidation de l'élection du requérant étaient réunies, la Chambre des députés a déchu l'intéressé de son mandat.

Au vu de ce qui précède, et indépendamment de la qualification que le Comité des incompatibilités, des inéligibilités et des déchéances a donnée à la procédure prévue par le règlement de la Chambre des députés, M. Galan a bénéficié de garanties procédurales suffisantes et adéquates.

Conclusion : irrecevable (défaut manifeste de fondement) dans l'affaire *Galan* ; non-violation (unanimité) dans l'affaire *Miniscalco*.

(Voir *Del Río Prada c. Espagne* [GC], 42750/09, 21 octobre 2013, Résumé juridique, et *Lykourezos c. Grèce*, 33554/03, 15 juin 2006, Résumé juridique)

ARTICLE 8

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

Criminal conviction for refusal to disclose the security code to unlock a mobile phone during police custody: *communicated*

Condamnation pénale pour refus de communiquer le code de déverrouillage de son téléphone portable durant une garde à vue : *affaire communiquée*

Minteh – France, 23624/20, Communication [Section V]

(See Article 6 § 1 above/Voir l'article 6 § 1 ci-dessus, page 19)

Respect for family life/Respect de la vie familiale

Insufficient assessment as to existence of "grave risk" in returning abducted child under the Hague Convention to a conflict zone in eastern Ukraine: *violation*

L'existence d'un « risque grave » n'a pas été correctement appréciée dans une décision ordonnant le retour d'un enfant dans une zone de conflit de l'est de l'Ukraine en application de la Convention de la Haye : *violation*

Y.S. and/et O.S – Russia/Russie, 17665/17, Judgment/Arrêt 15.6.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The first applicant, a Russian national, married a Ukrainian national (A.S.) and settled in Donetsk, Ukraine. After the birth of their daughter (the second applicant), the first applicant left her husband and the second applicant, maintaining contact with the latter. Several years later, in 2014, armed groups started to take control of State facilities in the Donetsk Region and announced the creation of the "Donetsk People's Republic" (the "DPR"). In 2016, the applicant took the second applicant to Russia without obtaining A.S.'s consent or informing him of her intentions. A.S. submitted a successful application for the second applicant's return to Ukraine under the Hague Convention: the decision was given by a Russian District Court. The first applicant appealed unsuccessfully.

Law – Article 8: The District Court's judgment ordering the return of the second applicant to Ukraine – Donetsk – had constituted an interference with the applicants' right to respect for family life, which had been "in accordance with the law" and pursued the legitimate aim of protecting the rights and freedoms of the child (the second applicant) and her father (A.S.).

The Court therefore had to determine whether the interference had been "necessary in a democratic society", within the meaning of 8 § 2, interpreted in the light of the relevant international instruments, and whether when striking a balance between competing interests at stake, appropriate weight had been given to the child's best interests, within the margin of appreciation afforded to the State in such matters.

The first applicant had opposed the second applicant's return to the place of her habitual residence arguing that it would constitute a "a grave risk" for the child within the meaning of Article 13(b) of the Hague Convention. In particular, she had claimed that the child's return to Ukraine would put her physical and emotional well-being at risk in view of the ongoing military conflict on the territory of the "DPR", of which Donetsk was a part. It had therefore been for the domestic courts to carry out meaningful checks, enabling them to either confirm or exclude the existence of a "grave risk".

While the provision was not restrictive as to the exact nature of the "grave risk" – which could entail not only "physical or psychological harm" but also "an intolerable situation" – it could not be read, in the light of Article 8, as including all of the inconveniences necessarily linked to the experience of return: the exception provided for in Article 13(b) concerned only the situations which went beyond what a child might reasonably bear. Further, it was not the task of the Court to take the place of the competent authorities in examining whether there would be a grave risk that the second applicant would be exposed to psychological or physical harm, within the meaning of Article 13 of the Hague Convention, if she returned to Donetsk.

However, it was competent to ascertain whether the Russian courts, in applying and interpreting the provisions of that Convention, had secured the guarantees set forth in Article 8, particularly taking into account the child's best interests (see *Vladimir Ushakov v. Russia*, 15122/17, 18 June 2019).

As regards the alleged existence of a "grave risk", the District Court had taken the view that the occasional military actions there had not as such constituted an exception relating to a very serious risk of harm to the child. The District Court had considered that the alleged risk had been a general consequence of living in a conflict zone and not individual to the child. It had noted that, although the military conflict had been ongoing in Ukraine since 2014, it had not been until 2016 that the first applicant had taken the second applicant to Russia. It further considered that she had not provided any evidence that the alleged risk could not be addressed by the competent Ukrainian authorities and that the second applicant's removal from her habitual place of residence had been the only possible way of protecting her from the alleged risk. The Regional Court had endorsed the District Court's reasoning.

The reasoning of the District Court related to the assessment of the gravity of the security situation in the place of the second applicant's habitual residence had been rather scarce. So had its assessment of the impact of that general security situation on the second applicant and of whether the level of such impact had been sufficient to engage the "grave risk" exception under Article 13(b) of the Hague Convention. In reaching its conclusion, it had not taken into account or relied on any Government reports, official documents from international organisations closely following the situation in Donetsk and/or travel advice detailing the security situation there at the material time. At the same time, the situation could have easily been ascertained by a wide number of sources, which had unanimously attested to serious human rights violations and abuses in eastern Ukraine of which Donetsk was part, including thousands of conflict related civilian casualties and deaths counting both adults and children, the vast majority of which had been caused by shelling, including from artillery and large-caliber mortars. Nor had the District Court assessed whether the circumstances pertaining in Donetsk at that time had been more than isolated incidents in an unsettled political environment to reach the threshold for "grave risk". It had failed to consider the views of the second applicant expressed in a report by the chief inspector of the local childcare authority, which had mentioned, in particular, that she had been afraid to return because she had feared gunfire and exploding bombs. Further, the District Court's judgment had remained silent on the availability of adequate and effective measures in the State of the second applicant's habitual residence – Ukraine – to prevent or mitigate the alleged "grave risk" upon the child's return, whether A.S. could have provided safety measures and whether the first applicant would have had timely access to justice and court proceedings following the second applicant's return.

In the light of the foregoing, the "grave risk" allegation had not been genuinely taken into account by the Russian courts and their decisions dismissing the first applicant's objections had not been sufficiently reasoned in order to enable the Court to ascertain that those questions had been effectively examined and evaluated in the light of Article 8. For those reasons, the applicants had suffered a disproportionate interference with their right to respect for their family life in that the decision-making process under domestic law had not satisfied the procedural requirements inherent in Article 8.

Conclusion: violation (four votes to three).

The Court also held, by four votes to three, that there was no need to examine the complaints under Articles 2 and 3 in respect of the second applicant; and, unanimously, that there was no need to examine the complaint under Article 3 in respect of the first applicant. It decided, by six votes to one, to continue to indicate to the Government under Rule 39 of the Rules of Court that it was desirable not to enforce the second applicant's return to Donetsk, Ukraine, until such time as the present judgment became final or until further notice.

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

(See also *Andersena v. Latvia*, 79441/17, 19 September 2019)

Positive obligations/Obligations positives

Failure to advise 4-year old child of her duty to tell the truth and her right not to testify against her father, leading to exclusion of her testimony and father's acquittal of sexual abuse: *violation*

Défaut d'information d'une enfant de 4 ans quant à son devoir de dire la vérité et à son droit de ne pas témoigner contre son père, ayant abouti à l'exclusion du témoignage de l'enfant et à l'acquittement du père des charges d'abus sexuels : *violation*

R.B. – Estonia/Estonie, 22597/16, Judgment/Arrêt 22.6.2021 [Section III]

(See Article 3 above/Voir l'article 3 ci-dessus, page 12)

ARTICLE 10

Freedom of expression/Liberté d'expression

Dismissal without entitlement to compensation of contractual employee of national education authority for putting "likes" on certain Facebook posts: *violation*

Licenciement sans droit à indemnisation d'une employée contractuelle du ministère de l'Éducation nationale pour les mentions « J'aime » ajoutées sur des contenus Facebook de tiers : *violation*

Melike – Turkey/Turquie, 35786/19, Judgment/Arrêt 15.6.2021 [Section II]

English translation of the summary – Version imprimable

En fait – La requérante, agente de nettoyage contractuelle du ministère de l'Éducation nationale à l'époque des faits, a été licenciée sans avoir eu le droit à des indemnités pour les mentions « J'aime » qu'elle avait ajoutées sur certains contenus Facebook de tiers.

En droit – Article 10 : Même si son employeur était un établissement public, la requérante ne disposait pas de statut de fonctionnaire de l'État, mais de celui d'employée permanente et elle était ainsi soumise non pas à la législation spécifique relative aux fonctionnaires, mais au régime commun du droit de travail. La requérante a ainsi été licenciée par son employeur en application de la décision d'une commission disciplinaire établie selon les règles prévues à la convention collective de travail applicable à son lieu de travail, et elle a contesté son licenciement devant les tribunaux de travail.

La requérante a été licenciée pour ses mentions « J'aime » sur certains contenus publiés par des tiers sur Facebook. L'emploi des mentions « J'aime » sur les réseaux sociaux, qui pourrait être considéré comme un moyen d'afficher un intérêt ou une approbation pour un contenu, constitue bien, en tant que tel, une forme courante et populaire d'exercice de la liberté d'expression en ligne.

Le tribunal de travail a considéré que les contenus que la requérante avait « aimés » ne pouvaient être considérés comme protégés par la liberté d'expression et étaient susceptibles de perturber la paix et la tranquillité du lieu de travail de l'intéressée, des établissements scolaires du ministère de l'Éducation nationale, au motif que le contenu portant sur les professeurs, jugé offensant pour ces derniers, pouvait inquiéter les parents et élèves et que les autres contenus étaient de nature politique. Le tribunal de travail a confirmé la conclusion de la commission disciplinaire. Et la Cour constitutionnelle a rejeté le recours de la requérante en estimant qu'elle n'avait pas étayé son allégation de violation de son droit à la liberté d'expression à raison de son licenciement.

En rendant leurs décisions, les juridictions nationales ne semblent pas avoir procédé à un examen suffisamment approfondi de la teneur des contenus litigieux ni du contexte dans lequel ils s'inscrivaient. Ces contenus consistent en des critiques politiques virulentes dirigées contre les pratiques répressives alléguées des autorités, des appels et encouragements à manifester pour protester contre ces pratiques, l'expression d'une indignation concernant l'assassinat du président d'un barreau, des dénonciations des abus allégués des élèves qui auraient eu lieu dans les établissements placés sous le contrôle des autorités, ainsi qu'une réaction acerbe visant une déclaration, jugée sexiste, d'une personnalité religieuse connue du public.

La requérante n'était pas une fonctionnaire de l'État portant un lien particulier de confiance et de loyauté envers son administration, mais une employée contractuelle soumis au droit de travail. Le devoir de loyauté, de réserve et de discrétion des salariés travaillant sous le régime du droit privé envers leur employeur ne peut pas être aussi accentué que celui des membres de la fonction publique.

Les juridictions nationales n'ont aucunement examiné la question de l'impact potentiel de l'acte litigieux de la requérante, alors qu'il est essentiel pour l'évaluation de l'influence potentielle d'une publication en ligne de déterminer son étendue et sa portée auprès du public.

À ce propos, en premier lieu, la requérante n'est pas la personne qui a créé et publié les contenus litigieux sur le réseau social concerné et son acte se limite à cliquer sur le bouton « J'aime » se trouvant en dessous de ces contenus. Cet acte ne peut être considéré comme portant le même poids qu'un partage de contenu sur les réseaux sociaux, dans la mesure où une mention « J'aime » exprime seulement une sympathie à l'égard d'un contenu publié, et non pas une volonté active de sa diffusion. Ensuite, il n'est pas allégué par les autorités que les contenus en question avaient atteint un public très large sur le réseau social en cause. Certains de ces contenus ont reçu seulement une dizaine de mentions « J'aime » et quelques commentaires au total. En outre, compte tenu de la nature de sa fonction, la requérante ne pouvait disposer que d'une notoriété et d'une représentativité limitées dans son lieu de travail, et ses activités sur Facebook ne pouvaient pas avoir un impact significatif sur les élèves, les parents d'élèves, les professeurs et d'autres

employés. Les autorités nationales n'ont d'ailleurs pas cherché à établir dans leurs décisions si ces derniers avaient accès au compte Facebook de la requérante ou à ses mentions « J'aime » litigieuses, compte tenu des paramètres, des connexions et du degré de popularité du profil de l'intéressée sur ce réseau social.

En tout état de cause, les autorités nationales ne précisent, pas dans leurs décisions, si pendant la période passée entre la publication des contenus litigieux et l'ouverture de la procédure disciplinaire, qui était d'environ six à neuf mois en fonction du contenu, les mentions « J'aime » de la requérante avaient été remarquées ou dénoncées par des élèves, des parents d'élèves, des professeurs ou d'autres employés du même lieu de travail et si ces mentions avaient causé des incidents de nature à mettre en péril l'ordre et la paix du lieu de travail.

Eu égard à ce qui précède, la commission disciplinaire et les juridictions nationales n'ont pas tenu compte de tous les faits et facteurs pertinents dans les circonstances de l'espèce pour arriver à leur conclusion selon laquelle l'acte litigieux de la requérante était de nature à perturber la paix et la tranquillité du lieu de travail de l'intéressée. Les autorités nationales n'ont pas cherché à évaluer notamment la capacité des mentions « J'aime » en cause à provoquer des conséquences dommageables sur le lieu de travail de la requérante, compte tenu de la teneur des contenus auxquels ces mentions se rapportaient, au contexte professionnel et social dans lequel elles s'inscrivaient, et de leur portée et impact potentiels. Dès lors, les motifs retenus en l'espèce pour justifier le licenciement de la requérante ne peuvent être considérés comme pertinents et suffisants.

Enfin, l'autorité disciplinaire, dont la décision a été approuvée par les juridictions nationales, a appliqué la sanction maximale prévue par la convention collective de travail, à savoir la résiliation immédiate du contrat de travail sans droit à indemnisation. Il est incontestable que cette sanction a revêtu, eu égard notamment à l'ancienneté de la requérante dans sa fonction et à son âge, une sévérité extrême.

Ainsi, il n'y avait pas de rapport de proportionnalité raisonnable entre l'ingérence dans l'exercice du droit de la requérante à la liberté d'expression et le but légitime poursuivi.

Conclusion : violation (unanimité).

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

(Voir aussi *Fuentes Bobo c. Espagne*, 39293/98, 29 février 2000, Résumé juridique ; *Heinisch c. Allemagne*, 28274/08, 21 juillet 2011, Résumé juridique ; *Palomo Sánchez et autres c. Espagne* [GC], 28955/06 et al., 12 septembre 2011, Résumé juridique ; *Catalan c. Roumanie*, 13003/04, 9 janvier 2018, Résumé juridique ; *Magyar Jeti Zrt c. Hongrie*, 11257/16, 4 décembre 2018, Résumé juridique ; et *Kilin c. Russie*, 10271/12, 11 mai 2021, Résumé juridique)

Freedom of expression/Liberté d'expression

Speech given at a ceremony paying tribute to a member of the ETA terrorist organisation which did not directly or indirectly incite to terrorist violence: *violation*

Discours prononcé lors d'un hommage à un membre de l'organisation terroriste ETA n'incitant pas directement ou indirectement à la violence terroriste : *violation*

Erkizia Almandoz – Spain/Espagne, 5869/17, Judgment/Arrêt 22.6.2021 [Section III]

English translation of the summary – Version imprimable

En fait – Le requérant, ancien politicien basque indépendantiste, a été condamné à une peine d'un an de prison et sept ans de suspension du droit d'éligibilité pour le crime d'apologie du terrorisme, du fait de sa participation, en tant qu'orateur principal, à un événement qui visait à rendre hommage à un ancien membre de l'organisation terroriste ETA.

En droit – Article 10 : La condamnation litigieuse constitue une ingérence dans le droit du requérant à la liberté d'expression, qui poursuivait les buts légitimes de la sûreté publique, de la défense de l'ordre et de la prévention du crime, ou, encore, de la protection de la réputation ou des droits d'autrui.

Même si le requérant est une personne qui jouit d'une certaine importance dans le domaine politique, eu égard à sa longue trajectoire politique au Pays basque quelques années auparavant et à sa position de référence dans le cadre du mouvement indépendantiste basque, au moment des faits il n'agissait pas en sa qualité d'homme politique. En effet, l'intéressé ne s'est pas exprimé en qualité d'élu d'un groupe parlementaire ou d'un parti politique, car il n'avait pas un tel statut depuis des années.

Néanmoins, les propos du requérant relevaient d'un sujet d'intérêt général, dans le contexte sociétal espagnol, et notamment celui du Pays basque. Effectivement, la question de son indépendance et le débat à propos de l'usage ou non de la violence armée dans le but d'atteindre celle-ci ont longtemps été récurrents dans la société espagnole. En ce sens, la question de l'intégrité territoriale de l'Espagne est un sujet sensible qui génère diffé-

rents points de vue et opinions au sein de la société espagnole, souvent forts et passionnés. Dès lors, il s'agit bien d'un débat public d'intérêt général.

Toutefois, il convient de déterminer si le discours tenu par le requérant a exhorté à l'usage de la violence ou s'il peut être considéré comme un discours de haine ou éloge ou justification du terrorisme. Dans ce but, la Cour est appelée à trancher la question de savoir si la sanction imposée au requérant peut être qualifiée de proportionnée au but légitime poursuivi, en tenant compte des différents critères qui caractérisent le discours de haine ou éloge ou justification du terrorisme.

En ce qui concerne, d'abord, le premier des critères, les propos du requérant ont été tenus dans un contexte politique et social tendu. En effet, la situation que l'Espagne a connue depuis de nombreuses années en matière de terrorisme, ainsi que la prise en considération du Pays basque en tant que « région politiquement sensible » ont été déjà appréciées par la Cour.

En ce qui concerne, ensuite, le deuxième des critères, il y a lieu d'examiner si les propos litigieux, correctement interprétés et appréciés dans leur contexte immédiat ou plus général, peuvent passer pour un appel direct ou indirect à la violence ou pour une justification de la violence, de la haine ou de l'intolérance. L'intéressé a participé, en tant qu'orateur principal, à un événement qui avait pour but de rendre hommage à un membre reconnu de l'organisation terroriste ETA et d'en faire l'éloge. Cependant, le discours lu dans son ensemble n'incite ni à l'usage de la violence ni à la résistance armée, soit directement ou indirectement. Et ceci bien que certaines expressions employées par le requérant pussent être considérées comme ambiguës. En effet, ce dernier exprima de façon explicite qu'il fallait choisir le chemin le plus adéquat pour conduire le peuple vers un scénario démocratique.

Il existe plusieurs ambiguïtés concernant le contexte de l'acte et les raisons fournies par le requérant pour y assister. En effet, bien que ce dernier allègue qu'il s'agissait d'un acte familial, il expose aussi qu'il s'agissait d'un acte politique. Le requérant allègue encore que ce fut un acte privé mais tenu dans un lieu public dans lequel une question d'intérêt public était discutée. Aussi, il expose que les assistants étaient des amis et familiers au nombre de 50, mais en réalité ce furent 250 personnes qui assistèrent finalement. Il convient de prendre en compte aussi que les autorités n'avaient pas été informées de la nature concrète de l'acte qui eut finalement lieu. En revanche, le requérant n'était ni l'organisateur de l'événement ni le responsable de la projection de photographies de membres cagoulés de l'ETA. Sa seule participation à l'acte ne peut pas être considérée, en elle-même, comme contenant un appel à l'usage de la violence ni comme constituant un discours de haine.

En ce qui concerne le troisième des critères, les déclarations du requérant ont été prononcées oralement dans le cadre d'un événement qui rassemblait des sympathisants du mouvement indépendantiste du Pays basque. En ce sens, il n'apparaît pas de la manière dont les propos ont été formulés une aptitude particulière à nuire.

Compte tenu de l'ensemble des critères relatifs au contexte de l'affaire, la Cour ne saurait suivre l'appréciation des faits pertinents menée par la juridiction interne pour aboutir à la condamnation du requérant. En effet, le discours du requérant ne s'inscrivait pas dans le « discours de haine ». Bien qu'il s'agît d'un discours prononcé dans le cadre d'un acte d'hommage à un membre de l'organisation terroriste ETA, le requérant ne visait pas à justifier des actes terroristes ou faire éloge du terrorisme. Bien au contraire, il ressort des mots du requérant qu'il prônait une réflexion afin d'entamer une nouvelle voie démocratique. À l'époque des faits d'espèce, les violences terroristes de l'ETA étaient encore une dure réalité. Cependant, ce facteur ne saurait justifier la condamnation du requérant, qui fut tenu responsable de l'ensemble des actes menés dans le cadre de l'hommage rendu.

Enfin, la condamnation du requérant ne saurait être considérée comme une mesure proportionnée.

À la lumière de ce qui précède et, notamment, que l'existence d'une incitation directe ou indirecte à la violence terroriste n'a pas été avérée et que le discours du requérant semblait plutôt défendre d'entamer une voie démocratique pour atteindre les objectifs politiques de la gauche *abertzale*, l'ingérence des autorités publiques dans le droit à la liberté d'expression du requérant ne saurait être qualifiée de « nécessaire dans une société démocratique ».

Conclusion : violation (quatre voix contre trois).

Article 41 : 6 000 EUR pour préjudice moral.

(Voir aussi *Perinçek c. Suisse* [GC], 27510/08, 15 octobre 2015, Résumé juridique)

Freedom of expression/Liberté d'expression

Animus toward anti-government views in judgment imposing prison sentences, without individualised assessment, on protestors who occupied and damaged ministry premises: *violation*

Hostilité envers des opinions anti-gouvernementales dans un jugement infligeant

des peines de prison, sans examen individualisé, à des manifestants qui avaient occupé et endommagé des locaux ministériels : *violation*

Yezhov and Others/et autres – Russia/Russie, 22051/05, Judgment/Arrêt 29.6.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants – members of the National Bolshevik Party ("the NBP") – took part in a protest against the introduction of a law concerning social benefits received by various groups of the population. The NBP members dressed in emergency-service uniforms, forced entry into the building of the Ministry of Health and Social Development ("the Ministry") and occupied offices, telling employees to leave. They nailed the doors shut from inside using nail guns and blocked them with office furniture, waved NBP flags out of the windows, threw out leaflets and chanted slogans calling for the resignation of the Minister for Health at the time. They also set off firecrackers and threw a portrait of the President of Russia out of the window. They stayed in the office for about an hour before the police broke through the doors and arrested them.

The applicants were held in pre-trial detention and convicted by a District Court of a gross breach of public order and intentional destruction and degradation of others' property in public places, and sentenced to a term of imprisonment. They were also ordered to pay the Ministry compensation for the damage sustained. On appeal the convictions were upheld but the sentences were reduced.

Law – Article 10: The applicants' arrest, detention and conviction had constituted an interference with the right to freedom of expression, which had been "prescribed by law" and followed the legitimate aims of preventing disorder and protecting the rights of others. The Court therefore had to determine whether the interference had been "necessary in a democratic society".

As to whether the measures in issue had corresponded to a "pressing social need", the applicants' protest had concerned a topic of public interest, that is, the pending introduction of a controversial law, and they had wished to draw the attention of their fellow citizens and public officials to their disapproval of it. They had not, however, had a right to enter a publicly owned property, such as the office building of the Ministry, in the manner that they did, to express their opinion (see similarly *Taranenko v. Russia*). The police had therefore been justified in arresting the applicants and removing them from the premises of the Ministry, with a view to the protection of public order and the resumption of the Ministry's functions, and those actions appeared proportionate to the aim pursued. Whether their criminal convictions had also met a pressing social need depended on the reasons provided by the national courts and the proportionality of the sentences.

The applicants had been convicted of a gross breach of public order as a result of their conduct during the protest. The District Court had condemned the methods employed by them as being proscribed by the law (using nail guns to block the doors, throwing firecrackers onto the street, forcing Ministry's employees out of their offices and damaging the property). The prosecution and conviction of the applicants had therefore been justified by the need to attribute responsibility for committing such acts and to deter similar crime. However, the District Court had not sought to establish the individual role of each of the applicants during the protest, the extent of their involvement and their individual acts during the protest, having thus deprived them of the opportunity to contest the concrete reasons for limiting their freedom of expression. By failing to make an individual assessment of facts in respect of each of the applicants, the District Court had denied them an important procedural safeguard against arbitrary interference with the rights protected under Article 10.

Furthermore, the District Court had condemned not only the criminal acts imputed to the applicants but also the content and the form of the message conveyed by them ("prepared ... anti-government leaflets", "chanting anti-government slogans", "showing manifest lack of respect for ... State authority by ... throwing the portrait of the President of the Russian Federation out of the window") and had penalised them for that political message. By doing so, it had shown a degree of animus towards the applicants' political views that was difficult to reconcile with the Article 10 duty on national authorities to remain neutral with respect to legitimate political viewpoints and not to dissuade others from criticising government policies altogether. The District Court had considered the applicants' anti-government rhetoric as unacceptable or even criminal, thus going beyond the narrow margin of appreciation afforded to the domestic authorities under Article 10 in respect of political speech, matters of public interest and criticism of the government, all of which enjoy a high level of protection from State interference.

The Court was therefore not convinced that the reasons given in support of the applicants' conviction had been "relevant and sufficient" for the purposes of Article 10 § 2.

Regarding the sanction imposed on the applicants, they had initially been sentenced to five years' imprisonment, reduced to two years and six months'

imprisonment for the first and third applicants and to three years' imprisonment for the second applicant. The Court reiterated that it examines with particular scrutiny the cases where sanctions imposed by the national authorities for protest-related conduct involve a prison sentence. It did not consider that the sanction imposed on the applicants in the present case had been proportionate to the aim of the punishment of their criminal conduct, in the light of its case-law on the matter. Even considering that the behaviour of the applicants had been more disruptive (mostly owing to the nailing of the doors) than the actions of the applicant in the case of *Taranenko*, the sanctions imposed on the current applicants (at first four months in detention on remand that was then calculated as part of the custodial sentence between two and a half and three years) had nevertheless been significantly more severe than the sanction in *Taranenko* (detention on remand for a year and three years' imprisonment, suspended for three years), which suggested a generally repressive attitude of the national authorities towards the members of this political movement.

The foregoing was sufficient to conclude that the interference in question had not been necessary in a democratic society.

Conclusion: violation (six votes to one).

The Court also held, by six votes to one, that there was no need to examine separately the complaint under Article 11, having regard to the facts of the case, the parties' submissions and the findings under Article 10.

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

(See *Taranenko v. Russia*, 19554/05, 15 May 2014, Legal Summary, and *Stepan Zimin v. Russia*, 63686/13 and 60894/14, 30 January 2018)

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

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

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

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

English translation of the summary – Version imprimable

En fait – Le requérant, éditeur responsable d'un quotidien belge, a été condamné au civil en 2013, à anonymiser, au nom du droit à l'oubli, l'archive électronique mise en ligne en 2008 d'un ancien article publié en 1994, mentionnant le nom complet de G., le conducteur responsable d'un accident de la route meurtrier. Les recours du requérant n'aboutirent pas.

En droit – Article 10 : La condamnation civile du requérant à anonymiser l'article litigieux constitue une ingérence dans ses droits garantis par l'article 10.

a) *Sur la légalité de l'ingérence et l'existence d'un but légitime* – Le droit belge reconnaît un droit à l'oubli comme faisant partie intégrante du droit au respect de la vie privée. G. pouvait en bénéficier étant donné que les juridictions nationales ont considéré que la mise en ligne de l'archive de l'article litigieux constituait une « nouvelle divulgation » de son passé judiciaire. En outre, la cour d'appel n'a pas, en se référant à l'arrêt *Google Spain* de la CJUE, assimilé les éditeurs de presse aux moteurs de recherche. Elle s'est seulement fondée sur cet arrêt qui concernait un moteur de recherche pour déterminer la portée à donner au droit à l'oubli en tant que tel. Ainsi, l'interprétation qui a été faite par les juridictions nationales des dispositions relatives à la protection de la vie privée n'est ni arbitraire ni manifestement déraisonnable.

L'article 1382 du code civil oblige toute personne à réparer le dommage causé par sa faute, notamment une atteinte injustifiée à un droit. Cette disposition sert de fondement aux actions civiles pour les abus allégués à la liberté de la presse. Il en résulte que la condamnation du requérant était fondée sur une base légale prévisible. L'ingérence était donc « prévue par la loi » et elle poursuivait le but légitime de la protection de la réputation et des droits d'autrui, en l'espèce le droit au respect de la vie privée de G.

b) *Sur la nécessité de l'ingérence* – À l'instar de l'affaire *M.L. et W.W. c. Allemagne*, ce n'est pas la licéité de l'article lors de sa première parution qui est mise en cause en l'espèce, mais sa mise à disposition sur Internet et la possibilité d'accéder à cet article longtemps après les faits.

Les droits d'une personne ayant fait l'objet d'une publication disponible sur Internet doivent être mis en balance avec le droit du public à s'informer sur des événements du passé et de l'histoire contemporaine, notamment à l'aide des archives numériques de la presse.

À cet égard, l'obligation pour un éditeur de devoir anonymiser un article dont la licéité n'a pas été mise en cause comporte un risque d'effet dissuasif

sur la liberté de la presse, le risque que la presse s'abstienne de conserver des reportages dans ses archives en ligne ou qu'elle omette des éléments individualisés dans des reportages susceptibles d'ultérieurement faire l'objet d'une telle demande.

La modification de la version archivée d'un article porte atteinte à l'intégrité des archives, qui en constitue l'essence même. Les juridictions internes doivent donc être particulièrement vigilantes lorsqu'elles font droit à une demande d'anonymisation ou de modification de la version électronique d'un article archivé pour les besoins du droit au respect de la vie privée.

Cela étant dit, le droit de maintenir des archives en ligne à la disposition du public n'est pas un droit absolu. Il doit être mis en balance avec les autres droits en présence. Dans ce cadre, quand est concerné la mise en ligne ou le maintien à disposition d'une publication archivée, les critères qui doivent être pris en compte sont en principe les mêmes que ceux utilisés par la Cour dans le cadre d'une publication initiale. Certains d'entre eux peuvent toutefois revêtir plus ou moins de pertinence eu égard aux circonstances de l'espèce et au passage du temps.

i. *La contribution à un débat d'intérêt public* – La mise en ligne de l'article ne revêtait aucune valeur d'actualité. Vingt ans après les faits, l'identité d'une personne non publique n'apportait aucune valeur ajoutée d'intérêt général à l'article litigieux, lequel ne contribuait que de façon statistique à un débat général sur la sécurité routière.

ii. *La notoriété de la personne visée et l'objet de l'article* – L'archivage électronique d'un article relatif au délit commis ne doit pas créer pour l'intéressé une sorte de « casier judiciaire virtuel ». Il en va d'autant plus ainsi lorsque, comme en l'espèce, la personne a purgé sa peine et qu'elle a été réhabilitée.

G. n'exerçait aucune fonction publique. Il était une personne privée inconnue du grand public au moment de sa demande d'anonymisation. Les faits pour lesquels il a été condamné n'ont fait l'objet d'aucune médiatisation, à l'exception de l'article litigieux, et l'affaire n'a eu aucun retentissement dans les médias, que ce soit à l'époque des faits relatés ou au moment de la mise en ligne de la version archivée de l'article sur Internet.

iii. *Le comportement de la personne visée à l'égard des médias* – G. n'a à aucun moment pris contact avec les médias pour rendre sa situation publique ni au moment de la parution de l'article en 1994 ni lors de sa mise en ligne en 2008. Il ressort de ses courriers au quotidien pour demander la suppression ou l'anonymisation de l'article litigieux qu'au contraire, il a tout fait pour rester à l'écart des projecteurs des médias.

iv. *Le mode d'obtention des informations et leur véracité* – Il n'était pas contesté que la divulgation initiale de l'article litigieux était licite.

v. *Le contenu, la forme et les répercussions de la publication* – En ce qui concerne le contenu de l'article litigieux, il relate plusieurs accidents de la route ayant eu lieu en 1994 en l'espace de quelques jours. L'accident causé par G. en était un parmi d'autres.

En ce qui concerne la forme de la publication, les sites Internet sont des outils d'information et de communication qui se distinguent particulièrement de la presse écrite, notamment quant à leur capacité à emmagasiner et à diffuser l'information, et les communications en ligne et leur contenu risquent bien plus que des publications sur support papier de porter atteinte à l'exercice et à la jouissance des droits et libertés fondamentaux, en particulier du droit au respect de la vie privée.

La reproduction de matériaux tirés de la presse écrite et celle de matériaux tirés d'Internet peuvent être soumises à un régime différent. Il en va de même en ce qui concerne les archives papier et les archives numériques. La portée de ces dernières est en effet beaucoup plus importante et les conséquences sur la vie privée des personnes nommées d'autant plus graves, ce qui est encore amplifié par les moteurs de recherche.

En ce qui concerne le degré de diffusion de la version archivée de l'article, la consultation d'archives nécessite une démarche active de recherche par l'introduction de mots-clés sur le site des archives du journal. Du fait de son emplacement sur le site Internet, l'article litigieux n'était pas susceptible d'attirer l'attention de ceux des internautes qui n'étaient pas à la recherche d'informations sur G. Le maintien de l'accès à l'article litigieux n'avait pas pour but de propager à nouveau des informations sur G.

Toutefois, au moment de l'introduction par G. de sa demande et pendant toute la procédure interne, les archives du journal étaient disponibles en accès libre et gratuit.

Le requérant souligne que ce n'est pas l'exploitant d'un moteur de recherche qui a été condamné, mais l'éditeur responsable d'un journal dont les archives sont accessibles en ligne.

À l'instar de la CJUE, la Cour admet que des obligations différentes peuvent être appliquées aux moteurs de recherche et aux éditeurs à l'origine de l'information litigieuse. Il est également vrai que c'est avant tout en raison des moteurs de recherche que les informations sur les personnes tenues à disposition par les médias concernés peuvent facilement être repérées par les internautes. Il ne peut toutefois pas être perdu de vue que le fait pour un journal de mettre en ligne un article sur son site

web a déjà, en tant que tel, des répercussions sur la visibilité des informations litigieuses. Aussi, l'ingérence initiale dans le droit de G. au respect de sa vie privée résulte de la décision du requérant de publier ces informations sur son site et, surtout, de les y garder disponibles, fût-ce sans intention d'attirer l'attention du public.

S'agissant des répercussions de la publication, une simple recherche à partir des nom et prénom de G. sur le moteur de recherche du journal ou sur Google faisait immédiatement apparaître l'article litigieux. La cour d'appel a considéré que son maintien en ligne était ainsi de nature à porter indéfiniment et gravement atteinte à la réputation de G., lui créant, comme il a déjà été rappelé, un casier judiciaire virtuel, alors qu'il avait non seulement été définitivement condamné pour les faits litigieux et avait purgé sa peine mais qu'en outre, il avait été réhabilité.

Cette appréciation de la cour d'appel n'est pas arbitraire ou manifestement déraisonnable. Avec l'écoulement du temps, une personne devrait avoir la possibilité de reconstruire sa vie sans être confrontée par des membres du public à ses erreurs du passé. Les recherches sur des personnes à partir de leur nom sont devenues une pratique courante dans la société actuelle, et le plus souvent il s'agit d'une simple recherche motivée par des raisons totalement étrangères à d'éventuelles poursuites ou condamnations pénales de la personne concernée.

vi. *La gravité de la mesure imposée au requérant* – L'ajout d'une balise de désindexation à l'article litigieux par *Le Soir*, un déréférencement de l'article litigieux par des moteurs de recherche et d'autres moyens moins attentatoires au droit à la liberté d'expression du requérant n'ont pas été allégués devant les juridictions internes.

La mesure imposée au requérant par la cour d'appel est d'anonymiser l'article figurant sur le site web du *Soir* en remplaçant les nom et prénom de G. par la lettre X. Une impossibilité technique de modifier les articles archivés n'était nullement établie.

La nature de la mesure imposée permet en l'espèce d'assurer l'intégrité de l'article archivé en tant que tel, puisqu'il s'agit uniquement d'anonymiser la version mise en ligne de l'article, le requérant étant autorisé à garder les archives numériques et papier d'origine. Des personnes ayant un intérêt pouvaient toujours demander accès à la version originale de l'article, même sous forme numérique. Ce n'était donc pas l'article même, mais son accessibilité sur le site web du journal *Le Soir*, qui était affectée par la mesure.

Eu égard à ce qui précède, les juridictions nationales pouvaient conclure que la condition relative à la proportionnalité de l'ingérence dans le droit à la liberté d'expression était remplie.

vii. *Conclusion* – Les juridictions internes ont mis en balance le droit au respect de la vie privée de G. et le droit à la liberté d'expression du requérant conformément aux critères énoncés dans la jurisprudence de la Cour. En particulier, la cour d'appel a attaché une importance particulière au préjudice souffert par G. à cause de la mise en ligne de l'article litigieux, eu égard notamment au temps qui s'était écoulé depuis la publication de l'article d'origine, d'une part, ainsi qu'au fait que l'anonymisation de l'article litigieux sur le site web du *Soir* laissait intactes les archives en tant que telles et constituait la mesure la plus efficace parmi celles qui étaient envisageables en l'espèce, sans pour autant porter atteinte de manière disproportionnée à la liberté d'expression du requérant, d'autre part. Les motifs donnés par les juridictions internes étaient pertinents et suffisants. La Cour n'aperçoit pas de raisons sérieuses pour substituer son avis à celui des juridictions internes et d'écarter le résultat de la mise en balance effectuée par celles-ci. La mesure imposée peut donc être considérée comme une mesure proportionnée au but légitime poursuivi et comme ménageant un juste équilibre entre les droits concurrents en jeu.

Cette conclusion ne saurait être interprétée comme impliquant une obligation pour les médias de vérifier leurs archives de manière systématique et permanente. Sans préjudice de leur devoir de respecter la vie privée lors de la publication initiale d'un article, il s'agit pour eux, en ce qui concerne l'archivage de l'article, de procéder à une vérification et donc à une mise en balance des droits en jeu seulement en cas de demande expresse à cet effet.

Conclusion : non-violation (unanimité).

(Voir *M.L. et W.W. c. Allemagne*, 60798/10 et 65599/10, 28 juin 2018, Résumé juridique ; voir aussi *Österreichischer Rundfunk c. Autriche*, 35841/02, 7 décembre 2006, Résumé juridique ; *Węgrzynowski et Smolczewski c. Pologne*, 33846/07, 16 juillet 2013, Résumé juridique ; *Delfi AS c. Estonie* [GC], 64569/09, 16 juin 2015, Résumé juridique ; *Satakunnan Markkinapörssi Oy et Satamedia Oy c. Finlande* [GC], 931/13, 27 juin 2017, Résumé juridique)

ARTICLE 11

Freedom of association/Liberté d'association

Well-founded decision to declare unlawful announced trade union boycott to pressure foreign company into collective agreement

in breach of EEA freedom of establishment: *no violation*

Décision fondée déclarant illégale l'annonce d'un boycott, faite par un syndicat pour contraindre une société étrangère à adhérer à une convention collective, en violation de la liberté d'établissement garantie dans l'EEE : *non-violation*

Norwegian Confederation of Trade Unions (LO) and/et Norwegian Transport Workers' Union (NTF) – Norway/Norvège, 45487/17, Judgment/Arrêt 10.6.2021 [Section V]

Traduction française du résumé – Printable version

Facts – Norway is a member of the European Free Trade Association (EFTA) and of the European Economic Area (EEA). The applicant trade unions, NTF and LO, entered into a collective framework agreement with the Confederation of Norwegian Enterprise (NHO), the largest employer organisation in Norway, and the Norwegian Logistics and Freight Association (NHO logistikk og transport), in respect of a fixed pay scheme for dockworkers at many of Norway's major ports, including the port of Drammen. Among other things, the Framework Agreement established an Administration Office for Docks Work in Drammen and all permanently employed dockworkers in the port were employed by the Office.

Holship Norge AS was a Norwegian subsidiary of a Danish freight forwarding company. It was not a member of NHO or NHO logistikk og transport. In 2013, Holship employed four persons in the port who, *inter alia*, carried out loading and unloading operations for their employer.

Subsequently, NTF demanded that a collective agreement be entered into and that Holship accept the Framework Agreement. Holship did not agree. The NTF sent a letter with a notice of boycott and successfully sought an advance declaratory judgment that the announced boycott would not be unlawful from the domestic courts. Holship appealed up to the Supreme Court, which applied for an advisory opinion by the Court of Justice of the European Free Trade Association (the EFTA Court). The Supreme Court ruled that the boycott would be unlawful.

Law – Article 11

(a) *Applicability* – The Court had not previously rendered judgments relating to an action fully resembling the one at issue in the instant case. The collective action had essentially been a boycott in the form of a blockade organised by NTF in order to pressure Holship to enter into a collective agreement containing a priority clause for registered dockworkers employed in the Administration Office.

The Court had previously held that it would be inconsistent with the method of interpretation outlined in *Demir and Baykara v. Turkey* ([GC], 34503/97, 12 November 2008) for it to adopt an interpretation of the scope of freedom of association of trade unions that was much narrower than that which prevailed in international law (*National Union of Rail, Maritime and Transport Workers v. the United Kingdom*, 31045/10, 8 April 2014). Given that a blockade could lead to Article 11 being deemed applicable in relation to the negative freedom of association of an applicant business or employer (*Gustafsson v. Sweden*, 15573/89, 25 April 1996), it followed that the exercise of a blockade by an applicant trade union could also give rise to the applicability of Article 11. Moreover, the Court of Justice of the European Union (CJEU) had recognised that the right to collective action constituted a fundamental right under EU, in a case also involving a blockade (*Laval un Partneri Ltd*, C341/05, 18 December 2007).

With regard to the purpose of the proposed action, the impugned boycott had aimed, *inter alia*, to ensure stable and safe working conditions for dockworkers. Furthermore, the priority right, which was one of the rights the proposed boycott had sought to defend, was based on a long-standing tradition domestically, and provided for in international law.

In the light of the above, the impugned boycott, which the applicant unions had notified in advance in accordance with domestic law, was capable of falling within the scope of Article 11 § 1.

(b) *Merits* – The Supreme Court's judgment finding the intended boycott unlawful had entailed a "restriction" on the exercise of the trade unions' rights which was prescribed by law and aimed to protect the "rights and freedoms" of others, in particular Holship's right to freedom of establishment as guaranteed by the EEA Agreement. The Court then addressed two preliminary issues:

(i) *Holship's "negative freedom of association"* – First, it had not been established that the impugned boycott would have contravened Holship's right to "negative freedom of association". That being the case, the examination in the instant case had to focus on the necessity of the restriction under Article 11 § 2.

(ii) *Applicability of the Bosphorus presumption to EEA law* – The second issue concerned the possible existence and application of the presumption of equivalent protection (*Bosphorus v. Ireland*). In *Konkurrenten.no AS v. Norway*, the Court had stated that the basis for the *Bosphorus* presumption was in principle lacking when it came to the implementation of EEA law at domestic level within the framework of the EEA Agreement, due to the specificities of the governing treaties compared to

those of the European Union. Two distinct features had been specifically highlighted: the lack of direct effect and supremacy in the framework of the EEA Agreement itself, and the fact that the EEA agreement did not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention.

Regarding that latter feature, however, the Court observed, as clearly stated by the EFTA court in its advisory opinion, that fundamental rights formed part of the unwritten principles of EEA law. Since that reflected the position which had previously pertained under EU law, prior to successive EU Treaty amendments, according to which fundamental rights had first been recognised as general principles of EU law, the fact that the EEA agreement did not include the EU Charter was not determinative of the question whether the *Bosphorus* presumption could apply when it came to the implementation of EEA law, or certain parts thereof.

However, given the former feature of EEA law identified by the Court in *Konkurrenten.no*, added to which was the absence of the binding legal effect of advisory opinions from the EFTA Court, and given that the existence of procedural mechanisms for ensuring the protection of substantive fundamental rights guarantees was one of the two conditions for the application of the *Bosphorus* presumption, the Court left it to another case, where questions in relation to the procedural mechanisms under EEA law might arise, to review that issue. For the purposes of this case, the Court proceeded on the basis that the *Bosphorus* presumption did not apply to EEA law. It was therefore required to determine whether the restriction had been necessary for the purposes of Article 11.

(iii) *The necessity of the restriction* – The Court emphasised that a majority of the Supreme Court had found that the Framework Agreement and its system involving priority for registered dockworkers had had little to do with the protection of workers. The collective agreement demanded by NTF had been "irregular", and the protection it had afforded to members' interests in working and pay conditions had been "relatively indirect". The Administration Office had been a company engaged in "business activities in a market" – the market of unloading and loading activities – to which other operators had wanted access, and as regards the announced boycott, its "primary effect" would have been to deny Holship access to that market, which it had wished to enter. That characterisation of the boycott was central to the Supreme Court's finding that a fair balance had, in the particular circumstances of that case, been struck.

As regards the balancing exercise undertaken by the Supreme Court, it was clear that it had engaged in an extensive assessment of the conflicting fundamental right to collective action relied on by the applicant unions and the fundamental economic freedom under EEA law on which the employer had relied. It had indicated that the boycott had, among other things, to be reconciled with the rights that followed from the EEA Agreement and that in consideration of proportionality, a fair balance had to be struck between those rights. Given the characteristics of the collective action, the breadth of the margin of appreciation in the present case was clearly wide.

Following the Supreme Court judgment, the relevant social partners had negotiated and concluded a new collective agreement: the restriction of the applicant unions' Article 11 rights had not as such prevented them from engaging in further collective bargaining. Against that background, the Court did not consider that sufficiently "strong reasons" existed for it to substitute its views for that of the Supreme Court in this case.

Nevertheless, it was necessary to note, firstly, that for a collective action to achieve its aim, it might have to interfere with internal market freedoms such as those at issue in the case before the Supreme Court. The degree to which a collective action risked having economic consequences could not, therefore, in and of itself be a decisive consideration in the analysis of proportionality under Article 11 § 2 (see *Ognevenko v. Russia*, 44873/09, 20 November 2018). Even when implementing their obligations under EU or EEA law, Contracting Parties had to ensure that restrictions imposed on Article 11 rights did not affect the essential elements of trade union freedom, without which that freedom would become devoid of substance. Secondly, there was a risk that a domestic court, which found itself in a position such as that in which the Supreme Court had found itself in the present case, might balance a right under the Convention against a right under the EEA Agreement in a manner that would generally only be appropriate had the issue before it been a matter of conflicting fundamental rights under the Convention. From the perspective of Article 11, the EEA freedom of establishment was not a counterbalancing fundamental right to freedom of association but rather one element, albeit an important one, to be taken into consideration in the assessment of proportionality under Article 11 § 2.

However, in the particular circumstances of this case, the Supreme Court had advanced relevant and sufficient grounds to justify its final conclusion.

Conclusion: no violation (unanimously).

(See *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC] 45036/98, 30 June 2005, Legal Summary, and *Konkurrenten.no AS v. Norway* (dec.) 47341/15, 5 November 2019, Legal Summary)

ARTICLE 14

Discrimination (Article 3)

Unlawful detention and ill-treatment of Avars by military servicemen of Chechen origin, failure to investigate possible motive of ethnic hatred: *violation*

Détention irrégulière d'Avars et mauvais traitements perpétrés à leur égard par des militaires d'origine tchétchène, absence d'enquête sur une possible motivation fondée sur la haine ethnique : *violation*

Adzhigitova and Others/et autres – Russia/Russie, 40165/07 and/et 2593/08, Judgment/Arrêt 22.6.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants lived in the village of Borozdinovskaya (hereafter "the village"), which is mostly inhabited by Avars (people of a north-east Caucasian native ethnic group that originates in the territories of Dagestan), but also by several Chechen and Russian families. According to the applicants, Avar village residents had a tense relationship with their Chechen neighbours.

The Vostok Battalion is stationed about one hundred kilometres away – its members were recruited from ethnic Chechens.

After a violent incident perpetrated by an illegal armed group, a special operation was planned and entrusted to two groups of Vostok Battalion soldiers, in order to arrest the perpetrators, who were allegedly hiding in the forest next to the village. The Lieutenant of one unit ordered the subordinate military personnel to seal off the village and search the residents' houses for firearms or other evidence of membership of the illegal armed group. He also ordered them to arrest the male residents of the village and gather them at the local school in order to identify those responsible for the attack. A number of the applicants' relatives went missing as soon as the operation was over.

Law

Article 14 in conjunction with Articles 2 and 8: Military servicemen had searched the village houses in a blanket, indiscriminate manner. Further, not all of the missing men were Avars. Racial prejudice had not been a causal factor behind the military operation. It was not the Avar community, but individual people – alleged members of an illegal armed group – who had been the main targets of the operation. The Court could therefore not conclude that the searches and the enforced disappearances had been the result of any different treatment of village residents on account of their ethnicity. Lastly, the applicants had not made a prima facie case that the searches or abductions were discriminatory in nature. Such a motive had not been clearly formulated in the complaints and requests for the opening of criminal proceedings. The domestic authorities had therefore had no obligation under the Convention to investigate it.

Conclusion: no violation (unanimously).

Article 14 in conjunction with Article 3: The domestic court had established that the Vostok Battalion personnel had arrested village residents, ill-treated and unlawfully detained them. The service personnel had arrested the village men in a blanket manner, disregarding their ethnic origin. However, at the school they had interviewed the village residents and released only those of them who were of Chechen or Russian ethnicity. The Avars had been kept in the school and beaten for several hours. The beatings had been accompanied by racist comments.

In the absence of any explanation from the Government, and taking into account the reported tension between Chechens (who staffed the Vostok Battalion) and Avars (who comprised part of the village's population), the Court concluded that the applicants' ethnic origin had been among the causal factors for their unlawful detention and ill-treatment (compare *Antayev and Others v. Russia*).

Regarding the State's procedural obligation under Article 14, in the complaints lodged with the investigating authorities, several applicants had explicitly mentioned racist insults that had allegedly been made against them by military personnel at the time of their detention and ill-treatment at the local school. That had constituted a sufficient trigger for the State's procedural obligation to ensure an effective investigation into the alleged ethnic hatred.

However, no thorough examination of any possible racial motives had been undertaken. On the contrary, the investigation had ignored any possibility that the crimes may have been motivated by ethnic hatred. There was nothing to suggest that the investigators who had questioned military personnel and village residents had asked them about any possible racist background to the incident (compare *Makhashevy v. Russia* and *Antayev and Others*, and contrast with *R.R. and R.D. v. Slovakia*). As a result, the motive of hatred had not been included in the legal classification of the crimes. When several applicants had challenged in court that failure to include the motive of hatred, their complaints had been dismissed in a summary fashion.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been: a failure of the State to comply with their obligations under Article 38; a violation of Article 2 in respect of several applicants' enforced disappearance, and lack of an effective investigation into the disappearance or death of Mr. Magomazov; no violation of Article 2 on account of Mr. Magomazov's death or the alleged failure of the State to safeguard his life; a violation of Article 3 on account of the ill-treatment of a number of the applicants, on account of the lack of an effective investigation into their ill-treatment, and on account of the mental suffering of several applicants caused by the disappearance of their relatives; a violation of Article 13, in conjunction with Article 3, on account of the lack of an effective domestic remedy concerning the mental suffering caused to the applicants by their relatives' disappearance; a violation of Article 8 on account of unlawful searches conducted; no violation of Article 1 of Protocol No. 1 under its substantive or procedural limbs on account of incidents of arson and related investigation; and no violation of Article 14 in conjunction with Article 1 of Protocol No. 1.

Article 41: Sums ranging between EUR 26,000 and EUR 60,000 to each of the relevant applicants in respect of non-pecuniary damage; claims in respect of pecuniary damage dismissed.

(See *Makhashevy v. Russia*, 20546/07, 31 July 2012; *Antayev and Others v. Russia*, 37966/07, 3 July 2014; and *R.R. and R.D. v. Slovakia*, 20649/18, 1 September 2020)

Discrimination (Articles 8 and/et 11)

State's failure to ensure LGBT event proceeded peacefully, without verbal abuse, and carry out effective investigation into homophobic motives of counter-demonstrators: *violation*

Manquement par l'État à assurer le déroulement pacifique d'un événement LGBT, sans agression verbale, et à conduire une enquête effective sur les intentions homophobes des contre-manifestants : *violation*

Association ACCEPT and Others/et autres – Romania/Roumanie, 19237/16, Judgment/Arrêt 1.6.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants are an association ("first applicant") promoting the interests of lesbian, gay, bisexual and transgender people (LGTB) in Romania and five individuals. On 20 February 2013 the first applicant organised the public screening of a movie portraying a same-sex family on the premises of a public museum, which was attended, *inter alia,* by the other applicants. The event was interrupted by a group of about 50 people who entered the venue shouting homophobic remarks, insulting and threatening the participants. Some of the intruders displayed fascist and xenophobic signs and brandished the flag of a former Romanian far-right party which had been dissolved by court order for fascist propaganda. The event could no longer continue but was rescheduled and took place on a later date. The investigation into the applicants' criminal complaint, for incitement to discrimination, abuse of office by restriction of rights and the use of fascist, racist or xenophobic symbols in public, was discontinued by the prosecutor and their challenges thereto were unsuccessful.

Law

Article 14 taken together with Article 8: The Court examined this complaint in respect of the individual applicants, having found that the first applicant lacked victim status in this regard. It held that the applicants had suffered discrimination on grounds of their sexual orientation given that the authorities had failed to offer them adequate protection in respect of their dignity (and more broadly, their private life), and to effectively investigate the real nature of the homophobic abuse directed against them. More specifically:

(a) *As to the obligation to protect* – A sufficient number of police officers and gendarmes (hereafter "the officers") had been present on the premises from the beginning of the incident, after having been informed by the first applicant of possible opposition to the event. At no point had the officers been overpowered by the intruders. Nor did they claim that they had been caught unprepared and thus lacked the proper equipment to intervene. Yet, they had not stopped the counter-demonstrators but had remained outside the room in which the incident occurred and largely refrained from intervening to de-escalate the situation and prevent the individual applicants from being bullied and insulted. This had been despite being aware of the views manifested by the intruders and having heard the contents of the slurs uttered by them. This also seemed to indicate a certain bias against homosexuals, which had also permeated their subsequent reports on the incident; these contained no reference to the homophobic insults suffered by the individual applicants and described the incident in terms that completely disregarded any such manifestations of homophobia. Accordingly, the authorities had failed to correctly assess the risk incurred by the individual applicants at the hands of the intruders and to respond adequately in order to protect their dignity against homophobic attacks by a third party.

(b) *As to the obligation to investigate* – The Court took into account the following elements:

– The applicants had lodged their criminal complaint within two weeks from the incident, with a detailed factual description and all the evidence at their disposal, including the officers' reports and footage of the incident. The prosecutor's office also had the names of some of the participants and intruders. Hence, at least the initial stages of the investigation should not have been too difficult. However, no significant steps had been taken for more than a year and the overall investigation had lasted more than four years and eight months.

– The intruders had never been investigated against despite the complaint having also been against them and none of them had ever been formally accused in spite of the applicants' objections. The ones who had been identified by the police on the night of the incident, had only been interviewed as witnesses four years later.

– The authorities had deemed that the alleged threats or remarks had not reached the threshold required by the applicable law to constitute a criminal offence. The Court reiterated, however, that while being careful not to hold that each and every utterance of hate speech must, as such, attract criminal prosecution and criminal sanctions, comments that amounted to hate speech and incitement to violence, and were thus clearly unlawful on the face of things, might in principle require the States to take certain positive measures. Likewise, inciting hatred did not necessarily amount to a call for an act of violence or other criminal acts. Attacks on people committed by insulting, holding up to ridicule or slandering specific groups of the population could be sufficient for the authorities to favour combating racist speech in the form of freedom of expression exercised in an irresponsible manner.

– The applicants' claim as to the attacks' homophobic nature had not been duly explored. Investigation into the alleged display of fascist symbols had only started nearly two years after the incident whereas the homophobic reasons for the commission of the acts had not been mentioned in the prosecutors' decisions.

– The language consistently used by the authorities in their reports about the incident and all involved, far from being neutral or accidental, suggested bias on their part against the individual applicants, which might be seen as indicating that the authorities had turned a blind eye to the homophobic overtones of the acts that had been perpetrated, thus jeopardising the accuracy and effectiveness of the domestic proceedings as a whole.

– No weight had been attached to the fact that the organisation that seemed to have been behind the attacks was notoriously opposed to homosexual relations or that the homophobic slurs in question had been uttered against the individual applicants.

The Court emphasised that the necessity of conducting a meaningful inquiry into the possibility that discriminatory motives had lain behind the abuse was absolute, given the hostility against the LGBT community in the respondent State and in the light of the evidence that homophobic slurs had been uttered by the intruders during the incident. In the absence of such an inquiry, prejudice-motivated crimes would inevitably be treated on an equal footing with cases without such overtones, and the resultant indifference would be tantamount to official acquiescence, or even connivance in, hate crimes.

In conclusion, the authorities had failed to discharge their positive obligation to investigate in an effective manner whether the verbal abuse directed towards the individual applicants constituted a criminal offence motivated by homophobia. In doing so, the authorities had shown their own bias towards members of the LGBT community.

Conclusion: violation (five votes to two).

Article 14 taken together with Article 11: The domestic authorities had failed to ensure that the event took place peacefully on 20 February 2013 by sufficiently containing the homophobic counter-demonstrators. They thus fell short of their positive obligation to use any means possible to ensure that the applicants' right to peaceful assembly had been respected. In reaching this conclusion, the Court primarily relied on its findings under Article 14 read in conjunction with Article 8, ruling that they were also pertinent to the examination of this complaint which extended to all the applicants. This was notwithstanding, the first applicant's decision to stop the screening and reschedule the event, as the right to freedom of assembly included the right to choose the time, place and practical conditions of such an assembly, within the limits established in Article 11 § 2.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 to the applicant association and EUR 9,750 to each individual applicant in respect of non-pecuniary damage.

(See also *Identoba and Others v. Georgia*, 73235/12, 12 May 2015, Legal Summary; *M.C. and A.C. v. Romania*, 12060/12, 12 April 2016, Legal Summary; *Beizaras and Levickas v. Lithuania*, 41288/15, 14 January 2020, Legal Summary; and *Berkman v. Russia*, 46712/15, 1 December 2020, Legal Summary)

Discrimination (Article 9)

Denial of State recognition to a pagan religious association meeting eligibility criteria, on grounds incompatible with the State's duty of neutrality and impartiality: *violation*

Refus de l'État de reconnaître une association religieuse païenne satisfaisant aux critères d'éligibilité, pour des motifs incompatibles avec l'obligation de neutralité et d'impartialité de l'État : *violation*

Ancient Baltic religious association "Romuva"/ Association « Romuva » de l'ancienne religion balte – Lithuania/Lituanie, 48329/19, Judgment/Arrêt 8.6.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicant, a non-traditional religious association established under Lithuanian law and comprising several religious communities following the old Baltic pagan faith, applied to be granted the status of a State-recognised religious association. Such status would have entitled it to a number of privileges, namely, the right for its ministers to perform religious marriages that would have had the effect of civil marriages, the right to provide religious education in schools, the right to be given airtime for the purpose of broadcasting its religious services, an exemption from the payment of land tax, and the right for its ministers to receive social insurance benefits at the expense of the State.

The Ministry of Justice concluded that the applicant association fulfilled all the legal requirements and a draft resolution proposing its recognition, presented by a group of members of the Seimas (the Lithuanian parliament), was examined and supported by other State authorities as well as the Government. In the end, however, following two debates, the Seimas did not adopt it. The Seimas Commission on Ethics and Procedure and the first instance Administrative Court upheld the applicant association's claims about defamatory and false statements made by a member of Seimas during the second debate. The appeal proceedings are still pending.

Law – Article 14 taken together with Article 9: The applicant association could be described as "religious" and the privileges granted to State-recognised religious associations fell within the ambit of Article 9. Thus, on the facts of the present case, Article 14 was applicable read in conjunction with Article 9.

(a) *Whether there was a difference in treatment between persons in analogous or relevantly similar situations* – The applicant association was in an analogous or relevantly similar situation to other non-traditional religious associations which had obtained a positive assessment from the Ministry of Justice. Several of those associations had been granted recognition by the Seimas. In the instant case, it transpired from the statements made by various Seimas' members during the debates, as well as the Government's submissions before the Court, that the refusal had been largely motivated by arguments relating to the substance of its religious beliefs. The differential treatment had thus been based on religious grounds.

(b) *Whether the difference in treatment was justified* – The Court first observed that none of the relevant domestic laws or case-law before it indicated the grounds on which the Seimas might refuse to grant State recognition to a religious association in respect of which the Ministry had adopted a favourable conclusion. Nor did they specify whether the Seimas might challenge the Ministry's conclusion. This could lead to arbitrariness in decision-making but also restricted the ability of religious associations to find out with sufficient certainty the relevant criteria taken into account when deciding on their status and to demonstrate that they met them. Furthermore, the Seimas being a political body, the political nature of parliamentary proceedings entailed the risk that the granting or refusal to grant a particular status to a religious organisation might be related to political events and situations. Indeed, in the present case both the applicant association and the Government suggested that the impugned decision might have constituted a "personal revenge" on the part of some members of the Seimas against a specific politician, which pointed to the possibility of precisely that risk.

Notwithstanding, the Court had to limit itself to determining whether the manner in which the domestic law had been applied in the present gave rise to a violation of the Convention and not to take a decision *in abstracto*. In examining whether the refusal had been based on a reasonable and objective justification, its task was to determine whether the applicant association had been given a fair opportunity to apply for State recognition and whether the domestic law criteria had been applied in a non-discriminatory manner; not whether it should or should not have been granted such status. As the impugned decision did not include any reasons, the Court assessed the arguments given by members of the Seimas during the parliamentary debates. It found as follows:

– *National security grounds*: The alleged existence of links between the applicant association's activities and the policies of the KGB or the Kremlin had not been supported by any relevant domestic authorities. Neither had the Government argued that the applicant association might have posed any risk to national security nor had the Court been

made aware of any domestic proceedings as to any such possible risk.

– *Doubts as to the "religious" nature of the applicant association's activities and the existence of a "Baltic faith"*: Neither the Seimas nor the Government had argued that the applicant association's beliefs had not attained the requisite level of cogency, seriousness, cohesion and importance, or that the applicant association could be compared to any of the parody religions, such as Pastafarianism, Jediism, and Dudeism. The applicant association had been registered as a religious association and the relevant authorities had not challenged its religious nature until the impugned debates. Thus, the assessment by the Seimas had essentially questioned the legitimacy of the applicant association's beliefs and the ways in which those beliefs were expressed, which, as the Court has repeatedly emphasised, was incompatible with the State's duty of neutrality and impartiality.

– *The applicant association's actual or perceived relationship with Christianity*: Several members of the Seimas had referred to the majority of Lithuanians being Catholic, the historical importance of Christianity in Lithuania, and the impact which the granting of State recognition to a pagan religious association could have on Lithuania's relations with "the Christian world". Moreover, without speculating as to its possible effect, a letter sent from the Lithuanian Bishops' Conference had been circulated among more than a half of the members of the Seimas, had been explicitly referred to and its contents discussed during the second debate. In this connection, it was also relevant that when granting State recognition to other non-traditional religious associations, the Seimas, on several occasions, had pointed to their good relationship with the Catholic Church; in one such case, a favourable letter from a Catholic authority had also been put before the Seimas as an argument for granting State recognition. The authorities' role, however, was not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. Accordingly, the Court was unable to accept that the existence of a religion to which the majority of the population adhered, or any alleged tension between the applicant association and the majority religion, or the opposition of an authority of that religion, could constitute objective and reasonable justification for refusing State recognition to the applicant association. Furthermore, in line with the Constitutional Court's case-law, the principle of the separation of church and State was the basis of the secularism of the Lithuanian State; the State had to be neutral in matters of conviction and did not have any right to establish a mandatory system of views. Lastly, with regard to the Government's contention that in most Catholic countries of Europe no pagan movements enjoyed any sort of privileged status in their relationship with the State, the Court reiterated that the scope of the States' margin of appreciation could not be broader or narrower, depending on the nature of the religious beliefs. Therefore, the difference in the treatment of the applicant association compared to that of other religious associations in a similar situation could not be justified by the nature of its faith.

In view of all the above, the State authorities had not provided a reasonable and objective justification for treating the applicant differently from other religious associations in a relevantly similar situation, and the members of the Seimas who had voted against the recognition had not remained neutral and impartial in exercising their regulatory powers.

Conclusion: violation (unanimously).

The Court also found a violation of Article 13 on account of the lack of an effective remedy with respect to the impugned decision of the Seimas.

Article 41: no claim made in respect of damage.

(See also *Metropolitan Church of Bessarabia and Others v. Moldova*, 45701/99, 13 December 2001, Legal Summary; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, 71156/01, 3 May 2007, Legal Summary; and *İzzettin Doğan and Others v. Turkey* [GC], 62649/10, 26 April 2016, Legal Summary)

ARTICLE 35

Article 35 § 1

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

Availability or not of domestic remedies to complain of infection with the Covid-19 virus on account of inadequate conditions of detention: *communicated*

Existence ou non de recours internes permettant de dénoncer une infection par le virus de la Covid-19 en raison de conditions de détention inadéquates : *affaire communiquée*

Rus – Romania/Roumanie, 2621/21, Communication [Section IV]

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

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

Stand for election/Se porter candidat aux élections

Disqualification from standing for election, and removal from elected office, on account of criminal convictions for corruption and abuse of power: *inadmissible; no violation*

Interdiction de se porter candidat aux élections et déchéance de mandat d'élu, en raison des condamnations pénales pour corruption et abus de pouvoir : *irrecevable ; non-violation*

Galan – Italy/Italie, 63772/16, Decision/Décision 18.5.2021 [Section I]
Miniscalco – Italy/Italie, 55093/13, Judgment/Arrêt 17.6.2021 [Section I]

(See Article 7 above/Voir l'article 7 ci-dessus, page 20)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

The Court of Justice rules on a series of Romanian reforms in the areas of judicial organisation, the disciplinary regime applicable to judges, and the financial liability of the State and the personal liability of judges as a result of judicial error

La Cour de justice se prononce sur une série de réformes roumaines relatives à l'organisation judiciaire, au régime disciplinaire des magistrats ainsi qu'à la responsabilité patrimoniale de l'État et à la responsabilité personnelle des juges à la suite d'une erreur judiciaire

Joined Cases/Affaires jointes C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and/et C-397/19, Judgment/Arrêt 18.5.2021

Press release – Communiqué de presse

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