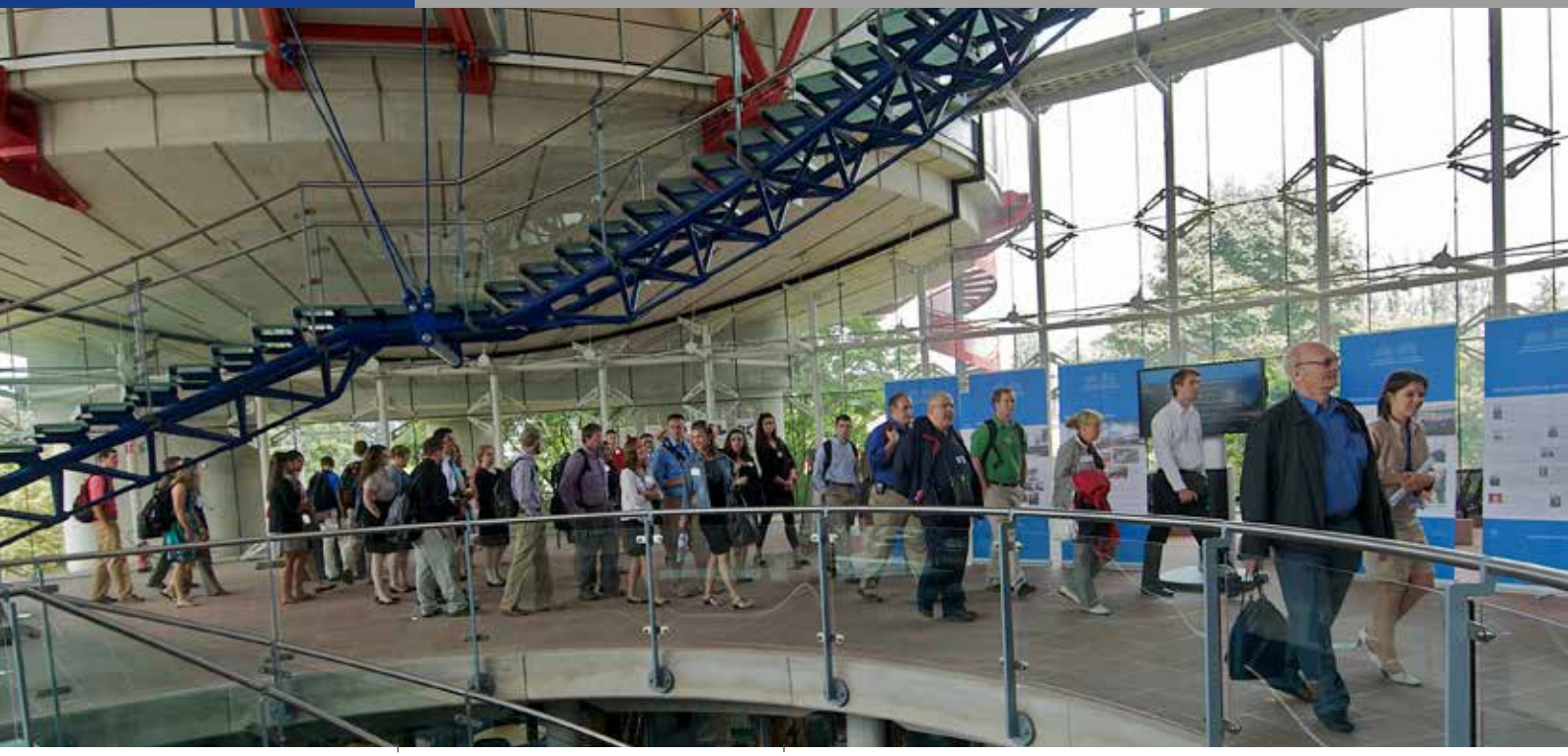
208

June
2017
Juin

INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

PROVISIONAL/PROVISOIRE



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Layout/Mise en page: Case-Law Information Unit/Unité de l'information sur la jurisprudence

Photograph: Council of Europe / Photo : Conseil de l'Europe
Cover: interior of the Human Rights Building (Architects: Richard Rogers Partnership and Atelier Claude Bucher)
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ARTICLE 2

Positive obligations (substantive aspect)/ Obligations positives (volet matériel)

Decision to withdraw life-sustaining treatment for infant child suffering from fatal genetic disease: *inadmissible*

Décision de mettre fin à un traitement qui maintient artificiellement en vie un bébé atteint d'une maladie génétique mortelle : *irrecevable*

Gard and Others/et autres – United Kingdom/ Royaume-Uni, 39793/17, decision/décision 27.6.2017 [Section I]

Facts – The case concerned an infant (Charles Gard) suffering from a rare and fatal genetic disease. In February 2017, the treating hospital sought a declaration from the domestic courts as to whether it would be lawful to withdraw artificial ventilation and provide him with palliative care. His parents also asked the courts to consider whether it would be in the best interests of their son to undergo experimental treatment in the United States. The domestic courts concluded that it would be lawful for the hospital to withdraw life-sustaining treatment because it was likely that the child would suffer significant harm if his present suffering was prolonged without any realistic prospect of improvement, and the experimental therapy would be of no effective benefit.

In the Convention proceedings, the applicants complained, *inter alia*, that the hospital had blocked access to potentially life-sustaining treatment in the United States, in breach of Article 2 of the Convention, and that that the domestic court decisions amounted to an unfair and disproportionate interference in their parental rights (Article 8).

Law

Article 2: As to the applicants' complaint that the hospital had, through the domestic legal proceedings, blocked access to life-sustaining treatment for the child, the Court recalled that in *Hristozov and Others*[1] it had found no violation of Article 2 because the respondent State in that case had put in place a regulatory framework governing access to experimental medication. Such a framework was in place in the United Kingdom and was derived from the relevant European Directives.[2] Article 2 of the Convention could not be interpreted as requiring access to unauthorised medicinal products for the terminally ill to be regulated in any particular way.

The Court went on to consider whether there had been a violation of Article 2 on account of the withdrawal of life-sustaining treatment. Of relevance here were (i) the existence in domestic law and practice of a regulatory framework; (ii) the wishes of the patient and those close to him and the opinions of other medical personnel; and (iii) the possibility to refer to the courts doubts regarding the best decision in the patient's interests.[3]

All three elements were satisfied in the present case:

(i) *Regulatory framework* – The Court had already found in a previous case (*Glass*[4]) that an appropriate regulatory framework, consistent with the standards laid down in the Council of Europe's Convention on Human Rights and Biomedicine in the area of consent, existed in the United Kingdom and saw no reason to change that conclusion.

(ii) *Views of patient, family and medical experts* – Although the child could not express his own wishes, the domestic courts had ensured that his wishes were expressed though his guardian, an independent professional appointed expressly by the domestic courts for that purpose. The parents had been fully involved and represented through all the decisions made and significant weight was given to their views. They had also been able to instruct their own medical expert and the domestic courts had engaged in detail with the views of that expert. The opinions of all the medical personnel involved were examined in detail and opinions were also sought from a specialised overseas team. The Court of Appeal had also heard from the doctor in the United States who was willing to treat the child and who had also been invited to discuss his professional views with the child's doctors in the United Kingdom.

(iii) *Referral to courts* – It was evident from the domestic proceedings that there was not only the possibility to approach the courts in the event of doubt but in fact, a duty to do so. The hospital had quite properly applied to the High Court under the relevant statute and the inherent jurisdiction of that

1 *Hristozov and Others v. Bulgaria*, 47039/11 and 358/12, 13 November 2012, Information Note 157.

2 Notably the European Clinical Trials Directive (EC/2001/20).

3 *Lambert and Others v. France* [GC], 46043/14, 5 June 2015, Information Note 186.

4 *Glass v. the United Kingdom*, 61827/00, 9 March 2004, Information Note 62; and *Glass v. the United Kingdom* (dec.), 61827/00, 18 March 2003, Information Note 51.

court to obtain a legal decision as to the appropriate way forward.

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Accordingly, and in view of the margin of appreciation left to the authorities, the complaint under Article 2 was manifestly ill-founded.

Conclusion: inadmissible (manifestly ill-founded).

Article 8: There had been interference with the parents' rights relating to their family ties with their son. That interference had been in accordance with the law and pursued the legitimate aims of protecting the "health or morals" and the "rights and freedoms" of a minor.

In examining whether the interference had been necessary in a democratic society, the Court rejected two arguments that had been raised by the parents who had argued that (i) it was not appropriate for the question of their son's treatment to be taken by the courts and (ii) the appropriate test for determining whether the interference with their parental rights was necessary was not whether it was in the child's "best interests", but whether there was a risk of "significant harm" to the child. As to the first argument, the Court stated that in the light of its case-law in *Glass* and *Lambert and Others*, it was clearly appropriate for the treating hospital to turn to the courts in the event of conflict. As to the second argument, there was a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount. The question was not, however, decisive in the instant case as the domestic courts had in any event concluded on the basis of extensive expert evidence that there was a risk of "significant harm" to the child, who was likely being exposed to continued pain, suffering and distress and would not benefit from the experimental treatment.

The domestic courts had been meticulous and thorough, ensured that all concerned were represented throughout, heard extensive and high-quality expert evidence and accorded weight to all the arguments raised. The domestic decisions were reviewed at three levels of jurisdiction with clear and extensive reasoning giving relevant and sufficient support for the courts' conclusions at all three levels.

There was accordingly nothing to suggest that the domestic courts' decisions could amount to an arbitrary or disproportionate interference.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible, as manifestly ill-founded, the applicants' complaint under Article 5 of the Convention.

Positive obligations (procedural aspect)/ Obligations positives (volet procédural)

Lack of adequate judicial response to establish circumstances of death of passenger in truck carrying inflammables: *violation*

Absence d'une réponse juridique adéquate pour établir les circonstances de la mort du passager d'un camion chargé de produit inflammable : *violation*

Sinim – Turkey/Turquie, 9441/10, judgment/arrêt 6.6.2017 [Section II]

Facts – The applicant's husband entered into an agreement with a truck owner for the transport of personal goods and furniture. The husband was informed that the truck had been booked by a transport company for the same day and would also be carrying raw materials belonging to another client. While transporting the goods, the truck was involved in a collision with another vehicle and caught fire. The applicant's husband, who was a passenger in the truck, later died from burns in hospital. It was subsequently discovered that the "raw materials" being transported with the husband's goods were in fact an inflammable liquid which had caught fire upon impact.

Law – Article 2 (*procedural aspect*): The truck was not equipped with an electrical system to prevent short circuits and fire and carried no warning signs. The driver had not been trained in the transport of dangerous goods, contrary to the clear requirements of the law. No licence had been obtained for the transport of such goods and the shipment was incorrectly described as "raw material" in the invoice and delivery note in a possible attempt to evade inspection by the authorities. All these elements taken together suggested that, although not caused intentionally, the husband's death had resulted from voluntary and reckless disregard of their statutory duties by those responsible. It was not a case of simple omission or human error for which civil remedies were sufficient. By their apparently reckless conduct, the persons responsible for the shipment had caused the kind of serious harm that the legislation in question was intended to prevent. Such action required a criminal-law response to ensure effective deterrence against similar threats to the right to life in the future.

A criminal investigation into the accident had been necessary to determine whether the death was caused by the unlawful transport of a dangerous substance contrary to section 174 § 1 of the Criminal Code.

Although an investigation was promptly initiated into the circumstances surrounding the death, the public prosecutor appeared to have treated the incident as an ordinary traffic accident caused by negligent driving without paying attention to the cause of the fire that claimed the applicant's husband's life. No steps were taken to determine the composition and chemical properties of the truck's cargo or to identify the individuals or companies involved in the transport of such material. These significant omissions by the public prosecutor were disregarded by the Assize Court, despite the applicant's objections.

In addition, the judicial authorities ignored the applicant's official complaints for a considerable length of time and denied her the right to participate effectively in the proceedings. She was not notified of the expert opinion or of the prosecutor's decision not to prosecute. She was not recognised as a "complainant" by the Assize Court and not notified of its decision.

Those considerations largely sufficed to conclude that the criminal proceedings at issue did not satisfy the State's positive obligations under Article 2 as they failed to shed light on the circumstances of the death and had little deterrent effect in terms of ensuring effective enforcement of the regulatory framework on the transport of dangerous goods.

Although the applicant also brought compensation proceedings against those allegedly responsible, the appropriate judicial response would have been a criminal-law remedy. Civil remedies aimed at awarding damages alone were not sufficient to fulfil the respondent State's obligations under Article 2 in the applicant's case.

Conclusion: violation (unanimously).

Article 41: EUR 15,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 5

Article 5 § 1

Liberty of person/Liberté physique

Alleged unlawful detention of journalists: *communicated*

Détention de journalistes qui serait illégale : *affaire communiquée*

Sabuncu and Others/et autres – Turkey/Turquie, 23199/17 [Section II]

(See Article 18 below/Voir l'article 18 ci-dessous, page 30)

Article 5 § 3

Brought promptly before judge or other officer/ Aussitôt traduit devant un juge ou autre magistrat

Alleged unlawful detention of journalists: *communicated*

Détention de journalistes qui serait illégale : *affaire communiquée*

Sabuncu and Others/et autres – Turkey/Turquie, 23199/17 [Section II]

(See Article 18 below/Voir l'article 18 ci-dessous, page 30)

Article 5 § 4

Speediness of review/Contrôle à bref délai

Alleged unlawful detention of journalists: *communicated*

Détention de journalistes qui serait illégale : *affaire communiquée*

Sabuncu and Others/et autres – Turkey/Turquie, 23199/17 [Section II]

(See Article 18 below/Voir l'article 18 ci-dessous, page 30)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal
Fair hearing/Procès équitable

Application of Islamic law (sharia) in litigation concerning succession to estate of Greek Muslim: *relinquishment in favour of the Grand Chamber*

Application de la loi sacrée de l'Islam (charia) à un litige successoral entre des citoyens

musulmans grecs : *dessaisissement au profit de la Grande Chambre*

Molla Sali – Greece/Grèce, 20452/14 [Section I]

À la mort de son mari, la requérante hérita de tous ses biens, par testament établi par ce dernier devant notaire. Les deux sœurs du défunt contestèrent la validité du testament, alléguant que dès lors que leur frère appartenait à la communauté musulmane, toute question relative à la succession était soumise à la loi musulmane sacrée et à la compétence du « mufti » et non aux dispositions du code civil grec. Elles se prévalaient notamment du traité de Sèvres de 1920 et du traité de Lausanne de 1923 qui prévoyaient l'application des coutumes musulmanes et de la loi sacrée musulmane aux ressortissants grecs de confession musulmane.

Sur renvoi de la Cour de cassation, la cour d'appel jugea en décembre 2015 que le droit applicable à la succession du défunt était la loi musulmane sacrée et que le testament public litigieux ne produisait pas d'effet juridique. La requérante forma un pourvoi en cassation contre cet arrêt.

Invoquant l'article 6 § 1 pris isolément et combiné avec l'article 14 de la Convention européenne, la requérante se plaint de l'application de la charia à son litige successoral et non pas du droit commun applicable à tous les citoyens grecs alors que le testament de son mari était établi selon les dispositions du code civil grec. Elle se prétend également victime d'une différence de traitement fondée sur la religion.

Invoquant l'article 1 du Protocole n° 1, elle se plaint aussi qu'en appliquant au testament de son mari la loi musulmane sacrée au lieu du droit civil grec, la Cour de cassation l'a privée des trois quarts de son héritage.

Le 6 juin 2017, la chambre à laquelle l'affaire avait été attribuée s'est dessaisie au profit de la Grande Chambre à la demande de la requérante.

Impartial tribunal/Tribunal impartial

Composition of appeal court failed to guarantee objective impartiality: *violation*

Impartialité objective non garantie par la composition d'une cour d'appel : *violation*

Ramljak – Croatia/Croatie, 5856/13, judgment/arrêt 27.6.2017 [Section II]

Facts – A judgment adopted in the applicant's favour in civil proceedings was overturned on appeal. The applicant lodged an appeal with the Supreme Court alleging that she had not had a fair hearing before an independent and impartial tribunal because one of the appeal judges was the father of a trainee lawyer employed in the office of the two lawyers representing her opponent. Her appeal was dismissed and her constitutional complaint declared inadmissible.

Before the European Court, the applicant complained that her right under Article 6 to an impartial tribunal had been violated.

Law – Article 6 § 1: There was no evidence as regards personal bias on the part of the appeal judge. The case was therefore to be examined from the perspective of objective impartiality and, more specifically, the question whether the applicant's doubts, stemming from the specific circumstances, could be regarded as objectively justified.

The nature of the personal link was of importance when determining whether the applicant's fears were objectively justified. There was nothing to suggest that the judge was not aware of the fact that his son was employed at a law office representing a party in the proceedings at issue. However, nothing in the case file showed that he informed the president of the court of those circumstances. Had he done so all the issues concerning his participation in the case would have been addressed before it was examined. The fact that such a close relative as the son of a judge adjudicating a civil case at the appeal stage had such close working ties with lawyers representing the applicant's opponent as one of the parties in those civil proceedings, although he had no involvement in the case, and that he was in a position of subordination to them compromised the court's impartiality and made it open to doubt.

It was not possible to ascertain the exact influence of the judge on the outcome of the appeal since it had been decided in a closed meeting. However, it could be observed that he had presided over the appeal court's three-judge panel and that therefore the applicant had grounds to believe that he had had an important role in delivering the judgment against her and that the impartiality of the court could have been open to genuine doubt.

Although the higher courts had the power to quash the decision on the ground that it appeared that the president of the appeal panel had not been impartial, they had declined to do so.

Conclusion: violation (six votes to one).

Article 41: EUR 3,500 in respect of non-pecuniary damage.

(See *Morice v. France* [GC], 29369/10, 23 April 2015, Information Note 184)

Article 6 § 1 (criminal/pénal)

Equality of arms/Égalité des armes

Appointment of expert who had already reported to the public prosecutor during the preliminary investigation as official expert at trial: *no violation*

Désignation, comme expert officiel lors d'un procès, d'un expert qui avait déjà établi un rapport pour le procureur lors de l'enquête préliminaire : *non-violation*

J.M. and Others/et autres – Austria/Autriche, 61503/14 et al., judgment/arrêt 1.6.2017 [Section V]

Facts – The applicants were investigated in connection with an alleged breach of trust and fraud relating to the level of consultancy fees paid in connection with the sale of shares in a bank. During the preliminary investigation the public prosecutor appointed an expert (F.S.) to submit a report on what would have been a reasonable payment for the consultant's services.

During the applicants' ensuing trial the same expert from the preliminary investigation was appointed an official expert. He submitted a written report and was questioned by the trial court and the parties. Although the applicants were able to challenge him for bias, their challenge was dismissed as unfounded. An expert commissioned by the defence sat next to the applicants' lawyers and advised them, but was not allowed to question F.S. on his own and the applicants' request to call evidence from their private experts to counter the F.S.'s findings were rejected. The applicants were convicted.

In the Convention proceedings, the applicants complained that the criminal proceedings had been unfair as the official expert at the trial (F.S.) had also acted as an expert appointed by the public prosecutor during the preliminary proceedings.

Law – Article 6 §§ 1 and 3 (d): If a bill of indictment is based on the report of an expert who was appointed in the preliminary investigations by the public prosecutor, the appointment of the same person as expert by the trial court entails the risk of a breach of the principle of equality of arms. However, that risk can be counterbalanced by specific procedural safeguards.

In the instant case, the applicants' doubts about F.S.'s impartiality were not objectively justified. As a professor of law at a German university, F.S. was not, economically or otherwise, dependent on the public prosecutor's office. He had been present at the trial and had given a brief summary of his report and answered questions by the court and the parties, but otherwise had played no active role. The applicants had been free to rely on assistance by private experts for support at the trial, for example when questioning F.S. F.S. was under a strict legal obligation to be objective and the trial court had examined the applicants' allegations of bias before dismissing them as unfounded. F.S.'s evidence was not decisive for the conviction. The applicants had had a reasonable opportunity to present their case and had not been placed at a substantial disadvantage vis-à-vis the prosecution. There had thus been no breach of the principle of equality of arms in the criminal proceedings against the applicants.

Conclusion: no violation (unanimously).

Article 6 § 1 (enforcement/exécution)

Reasonable time/Délai raisonnable

Length of time taken to comply with court orders for payment of costs of "Pinto" proceedings directly to the plaintiffs' lawyers: *inadmissible*

Délai d'exécution de décisions judiciaires ayant ordonné que les frais de justice afférents à des « procédures Pinto » soient remboursés directement aux avocats des demandeurs : *irrecevable*

Izzo and Others/et autres – Italy/Italie, 46141/12, decision/décision 30.5.2017 [Section I]

Facts – The applicants were lawyers who acted as counsel for a number of clients seeking compensation under the Pinto Act[1] in length-of-proceedings cases. Having advanced the court costs on behalf of their clients the applicants requested and were granted an order for the legal costs and fees (totalling between EUR 150 and EUR 2,180) to be paid directly to them. The sums were paid only after delays of between 16 and 23 months. In the Convention proceedings, the applicants complained under Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 of the delays in payment.

1 Law no. 89 of 24 March 2001 (the "Pinto Act").

Law – Article 6 § 1 of the Convention and Article 1 of Protocol No. 1: The Court reiterated that, in the light of the particular nature of the "Pinto" remedy, decisions adopted within the framework of proceedings instituted under the Pinto Act should in principle be complied with within a particularly short time, specifically within a period not exceeding six months from the date on which the decision awarding compensation became enforceable.

However, that short time-limit stemmed from the compensatory nature of the "Pinto" remedy which was relevant only as regards the plaintiff who brought the claim under the Pinto Act, not the lawyers who represented them. A "Pinto" decision awarding a certain sum directly to the lawyer had no compensatory value and merely represented a credit instrument evidencing a debt owed by the State. Adherence to the particularly short time-limit for the execution of the "Pinto" decisions in such cases was not warranted. In the instant case, the judgments of the "Pinto" courts were complied with following delays ranging from 16 to 23 months. Those periods were not unreasonable for the purposes of either Article 6 § 1 of the Convention or Article 1 of Protocol No. 1.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 3 (c)

Defence through legal assistance/Se défendre avec l'assistance d'un défenseur

No provision for legal assistance during questioning by police and investigating judge in initial phase of criminal proceedings: *relinquishment in favour of the Grand Chamber*

Loi ne prévoyant pas l'assistance d'un avocat lors des interrogatoires par la police et par le juge d'instruction dans la phase initiale de la procédure pénale : *dessaisissement en faveur de la Grande Chambre*

Beuze – Belgium/Belgique, 71409/10 [Section II]

En décembre 2007, le requérant fut arrêté par la gendarmerie française et placé en garde à vue en exécution d'un mandat d'arrêt européen. Selon le procès-verbal d'arrestation, ce dernier avait renoncé à son droit de s'entretenir avec un avocat.

Remis aux autorités belges, le requérant fut déféré devant le juge d'instruction et il lui répondit ne pas avoir fait son choix d'un conseil. Le procès-verbal fit état de ce qu'il avait été signalé au requérant que le juge d'instruction en informerait le bâtonnier de l'ordre des avocats.

Un second mandat fut délivré en août 2008 étendant la saisine du juge d'instruction. En 2008 et 2009, le requérant fut interrogé à sept reprises par la police et à deux reprises par le juge d'instruction. À aucun moment, il ne bénéficia de l'assistance d'un avocat, laquelle n'était alors pas prévue par la législation belge.

Devant la cour d'assises, le requérant, assisté d'un conseil, sollicita que les poursuites soient déclarées irrecevables faute d'assistance d'un avocat au cours des interrogatoires et auditions par la police et par le juge d'instruction. La cour d'assises rejeta cette défense. Il fut déclaré coupable et condamné à la peine de réclusion à perpétuité.

La Cour de cassation rejeta le moyen tiré du défaut d'assistance d'un avocat durant la phase préliminaire du procès, considérant qu'au regard de l'ensemble de la procédure, le droit à un procès équitable du requérant avait été respecté.

Invoquant l'article 6 §§ 1 et 3 c), le requérant se plaint de ne pas avoir bénéficié du droit à l'assistance d'un avocat dans la phase initiale de la procédure menée contre lui.

Le 13 juin 2017, la chambre à laquelle l'affaire avait été attribuée s'est dessaisie au profit de la Grande Chambre.

ARTICLE 7

Nulla poena sine lege

Removal from elected office pursuant to legislation introduced after the impugned offence had been committed: *relinquishment in favour of the Grand Chamber*

Déchéance d'un mandat électif en vertu d'une loi adoptée après commission de l'infraction litigieuse : *dessaisissement au profit de la Grande Chambre*

Berlusconi – Italy/Italie, 58428/13 [Section I]

(See Article 3 of Protocol No. 1 below/Voir l'article 3 du Protocole n° 1 ci-dessous, page 35)

ARTICLE 8

Respect for private and family life/Respect de la vie privée et familiale
Positive obligations/Obligations positives

Insufficient protection afforded to child's image: *violation*

Protection insuffisante de l'image d'un enfant : *violation*

Bogomolova – Russia/Russie, 13812/09, judgment/arrêt 20.6.2017 [Section III]

Facts – In 2007 the applicant, a single mother, learnt that a photograph of her son had been reproduced on the cover page of a booklet entitled "Children need a family", which was published by a centre for psychological, medical and social support. She brought civil proceedings against the centre complaining that her and her son's honour, dignity and reputation had been damaged by the unlawful publication of her son's photograph in a booklet calling for adoption and that the photograph had been published without her authorisation or knowledge. Her claims were dismissed.

Before the European Court the applicant complained that the domestic courts had not afforded sufficient protection to her and her son's right to respect for their private and family life.

Law – Article 8: In order for Article 8 to come into play, the attack on personal reputation had to attain a certain level of seriousness and had to have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life. Regarding photographs, a person's image constituted one of the chief attributes of his or her personality, as it revealed that person's unique characteristics and distinguished them from his or her peers. The right to the protection of one's image was thus one of the essential components of personal development and presupposed the right to control the use of that image, including the right to refuse publication thereof.

The effect of the publication of the photograph attained a certain level of seriousness and prejudiced the applicant's enjoyment of her right to respect for her private life. The main issue in the case was whether the domestic courts had afforded the applicant and her son sufficient protection of their private life. In taking the decision to dismiss the applicant's claims, the domestic courts established that the photograph had been taken with the applicant's authorisation and that the applicant had not placed any restrictions or conditions on its use. However, they had failed to examine whether she had given her consent to the publication of the photograph.

The case concerned the publication of a photograph which, at least by inference, could be seen to suggest that the applicant's son was an orphan. Consequently, the impugned publication could have given its readers the false impression that the applicant's son had no parents or that his parents had abandoned him. Any such impression or other similar false impressions could prejudice the public perception of the family bond and relations between the applicant and her son.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 in respect of non-pecuniary damage; EUR 130 in respect of pecuniary damage.

(See *Reklos and Davourlis v. Greece*, 1234/05, 15 January 2009, Information Note 115)

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

Expert medical report relieving doctors of liability without examining whether they had provided due professional care: *violation*

Rapport d'expertise en matière de responsabilité médicale concluant à l'absence de faute des médecins sans examen concret de la conformité des actes accomplis aux règles de l'art : *violation*

Erdinç Kurt and Others/et autres – Turkey/Turquie, 50772/11, judgment/arrêt 6.6.2017 [Section II]

En fait – Les requérants sont un couple de parents et leur fille, lourdement handicapée à la suite de deux interventions chirurgicales : la première visait à soigner une maladie cardiaque congénitale très grave ; la seconde visait à remédier à une complication de la première, mais a entraîné des séquelles neurologiques lourdes.

Les parents engagèrent une action en réparation devant les juridictions civiles. Le tribunal demanda une expertise. Citant une importante bibliographie, le rapport énuméra les taux de complications et de décès liés à des interventions telles que celles en cause ; ces risques très élevés le firent conclure à l'absence de faute des médecins. Dénonçant un manque de motivation dudit rapport, les requérants demandèrent en vain une contre-expertise.

En droit – Article 8 : Même si les conclusions d'une expertise ne lient pas le juge, elles peuvent exercer une influence déterminante sur l'appréciation de ce dernier, le domaine technique concerné échappant à sa connaissance.

Ce n'est que lorsqu'il a été établi que les médecins ont réalisé l'opération selon les règles de l'art, en prenant dûment en compte les risques que présentait celle-ci, que les séquelles peuvent être considérées comme relevant de l'aléa thérapeutique. S'il devait

en aller autrement, aucun chirurgien ne serait jamais inquiété, puisque le risque est inhérent à toute intervention chirurgicale.

En l'espèce, la question à trancher par les experts consistait justement à déterminer si, indépendamment du risque que présentait l'intervention, les médecins avaient contribué à la réalisation du dommage.

Or le rapport d'expertise litigieux n'aborde nullement cette question. Appuyé seulement sur des éléments bibliographiques attestant l'existence de risques, il n'examine pas si les médecins concernés ont agi en adéquation avec les normes de la médecine moderne avant, pendant et après l'opération. Ne s'appuyant ainsi sur aucun élément concret, sa conclusion d'absence de faute relève de l'affirmation plus que de la démonstration.

Ce rapport est donc insuffisamment motivé au regard de la question sur laquelle il était censé apporter un éclairage technique. Or, face à cette carence, la demande de contre-expertise des intéressés est restée sans suite. Partant, les requérants n'ont pas bénéficié d'une réaction judiciaire adéquate au regard des exigences inhérentes à la protection du droit à l'intégrité physique de la patiente.

Conclusion : violation (unanimité).

Article 41 : 7 500 EUR conjointement pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir également, sous l'angle de l'article 2 de la Convention, *Eugenia Lazăr c. Roumanie*, 32146/05, 16 février 2010, Note d'information 127, et *Altuğ et autres c. Turquie*, 32086/07, 30 juin 2015)

Respect for private life/Respect de la vie privée_

Fixed period for retention of DNA samples of convicted offenders irrespective of gravity of offence and with no possibility of seeking their destruction: *violation*

Fichage des données ADN des auteurs d'infractions pénales sans différence de durée selon la gravité de l'infraction ni accès à une procédure d'effacement : *violation*

Aycaguer – France, 8806/12, judgment/arrêt 22.6.2017 [Section V]

En fait – En 2008, le requérant fut condamné à deux mois d'emprisonnement avec sursis pour avoir porté des coups de parapluie à des gendarmes à l'occasion d'une manifestation syndicale d'agriculteurs. Convoqué ensuite pour un prélèvement d'ADN aux fins de son inscription dans le « fichier national automatisé des empreintes génétiques » (FNAEG) des personnes condamnées pour certaines infractions (énumérées par la loi), le requérant refusa de se soumettre à ce prélèvement. Il ne fut pas inscrit dans le fichier, mais fut condamné pour ce refus à une amende de 500 EUR.

En droit – Article 8 : Lorsqu'un aspect particulièrement important de l'existence ou de l'identité d'un individu se trouve en jeu, la marge d'appréciation laissée à l'État est en général restreinte.

La protection des données à caractère personnel joue un rôle fondamental dans l'exercice du droit au respect de la vie privée consacré par l'article 8 de la Convention. La législation interne doit donc ménager des garanties appropriées.

Les considérations ci-après amènent la Cour à conclure que, faute d'un juste équilibre entre les intérêts publics et privés concurrents en jeu, l'État défendeur a outrepassé sa marge d'appréciation et que l'atteinte au droit au respect de la vie privée du requérant a été disproportionnée.

a) *Durée de conservation* – En 2010, le Conseil constitutionnel français a déclaré conformes à la Constitution les dispositions législatives relatives au fichier incriminé, sous réserve « de proportionner la durée de conservation de ces données personnelles, compte tenu de l'objet du fichier, à la nature ou à la gravité des infractions concernées ». À ce jour, cette réserve n'a pas reçu de suite appropriée.

Selon le code de procédure pénale, la durée de conservation des profils ADN ne peut dépasser « quarante ans » s'agissant des personnes condamnées pour l'une des infractions énumérées. Il s'agit là d'un maximum qui aurait dû être aménagé par décret. Ce décret n'ayant pas vu le jour, la durée de quarante ans n'est plus un simple maximum mais devient en pratique la norme.

Ainsi, aucune différenciation n'est actuellement prévue en fonction de la nature et de la gravité de l'infraction commise. Or les situations susceptibles d'entrer dans le champ d'application légal du fichier en cause présentent une importante disparité, pouvant aller jusqu'à des faits particulièrement graves (à l'instar notamment des infractions sexuelles, du terrorisme ou encore des crimes contre l'humanité ou de la traite des êtres humains).

La présente affaire (de simples coups de parapluie donnés dans un contexte politique et syndical en direction de gendarmes qui n'ont pas même été

identifiés) se distingue clairement de celles qui concernaient spécifiquement des infractions aussi graves que la criminalité organisée ou des agressions sexuelles.

b) *Procédure d'effacement* – L'accès à une telle procédure n'est prévu que pour les personnes soupçonnées, et non pour celles qui ont été condamnées (à l'instar du requérant). Or, aux yeux de la Cour, les personnes condamnées devraient également se voir offrir une possibilité concrète de présenter une requête en effacement des données mémorisées.

Conclusion : violation (unanimité).

Article 41 : 3 000 EUR pour préjudice moral.

(Voir également la fiche thématique Protection des données personnelles)

Removal of name of former police investigator with criminal conviction from list of trainee advocates: *no violation*

Radiation d'un ancien enquêteur de police de la liste des avocats stagiaires en raison d'une condamnation pénale : *non-violation*

Jankauskas – Lithuania/Lituanie (no. 2/n° 2), 50446/09, judgment/arrêt 27.6.2017 [Section IV]

Facts – In October 2000 the applicant, a police investigator, was found guilty of abuse of office for having solicited and obtained bribes in exchange for the discontinuation of criminal proceedings. He was sentenced to a period of imprisonment and prohibited from working in law enforcement or the justice system for five years. In 2007, following his release from prison, the applicant wrote to the Lithuanian Bar Association, requesting to be admitted as a trainee advocate. His application was accepted. The Bar Association subsequently became aware of his previous conviction which he had failed to mention in his application. In domestic proceedings the applicant was found to have breached the Code of Professional Ethics for Advocates and was removed from the list of trainee advocates as a disciplinary measure. The applicant's appeals against that measure were dismissed.

Before the European Court the applicant complained about the decision to strike his name off the list arguing that violated his right to respect for his private life under Article 8.

Law – Article 8

(a) *Applicability* – The notion of private life did not in principle exclude activities of a professional or business nature. Restrictions on registration as a member of certain professions, which could to a certain degree affect an applicant's ability to develop relationships within the outside world would undoubtedly fall within the sphere of his or her private life.

The applicant had a degree in law and from 1991 up to his conviction had worked as a police investigator. After his conviction had been expunged, he practised law as an in-house lawyer in the private sector and also worked as a trainee advocate for ten months. Taking into account the applicant's education and his prior professional experience the Lithuanian authorities' decision to remove him from the list of trainee advocates affected his ability to pursue his professional activity and there were consequential effects on the enjoyment of his right to respect for his private life within the meaning of Article 8.

(b) *Merits* – The applicant's dismissal as a trainee advocate constituted an interference with his right to respect for his private life. The interference had been prescribed by law and pursued a legitimate aim, namely that of the protection of the rights of others. As to whether the interference was necessary in a democratic society, the Court underlined the important role played by lawyers in the administration of justice. For members of the public to have confidence in the administration of justice they had to have confidence in the ability of the legal profession to provide effective representation. That special role of lawyers, as independent professionals, in the administration of justice entailed a number of duties and restrictions, particularly with regard to their professional conduct, which had to be discreet, honest and dignified.

Any criminal proceedings entailed certain consequences for the private life of an individual who had committed a crime. Those consequences were compatible with Article 8 of the Convention provided that they did not exceed the normal and inevitable consequences of such a situation.

The domestic courts had found that the applicant was not of high moral character based on consistent domestic case-law, which emphasised the high standards applicable to the profession of advocate. They underlined that the applicant had committed his crimes while working in law enforcement. Having found the applicant guilty, the domestic courts also prohibited him from working in law enforcement and the justice system for five years. Given the nature of the crimes committed by the applicant, it was not unreasonable for the domestic courts to have found that it was inappropriate to regard the

applicant as being person of high moral character so as to qualify to work in the justice system. The principles applicable to an advocate's profession contained values such as the dignity and honour of the legal profession, the integrity and good standing of the individual advocate, respect towards professional colleagues and respect for the fair administration of justice.

In addition, the applicant's prior conviction and the nature and scope of his crimes were only one of the grounds for holding that he lacked high moral character. The domestic authorities had also noted that a person who wished to become an advocate had an obligation to cooperate honestly and fully with the Bar Association and to disclose all relevant information, which the applicant had failed to do. It was not unreasonable that the domestic authorities should have concluded that such an obligation flowed from notions of honesty and ethics and the idea that the relationship between an advocate and the Bar Association had to be based on mutual respect and goodwill assistance. The applicant should have understood the significance of such information for his application and the need to provide it.

The domestic courts had carried out a careful analysis and had sought to strike a balance between the protection of the applicant's private life and the need to protect the rights of others and the justice system as a whole.

Conclusion: no violation (unanimously).

(See *Bigaeva v. Greece*, 26713/05, 28 May 2009, Information Note 119; *Morice v. France* [GC], 29369/10, 23 April 2015, Information Note 184; and *Lekavičienė v. Lithuania*, 48427/09, 27 June 2017)

Respect for family life/Respect de la vie familiale

Child removed from parents and declared eligible for adoption on ground of precarious living conditions of family: *violation*

Enfant séparée des parents et déclarée adoptable au motif des conditions de vie précaires de la famille : *violation*

Barnea and/et Caldararu – Italy/Italie, 37931/15, judgment/arrêt 22.6.2017 [Section I]

En fait – Les requérants sont une famille rom. Les parents (deux premiers requérants) et leurs quatre enfants (dont les trois autres requérants) vivaient dans un campement dans des conditions précaires.

En juin 2009, la dernière fille fut placée dans une institution, puis déclarée adoptable par un tribunal en décembre 2010 : il était principalement reproché aux requérants de ne pas offrir à l'enfant des conditions matérielles adéquates et de l'avoir confiée à une tierce personne.

En octobre 2012, cependant, la cour d'appel décida du retour progressif de l'enfant dans sa famille d'origine dans un délai de six mois. Mais les services sociaux ne suivirent pas ces prescriptions, et, en novembre 2014, le tribunal prorogea le placement de l'enfant dans la famille d'accueil. En janvier 2015, la cour d'appel annula cette décision mais maintint le placement de l'enfant dans sa famille d'accueil, où elle était intégrée depuis six ans.

Finalement, en août 2016, le tribunal ordonna le retour de l'enfant auprès des siens. Ce retour eut lieu en septembre 2016, tout en étant très difficile pour l'enfant.

En droit – Article 8 : Nonobstant la marge d'appréciation de l'État défendeur, les autorités italiennes n'ont pas déployé des efforts adéquats et suffisants pour faire respecter le droit des requérants à vivre avec leur enfant entre juin 2009 et novembre 2016, au regard des conditions de leur séparation et de la non-exécution de l'arrêt de la cour d'appel de 2012 qui prévoyait le retour de l'enfant dans sa famille d'origine, méconnaissant ainsi le droit des requérants au respect de leur vie familiale.

Premièrement, les motifs retenus par le tribunal pour refuser le retour de l'enfant chez les requérants et pour déclarer l'adoptabilité ne constituaient pas des circonstances « tout à fait exceptionnelles » susceptibles de justifier une rupture du lien familial. Au demeurant, avant de placer l'enfant et d'ouvrir une procédure d'adoptabilité, les autorités auraient dû prendre des mesures concrètes pour lui permettre de vivre avec les requérants.

En effet, à aucun moment de la procédure n'ont été évoqués une situation de maltraitance, d'abus sexuels ou de carences affectives, un état de santé inquiétant, ou encore un déséquilibre psychique des parents. Au contraire les liens entre les parents et l'enfant étaient particulièrement forts. Les requérants étaient capables de remplir leur rôle parental et n'avaient pas d'influence négative sur le développement de l'enfant. La première expertise suggérait d'ailleurs qu'un processus de réintégration de l'enfant dans sa famille soit mis en place.

Deuxièmement, à la suite de l'arrêt de la cour d'appel en 2012, aucun projet de rapprochement entre les requérants et l'enfant n'a été mis en place dans

le délai de six mois indiqué. Après quoi le tribunal a prorogé le placement dans la famille d'accueil et réduit le nombre de rencontres de l'enfant avec les siens à quatre par an, en se fondant sur le comportement et les conditions matérielles de vie des requérants, sur les difficultés potentielles d'intégration de l'enfant dans sa famille d'origine et sur les liens profonds tissés avec la famille d'accueil.

Or le fait qu'un enfant puisse être accueilli dans un cadre plus propice à son éducation ne saurait en soi justifier qu'on le soustraie aux soins de ses parents biologiques. En l'espèce, les capacités éducatives et affectives des requérants n'ont pas été mises en cause et avaient été reconnues à plusieurs reprises par la cour d'appel.

Troisièmement, même si cette décision du tribunal a ensuite été annulée en 2015, la cour d'appel a toutefois confirmé le placement en famille d'accueil au motif que, en raison de l'écoulement du temps – en l'occurrence six ans –, des liens très forts s'étaient tissés avec la famille d'accueil et qu'un retour chez les requérants n'était plus envisageable.

Or un respect effectif de la vie familiale commande que les relations futures entre parent et enfant se règlent sur la seule base de l'ensemble des éléments pertinents, et non par le simple écoulement du temps. En l'espèce, les motifs retenus par les services sociaux puis les autorités judiciaires pour refuser le retour de l'enfant auprès des requérants ne constituent pas des circonstances « tout à fait exceptionnelles » qui pourraient justifier une rupture du lien familial.

La Cour conçoit que, en raison de l'écoulement du temps et de son intégration dans la famille d'accueil, les juridictions nationales puissent refuser le retour d'un enfant. En l'espèce cependant, le temps écoulé, conséquence de l'inertie des services sociaux dans la mise en place du projet de rapprochement, et les motifs avancés par le tribunal pour proroger le placement provisoire de l'enfant, ont contribué de façon décisive à empêcher la réunion des requérants et de l'enfant, qui aurait dû avoir lieu en 2012.

Conclusion : violation (unanimité).

Article 41 : 40 000 EUR pour préjudice moral.

(Voir *Kutzner c. Allemagne*, 46544/99, 26 février 2002, Note d'information 39 ; *Couillard Maugery c. France*, 64796/01, 1er juillet 2004, Note d'information 66 ; *Clemeno et autres c. Italie*, 19537/03, 21 octobre 2008, Note d'information 112 ; *Saviny c. Ukraine*, 39948/06, 18 décembre 2008, Note d'information 114 ; *B. c. Roumanie (n° 2)*, 1285/03, 19 février 2013, Note d'information 160 ; *R.M.S. c. Espagne*, 28775/12, 18 juin 2013, Note d'information 164 ; *Zhou c. Italie*, 33773/11, 21 janvier 2014, Note d'information 170 ; *Soares de Melo c. Portugal*, 72850/14, 16 février 2016, Note d'information 193)

Decision to withdraw life-sustaining treatment for infant child against parents' wishes: *inadmissible*

Décision, contraire à la volonté des parents, de mettre fin à un traitement qui maintient artificiellement en vie leur bébé : *irrecevable*

Gard and Others/et autres – United Kingdom/Royaume-Uni, 39793/17, decision/décision 27.6.2017 [Section I]

(See Article 2 above/Voir l'article 2 ci-dessus, page 9)

ARTICLE 9

Freedom of religion/Liberté de religion
Manifest religion or belief/Manifester sa religion ou sa conviction

Refusal to register religious association owing to lack of precise description of its beliefs and rites in its statute: *violation*

Refus d'enregistrer une association cultuelle en raison de l'absence dans ses statuts d'exposé précis de ses croyances et ses rites : *violation*

Metodiev and Others/et autres – Bulgaria/Bulgarie, 58088/08, judgment/arrêt 15.6.2017 [Section V]

En fait – En février 2007, dix personnes de confession ahmadie, dont neuf des 31 requérants, décidèrent de créer une nouvelle association cultuelle, dénommée « Communauté musulmane Ahmadiyya ».

Le premier requérant déposa devant le tribunal de la ville une demande d'enregistrement en application de la loi sur les cultes. Il joignit à sa demande les statuts de l'association qui explicitaient ses buts et ses croyances. Cependant les juridictions nationales refusèrent d'enregistrer l'association cultuelle en raison de l'absence d'exposé précis de ses croyances et de ses rites.

En droit – Article 9 lu à la lumière de l'article 11 : En l'absence d'enregistrement par le tribunal, l'association cultuelle ne pouvait acquérir la personnalité

juridique et exercer en son nom les droits associés à un tel statut, notamment le droit de posséder ou de louer des biens, de détenir des comptes bancaires ou d'ester en justice, qui sont pourtant essentiels pour l'exercice du droit de manifester sa religion. Ainsi, le refus d'enregistrement de l'association cultuelle en application de la loi sur les cultes constitue une ingérence dans l'exercice des droits qui sont garantis aux requérants par l'article 9 de la Convention, interprété à la lumière de l'article 11. Aussi, l'ingérence litigieuse était donc prévue par la loi et poursuivait des objectifs légitimes tendant à la protection de l'ordre et des droits et libertés d'autrui.

Pour refuser l'enregistrement de l'association requérante, la Cour suprême de cassation a retenu pour seul motif l'absence d'une indication suffisamment précise et complète des croyances et des rites du culte ahmadi dans les statuts de l'association. Elle en a déduit que les statuts ne répondaient pas aux exigences de la loi sur les cultes, lesquelles visaient à distinguer les différents cultes et à éviter des confrontations entre les communautés religieuses.

Le nom de l'association cultuelle des requérants et ses statuts précisaient clairement que celle-ci appartenait à la communauté Ahmadiyya, présente dans le monde entier, et les statuts exposaient les croyances et les valeurs fondamentales de ses adeptes. Or la loi sur les cultes ne contient pas de dispositions spécifiques indiquant quel degré de précision doit revêtir pareille description et quelles informations spécifiques doivent figurer dans l'exposé des croyances et des rites du culte. Il n'existe pas d'autre réglementation ou de lignes directrices qui auraient été accessibles aux requérants et qui auraient été susceptibles de les guider dans leur démarche. Il n'était donc pas aisé pour les requérants de mettre les statuts de l'association en conformité avec l'exigence de précision demandée par les juridictions internes. En outre, les requérants ne se sont pas vu offrir la possibilité de remédier à la lacune constatée en fournissant des informations complémentaires aux juridictions compétentes.

La condition à l'enregistrement de l'association cultuelle était sa démonstration que les croyances partagées par ses adeptes se distinguent de celles des cultes déjà enregistrés et, en particulier, du culte musulman dominant. Une telle approche, strictement appliquée comme c'est le cas en l'espèce, conduirait en pratique à refuser l'enregistrement de toute nouvelle association cultuelle qui aurait la même doctrine qu'un culte déjà existant. Eu égard à l'impossibilité, en droit bulgare, pour une association ayant des activités cultuelles, d'obtenir la personnalité juridique d'une autre manière, cette position de la haute juridiction pourrait avoir pour conséquences de ne permettre l'existence que d'une seule association cultuelle par courant religieux et d'imposer aux croyants de se tourner vers celle-ci. De surcroît, l'appréciation du caractère identique ou non des croyances relèverait des juridictions et non des communautés religieuses elles-mêmes.

Pareille approche paraît difficilement conciliable avec la liberté de religion garantie par l'article 9 de la Convention, interprété à la lumière de la liberté d'association que garantit l'article 11. Le droit à la liberté de religion exclut en principe que l'État apprécie la légitimité des croyances religieuses ou les modalités d'expression de celles-ci, et ce même dans un souci de préserver l'unité au sein d'une communauté religieuse. Le défaut allégué de précision de la description des croyances et des rites de l'association cultuelle dans les statuts de celle-ci n'était pas de nature à justifier le refus d'enregistrement litigieux qui, dès lors, n'était pas nécessaire dans une société démocratique.

Conclusion : violation (unanimité).

Article 41 : 4 000 EUR au premier requérant pour préjudice moral ; constat de violation suffisant en lui-même pour le préjudice moral subi par les autres requérants.

(Voir *Hassan et Tchaouch c. Bulgarie*, 30985/96, 26 octobre 2000; *Église métropolitaine de Bessarabie et autres c. Moldova*, 45701/99, 13 décembre 2001, Note d'information 37 ; *Kimlya et autres c. Russie*, 76836/01 et 32782/03, 1er octobre 2009, Note d'information 123 ; et *İzzettin Doğan et autres c. Turquie* [GC], 62649/10, 26 avril 2016, Note d'information 195)

ARTICLE 10

Freedom of expression/Liberté d'expression

NGOs bound by requirement to verify factual statements defamatory of private individuals: *no violation*

ONG tenues à l'obligation de vérifier les déclarations factuelles diffamatoires à l'égard de particuliers : *non-violation*

Medžlis Islamske Zajednice Brčko and Others/et autres – Bosnia and Herzegovina/Bosnie-Herzégovine, 17224/11, judgment/arrêt 27.6.2017 [GC]

Facts – The applicants, a religious community of Muslims and three NGOs of ethnic Bosniacs in the Brčko District, sent a letter to the highest district authorities, voicing their concerns about the procedure for

the appointment of director of the multi-ethnic public radio station and alleging that an editor at the station, who had been proposed for the position, had carried out actions which were disrespectful of Muslims and ethnic Bosniacs. Soon afterwards, the letter was published in three different daily newspapers. The editor brought civil defamation proceedings. The applicants were held liable for defamation and ordered to retract the letter, failing which they were to pay compensation for non-pecuniary damage.

Before the European Court the applicants complained that their punishment violated their right to freedom of expression as guaranteed by Article 10.

Law – Article 10: The decisions of the domestic courts amounted to an interference with the applicants' freedom of expression. The interference had been prescribed by law and pursued a legitimate aim, namely that of the protection of the reputation of others. The central issue before the Court was whether the interference was necessary in a democratic society.

Accusing the editor of being disrespectful in regard to another ethnicity and religion was not only capable of tarnishing her reputation, but also of causing her prejudice in both her professional and social environment. Accordingly, the accusations attained the requisite level of seriousness as could harm her rights under Article 8. Therefore the Court had to verify whether the domestic authorities had struck a fair balance between the two values guaranteed by the Convention, namely, on the one hand, the applicant's freedom of expression protected by Article 10 and, on the other, the editor's right to respect for her reputation under Article 8.

The applicants were not in any subordinated work-based relationship with the public radio which would have made them bound by a duty of loyalty, reserve and discretion towards it and as such, there was no need for the Court to enquire into issues central to its case-law on whistle-blowing. The Court shared the opinion of the domestic authorities that the applicants' liability for defamation should be assessed only in relation to their private correspondence with local authorities, rather than the publication of the letter in the media, as it had not been proven that they had been responsible for its publication.

When an NGO drew attention to matters of public interest, it was exercising a public watchdog role of similar importance to that of the press and could be characterised as a social watchdog. In the area of press freedom, by reason of the duties and responsibilities' inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they were acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. The same considerations applied to an NGO assuming a social watchdog function.

In balancing the competing interests involved, it was appropriate to take account of the criteria that generally applied to the dissemination of defamatory statements by the media in the exercise of its public watchdog function.

(a) *How well-known was the person concerned and what was the subject of the allegations* – By having applied for the post of the radio's director and bearing in mind the public interest involved in the information contained in the letter, the editor had to be considered to have inevitably and knowingly entered the public domain and laid herself open to close scrutiny of her acts. In such circumstances, the limits of acceptable criticism were accordingly to be wider than in the case of an ordinary professional.

(b) *Content, form and consequences of the information passed on to the authorities* – An important factor was the wording used by the applicants in the impugned letter. They had not explicitly said that part of the information which they passed on to the authorities had emanated from other sources, such as radio employees. They had introduced their letter with the words "according to our information", but had not clearly indicated that they had acted as messengers. Therefore they implicitly presented themselves as having direct access to that information and in those circumstances they had assumed responsibility for the statements.

Another important factor was whether the thrust of the impugned statements had been primarily to accuse the editor or whether it had been to notify the competent State officials of conduct which to them appeared irregular or unlawful. The applicants maintained that their intention had been to inform the competent authorities about certain irregularities and to prompt them to investigate and verify the allegations made in the letter. However, the impugned letter did not contain any request for investigation and verification of the allegations.

As to the consequences of the above accusations passed on to the authorities, there could be little doubt that when considered cumulatively and against the background of the specific context in which they were made, the conduct attributed to the editor was to be regarded as particularly improper from a moral and social point of view. The allega-

tions cast her in a very negative light and were liable to portray her as a person who was disrespectful and contemptuous in her opinions and sentiments about Muslims and ethnic Bosniacs. The domestic courts had held that the statements in question contained defamatory accusations that damaged her reputation and the Court found no reason to hold otherwise. That the allegations were submitted to a limited number of State officials by way of private correspondence did not eliminate their potential harmful effect on the career prospects of the editor as a civil servant and her professional reputation as a journalist. Irrespective of how the letter reached the media, it was conceivable that its publication opened a possibility for public debate and aggravated the harm to her dignity and professional reputation.

(c) *The authenticity of the information disclosed* – The most important factor relevant for the balancing exercise in the case was the authenticity of the information passed on to the authorities. In the context of press freedom, special grounds were required before the media could be dispensed from their ordinary obligation to verify factual statements that were defamatory of private individuals. Similarly to newspapers, the applicants were bound by the requirement to verify the veracity of the allegations submitted. That requirement was inherent in the Code of Ethics and Conduct for NGOs.

The domestic authorities had held that there was an evident inconsistency between what the appellants had been told by the radio's employees and what they had reported in the letter. The applicants, as NGOs whose members enjoyed a good reputation in society, were required to present an accurate rendering of the employees' account, as an important element for the development and maintaining of mutual trust and of their image as competent and responsible participants in public life. The domestic courts had established that, contrary to what had been alleged, the editor had not been the author of comments reported in the weekly newspaper. The verification of that fact prior to reporting would not have required any particular effort on the part of the applicants.

The Court found no reason to depart from the findings of the domestic courts that the applicant's had not proved the truthfulness of their statements which they knew or ought to have known were false and accordingly concluded that the applicants did not have a sufficient factual basis for their impugned allegations about the editor in their letter.

(d) *The severity of the sanction* – The domestic authorities had ordered that the applicants inform the authorities that they had retracted their letter, failing which they would have to pay EUR 1,280 jointly in respect of non-pecuniary damage. The amount the applicants were ordered to pay was not, in itself, disproportionate.

The Court discerned no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them. It was satisfied that the disputed interference was supported by relevant and sufficient reasons and that the authorities of the respondent State had struck a fair balance between the applicants' interest in free speech, on the one hand, and the editor's interest in protection of her reputation on the other hand, thus acting within their margin of appreciation.

Conclusion: no violation (eleven votes to six).

(See *Zakharov v. Russia*, 14881/03, 5 October 2006; *Björk Eiðsdóttir v. Iceland*, 46443/09, 10 July 2012, Information Note 154; *Pedersen and Baadsgaard v. Denmark* [GC], 49017/99, 17 December 2004, Information Note 70)

Conviction of newspaper for publishing criminal procedural documents before they had been read out in open court: *no violation*

Condamnation d'un journal pour avoir publié des actes d'une procédure pénale avant leur lecture en audience publique : *non-violation*

Giesbert and Others/et autres – France, 68974/11 et al., judgment/arrêt 1.6.2017 [Section V]

En fait – Les requérants, un journal, son directeur de publication et un journaliste, ont été condamnés pour avoir publié dans deux articles des actes d'une procédure pénale avant leur lecture en audience publique dans une affaire médiatique concernant M^me^ Bettencourt, l'une des plus grosses fortunes françaises, ayant consenti à B. de nombreux dons pour un total de plusieurs centaines de millions d'euros. Les juridictions nationales reconnurent que les publications litigieuses portaient atteinte au droit de B. à un procès équitable dans le respect des droits de sa défense et de la présomption d'innocence et méconnaissaient l'article 38 de la loi de 1881, qui réprime le délit de publication d'actes de procédure pénale avant leur lecture en audience publique.

En droit – Article 10 : Les condamnations litigieuses s'analysent en une ingérence dans l'exercice par les requérants de leur droit à la liberté d'expression,

prévue par la loi et ayant pour buts la protection de la réputation et des droits d'autrui et la garantie de l'autorité et l'impartialité du pouvoir judiciaire.

La Cour estime que les critères dégagés dans l'arrêt *Bédat c. Suisse* [GC] (56925/08, 29 mars 2016, Note d'information 194), devant guider les autorités nationales des États parties à la Convention dans la mise en balance des droits protégés par l'article 10, d'une part, et des intérêts publics et privés protégés par le secret de l'instruction, d'autre part, sont applicables *mutatis mutandis* aux cas d'espèce.

a) *Quant à la manière dont les requérants sont entrés en possession des informations litigieuses* – Si l'article 38 de la loi de 1881 ne réprime et ne vise pas les conditions dans lesquelles un document issu d'une procédure a été obtenu mais la simple publication d'un tel document, les requérants devaient savoir que la publication littérale d'une partie des actes litigieux se heurtait à la prohibition de cette disposition.

b) *Quant à la teneur des articles litigieux* – Les articles allaient dans le sens de l'accusation de B., au mépris de sa présomption d'innocence.

c) *La contribution des articles litigieux à l'intérêt général* – Les propos reprochés aux requérants, qui concernaient des personnes publiques et le fonctionnement du pouvoir judiciaire, s'inscrivaient dans le cadre d'un débat d'intérêt général qui allait au-delà de la simple curiosité d'un certain public sur un événement ou un procès anonyme. L'intérêt du public de recevoir des informations d'intérêt général dépassait le cadre du procès.

Les décisions rendues par les juridictions nationales n'ont pas pris en considération l'éclairage que pouvait apporter les publications pour le débat public et l'intérêt du public ; le fait qu'elles ne l'aient pas trouvé suffisamment pertinent relève de leur marge d'appréciation.

d) *L'influence des articles litigieux sur la conduite de la procédure pénale*

i. *Concernant les articles du 10 décembre 2009 et du 4 février 2010 vis-à-vis de B* – Au vu des questions complexes que les autorités judiciaires avaient à trancher quant à la vulnérabilité de M^me^ Bettencourt d'une part, et quant au délit d'abus de faiblesse reproché à B. d'autre part, la publication des actes de procédure insérés dans des articles orientés comportait les risques que le bon déroulement du procès soit perturbé et que le droit de l'intéressé à un procès équitable soit menacé.

ii. *Concernant l'article du 4 février 2010 vis-à-vis de M^me^ Bettencourt* – La procédure en référé a abouti à une reconnaissance de son préjudice dès lors que la publication était susceptible de porter atteinte à ses droits en ce qu'elle la présentait, avant que ne débute l'examen de l'affaire pénale devant le tribunal correctionnel, comme une femme manipulée et affaiblie, ce qu'elle contestait. Alors que M^me^ Bettencourt avait déposé des conclusions d'intervention volontaire comportant à titre subsidiaire une constitution de partie civile devant le tribunal correctionnel, et compte tenu de la teneur des informations livrées au lecteur, la publication litigieuse pouvait avoir des répercussions négatives sur la bonne administration de la justice.

e) *Quant à l'atteinte à la vie privée* – Aucune atteinte à la vie privée de B. et M^me^ Bettencourt n'a été constatée par les juridictions nationales.

f) *Quant à la proportionnalité de la sanction prononcée* – Les requérants ont été condamnés au paiement d'une provision de 13 000 EUR ainsi qu'à deux mesures de publication judiciaire et à 1 EUR en réparation du préjudice moral. Ces sanctions ne sauraient être considérées comme excessives ni de nature à emporter un effet dissuasif pour l'exercice de la liberté des médias.

g) *Conclusion* – Les motifs avancés par les juridictions nationales pour justifier l'ingérence dans le droit des requérants à la liberté d'expression découlant de leur condamnation étaient pertinents et suffisants. En particulier, l'intérêt des requérants et celui du public à communiquer et recevoir des informations au sujet d'une question d'intérêt général n'était pas de nature à l'emporter sur les considérations invoquées par les juridictions nationales quant aux conséquences sur la protection des droits d'autrui et sur la bonne administration de la justice. Ainsi, les condamnations répondaient à un besoin social assez impérieux pour primer l'intérêt public s'attachant à la liberté de la presse et elles ne sauraient passer pour disproportionnées au regard des buts légitimes poursuivis.

Conclusion : non-violation (unanimité).

(Voir aussi *Du Roy et Malaurie c. France*, 34000/96, 3 octobre 2000 ; *Tourancheau et July c. France*, 53886/00, 24 novembre 2005 ; et *Dupuis et autres c. France*, 1914/02, 7 juin 2007, Note d'information 98)

Absence of adequate and effective safeguards concerning damages award in libel action: *violation*

Absence de garanties adéquates et effectives concernant les dommages-intérêts dans un procès en diffamation : *violation*

Independent Newspapers (Ireland) Limited – Ireland/ Irlande, 28199/15, judgment/arrêt 15.6.2017 [Section V]

Facts – The applicant company, which at the material time published the *Evening Herald* newspaper, was sued by a public-relations consultant (Ms L.) after running a series of articles attacking her business and personal integrity in connection with an award of Government contracts. Ms L. brought a civil action against the applicant company in defamation and the jury found in her favour. On the question of damages, the trial judge gave directions to the jury in accordance with the *Barret* rules[1] that had been laid down by the Supreme Court in 1986. He did not give any specific guideline to the jury regarding the appropriate level of compensation, stressed the limited nature of the guidelines he could provide and indicated, in broad terms, that, when assessing damages the jury must bear in mind reality, the current times, the cost of living and the value of money. He warned the jurors not to be "overcome by feelings of generosity". The jurors assessed damages at EUR 1,872,000. On appeal, the Supreme Court set the award aside as being excessive and substituted its own assessment of damages in an amount of EUR 1,250,000.

In the Convention proceedings, the applicant company complained that the award was excessive and signified the absence of adequate and effective safeguards in domestic law, in violation of its right to freedom of expression under Article 10 of the Convention.

Law – Article 10: The award of damages against the applicant company constituted a restriction on the exercise of its right to freedom of expression, which interference was prescribed by law and pursued the aim of protecting Ms L.'s reputation and her right to respect for her private and family life.

As to whether the interference could be regarded as "necessary in a democratic society", the Court, following its approach in the *Independent News and Media* case, examined the adequacy and efficacy, in the circumstances of the applicant company's case, of the domestic safeguards against disproportionate awards. It noted in that connection that unpredictably high damages in libel cases were considered capable of having a chilling effect and therefore required the most careful scrutiny and very strong justification. The effectiveness – or not – of the safeguard at first instance, the resulting unpredictability of the quantum of damages that was not solely a function of the unique facts of each case, the considerable expense and delay entailed by seeking appellate review and, where an award was set aside, a re-trial of the case, were all relevant considerations.

(i) *First safeguard – directions to the jury*: At first instance, the safeguard took the form of guidance to the jury on how to assess the damages to be awarded. The Court reiterated that in the context of defamation cases, while the jury's assessment of damages may be inherently complex and uncertain, the uncertainty must be kept to a minimum and the nature, clarity and scope of the directions provided to the jury were key in that regard. In the applicant company's case the trial judge had had to operate under the strict constraints imposed by the Supreme Court's case-law. As a result, his directions had remained inevitably quite generic. While it could not be said that the jury's discretion was without limit, the Court did not consider that the direction given was such as to reliably guide the jury towards an assessment of damages bearing a reasonable relationship of proportionality to the injury sustained by Ms L. to her reputation and private and family life. Therefore, and as evidenced by the Supreme Court finding that the jury award was excessive and disproportionate, the first safeguard had proved ineffective.

(ii) *Second safeguard – appellate review*: The Supreme Court had set aside the High Court award and, to that extent at least, the appellate safeguard was effective. However, the Supreme Court had gone on, exceptionally, to substitute its own award. The amount of that award was higher than any award ever made by a jury or appellate court and was far in excess of amounts the Supreme Court had previously approved or set aside. In the Court's view, the quite legitimate but exceptional exercise by the Supreme Court of its power to substitute its own assessment of damages for that of the jury, along with the exceptional nature of the final award from a domestic perspective, pointed to a need for comprehensive reasons explaining the final award. However, while its award was not entirely unreasoned, the Supreme Court did not explain, apart from reapplying the *Barrett* principles which had formed the basis for the charge to the jury and comparing, with caution, a previous defamation case, how it arrived at the figure of EUR 1,250,000. Nor, despite strong misgivings voiced by the experienced trial judge at the

1 *Barrett v. Independent Newspapers Limited* [1986] IR 13.

constraints deriving from the Supreme Court's case-law restricting the terms in which he could direct the jury, did it address the ineffectiveness in the instant case of that crucial safeguard against disproportionate awards.

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The Court stressed in conclusion that what was at issue in the present case was not the respondent State's choice of a system of trial judge and jury, but rather the nature and extent of the directions to be given to the jury by the trial judge to guide it in its assessment of damages and protect against disproportionate awards and, in the event that the appellate court engaged in a fresh assessment, relevant and sufficient reasons for the substituted award.[1]

Conclusion: violation (unanimously).

Article 41: claims in respect of pecuniary damage and non-pecuniary dismissed, the Court being unable to speculate on the outcome of the proceedings had there been no violation.

(See also *Tolstoy Miloslavsky v. the United Kingdom*, 18139/91, 13 July 1995; *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, 55120/00, 16 June 2005, Information Note 76)

Criminal conviction for referring to tax inspector in abusive and derogatory terms in letter sent to two administrative authorities: *violation*

Condamnation pénale, pour avoir qualifié un inspecteur du fisc en des termes injurieux et vexatoires, dans une lettre à l'attention de deux administrations : *violation*

Ali Çetin – Turkey/Turquie, 30905/09, judgment/arrêt 20.6.2017 [Section II]

En fait – Le requérant a été condamné pénalement pour avoir adressé une lettre à une fondation pour laquelle il avait travaillé (et qu'il avait jointe à un recours administratif), dans laquelle il reprochait à un inspecteur du fisc d'avoir agi dans un rapport, ayant conduit au licenciement du requérant, comme s'il avait lancé une « fatwa » à son encontre et en comparant indirectement l'inspecteur à un personnage fictif issu de la littérature turque.

En droit – Article 10 : La condamnation litigieuse constituait une ingérence dans l'exercice par le requérant de son droit à la liberté d'expression, prévue par la loi et poursuivant le but légitime de la protection de la réputation ou des droits d'autrui.

Il ressort des termes du courrier joint à son recours administratif que le requérant cherchait à exprimer ses opinions personnelles. Ses déclarations s'apparentaient donc, non à des allégations de fait, mais à des jugements de valeur.

Ces propos ne s'inscrivaient pas dans un débat ouvert concernant une question d'intérêt général, mais étaient des critiques émises en réaction à un rapport, rédigé par un inspecteur en sa qualité de fonctionnaire, ayant causé un préjudice direct et certain au requérant, à savoir son licenciement. Dans sa réclamation, le requérant sollicitait la suppression de certains passages du rapport, à ses yeux susceptibles de nuire à sa carrière. Il y comparait la mentalité du rédacteur du rapport avec celle d'un personnage de fiction de la littérature turque.

La condamnation du requérant était fondée sur les termes qu'il avait employés pour qualifier l'inspecteur, termes qui avaient été jugés injurieux et pouvaient être considérés comme vexatoires, et non sur les opinions critiques de nature professionnelle qu'il avait formulées à l'encontre de l'inspecteur.

Or les propos litigieux n'ont été diffusés que dans une lettre jointe à un recours pour contester un rapport ayant eu de lourdes conséquences professionnelles pour le requérant. Ils n'étaient donc pas destinés à être accessibles au public, mais uniquement aux autorités internes concernées.

Considérant la nature des propos litigieux et le contexte dans lequel ils ont été diffusés, les motifs invoqués par les autorités nationales pour condamner le requérant ne pouvaient passer pour « pertinents et suffisants ».

Et si la sanction prononcée à l'encontre du requérant (peine de sept jours de prison commuée en une amende d'environ 195 EUR) représentait une ingérence proportionnée dans l'exercice par l'intéressé de son droit à la liberté d'expression, elle n'en constitue pas moins une peine au sens pénal du terme.

Ainsi, la condamnation du requérant a constitué une ingérence disproportionnée dans son droit à la liberté d'expression qui n'était pas « nécessaire dans une société démocratique ».

Conclusion : violation (unanimité).

1 The Court also noted that the legal regime in Ireland had changed since the events in the applicant company's case with the adoption of the Defamation Act 2009, which included new provisions allowing the trial judge to give more detailed directions to the jury when assessing damages.

Article 41 : demande pour dommage matériel et préjudice moral rejetée.

Legislative prohibition on the promotion of homosexuality among minors reinforcing stigma and prejudice and encouraging homophobia: *violation*

L'interdiction législative de la promotion de l'homosexualité auprès des mineurs renforce la stigmatisation et les préjugés et encourage l'homophobie : *violation*

Bayev and Others/et autres – Russia/Russie, 67667/09 et al., judgment/arrêt 20.6.2017 [Section III]

Facts –The applicants, gay rights activists, were fined in administrative proceedings for having staged a protest against laws banning the promotion of homosexuality among minors. Such laws had been enacted first at regional and subsequently at federal level.

Before the European Court the applicants complained under Article 10 about the ban on public statements concerning the identity, rights and social status of sexual minorities. They further argued that this ban was discriminatory under Article 14 as no similar restrictions applied with regard to the heterosexual majority.

Law – Article 10: The central issue in the case was the very existence of a legislative ban on the promotion of homosexuality or non-traditional sexual relations among minors which the applicants argued was inherently incompatible with the Convention. It was of relevance that even before any administrative measures had been taken against the applicants the ban had arguably encroached on the activities in which they might personally have wished to engage, especially as LGBT activists. The chilling effect of a legislative provision or policy could in itself constitute an interference with freedom of expression. The Court was not required to establish the existence of interference on the basis of the general impact of the impugned laws on the applicants' lives, however, because the laws had actually been enforced against the applicants in the administrative proceedings.

In order to determine the proportionality of a general measure, the Court had to primarily assess the legislative choices underlying it, regard being had to the quality of the parliamentary and judicial review of the necessity of the measure, and the risk of abuse if a general measure were to be relaxed. In doing so, it had to take into account its implementation in the applicants' concrete cases, which were illustrative of its impact in practice and were thus material to the measure's proportionality. As a matter of principle, the more convincing the general justifications for the general measure were the less importance the Court would attach to its impact in a particular case. Accordingly, the Court's assessment would focus on the necessity of the impugned laws as general measures, an approach which was to be distinguished from a call to review domestic law in the abstract.

The Government defended the need for the legislative ban with reference to the protection of morals and family values, the protection of health and the protection of the rights of others.

(a) *Justification on the grounds of protection of morals* – There was a clear European consensus about the recognition of individuals' right to openly identity themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms. There was no reason to consider that, as argued by the Government, maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality were incompatible, especially in view of the growing tendency to include relationships between same-sex couples within the concept of family life and the acknowledgement of the need for their legal recognition and protection.

The Court had consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. Those negative attitudes, references to traditions or general assumptions in a particular country could not of themselves be considered to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour. The legislation at hand was an example of such predisposed bias, unambiguously highlighted by its domestic interpretation and enforcement, and embodied in formulas such as "to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships".

The Court took note of the Government's assertion that the majority of Russians disapproved of homosexuality. It was true that popular sentiment could play an important role in the Court's assessment when it came to the justification on the grounds of morals. However, there was an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to narrow the scope of the substantive protection. It would be incompatible with the underlying

values of the Convention if the exercise of Convention rights by a minority group were made conditional on their being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.

(b) *Justification on the grounds of protection of health* – It was improbable that a restriction on potential freedom of expression concerning LGBT issues would be conducive to a reduction of health risks. Quite the contrary, disseminating knowledge on sex and gender identity issues and raising awareness of any associated risks and of methods of protecting oneself against those risks, presented objectively and scientifically, would be an indispensable part of a disease-prevention campaign and of a general public-health policy.

It was equally difficult to see how the law prohibiting promotion of homosexuality or non-traditional sexual relations among minors could help in achieving the desired demographic targets, or how, conversely, the absence of such a law would adversely affect them. Suppression of information about same-sex relationships was not a method by which a negative demographic trend might be reversed.

(c) *Justification on the grounds of protection of the rights of others* – The position of the Government concerning possible forceful or underhand "recruiting" of minors by the LGBT community had not evolved since *Alekseyev*[1] and remained unsubstantiated. The Government had been unable to provide any explanation of the mechanism by which a minor could be enticed into a "homosexual lifestyle", let alone any science-based evidence that one's sexual orientation or identity was susceptible to change under external influence.

In sensitive matters such as public discussion of sex education, where parental views, educational policies and the right of third parties to freedom of expression had to be balanced, the authorities had no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience. It was important to note that the applicants' messages were not inaccurate, sexually explicit or aggressive. Nor did the applicants make any attempt to advocate any sexual behaviour. Nothing in the applicants' actions diminished the right of parents to enlighten and advise their children, to exercise with regard to their children the natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions. To the extent that the minors who witnessed the applicants' campaign were exposed to the ideas of diversity, equality and tolerance, the adoption of those views could only be conducive to social cohesion.

The legal provisions in question did not serve to advance the legitimate aim of the protection of morals, and such measures were likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of the rights of others. Given the vagueness of the terminology used and the potentially unlimited scope of the application, the provisions were open to abuse in individual cases, as evidenced in the applications at hand. By adopting such laws the authorities reinforced stigma and prejudice and encouraged homophobia, which was incompatible with the notions of equality, pluralism and tolerance inherent in democratic society. In adopting the measures in question and implementing them in the applicants' cases the Russian authorities had overstepped the margin of appreciation afforded by Article 10.

Conclusion: violation (six votes to one).

Article 14 in conjunction with Article 10: The State's margin of appreciation was a narrow one with regard to differences in treatment based on sexual origination. Such differences required particularly convincing and weighty reasons by way of justification. Differences based solely on considerations of sexual orientation were unacceptable under the Convention. The legislation at hand stated the inferiority of same-sex relationships compared with opposite-sex relationships. The legislative provisions embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority and the Government had not offered convincing and weighty reasons justifying that difference in treatment.

Conclusion: violation (six votes to one).

Article 41: Between EUR 8,000 and EUR 20,000 in respect of non-pecuniary damage; between EUR 45 and EUR 180 in respect of pecuniary damage.

(See *Smith and Grady v. the United Kingdom*, 33985/96 and 33986/96, 27 September 1999; *Animal Defenders International v. the United Kingdom* [GC], 48876/08, 22 April 2013, Information Note 162; and *Lashmankin and Others v. Russia*, 57818/09 et al., 7 February 2017, Information Note 204)

1 *Alekseyev v. Russia*, 4916/07 et al., 21 October 2010, Information Note 134.

Alleged breach of freedom of expression of journalists: *communicated*

Violation alléguée de la liberté d'expression de journalistes : *affaire communiquée*

Sabuncu and Others/et autres – Turkey/Turquie, 23199/17 [Section II]

(See Article 18 below/Voir l'article 18 ci-dessous, page 30)

Freedom to impart information/Liberté de communiquer des informations

Order restraining mass publication of tax information: *no violation*

Décision de justice interdisant la publication à grande échelle d'informations fiscales : *non-violation*

Satakunnan Markkinapörssi Oy and/et Satamedia Oy – Finland/Finlande, 931/13, judgment/arrêt 27.6.2017 [GC]

Facts – The first applicant company (Satakunnan Markkinapörssi Oy) published a newspaper providing information on the taxable income and assets of Finnish taxpayers. The information was, by law, public.[1] The second applicant company (Satamedia Oy) offered a service supplying taxation information by SMS text message.

In April 2003 the Data Protection Ombudsman requested the Data Protection Board to restrain the applicant companies from processing taxation data in the manner and to the extent they had in 2002 and from passing such data to an SMS-service. The Data Protection Board dismissed the Ombudsman's request on the grounds that the applicant companies were engaged in journalism and so were entitled to a derogation under section 2(5) of the Personal Data Act. The case subsequently came before the Supreme Administrative Court, which in February 2007 sought a preliminary ruling from the Court of Justice of the European Union (CJEU) on the interpretation of the EU Data Protection Directive.[2] In its judgment of 16 December 2008[3] the CJEU ruled that activities relating to data from documents which were in the public domain under national legislation could be classified as "journalistic activities" if their object was to disclose to the public information, opinions or ideas, irrespective of the medium used to transmit them. In September 2009 the Supreme Administrative Court directed the Data Protection Board to forbid the processing of taxation data in the manner and to the extent carried out by the applicant companies in 2002. Noting that the CJEU had found that the decisive factor was to assess whether a publication contributed to a public debate or was solely intended to satisfy the curiosity of readers, the Supreme Administrative Court concluded that the publication of the whole database collected for journalistic purposes and the transmission of the information to the SMS service could not be regarded as journalistic activity.

In the Convention proceedings the applicant companies complained, among other matters, of a violation of Article 10 of the Convention. In a judgment of 21 July 2015 a Chamber of the Court held, by six votes to one, that there had been no violation of that provision. On 14 December 2015 the case was referred to the Grand Chamber at the applicants' request.

Law – Article 10

(a) *Preliminary issue – whether the taxpayers had a competing right to privacy under Article 8* – The fact that information was already in the public domain did not necessarily remove the protection of Article 8. Where there had been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private-life considerations arose. In the instant case, the data collected, processed and published by the applicant companies in the newspaper had provided details of taxable earned and unearned income and taxable net assets and so clearly concerned the private life of the individuals concerned, notwithstanding the fact that, pursuant to Finnish law, the data could be accessed by the public.

(b) *Interference, prescribed by law and legitimate aim* – The Data Protection Board's decision to forbid the processing of the taxation data in the manner complained of, as upheld by the national courts, entailed an interference with the applicant companies' right to impart information as guaranteed by Article 10. The interference was prescribed by law – the terms of the relevant data-protection legislation and the nature and scope of the journalistic derogation on which the applicant companies sought to rely were applied in a sufficiently foreseeable manner following the interpretative guidance provided to the Supreme Administrative Court by the CJEU and,

1 By virtue of section 5 of the Act on the Public Disclosure and Confidentiality of Tax Information.

2 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

3 *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, C-73/07, judgment of 16 December 2008.

as media professionals, the applicant companies should have been aware that the mass collection of data and its wholesale dissemination might not be considered as processing "solely" for journalistic purposes – and the interference pursued the legitimate aim of protecting the reputation or rights of others.

(c) *Necessity in a democratic society* – The Court examined the criteria it had identified in its previous case-law as being relevant when balancing the competing rights to private life under Article 8 of the Convention and to freedom of expression under Article 10.

(i) *Contribution to a debate of public interest*: Underpinning the Finnish legislative policy of rendering taxation data publicly accessible was the need to ensure that the public could monitor the activities of government authorities. Nevertheless, public access to taxation data, subject to clear rules and procedures, and the general transparency of the Finnish taxation system did not mean that the impugned publication itself contributed to a debate of public interest. Taking the publication as a whole and in context the Court, like the Supreme Administrative Court, was not persuaded that publication of taxation data in the manner and to the extent done by the applicant companies (the raw data was published as catalogues *en masse*, almost verbatim) had contributed to such a debate or indeed that its principal purpose was to do so.

(ii) *Subject of the publication* – Some 1,200,000 natural persons were the subject of the publication. They were all taxpayers but only a very few were individuals with a high net income, public figures or well-known personalities within the meaning of the Court's case-law. The majority of the persons whose data were listed in the newspaper belonged to low-income groups.

(iii) *Manner of obtaining the information and its veracity* – The accuracy of the information published was never in dispute and the data were not obtained by illicit means. However, it was clear that the applicant companies, who had cancelled their request for data from the National Board of Taxation and instead hired people to collect taxation data manually at the local tax offices, had a policy of circumventing normal channels and, accordingly, the checks and balances established by the domestic authorities to regulate access and dissemination.

(iv) *Content, form and consequences of publication* – Although journalists enjoy the freedom to choose, from the news items that come to their attention, which they will deal with and how, that freedom is not devoid of responsibilities. Even though the taxation data in question in the applicant companies' case were publicly accessible in Finland, they could only be consulted at the local tax offices and consultation was subject to clear conditions. Journalists could receive taxation data in digital format, but only a certain amount of data could be retrieved. Journalists had to specify that the information was requested for journalistic purposes and that it would not be published in the form of a list. Therefore, while the information relating to individuals was publicly accessible, specific rules and safeguards governed its accessibility. For the Court, the fact that the data in question were accessible to the public under the domestic law did not necessarily mean that they could be published to an unlimited extent. Publishing the data in a newspaper, and further disseminating that data via an SMS service, had rendered them accessible in a manner and to an extent that was not intended by the legislator. The safeguards in national law were built in precisely because of the public accessibility of personal taxation data, the nature and purpose of data-protection legislation and the accompanying journalistic derogation. Under these circumstances, the authorities of the respondent State enjoyed a wide margin of appreciation in deciding how to strike a fair balance between the respective rights under Articles 8 and 10.

When weighing those rights, the domestic courts had sought to strike a balance between freedom of expression and the right to privacy embodied in data-protection legislation. Applying the derogation in section 2(5) of the Personal Data Act and the public-interest test to the impugned interference, they and, in particular, the Supreme Administrative Court, had analysed the relevant Convention and CJEU case-law and carefully applied the case-law of the Court to the facts of the instant case.

(v) *Sanction* – The applicant companies had not been prohibited from publishing taxation data or from continuing to publish the newspaper provided they did so in a manner consistent with Finnish and EU rules on data protection and access to information. The fact that, in practice, the limitations imposed on the quantity of the information to be published may have rendered some of their business activities less profitable was not, as such, a sanction within the meaning of the Court's case-law.

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In conclusion, the competent domestic authorities and, in particular, the Supreme Administrative Court had given due consideration to the principles and criteria laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. The Supreme Administra-

tive Court had attached particular weight to its finding that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and that the applicants could not in substance claim that it had been done solely for a journalistic purpose within the meaning of domestic and EU law. The reasons relied upon by the domestic courts were thus both relevant and sufficient to show that the interference complained of had been "necessary in a democratic society" and that the authorities of the respondent State had acted within their margin of appreciation in striking a fair balance between the competing interests at stake.

Conclusion: no violation (fifteen votes to two).

The Grand Chamber also held by fifteen votes to two that there been a violation of Article 6 § 1 of the Convention in respect of the length of the proceedings before the domestic courts.

ARTICLE 11

Freedom of association/Liberté d'association

Refusal to register religious association owing to lack of precise description of its beliefs and rites in its statute: *violation*

Refus d'enregistrer une association cultuelle en raison de l'absence d'exposé précis dans ses statuts de ses croyances et ses rites : *violation*

Metodiev and Others/et autres – Bulgaria/Bulgarie, 58088/08, judgment/arrêt 15.6.2017 [Section V]

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

ARTICLE 14

Discrimination (Article 10)

Unjustified difference in treatment between heterosexual majority and homosexual minority: *violation*

Différence de traitement injustifiée entre la majorité hétérosexuelle et la minorité homosexuelle : *violation*

Bayev and Others/et autres – Russia/Russie, 67667/09 et al., judgment/arrêt 20.6.2017 [Section III]

(See Article 10 above/Voir l'article 10 ci-dessus, page 26)

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

Alleged discrimination against former members of military as regards entitlement to pensions: *communicated*

Discrimination alléguée à l'égard d'anciens membres de l'armée relativement au droit à pension : *affaires communiquées*

Persjanow – Poland/Pologne, 39247/12 [Section IV]
Rał – Poland/Pologne, 41178/12 [Section IV]

(See Article 1 of Protocol No. 1 below/Voir l'article 1 du Protocole n° 1 ci-dessous, page 35)

ARTICLE 18

Limitation on use of restrictions on rights/ Limitation de l'usage des restrictions aux droits

Alleged politically motivated judicial harassment against journalists: *communicated*

Plainte de journalistes estimant subir un harcèlement judiciaire pour des motifs politiques : *affaire communiquée*

Sabuncu and Others/et autres – Turkey/Turquie, 23199/17 [Section II]

In October and November 2016 ten journalists from the daily newspaper *Cumhuriyet* ("the Republic") were arrested and placed in pre-trial detention on suspicion of having committed offences on behalf of terrorist organisations and disseminating propaganda. The applicants challenged the relevant detention orders and applied, unsuccessfully, for release. Proceedings before the Constitutional Court are pending.

In the Convention proceedings, the applicants complain under Article 5 §§ 1, 3 and 4 about their pre-trial detention and its duration, under Article 10 that there has been a breach of their freedom of expression and under Article 18 that their detention is a sanction against them for criticising the Government and amounts to politically-motivated judicial harassment.

Communicated under Article 5 §§ 1, 3 and 4 and Articles 10 and 18 of the Convention.

ARTICLE 35

Article 35 § 1

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

Failure to have recourse to labour courts: *inadmissible*

Défaut de saisine des juridictions du travail : *irrecevable*

Bilewicz – Poland/Pologne, 53626/16, decision/décision 30.5.2017 [Section I]

Facts – The applicant was a prosecutor at the Prosecutor General's Office. Following the introduction of new legislation,[1] he was informed that he was to be transferred to a regional office. Before the European Court, the applicant complained that he had no right to institute court proceedings against the Prosecutor General's decision[2] to transfer him to a lower post.

Law – The Supreme Court had examined a case of a prosecutor who had been affected by the same measure as the applicant and had claimed that judicial review of the Prosecutor General's decisions had been excluded. In that case, the Supreme Court had found that such a decision, which entailed a change of the conditions of service, could be reviewed by a labour court in accordance with the general rule[3] that the labour courts had jurisdiction to hear claims related to a prosecutor's service.

The applicant had failed to have recourse to a remedy provided by the domestic law as indicated by the Supreme Court. It would have been inconsistent with the subsidiarity principle to accept his application for substantive examination without requiring him first to submit the substance of his Convention claim to the domestic authorities.

Conclusion: inadmissible (failure to exhaust domestic remedies).

1 The Prosecution Service Act (*Prawo o prokuraturze*) and the Prosecution Service (Introductory Provisions) Act (*Przepisy wprowadzające ustawę – Prawo o prokuraturze*).

2 Taken under section 36 of the Introductory Provisions Act.

3 Section 101(1) of the Prosecution Service Act.

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

New remedy to be exhausted when challenging measures taken under emergency decree laws: *inadmissible*

Nouveau recours à épuiser pour contester les mesures prises en application des décrets-lois adoptés dans le cadre de l'état d'urgence : *irrecevable*

Köksal – Turkey/Turquie, 70478/16, decision/décision 6.6.2017 [Section II]

En fait – À la suite de la tentative avortée de coup d'État de juillet 2016, l'état d'urgence a été décrété en Turquie. Onze décrets-lois ont ensuite été adoptés dans ce cadre juridique particulier. L'un d'eux révoquait plus de 50 000 fonctionnaires, dont le requérant. Ces derniers ne pouvaient plus réintégrer la fonction publique et leurs passeports étaient annulés.

Le 28 septembre 2016, le requérant introduisit un recours individuel devant la Cour constitutionnelle pour contester la mesure de révocation prise à son encontre. Ce recours est à ce jour pendant.

Après l'introduction de la présente requête, le décret-loi n° 685 publié le 23 janvier 2017 a prévu la création d'une commission chargée, entre autres, de se prononcer sur les recours relatifs aux mesures prises directement par les décrets-lois édictés dans le cadre de l'état d'urgence, dont les mesures de révocation. Les fonctionnaires frappés de telles mesures auront la possibilité de saisir ladite commission dans un délai de soixante jours à compter de la date de réception des recours qui sera fixée par le Premier ministre au 23 juillet 2017 au plus tard. Aussi, les décisions de la commission pourront elles-mêmes faire l'objet d'un recours en annulation devant les juridictions administratives, dont les décisions pourront à leur tour être contestées devant la Cour constitutionnelle par la voie du recours individuel et, à la suite de la saisine de cette haute juridiction et des décisions prononcées par celle-ci, toute personne pourra, si besoin est, la saisir d'un grief tiré de la Convention.

En droit – Article 35 § 1 : Le décret-loi n° 685 a clairement ouvert la voie à un contrôle, par la commission susmentionnée, des mesures prises dans le cadre de l'état d'urgence et il a prévu la soumission des décisions prises par cette commission à un contrôle juridictionnel ultérieur. En effet, ce décret-loi a été

adopté dans l'objectif de porter remède à une situation problématique de grande envergure résultant non seulement des défaillances du processus décisionnel de prise des mesures dénoncées, mais aussi de l'incertitude sur le contrôle juridictionnel de ces mesures.

Même si la commission en question est un organe non-judiciaire, ses décisions peuvent faire l'objet d'un contrôle juridictionnel. Par ailleurs, cette voie de recours est *a priori* accessible.

Le requérant aura donc à sa disposition une nouvelle voie de recours qui lui permettra de donner aux instances internes l'occasion de remédier au niveau national à la prétendue violation des dispositions de la Convention.

Ainsi, il est justifié de faire une exception au principe général selon lequel la condition de l'épuisement des voies de recours internes doit être appréciée au moment de l'introduction de la requête.

Toutefois, cette conclusion ne préjuge en rien, le cas échéant, d'un éventuel réexamen par la Cour de la question de l'effectivité et de la réalité du recours instauré par le décret-loi n° 685, tant en théorie qu'en pratique, à la lumière des décisions qui seront rendues par la commission en question et les juridictions nationales, ainsi que de l'exécution effective de ces décisions. En tout état de cause, la charge de la preuve concernant l'effectivité de cette voie de recours pèsera alors sur l'État défendeur. La Cour conserve par ailleurs sa compétence de contrôle ultime pour tout grief au sujet duquel les voies de recours internes disponibles ont été épuisées.

Conclusion : irrecevable (non-épuisement des voies de recours internes).

Effective domestic remedy/Recours interne effectif – Bulgaria/Bulgarie

Domestic remedy under the State and Municipalities Liability for Damage Act 1988, as amended and in force from 15 December 2012, capable of providing redress: *inadmissible*

Capacité du recours interne fondé sur la loi de 1988 sur la responsabilité de l'État et des communes pour dommage, telle que modifiée et en vigueur depuis le 15 décembre 2012, à apporter un redressement : *irrecevable*

Tsonev – Bulgaria/Bulgarie, 9662/13, decision/décision 30.5.2017 [Section V]

Facts – In June 2012 the applicant was charged with possession of a narcotic drug with intent to distribute and placed in pre-trial detention. His appeals against that measure were dismissed. In July 2013 he was convicted of drug offences and sentenced to six years' imprisonment. His appeals against conviction were dismissed.

Relying on Articles 5 §§ 1 (c), 3, and 4, the applicant complained that the domestic courts had refused to examine the reasonableness of the suspicion against him when considering his pre-trial detention.

Law – Article 5: The question before the Court was whether the remedy cited by the Government – a claim for damages under section 2(1)(1) and (1)(2) of the State and Municipalities Liability for Damage Act 1988, as amended and in force from 15 December 2012 – was available to the applicant and whether that remedy was capable of providing him adequate redress. A claim under the relevant provisions could result in an express acknowledgment of a breach of Article 5 and a consequent award of compensation. Such a remedy could in principle provide adequate redress, if the situation alleged to amount to a breach of Article 5 had come to an end.

The applicant was still in pre-trial detention when he raised his complaints before the Court. Though the national courts' decisions of which he complained were one-off acts, it was open to question whether those courts' refusals to enquire into the reasonableness of the suspicion against him had an effect on his ensuing pre-trial detention. It followed that it was also open to question whether, in view of its purely compensatory character, the remedy was capable of providing the applicant adequate redress with respect to his complaint under Article 5 § 3 as long as that pre-trial detention persisted. But the applicant's situation had changed. In 2013 he was convicted and in 2014 his conviction became final. He was thus no longer in pre-trial detention. A remedy capable of resulting in an acknowledgment of the breach and compensation therefore became adequate in his case. Since the applicant's complaint concerned judicial decisions given after the amendment had entered into force, the remedy was clearly available and its lack of retrospective effect did not affect him.

The main point of contention between the parties was whether a claim for damages about the way in which a criminal court had dealt with a legal challenge to pre-trial detention would have been likely to succeed. Doubts about the prospects of a remedy which appeared to offer a reasonable possibility of redress were not a sufficient reason to eschew it. That was especially so if the legal provision on which

the remedy was based had been specifically put in place to allow a grievance under the Convention to be aired domestically. When the proper construction of a new legal provision was yet to be settled, the domestic courts had to be given the opportunity to dispel any doubts. It was true that the Bulgarian courts' case-law under the amended provisions was still scant and not well-settled. But that could not in itself lead to the conclusion that the remedy did not offer a reasonable prospect of success. The applicant's grievances directly related to judicial decisions and were thus well within the ambit of the legislation in question.

The limitation period for such a claim was five years and it was still open to the applicant to make one. If he was not successful, he would be able to re-apply to the Court, as the process of exhaustion of domestic remedies amounted to relevant new information.

While the application was therefore to be rejected for non-exhaustion of domestic remedies, the Court emphasised that its view on the effectiveness of the remedy could be subject to reconsideration depending, in particular, on the Bulgarian court's ability to develop a consistent case-law under those provisions in line with the requirements of the Convention.

Conclusion: inadmissible (failure to exhaust domestic remedies).

ARTICLE 41

Just satisfaction/Satisfaction équitable

Loss of two-thirds of old-age pension as a result of introduction of legislation effectively deciding outcome of pending litigation against the State: *assessment of pecuniary damage*

Perte des deux tiers d'une pension de retraite à la suite d'une intervention législative ayant déterminé l'issue d'une procédure pendante contre l'État : *calcul du dommage matériel*

Stefanetti and Others/et autres – Italy/Italie, 21838/10 et al., judgment/arrêt (just satisfaction/satisfaction équitable) 1.6.2017 [Section I]

En fait – Les requérants contestèrent en justice le mode de calcul retenu par l'organisme national de sécurité sociale (INPS) pour la détermination de leurs droits à pension de retraite. Mais l'intervention en cours de procédure d'une loi interprétative – un article de la loi n° 296/2006, portant loi de finances pour 2007 – avalisant la position de l'INPS conduisit les juridictions à les débouter. De ce fait, ils perdirent environ les deux tiers des pensions que l'état de la jurisprudence interne leur aurait permis d'espérer.

Par un arrêt du 15 avril 2014 (« l'arrêt au principal », Note d'information 173), la Cour a conclu à la violation de l'article 6 § 1 de la Convention et de l'article 1 du Protocole n° 1 au motif de l'absence de motifs impérieux d'intérêt général et des conséquences disproportionnées de l'intervention législative litigieuse. Elle a accordé à chacun des requérants 12 000 EUR pour préjudice moral, et réservé la question du dommage matériel.

En droit – Article 41 (*dommage matériel*) : La Cour détermine le dommage en deux étapes.

a) *Calcul de la différence entre les sommes effectivement perçues et celles que les requérants auraient dû obtenir sans la loi litigieuse*

i. *Période de référence* – La période à prendre en compte commence au jour du départ en retraite des requérants. Quant au point d'arrivée de cette période, la Cour n'accepte :

– ni de s'arrêter à l'entrée en vigueur de la loi litigieuse (thèse du Gouvernement), car la violation de l'article 6 de la Convention et de l'article 1 du Protocole n° 1 n'est pas liée exclusivement au caractère rétroactif de la loi ;

– ni d'aller jusqu'à la fin de l'espérance de vie résiduelle des intéressés (thèse des requérants), car la satisfaction équitable doit se rapporter aux violations constatées. Or, pour ce qui concerne la période postérieure à l'arrêt au principal (rendu en 2014), le dommage souffert sera à déterminer et régler par les autorités nationales dans le cadre de la procédure d'exécution de l'arrêt au principal. En effet, ce dommage-là découle simplement du fait que la loi litigieuse est toujours en vigueur ; or en vertu de l'article 46 §§ 1 et 2 de la Convention, dans le cadre de l'exécution des arrêts, les États ont l'obligation de mettre un terme à la violation constatée et d'en effacer les conséquences. La Cour renvoie ici à la Résolution CM/ResDH (2013)91 du Comité des Ministres du 29 mai 2013 sur l'exécution de l'arrêt *Lakićević et autres c. Monténégro et Serbie* (27458/06 et al., 13 décembre 2011, Note d'information 147).

En conclusion, la Cour retiendra comme base de calcul les arriérés de pension arrêtés en 2014.

ii. *Chiffrage par les parties* – Les sommes demandées par les requérants prenant indûment en compte diverses cotisations non pertinentes, la Cour décide de retenir comme base de calcul les montants indi-

qués par le Gouvernement, établis sur la base de tableaux fournis par l'INPS. Pour la période dépassant la date à laquelle s'arrêtent les chiffres du Gouvernement (2012), la Cour s'en tient aux chiffres des requérants.

b) *Détermination du dommage à retenir sur cette base, eu égard à la nature de la violation constatée* – Le dommage subi en l'espèce dépasse la simple « perte d'une chance » car il y a eu non seulement violation de l'article 6 § 1 de la Convention, mais également de l'article 1 du Protocole n° 1.

Toutefois, la Cour ne serait pas parvenue à la même conclusion de violation si la réduction des droits à pension des requérants était restée raisonnable et proportionnée. Or la Cour a déjà pu estimer non déraisonnable une réduction de moins de la moitié (voir *Maggio et autres c. Italie*, 46286/09 et al., 31 mai 2011, Note d'information 141).

Le dommage à réparer ne saurait donc atteindre l'intégralité de la différence entre les sommes perçues par les requérants et celles qu'ils auraient dû percevoir sans la loi litigieuse. Eu égard au type de contentieux en cause, la Cour juge raisonnable de fixer le dommage matériel à la différence entre les sommes perçues et 55 % de celles que les requérants auraient dû obtenir sans cette loi.

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Au terme de ces calculs, la Cour alloue à chacun des requérants entre 14 786 EUR et 167 601 EUR, selon leur cas, en précisant que ces sommes ne sauraient donner lieu à aucune exonération particulière quant à l'impôt sur le revenu auquel sont assujettis les arriérés de pension.

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

Peaceful enjoyment of possessions/Respect des biens

Insufficient account taken of applicant's situation in settlement of dispute over land acquired by monastery through adverse possession: *violation*

Égard insuffisant à la situation du requérant dans le règlement d'un litige de propriété immobilière selon les règles de la prescription acquisitive en faveur d'un monastère : *violation*

Kosmas and Others/et autres – Greece/Grèce, 20086/13, judgment/arrêt 29.6.2017 [Section I]

En fait – Les monastères du Mont Athos sont des personnes morales de droit public, jouissant d'un statut particulier. La loi rend leurs biens imprescriptibles, sauf à prouver une possession continue de trente ans antérieure à 1915.

En 2004, un monastère revendiqua en justice la propriété d'un terrain exploité par le (premier) requérant. Le monastère se prévalait d'un acte d'achat de 1824 et, subsidiairement, d'une possession continue de 1882 à 1915. Le requérant excipa d'une chaîne d'actes translatifs de propriété remontant à 1883, et de divers actes de possession depuis 1974. Il dénonça également l'action comme abusive.

Les tribunaux jugèrent que le monastère était au moins propriétaire par voie d'usucapion depuis 1912, car le requérant n'avait pas prouvé une possession continue de ses prédécesseurs à la même époque ; et que, par suite, les actes postérieurs invoqués par le requérant étaient inopérants, compte tenu de l'imprescriptibilité des biens monastiques. L'abus de droit ne fut pas non plus retenu.

En droit – Article 1 du Protocole n° 1

a) *Existence d'un « bien » et règle applicable* – Les titres ou la possession du requérant ou de ses prédécesseurs n'avaient jamais été contestés (des autorisations administratives lui avaient même été accordées pour exploiter un restaurant et construire un bâtiment).

Pareille tolérance prolongée indique que les autorités et le monastère leur ont reconnu *de facto* un intérêt patrimonial sur le terrain litigieux, consistant en la possession de celui-ci telle que reconnue et protégée par le droit interne, et qu'ils ne leur ont jamais donné à penser que cette situation pouvait basculer.

Bref, l'intérêt patrimonial du requérant était suffisamment important et reconnu pour constituer un « bien » au sens de la première phrase de l'article 1 du Protocole n° 1, laquelle est donc applicable.

b) *Ingérence et proportionnalité* – L'éviction du requérant, consécutive à l'arrêt de la Cour de cassation, était prévue par la loi et poursuivait un but légitime (protéger contre l'empiétement de tiers la propriété immobilière des monastères).

Les raisons suivantes amènent toutefois la Cour à la conclusion que le requérant a subi une charge spéciale et exorbitante, que ne justifiait aucun intérêt général légitime :

S'estimant propriétaire légal et de bonne foi du terrain litigieux au vu d'un ensemble de titres remon-

tant à 1883, le requérant y avait avec sa famille créé et exploité une entreprise.

Or, les tribunaux n'ont tenu compte ni de ces titres, ni du fait que divers permis d'exploitation ou de construction lui avaient été accordés comme s'il était le propriétaire du terrain, ou qu'il s'acquittait des taxes foncières.

Certes, à l'époque, les administrations concernées ne pouvaient pas savoir qu'en 2004 une action en revendication de propriété serait intentée par le monastère avec succès.

Toutefois, des actes administratifs légaux établis par des autorités étatiques ne peuvent que conforter leurs destinataires dans le sentiment que le système d'acquisition et de transmission des biens est stable et fiable et qu'ils possèdent de bon droit le bien visé par ces actes.

En tout état de cause, le requérant avait aussi dénoncé l'action du monastère comme relevant de l'abus de droit. Si ce moyen avait été accueilli, il aurait pu conserver au moins la « possession » du terrain. Or, ce moyen a été rejeté au motif que les frais engagés pour exploiter commercialement le terrain avaient été compensés par les profits dégagés et l'absence de loyer versé au monastère.

Les tribunaux n'ont ainsi pas pris en compte la perte, sans aucune indemnité, de l'outil de travail dont l'intéressé et sa famille tiraient leurs moyens de subsistance depuis 1986.

Conclusion : violation dans le chef du premier requérant (cinq voix contre deux).

Article 41 : 75 000 EUR au premier requérant pour dommage matériel et préjudice moral.

Suspension of pension following grant of another: *communicated*

Suspension d'une pension en raison de l'octroi d'une autre pension : *affaires communiquées*

Persjanow – Poland/Pologne, 39247/12 [Section IV]
Rał – Poland/Pologne, 41178/12 [Section IV]

Section 95(1) of the Law of 17 December 1998 provides that where a person is authorised to receive several of the benefits referred to in the Act, the person concerned shall be paid one benefit, either the most advantageous or that of his own choice.

Both applicants served in the army and were granted military pensions. They were then employed outside of the military, paid compulsory contributions into the Social Insurance Fund and were granted retirement pensions. When calculating the retirement pensions, the Social Security Board did not take into account their periods of military service. The first applicant chose to receive the pension from the Social Insurance Fund and his military pension was suspended. The second applicant chose to be paid the military pension and payment of his pension from the Social Insurance Fund was suspended. The applicants' appeals against the decisions of the Social Security Board were dismissed.

In the Convention proceedings, the applicants complain that even though they are entitled to both a retirement pension from the Social Insurance Fund and a military pension they can only be paid one of these benefits and that either the period of employment or of military service will not be taken into account.

Communicated under Article 14 of the Convention and Article 1 of Protocol No. 1.

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

Stand for election/Se porter candidat aux élections

Removal from elected office pursuant to legislation introduced after commission of impugned offence: *relinquishment in favour of the Grand Chamber*

Déchéance d'un mandat électif en vertu d'une loi adoptée après commission de l'infraction litigieuse : *dessaisissement au profit de la Grande Chambre*

Berlusconi – Italy/Italie, 58428/13 [Section I]

In 2012 the applicant, a former prime minister, was found guilty of tax fraud by a District Court and sentenced to a term of imprisonment and to an ancillary penalty of five years' disqualification from public office (reduced to two years on appeal).

In February 2013 the applicant was elected to the Senate. In August 2013 the Senate Commission for elections and parliamentary immunities initiated the procedure for his removal from office. On 15 October 2013 it reported to the Senate, which, on 27 November 2013, declared the applicant's office terminated.

In his application of 10 September 2013 to the European Court, the applicant complains of (i) a violation of Article 7 of the Convention (no punishment without law) on the grounds that he was disqualified from elective office after being convicted for acts he had committed before the entry into force of the relevant legislation (the so-called Severino Act[1]); (ii) a violation of Article 3 of Protocol No. 1 (right to free elections) alone and in conjunction with Article 14 (prohibition of discrimination) on the grounds that the ineligibility provided for by the Severino Act did not comply with the principles of legality and proportionality in relation to the aim pursued and was also discriminatory; (iii) a violation of Article 3 of Protocol No. 1 in that the applicant's removal from office breached both the applicant's right to hold office and the electorate's legitimate expectation that he would remain in office throughout the parliamentary term; and (iv) a violation of Article 13 on the grounds that there was no accessible and effective remedy in domestic law by which to challenge either the incompatibility of the Severino Act with the Convention or the Senate's decision to remove him from office.

On 6 June 2017 the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

PENDING GRAND CHAMBER / GRANDE CHAMBRE PENDANTES

Relinquishments/Dessaisissements

Molla Sali – Greece/Grèce, 20452/14 [Section I]

(See Article 6 § 1 (civil) above/Voir l'article 6 § 1 (civil) ci-dessus, page 11)

Beuze – Belgium/Belgique, 71409/10 [Section II]

(See Article 6 § 3 (c) above/Voir l'article 6 § 3 c) ci-dessus, page 14)

Berlusconi – Italy/Italie, 58428/13 [Section I]

(See Article 3 of Protocol No. 1 above/Voir l'article 3 du Protocole n° 1 ci-dessus, page 35)

1 Legislative Decree no. 235/2012 on ineligibility and disqualification from holding elected and governmental office following final convictions for certain offences, which was adopted following the entry into force of the Anticorruption Act (Law no. 190 of 6 November 2012 – the "Severino Law").

OTHER JURISDICTIONS / AUTRES JURIDICTIONS

Court of Justice of the European Union (CJEU)/ Cour de justice de l'Union européenne (CJUE)

Prior use of ombudsperson procedure as condition for admissibility of consumer law suits: compliance with right of access to justice

Engagement préalable d'une procédure de médiation comme condition de recevabilité des actions civiles de consommateurs : compatibilité avec le droit d'accès à la justice

Livio Menini and/et Maria Antonia Rampanelli – Banco Popolare Società Cooperativa, C-75/16, judgment/arrêt 14.6.2017 (First Chamber/première chambre)

Dans le cadre d'un litige au principal opposant une banque et deux clients, un tribunal italien renvoyait à la CJUE diverses questions préjudicielles tenant à l'interprétation de la directive 2013/11/UE relative au règlement extrajudiciaire des litiges de consommation. Était implicitement en cause le droit à un recours effectif et à un procès équitable défini par l'article 47 de la Charte des droits fondamentaux de l'Union européenne, auquel la directive fait référence dans ses considérants.

En l'espèce, les deux clients entendaient faire opposition à une injonction de payer. La juridiction de renvoi s'interrogeait sur la possibilité pour le droit national : de subordonner l'accès à la justice à une médiation préalable obligatoire ; d'exiger un avocat durant ladite procédure de médiation ; ou d'interdire à une partie de se retirer de la médiation sans juste motif.

La CJUE répond en substance comme suit :

a) *Applicabilité de la directive* – La directive vise à ce que les consommateurs aient la possibilité d'introduire à titre « volontaire » des plaintes contre des professionnels au moyen de procédures de règlement extrajudiciaire des litiges (REL). Dans la mesure où la procédure de médiation peut être considérée comme une des formes possibles de REL – ce que le juge national devra vérifier – la directive pourrait donc être applicable au cas d'espèce.

En particulier, la directive est applicable lorsque la procédure de REL (en l'espèce, la médiation) réunit les trois conditions cumulatives suivantes : 1° avoir été introduite par un consommateur contre un professionnel au sujet des obligations découlant du contrat de vente ou de service, 2° être indépendante,

impartiale, transparente, efficace, rapide et équitable, et 3° être confiée à une entité durablement établie et figurant dans une liste spéciale notifiée à la Commission européenne.

b) *Caractère obligatoire de la médiation préalable* – Dans l'hypothèse où la directive serait ainsi applicable, le caractère « volontaire » réside non pas dans la liberté des parties de recourir ou non à ce processus, mais dans le fait qu'elles sont responsables du processus et peuvent l'organiser comme elles l'entendent et y mettre un terme à tout moment.

Dès lors, ce qui importe, ce n'est pas le caractère obligatoire ou facultatif du système de médiation, mais le fait que le droit d'accès à la justice soit préservé. Une procédure de médiation préalable à un recours juridictionnel peut s'avérer compatible avec le principe de protection juridictionnelle effective sous certaines conditions – que le juge national devra vérifier.

Tel est notamment le cas lorsque la médiation : 1° n'aboutit pas à une décision contraignante pour les parties, 2° n'entraîne pas de retard substantiel pour saisir un juge, 3° suspend la prescription des droits concernés, et 4° ne génère pas de frais importants, pour autant que : 5° la voie électronique ne constitue pas l'unique moyen d'accès à la procédure de conciliation, et que 6° des mesures provisoires urgentes soient possibles.

Dans ces conditions, le fait qu'une réglementation nationale ait non seulement mis en place une procédure de médiation extrajudiciaire, mais aussi rendu obligatoire le recours à celle-ci préalablement à la saisine d'un organe juridictionnel n'est pas incompatible avec la directive.

c) *Ministère d'avocat* – En revanche, une législation nationale ne peut pas exiger que le consommateur qui prend part à une procédure de REL soit assisté obligatoirement d'un avocat.

d) *Faculté de renonciation* – La protection du droit d'accès à la justice implique que le retrait du consommateur de la procédure de REL, avec ou sans un juste motif, ne doit jamais avoir de conséquences défavorables à son égard dans les étapes suivantes du litige.

Cependant, le droit national peut prévoir des sanctions en cas de défaut de participation des parties à la procédure de médiation sans juste motif, pourvu que le consommateur puisse se retirer à l'issue de la première rencontre avec le médiateur.

(Voir également *Rosalba Alassini e.a. c. Telecom Italia SpA e.a.*, C-317/08 – C-320/08, arrêt du 18 mars 2010)

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

Presumption of innocence and assessment of evidence in criminal proceedings

Présomption d'innocence et appréciation des preuves dans une procédure pénale

Case of *Zegarra Marín v. Peru* / Affaire *Zegarra Marín c. Pérou*, Series C No. 331/Série C n° 331, judgment/ arrêt 15.2.2017

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

Facts – The applicant, Mr Agustin Bladimiro Zegarra Marín, served as Deputy Director of Passports in the Peruvian Office of Migration and Naturalisation from March to September 1994. Between August and October 1994, the press revealed that certain passports had been issued improperly, including one with the applicant's signature. On 8 November 1996 he was convicted of the crimes of "personal concealment", "general falsification of documents", and "corruption of officials" by the Fifth Criminal Chamber. The plausibility assigned to the facts indicated in the co-defendants' statements played a decisive role in the outcome of the judgment, which expressly stated that the defendant had not rebutted in their entirety the charges against him, "because, the defence did not raise conclusive evidence that would render him totally innocent". He was sentenced to four years in prison, suspended conditionally, and ordered to pay civil reparation. The applicant subsequently filed a motion to annul the judgment. However, the Criminal Chamber of the Supreme Court of Justice confirmed the court *a quo*'s ruling and imposed additional penalties. The applicant subsequently filed an appeal for review with the President of the Supreme Court of Justice, but it was declared inadmissible.

Law

(a) *Articles 8(1) and 8(2) (right to a fair trial), in conjunction with Article 1(1) (obligation to respect and ensure rights without discrimination) of the American Convention on Human Rights* – The Inter-American Court stressed that the presumption of innocence is a guiding principle in criminal trials and a foundational standard for the assessment of the evidence. Such assessment must be rational, objective, and

impartial in order to disprove the presumption of innocence and generate certainty about criminal responsibility. The Court noted that statements made by co-defendants are circumstantial evidence and, as such, their content should be corroborated by other means of proof. The Court established that, to reach a conviction, there must be sufficient evidence, which in turn must be substantial, precise and consistent. Co-defendants are not under any obligation to testify, given that their deposition is an act of defence.

The Court reiterated that, in criminal proceedings, the State bears the burden of proof. The accused is not obligated to affirmatively prove his innocence or to provide exculpatory evidence. However, to provide counterevidence or exculpatory evidence is a right that the defence may exercise in order to rebut the charges, which in turn the accusing party bears the burden of disproving.

The Court highlighted that to guarantee the presumption of innocence, especially as regards a criminal conviction rendered by a trial court, a reasoned judgment is imperative. It must state the sufficiency of the prosecution's evidence, observe the rules of sound judicial discretion in evaluating the evidence, including that which could generate doubt as to criminal responsibility, and lay out the final findings of the assessment of evidence. Only thus can a trial court judgment disprove the presumption of innocence and sustain a conviction beyond reasonable doubt. Where there is any doubt, the presumption of innocence and the principle of *in dubio pro reo* should play a decisive role in the judgment.

In the present case, the Court found that the presumption of innocence had not been respected, as the judgment had reversed the burden of proof, placing it on the accused rather than on the State. The Court also determined that the Fifth Criminal Chamber had not complied with its obligation to objectively and rationally evaluate the evidence before it or to assess the alternative hypothesis. Moreover, despite the fact that the statements made by the co-defendants had played a decisive role in the conviction, they were not corroborated by any other means of proof.

Additionally, the Fifth Criminal Chamber had failed to adequately reason its decision given that the evidence, both for the prosecution and exculpatory, was simply listed but not assessed in order to spell out which evidence formed the basis for establishing the commission of the crime and the finding of guilt. In this regard, the Court noted that the circumstances of time, manner and place in which each of the alleged crimes were alleged to have taken place were not set out in the judgment. Finally, the Court found that the lack of reasoning had a direct impact on the ability to exercise the right of defence and to appeal the judgment.

Conclusion: violation (unanimously).

(b) *Articles 8(2)(h) (right to appeal the judgment to a higher court), and 25 (right to judicial protection) of the ACHR, in conjunction with Article 1(1) thereof* – The Inter-American Court recalled that the right to appeal in criminal matters involves a comprehensive review of the contested judgment. In addition, the competent authority must carry out an analysis of the issues raised by the defendant and rule on them. The Court found that the Criminal Chamber of the Supreme Court of Justice had merely upheld the lower court's findings, without addressing the applicant's main arguments in the motion to annul. Therefore, the appellate court had not ensured a full revision of the court *a quo*'s judgment and thus the appeal was not effective.

As for the appeal for review, the Inter-American Court found that, at the relevant time, it was not the appropriate remedy under Peruvian law to challenge a conviction.

Conclusion: violation of Articles 8(2)(h) and 25(1) concerning the motion to annul (unanimously), and no violation of Article 25(1) concerning the appeal for review (unanimously).

(c) *Reparations* – The Inter-American Court ordered the State to: (i) ensure that the conviction issued against the applicant had no legal effect and, therefore, adopt all necessary measures to expunge all judicial, administrative, criminal or police records existing against him in regard to such proceedings; (ii) publish the judgment and its official summary; and (iii) pay compensation in respect of non-pecuniary damages, as well as costs and expenses.

COURT NEWS / DERNIÈRES NOUVELLES DE LA COUR

Superior Court Network (SCN)/Réseau des cours supérieures (RCS)

On 16 June 2017 the Court hosted for the first time a Focal Points Forum for its Superior Court Network (SCN). 50 representatives from 43 different courts met each other and their Registry counterparts (SCN Focal Points) for a one-day working session which included a presentation on Protocol No. 16, training on the SCN secured Intranet site and HUDOC, as well as an afternoon of discussions.

The SCN was born out of the desire to create a more structured and effective dialogue between the Strasbourg Court and the national Superior Courts, a dialogue focused on exchanging information on Convention case-law and related matters. The SCN was launched in October 2015 and its membership has now risen to 54 courts from 32 States and is growing.

More information on the SCN's web page (www.echr.coe.int – The Court).

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Le 16 juin 2017, la Cour a accueilli le premier Forum des personnes de contact du Réseau des cours supérieures (RCS). 50 représentants de 43 juridictions nationales ont rencontré leurs homologues du greffe de la Cour, pour une journée de travail incluant une présentation sur le Protocole n° 16, des sessions de formation sur le site intranet sécurisé du RCS et HUDOC, ainsi qu'un après-midi de discussions.

Le RCS est né du souhait d'instaurer un dialogue plus structuré et plus efficace entre la Cour de Strasbourg et les cours supérieures nationales, dialogue qui est axé sur l'échange d'informations sur la jurisprudence relative à la Convention et les sujets connexes. Lancé en octobre 2015, le RCS regroupe actuellement 54 cours de 32 États et le nombre de participants continue de croître.

Plus d'informations sur la page internet du RCS (www.echr.coe.int – La Cour).

RECENT PUBLICATIONS / PUBLICATIONS RÉCENTES

Reports of Judgments and Decisions/Recueil des arrêts et décisions

Volumes IV, V and VI for 2014 and the 2014 Index have now been published. The print edition is available from Wolf Legal Publishers (the Netherlands) at sales@wolfpublishers.nl. All published volumes and indexes from the *Reports* series may also be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Les volumes IV, V et VI ainsi que l'index de l'année 2014 viennent d'être publiés. Ils peuvent être achetés auprès des Éditions juridiques Wolf (Pays-Bas) à l'adresse sales@wolfpublishers.nl. Par ailleurs, tous les volumes et index de la série déjà publiés peuvent être téléchargés à partir du site internet de la Cour (www.echr.coe.int – Jurisprudence).

Case-Law Guides: updates and translations/ Guides sur la jurisprudence: mises à jour et traductions

Updates to 30 April 2017 in English and French have just been published regarding the Guides on Article 15 of the Convention (derogation in time of emergency), Article 2 of Protocol No. 1 (right to education) and Article 3 of Protocol No. 1 (right to free elections). Moreover, Guides on Article 4 (prohibition of slavery and forced labour) and Article 9 (freedom of thought, conscience and religion) of the Convention have just been translated into Albanian.

All Case-Law Guides can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Udhëzues rreth nenit 4 të Konventës (alb)

Udhëzues për nenin 9 (alb)

Guide on Article 15 of the Convention (eng)

Guide on Article 2 of Protocol No. 1 (eng)

Guide on Article 3 of Protocol No. 1 (eng)

Guide sur l'article 15 de la Convention (fre)

Guide sur l'article 2 du Protocole n° 1 (fre)

Guide sur l'article 3 du Protocole n° 1 (fre)

Des mises à jour au 30 avril 2017 en français et en anglais viennent d'être publiées concernant les guides sur l'article 15 de la Convention (dérogation en cas d'état d'urgence), sur l'article 2 du Protocole n° 1 (droit à l'instruction) et sur l'article 3 du Protocole n° 1 (droit à des élections libres). Par ailleurs, les guides sur l'article 4 (interdiction de l'esclavage et du travail forcé) et sur l'article 9 (droit à la liberté de pensée, de conscience et de religion) viennent d'être traduits en albanais.

Tous les guides sur la jurisprudence peuvent être téléchargés à partir du site internet de la Cour (www.echr.coe.int – Jurisprudence).

European Union Agency for Fundamental Rights (FRA)/Agence des droits fondamentaux de l'Union européenne (FRA)

The FRA has recently published three reports:

– Annual activity report 2016: this consolidated report provides an overview of the activities and achievements of the FRA in 2016.

– Fundamental Rights Report 2017 – FRA opinions: this report reviews major developments in the EU between January and December 2016, and outlines FRA's opinions thereon. Noting both achievements and remaining areas of concern, it provides insights into the main issues shaping fundamental rights debates across the EU.

– Between promise and delivery: 10 years of fundamental rights in the EU: this year marks the 10th anniversary of the EU Agency for Fundamental Rights. Such a milestone offers an opportunity for reflection – both on the progress that provides cause for celebration and on the lingering shortcomings that must be addressed.

These reports – available in English and French, and also in the various EU languages for the last two reports – can be downloaded from the FRA Internet site (http://fra.europa.eu/ – Publications).

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La FRA vient de publier récemment trois rapports :

– Rapport d'activité annuel 2016 : ce rapport consolidé fournit une vue d'ensemble des activités et des réalisations de la FRA en 2016.

– Rapport sur les droits fondamentaux 2017 - Avis de la FRA : ce rapport examine les principales évolutions intervenues dans l'Union entre janvier et décembre 2016 et présente les avis de la FRA à cet égard. Le rapport, qui relève à la fois les progrès accomplis et les sujets de préoccupation persistants, donne un aperçu des principales questions qui influencent les débats en matière de droits fondamentaux dans l'UE.

– Entre promesses et réalisations : 10 ans de droits fondamentaux dans l'UE : L'année 2017 marque les 10 ans de la création de la FRA. Cet anniversaire offre l'occasion d'examiner à la fois les progrès réalisés en matière de droits fondamentaux et les lacunes persistantes, ainsi que les mesures à prendre pour y répondre.

Ces rapports – disponibles en français et en anglais, mais aussi, pour les deux derniers rapports, dans les différentes langues de l'Union européenne – peuvent être téléchargés à partir du site internet de la FRA (http://fra.europa.eu/ – Publications).