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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

PROVISIONAL/PROVISOIRE

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

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Mendy – France, 71428/12, decision/décision 27.9.2018 [Section V]

Link to the English translation of the summary

En fait – La requérante est la sœur de L.M. En mai 2007, deux policiers, L.L. et S.T., tentèrent d'arrêter L.M. qui courait après J.-P.H. en le menaçant avec un couteau. L.M. fut tué par balles par le policier S.T.

En droit – Article 2 (*volet matériel*) : Le comportement forcené de L.M. constituait incontestablement un péril imminent pour J.-P.H. dont la vie se trouvait en danger. En effet, L.M. l'avait menacé puis poursuivi, armé de son couteau, refusant d'obtempérer aux injonctions des policiers et au tir de sommation, n'hésitant pas à frapper de son arme le brigadier-chef L.L. qui essayait de l'arrêter, parvenant à le blesser à la main, et reprenant sa poursuite acharnée de J.-P.H. après avoir été percuté par une voiture. Aussi les policiers pouvaient-ils légitimement penser que L.M. semblait hors de contrôle.

Ainsi, le policier S.T. a agi dans la conviction honnête que la vie de J.-P.H. était menacée et croyait sincèrement qu'il était nécessaire de recourir à la force, ce qui l'autorisait à faire usage de moyens appropriés et potentiellement meurtriers pour assurer la défense de ce dernier.

Le policier S.T. a effectué deux tirs de sommation sans effet dissuasif sur L.M. En outre, lors des deux tirs suivants, le policier, sans viser, avait simplement cherché à atteindre la partie la plus importante du corps de celui qu'il tentait d'arrêter. Ce coup de feu fatal est intervenu alors que le tireur et la victime étaient à cinq mètres l'un de l'autre mais en pleine course, ce qui réduisait significativement la précision de l'action du policier. Enfin, L.M. n'était plus qu'à une distance de quatre à cinq mètres de J.-P.H. Vu l'ensemble de ces circonstances, la riposte effectuée par le policier était absolument nécessaire au regard de la gravité du danger qui menaçait immédiatement la vie de J.-P.H.

Compte tenu de l'attitude de L.M., de l'impossibilité pour le brigadier-chef L.L. d'intervenir une fois blessé et du risque imminent indéniablement encouru par J.-P.H., la décision de S.T. de faire usage de son arme à feu, malgré le risque d'imprécision que comportait la poursuite de L.M., pouvait, dans les circonstances particulières de l'espèce, passer pour absolument nécessaire «pour assurer la défense de toute personne contre la violence illégale», au sens de l'article 2 § 2 a) de la Convention.

Par ailleurs, l'action violente de L.M. n'était pas imputable au sentiment de menace qu'auraient suscité chez lui les actes des policiers. En effet, son attitude agressive était antérieure à leur arrivée sur les lieux et avait justifié l'appel aux services de police par un tiers voisin ainsi que leur venue rapide sur les lieux. En outre, c'est le comportement même de L.M. qui a conduit à l'usage de la force par les policiers et conduit la Cour à juger que cet usage était justifié et absolument nécessaire au regard des circonstances de l'espèce.

Enfin, l'article 122-5 du code pénal, alinéa 1, applicable aux forces de l'ordre, qui prévoit la cause de justification de la légitime défense, mentionne la «nécessité» de la défense et l'«actualité» du danger, et exige un rapport de proportionnalité entre réaction et agression. Même si les termes utilisés ne sont pas identiques, cette disposition se rapproche de l'article 2 de la Convention et contient les éléments exigés par la jurisprudence de la Cour. Au regard des circonstances de l'espèce, on ne peut conclure à l'absence d'un cadre juridique interne approprié régissant l'utilisation des armes à feu.

Conclusion : irrecevable (défaut manifeste de fondement).

La Cour conclut aussi à l'irrecevabilité pour défaut manifeste de fondement de la partie de la requête sous le volet procédural de l'article 2, étant donné que l'enquête dans son ensemble a été suffisamment effective pour permettre de déterminer que le recours à la force avait été justifié dans les circonstances.

(Voir aussi *McCann et autres c. Royaume-Uni* [GC], 18984/91, 27 septembre 1995 ; *Makaratzis c. Grèce* [GC], 50385/99, 20 décembre 2004, Note d'information 70 ; *Giuliani et Gaggio c. Italie* [GC], 23458/02, 24 mars 2011, Note d'information 139 ; *Aydan c. Turquie*, 16281/10, 12 mars 2013, Note d'information 161 ; *Lamartine et autres c. France* (déc.), 25382/12, 8 juillet 2014 ; et *Guerdner et autres c. France*, 68780/10, 17 avril 2014)

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

Failure to conduct within a reasonable time criminal and civil proceedings concerning a death suspected of resulting from medical negligence: *violation*

Manquement à mener dans un délai raisonnable les procédures pénales et civiles sur un décès soupçonné d'être dû à une négligence médicale : *violation*

Yirdem and Others/et autres – Turkey/Turquie, 72781/12, judgment/arrêt 4.9.2018 [Section II]

Link to the English translation of the summary

En fait – Les requérantes affirment que leur proche serait décédé à l'hôpital des suites de diverses négligences médicales. Elles estiment que les juridictions nationales n'ont pas répondu à cette situation avec la promptitude, la réactivité et la diligence nécessaires.

En droit – Article 2

a) *Volet matériel* – Sauf en cas d'arbitraire ou d'erreur manifeste, la Cour n'a pas pour tâche de remettre en question les constats de fait opérés par les autorités internes. Il faut ainsi examiner les circonstances qui ont abouti au décès du proche des requérantes et la responsabilité alléguée des professionnels de la santé qui l'ont pris en charge en recherchant si les mécanismes existants permettaient de faire la lumière sur le cours des événements.

Les requérantes n'allèguent pas que l'on ait privé leur proche de l'accès à un traitement médical en général ou à des soins d'urgence en particulier, mais soutiennent qu'il a été soumis à un traitement défaillant parce que les médecins qui l'ont traité ont été négligents.

Or rien ne démontre qu'il existait, à l'époque des faits, un quelconque dysfonctionnement systémique ou structurel touchant les hôpitaux dont les autorités avaient ou auraient dû avoir connaissance et à l'égard duquel elles n'ont pas pris les mesures préventives nécessaires, et que cette défaillance a contribué de manière déterminante au décès du proche des requérantes.

Il n'a pas non plus été démontré que la faute prétendument commise par les professionnels de santé soit allée au-delà d'une simple erreur ou négligence médicale ni que les personnes ayant pris en charge le patient ne lui aient pas prodigué un traitement médical d'urgence, au mépris de leurs obligations professionnelles, alors qu'elles savaient pertinemment qu'une telle absence de traitement mettrait sa vie en danger.

Le traitement médical dispensé au proche des requérantes a fait l'objet d'un contrôle au niveau interne et aucune des instances judiciaires n'a conclu au final à une quelconque faute dans le traitement médical qui lui a été prodigué.

Au vu de ce qui précède, la Cour considère que la présente affaire a pour objet des allégations de négligence médicale. Dans ces conditions, les obligations positives matérielles pesant sur l'État défendeur se limitent à la mise en place d'un cadre réglementaire adéquat imposant aux hôpitaux, qu'ils soient privés ou publics, d'adopter des mesures appropriées pour protéger la vie des patients. Et le cadre réglementaire en vigueur n'a révélé aucun manquement de la part de l'État à l'obligation qui lui incombait de protéger le droit à la vie du proche des requérantes.

Conclusion : non-violation (unanimité).

b) *Volet procédural* – Les requérantes ont eu recours à deux procédures, l'une pénale et l'autre civile, pour faire valoir leurs droits. La première s'est soldée par l'acquittement des prévenus à l'issue d'une procédure qui a duré plus de neuf ans. Quant à la seconde, elle est pendante devant les juridictions nationales depuis 2004.

S'agissant du caractère effectif de la procédure pénale, il n'y a eu aucun manquement susceptible de remettre en cause le caractère globalement adéquat de l'enquête menée par les instances nationales. Par ailleurs, les requérantes ont bénéficié d'un accès aux informations produites par l'enquête à un degré suffisant pour leur permettre de participer de manière effective à la procédure.

En revanche, la procédure pénale n'a pas été menée promptement et sa durée totale, plus de neuf ans, n'a pas été raisonnable. Une procédure engagée pour faire la lumière sur des accusations de négligence médicale ne doit pas durer aussi longtemps devant les juridictions nationales. Il en est de même de la procédure en indemnisation engagée par les requérantes devant les juridictions civiles, qui est pendante devant les tribunaux internes depuis plus de treize ans. Il n'apparaît pas, au vu des éléments du dossier, qu'une telle durée soit justifiée par les circonstances de la cause. En outre, le tribunal de grande instance a mis plus de neuf ans pour conclure que l'action en indemnisation dirigée contre l'hôpital aurait dû être introduite devant les juridictions administratives et qu'il n'était pas compétent pour statuer sur l'affaire.

Pareilles lenteurs sont de nature à prolonger une incertitude éprouvante non seulement pour la partie demanderesse mais aussi pour les professionnels de la santé concernés.

Ces éléments suffisent en eux-mêmes pour conclure que les procédures menées en droit interne ont été défaillantes. Les autorités nationales n'ont pas traité la cause des requérantes liée au décès de leur proche avec le niveau de diligence requis par l'article 2.

Conclusion : violation (unanimité).

Article 41 : 10 000 EUR conjointement pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir aussi *Lopes de Sousa Fernandes c. Portugal* [GC], 56080/13, 19 décembre 2012, Note d'information 213, et la fiche thématique Santé)

ARTICLE 5

Article 5 § 1

Deprivation of liberty/Privation de liberté
Lawful arrest or detention/Arrestation ou détention régulières

Unacknowledged deprivation of liberty following "bringing in" of suspect to police station: *violation*

Privation de liberté non reconnue consécutivement à la « conduite » d'un suspect dans un poste de police : *violation*

Mushegh Saghatelyan – Armenia/Arménie, 23086/08, judgment/arrêt 20.9.2018 [Section I]

(See Article 11 below/Voir l'article 11 ci-dessous, page 27)

ARTICLE 6

Article 6 § 1 (civil)

Fair hearing/Procès équitable

Lack of reasons for Supreme Court decision not to refer to CJEU for preliminary ruling, absent explicit request to this effect: *inadmissible*

Absence de motivation du refus par la Cour suprême de saisir la CJUE par la voie d'une question préjudicielle en l'absence de demande explicite en ce sens : *irrecevable*

Somorjai – Hungary/Hongrie, 60934/13, judgment/arrêt 28.8.2018 [Section IV]

Lien vers la traduction française du résumé

Facts – Upon the applicant's request, in March 2010 a labour court instructed the pension authority to recalculate his pension in accordance with EU rules. The pension authority stated it would only pay arrears for the last five years preceding the date of the labour court's decision, when the mistake was discovered, as provided by the 1997 Pensions Act. This was contested by the applicant who claimed arrears for the whole period following Hungary's EU accession (May 2004) and that the current law constituted a "limitation of rights" prohibited by the relevant EU Regulation.

The labour court and the *Kúria* (the Supreme Court) upheld the decision of the pension authority restricting the payment period. The *Kúria* did not address the applicant's argument that Article 234 of the Treaty Establishing the European Community (now Article 267 of the Treaty on the Functioning of the European Union (TFEU)) was violated by the labour court's judgment.

Law – Article 6 § 1

(a) *Complaint alleging a misinterpretation of EU law* – The review of the soundness of the *Kúria*'s interpretation of EU law fell outside the Court's jurisdiction.

Conclusion: inadmissible (incompatible *ratione materiae*).

(b) *Complaint of a lack of reasoning in connection with the need for a reference for a preliminary ruling* – The *Kúria*'s jurisdiction had been limited to an examination of the issues raised by the petition for review. The applicant had not requested, in his petition for review, that the case be referred to theCourt of Justice of the European Union (CJEU) for a preliminary ruling; nor had he provided any reasons as to why, in his view, the labour court's judgment had violated Article 234 of the Treaty Establishing the European Community. Under those circumstances, the *Kúria*'s lack of reasoning in connection with those aspects seemed to be in line with the domestic procedural rules.

In addition, as per the CJEU relevant case-law, even if the initiative of a party was not necessary for a domestic court against whose decisions there was no judicial remedy under national law to be obliged to bring a question concerning the interpretation or the validity of EU law before the CJEU, it was solely for that court to determine, in the light of the particular circumstances of the case, the need for a preliminary ruling in order to enable it to deliver judgment. In the present case the *Kúria* had been of the view that the relevant provisions of the 1997 Pensions Act and those of the relevant EU Regulation did not conflict, and thus had not considered a preliminary ruling on a question of EU law necessary to give judgment. In such circumstances the Court did not discern any appearance of arbitrariness in the fact that the *Kúria* had not referred a question to the CJEU for a preliminary ruling or in its manner of giving reasons for the

judgment without elaborating on questions related to a potential reference for a preliminary ruling.

Conclusion: inadmissible (manifestly ill-founded).

The Court unanimously found a violation of Article 6 § 1 on account of the length of the proceedings.

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

(See also *Ullens de Schooten and Rezabek v. Belgium*, 3989/07, 20 September 2011, Information Note 144; and *Baydar v. the Netherlands*, 55385/14, 24 April 2018, Information Note 217)

Article 6 § 1 (criminal/pénal)

Criminal charge/Accusation en matière pénale
Access to court/Accès à un tribunal
Fair hearing/Procès équitable

Complaint about refusal by domestic court to re-open criminal proceedings following finding of a violation of Article 6 by European Court: *admissible*

Refusal by Court of Cassation of request for revision of a criminal judgment further to a judgment of European Court finding a violation of Article 6: *no violation*

Plainte concernant le refus par une juridiction nationale de rouvrir une procédure pénale suite au constat d'une violation de l'article 6 par la Cour européenne : *recevable*

Rejet par la Cour de Cassation d'une demande de révision d'un jugement pénal suite à un arrêt de la Cour européenne concluant à une violation de l'article 6 : *non-violation*

Kontalexis – Greece/Grèce (no. 2/n° 2), 29321/13, judgment/arrêt 6.9.2018 [Section I]

Link to the English translation of the summary

En fait – Le 31 mai 2011, la Cour européenne constata une violation de l'article 6 § 1 dans l'affaire, *Kontalexis c. Grèce*, 59000/08, introduite par le même requérant. Le 18 janvier 2013, la Cour de cassation refusa d'ordonner la réouverture de la procédure demandée par le requérant sur le fondement de l'article 525 § 1 e) du code de procédure pénale.

Le requérant allègue que le refus des juridictions internes de décider la réouverture de la procédure le concernant a constitué une nouvelle violation de son droit à ce que sa cause soit entendue équitablement par un tribunal établi par la loi, garanti par l'article 6 § 1 de la Convention.

En droit – Article 6 § 1

a) *Recevabilité*

i. *L'article 46 de la Convention fait-il obstacle à l'examen par la Cour du grief tiré de l'article 6 de la Convention ?* – La nouvelle requête soulève un nouveau grief concernant le manque d'équité allégué de la procédure d'examen du pourvoi exceptionnel formé par le requérant, et non son issue proprement dite ou ses conséquences sur la bonne exécution de l'arrêt rendu par la Cour le 31 mai 2011. Une procédure de surveillance de l'exécution de l'arrêt est à ce jour pendante devant le Comité des Ministres du Conseil de l'Europe, mais elle n'empêche pas pour autant la Cour d'examiner une nouvelle requête dès lors que celle-ci renferme des éléments nouveaux non tranchés dans l'arrêt initial. Partant, l'article 46 ne fait pas obstacle à l'examen par la Cour du nouveau grief soulevé par le requérant en raison d'un manque d'équité de la procédure qui s'est conclue par la décision de la Cour de cassation.

ii. *Le nouveau grief est-il compatible* ratione materiae *avec l'article 6 de la Convention ?* – La procédure prévue par le code de procédure pénale ne constitue pas une procédure extraordinaire qui échapperait au champ d'application de l'article 6 lorsqu'elle aboutirait à une décision de la juridiction compétente refusant la réouverture d'un procès. L'examen de l'affaire a porté sur le bien-fondé, au sens de l'article 6 § 1, de l'accusation pénale dirigée contre le requérant. Dès lors, les garanties de l'article 6 § 1 s'appliquent à la procédure devant la Cour de cassation.

iii. *Le requérant peut-il se prétendre victime d'une violation de l'article 6 dans la procédure nationale de l'exécution de l'arrêt de la Cour ?* – L'exception préliminaire du Gouvernement concernant la qualité de victime du requérant a trait à la procédure qui s'est achevée par l'arrêt de la Cour du 31 mai 2011. Elle vise donc une situation antérieure à la procédure relative à la demande de réouverture présentée par le requérant. Seule l'équité de la procédure postérieure à la demande de réouverture du requérant peut faire l'objet d'un nouvel examen. L'exception est donc rejetée.

b) *Fond* – Pour motiver son refus d'ordonner la réouverture, la Cour de cassation a considéré que la violation constatée par la Cour était de nature formelle et ne concernait pas le droit garanti par l'article 6, à savoir le droit de l'accusé d'être jugé par un tribunal indépendant et impartial et par des juges indépendants et impartiaux.

Plus particulièrement, la Cour de cassation a jugé que la violation constatée par la Cour n'avait pas influé sur le caractère équitable de la procédure et n'avait pas eu d'effet négatif sur l'appréciation faite par les juges du tribunal correctionnel. Cette violation était un fait accompli et était couverte par la force de chose jugée de l'arrêt de la Cour de cassation qui avait rejeté le moyen de cassation que la Cour avait par la suite accueilli. Le moyen relatif à la composition illégale du tribunal avait été rejeté par la Cour de cassation lors de la première procédure et cette décision ne pouvait pas être remise en cause rétroactivement à la suite de l'arrêt de la Cour.

Selon l'interprétation donnée par la Cour de cassation au code de procédure pénale, les irrégularités procédurales du type de celle constatée en l'espèce n'entraînent pas de plein droit la réouverture de la procédure. Cette interprétation, qui a pour conséquence de limiter les cas de réouverture des procédures pénales définitivement closes ou au moins de les assujettir à des critères soumis à l'appréciation des juridictions internes, n'apparaît pas arbitraire. Elle est d'ailleurs confortée par la jurisprudence constante de la Cour.

La Cour de cassation a estimé que l'arrêt de la Cour de 2011 ne mettait pas en cause l'indépendance ou l'impartialité de la formation de la juridiction qui a rendu l'arrêt litigieux, ni l'équité de la procédure dans son ensemble.

Compte tenu de la marge d'appréciation dont jouissent les autorités internes dans l'interprétation des arrêts de la Cour, à la lumière des principes relatifs à l'exécution, il n'est pas nécessaire pour la Cour de se prononcer sur la validité de l'interprétation donnée par la Cour de cassation dans son arrêt du 18 janvier 2013. En effet, il lui suffit de s'assurer que cet arrêt n'est pas entaché d'arbitraire, en ce qu'il y aurait eu une déformation ou une dénaturation par les juges de la Cour de cassation de l'arrêt rendu par la Cour.

Même si elle ne partage pas nécessairement tous les éléments de l'analyse de l'arrêt du 18 janvier 2013, la Cour ne saurait conclure que la lecture par la Cour de cassation de l'arrêt rendu par la Cour en 2011 était, dans son ensemble, le résultat d'une erreur de fait ou de droit manifeste aboutissant à un « déni de justice » et donc à une appréciation entachée d'arbitraire.

Conclusion : non-violation (unanimité).

(Voir aussi *Emre c. Suisse (n° 2)*, 5056/10, 11 octobre 2011, Note d'information 145 ; *Bochan c. Ukraine (n° 2)* [GC], 22251/08, 5 février 2015, Note d'information 182 ; et *Moreira Ferreira c. Portugal (n° 2)* [GC], 19867/12, 11 juillet 2017, Note d'information 209)

Article 6 § 3 (a)

Information in language understood/ Information dans une langue comprise

Article 6 § 3 (e)

Free assistance of interpreter/Assistance gratuite d'un interprète

Failure to provide interpretation of criminal proceedings and documentation in a language of which the accused had a sufficient command: *violation*

Absence, dans un procès pénal, de traduction orale des débats et de traduction écrite des pièces vers une langue que l'accusé maîtrise suffisamment : *violation*

Vizgirda – Slovenia/Slovénie, 59868/08, judgment/ arrêt 28.8.2018 [Section IV]

Lien vers la traduction française du résumé

Facts – The applicant, a Lithuanian national, was convicted and sentenced to a prison term in Slovenia. He unsuccessfully initiated various legal challenges complaining that he had not been able to defend himself effectively during the trial because the oral proceedings and the relevant documents had not been translated into Lithuanian, his native language, but instead into Russian, which he claimed to have considerable difficulties understanding.

Law – Article 6 §§ 1 and 3

(i) *General principles* – It was incumbent on the authorities involved in the proceedings, in particular the domestic courts, to ascertain whether the fairness of the trial required, or had required, the appointment of an interpreter to assist the defendant. In the Court's opinion, that duty was not confined to situations where the foreign defendant made an explicit request for interpretation, but arose whenever there were reasons to suspect that the defendant was not proficient enough in the language of the proceedings. It also arose when a third language was envisaged to be used for the interpretation. In such circumstances, the defendant's competency in the third language should be ascertained before the decision to use it for the purpose of interpretation was made. The fact that the defendant had a basic command of the language of the proceedings or, as might be the case, a third language into which interpretation was readily available, should not by itself bar that individual from benefiting from interpretation into a language he or she understood

sufficiently well to fully exercise his or her right to defence.

In the instant case, the suspect had to be notified, in a language he understood, of his right to interpretation when "charged with a criminal offence". The Court drew attention to the importance of noting in the record any procedure used and decision taken with regard to the verification of interpretation needs, notification of the right to an interpreter and the assistance provided by the interpreter.

(ii) *As regards the reasons for the appointment of a Russian interpreter* – There was no indication in the file that any possibilities of securing Lithuanian interpretation had been entertained by the authorities during the trial or the investigation. It was only after the second-instance court's judgment that the domestic court had made some enquiries about the availability of interpreters in Lithuanian, without any further steps being taken. While that court established that no such interpreters had been registered in Slovenia at the material time and that translation to and from that language would have required the assistance of the nearest Lithuanian Embassy, a translation from Lithuanian to Slovenian and *vice versa* had in fact been obtained later in the proceedings. In any event, the Government had not put forward any compelling reasons preventing the authorities from appointing a Lithuanian interpreter to assist the applicant. The domestic courts' decisions had been based on the assumption that the applicant understood Russian and was able to follow the proceedings in that language.

(iii) *As regards the assessment of the applicant's interpretation needs* – The authorities had not explicitly verified the applicant's linguistic competency in Russian. He had never been consulted as to whether he understood the interpretation and written translation in Russian well enough to conduct his defence effectively in that language. In that connection, the Court rejected Government's argument about the use of Russian in Lithuania.

(iv) *As regards other indications of the applicant's knowledge of Russian* – There had been no audio recordings of the questioning by the investigating judge or the hearing and no other evidence to determine the applicant's actual level of spoken Russian. In the absence of any verification, his lack of cooperation during the police procedure and during the questioning by the investigating judge might be explained, at least in part, by his difficulties expressing himself and following the proceedings in Russian. The few rather basic statements the applicant had made during the hearing, presumably in Russian, could not be considered as sufficient to show that he had in fact been able to conduct his defence effectively in that language. Even though the Constitutional Court had found that the applicant had "succeeded in communicating" with his counsel, its conclusion seemed to be based on an assumption rather than on evidence of the applicant's linguistic proficiency or actual communication with his counsel. In conclusion, although the applicant appeared to have been able to speak and understand some Russian, the Court did not find it established that his competency in that language was sufficient to safeguard the fairness of the proceedings.

(v) *As regards the lack of complaint or request for the appointment of a different interpreter during the trial* – Under domestic law the applicant was entitled to interpretation in his native language and the authorities were obliged to inform him of that right and to make a record of such a notification and of the applicant's response to it. There was no indication that the authorities had complied with that requirement. The Government had given no justification for that failure. In the Court's view the lack of the aforementioned notification of the right to interpretation, coupled with the applicant's vulnerability as a foreigner who had arrived in Slovenia only for a brief period before the arrest and had been detained during the proceedings, and his limited command of Russian, could well explain the lack of any request for a different interpreter or complaint in this regard until later in the proceedings, at which point he had been able to use his native language. The Constitutional Court had considered the applicant's situation to be of an exceptional nature, with the consequence that he had not been required to exhaust regular remedies. The failure by the applicant's legal representative to raise the issue of interpretation had not relieved the domestic court of its responsibility under Article 6.

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In sum, it was not established in the present case that the applicant had received language assistance which would have allowed him to actively participate in the trial against him. This, in the Court's view, had been sufficient to render the trial as a whole unfair.

Conclusion: violation (five votes to two).

Article 41: EUR 6,400 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 8

Respect for private and family life/Respect de la vie privée et familiale

Exhumation, in the context of criminal proceedings, of the remains of deceased persons against the wishes of their families: *violation*

Exhumation, dans le cadre d'un procès pénal, des restes de personnes décédées contre la volonté de leurs familles : *violation*

Solska and/et Rybicka – Poland/Pologne, 30491/17 and/et 31083/17, judgment/arrêt 20.9.2018 [Section I]

Lien vers la traduction française du résumé

Facts – On 10 April 2010 an aircraft of the Polish Air Force, carrying a Polish State delegation including the President of Poland and many high-ranking officials, crashed killing all ninety-six people on board. The applicants are the widows of two of the victims of the crash.

In 2016 a prosecutor of the State Prosecutor's Office decided to appoint a team of international and forensic experts with a view to carrying out autopsies on the bodies of eighty-three victims of the crash (the bodies of nine victims had already been exhumed and four victims had been cremated). The prosecutor further ordered that the bodies be exhumed on dates to be determined in separate orders. The applicants objected to the exhumation of their husbands' bodies and lodged interlocutory appeals against the prosecutor's decision. The Warsaw Regional Court held that as Article 210 of the Code of Criminal Procedure ("the CCP") did not provide for judicial review of a prosecutor's decision to exhume a body under that Article, it was constitutionally and conventionally deficient and referred a legal question to the Constitutional Court. The proceedings before it were suspended until the Constitutional Court had issued a decision on the matter. The applicants' attempt to obtain an injunction from the civil courts was unsuccessful.

The exhumations took place in 2018.

Law

Article 35 § 1 (*exhaustion of domestic remedies*): The Court rejected the Government's preliminary objection of non-exhaustion of domestic remedies. The referral of the legal question to the Constitutional Court suspended only the examination of the applicants' interlocutory appeal by the Warsaw Regional Court and the exhumations were carried out regardless of the pending proceedings.

Article 8

(a) *Applicability of the right to respect for private and family life* – The Court had not yet specifically addressed the issue of applicability of Article 8 to the exhumation of a deceased person against the will of the family members in the context of criminal proceedings. It was not disputed that Article 8 was applicable; the question was whether the right to respect for the memory of a late relative, which was recognised under the Polish law, should be considered part of family life. While the exercise of Article 8 rights concerning family and private life pertained, predominantly, to relationships between living human beings, the Court had previously found that certain issues related to the way in which the body of a deceased relative was treated, as well as issues regarding the ability to attend the burial and pay respects at the grave of a relative came within the scope of the right to respect for family or private life. Having regard to that case-law, the Court held that the facts in the case fell within the scope of the right to respect for private and family life.

(b) *Merits* – The exhumation of the applicants' deceased husbands' remains constituted an interference with their right to respect for private and family life. The interference complained of had a legal basis in Polish law, namely Article 210 of the CCP.

With regard to the quality of the law, the State authorities were required to find a due balance between the requirements of an effective investigation under Article 2 and the protection of the right to respect for private and family life of the parties to the investigation and other persons affected. There might be circumstances in which exhumation was justified, despite the opposition by the family. Even though the investigation in the present case concerned an incident of unprecedented gravity, which had affected the entire functioning of the State, the Court was mindful of the importance of the applicants' interest in ensuring that the remains of their deceased husbands were respected.

The prosecutor had ordered the exhumation of the remains of the applicants' husbands. When issuing his order, the prosecutor had not been required by the CCP to assess whether the aims of the investigation could have been attained through less restrictive means or to evaluate the possible implications of the impugned measures on the private and family life of the applicants. Furthermore, the prosecutor's decision was not amenable to appeal before a criminal court or any other form of adequate scrutiny before an independent authority.

The applicants had attempted to obtain an injunction from a civil court preventing the prosecutor from carrying out the exhumations. However, the civil courts had dismissed their application, having found that the prosecutor had exercised his functions in compliance with the relevant provisions of the CCP. The civil courts had neither reviewed the necessity of the impugned measure nor weighed the interference resulting from the prosecutor's decision against the applicants' interests safeguarded by Article 8 of the Convention.

The Court, therefore, concluded that Polish law did not provide sufficient safeguards against arbitrariness with regard to a prosecutorial decision ordering exhumation. The domestic law did not provide a mechanism to review the proportionality of the restrictions on the relevant Article 8 rights of the persons concerned resulting from the prosecutor's decision. The applicants had thus been deprived of the minimum degree of protection to which they were entitled.

Conclusion: violation (unanimously).

Article 41: EUR 16,000 to each applicant in respect of non-pecuniary damage.

Respect for private life/Respect de la vie privée

Dismissal of judge from the position of President of appeal court for failure to properly perform administrative duties: *Article 8 not applicable; inadmissible*

Révocation d'un juge de sa fonction de président de juridiction d'appel au motif qu'il s'était mal acquitté de ses fonctions administratives : *article 8 non applicable ; irrecevable*

Denisov – Ukraine, 76639/11, judgment/arrêt 25.9.2018 [GC]

Lien vers la traduction française du résumé

Facts – The applicant had been dismissed from the position of President of the Kyiv Administrative Court of Appeal on the basis of a failure to perform his administrative duties properly. He remained a judge of that same court. He complained, *inter alia*, that his dismissal had constituted an unlawful and disproportionate interference with his private life, contrary to Article 8 of the Convention.

Law – Article 8 (*applicability*): As the question of applicability was an issue of the Court's jurisdiction *ratione materiae*, the general rule of dealing with applications had to be respected and the relevant analysis had to be carried out at the admissibility stage unless there was a particular reason to join that question to the merits. No such particular reason existed in the applicant's case.

(a) *General Principles* – Article 8 could not be relied on in order to complain of a loss of reputation or other repercussions that were the foreseeable consequences of one's own actions (see *Gillberg v. Sweden* [GC]).

Employment-related disputes were not *per se* excluded from the scope of "private life" within the meaning of Article 8. There were some typical aspects of private life which might be affected in such disputes. Those aspects included the applicant's "inner circle", the applicant's opportunity to establish and develop relationships with others, and the applicant's social and professional reputation. There were two ways in which a private-life issue could arise in such a dispute: either because of the underlying reasons for the impugned measure (in that event the Court employed the reason-based approach) or – in certain cases – because of the consequences for private life (in that event the Court employed the consequence-based approach).

If the consequence-based approach was at stake, the threshold of severity with respect to those typical aspects of private life assumed crucial importance. It was for the applicant to show convincingly that the threshold had been attained. The applicant had to present evidence substantiating consequences of the impugned measure. The Court would only accept that Article 8 was applicable where those consequences were very serious and had affected his or her private life to a very significant degree.

An applicant's suffering was to be assessed by comparing his or her life before and after the measure in question. In determining the seriousness of the consequences in employment-related cases it was appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. That analysis would have to cover both the material and the non-material impact of the alleged measure. However, it remained for the applicant to define and substantiate the nature and extent of his or her suffering, which had to have had a causal connection with the impugned measure.

(b) *Application* – The explicit reasons for the applicant's dismissal had been strictly limited to his performance in the public arena, namely his alleged managerial failings, which were said to have undermined the proper functioning of the court. Those reasons related only to the applicant's administrative

tasks in the workplace and had had no connection to his private life. In the absence of any such issues in the reasons given for his dismissal, it had to be determined whether, according to the evidence and the substantiated allegations put forward by the applicant, the measure had had serious negative consequences for the aspects constituting his "private life".

The applicant contested the very existence of any misconduct, thus implying that the measure involving his legal liability – his dismissal – could not have been a foreseeable consequence of his conduct in the position of president of a court of appeal and therefore his case could be distinguished from the applicant's case in *Gillberg*.

The applicant had not provided any evidence to suggest that the reduction in his monthly remuneration had seriously affected the "inner circle" of his private life. As to establishing and maintaining relationships with others, his dismissal from the position of president had not resulted in his removal from his profession. He had continued to work as an ordinary judge and he had remained at the same court alongside his colleagues. Even if the applicant's opportunities to establish and maintain relationships, including those of a professional nature, might have been affected, there were no factual grounds for concluding that such effects were substantial.

The applicant's principal professional function was that of a judge. The profession of judge required him to possess specific knowledge, educational qualifications, skills and experience. In recompense for his service in that capacity, the applicant had been paid the predominant part of his salary. The successful performance of a presidential or administrative function in a court was not, strictly speaking, a characteristic of the judicial profession. Therefore, in objective terms, the judicial function constituted the applicant's fundamental professional role. His position as president of a court, however important and prestigious it might have been in the judicial sphere and however it might have been subjectively perceived and valued by the applicant, did not relate to the principal sphere of his professional activity. At no point had the domestic authorities examined the applicant's performance as a judge or expressed any opinion as to his judicial competence and professionalism. Unlike in *Oleksandr Volkov v. Ukraine*, the decisions concerned only his managerial skills. That limited area of scrutiny and criticism could not be regarded as having related to the core of the applicant's professional reputation. While his position as president might have been the apex of his legal career, he had not specified how the alleged loss of esteem among his peers had caused him serious prejudice in his professional environment or how his dismissal had affected his future career as a judge.

As regards social reputation in general, the criticism by the authorities had not affected a wider ethical aspect of the applicant's personality and character. Even though his dismissal had been based on the findings of breaches of official duties in the administration of justice, there had been no accusation of intentional misconduct or criminal behaviour. The applicant's moral values had not been called into question and no reproaches of that nature could be identified in the impugned decisions.

Accordingly, measuring the applicant's subjective perceptions against the objective background and assessing the material and non-material impact of his dismissal on the basis of the evidence presented before the Court, it had to be concluded that the dismissal had had limited negative effects on the applicant's private life and did not cross the threshold of seriousness for an issue to be raised under Article 8 of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*).

Applying the criteria set out in *Oleksandr Volkov v. Ukraine*, the Court found, unanimously, that the High Council of Justice had failed to ensure an independent and impartial examination of the applicant's case and that the subsequent review by the Higher Administrative Court had not remedies those defects, in breach of Article 6 § 1 of the Convention.

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

(See *Gillberg v. Sweden* [GC], 41723/06, 3 April 2012, Information Note 151; and *Oleksandr Volkov v. Ukraine*, 21722/11, 9 January 2013, Information Note 159; see also *Erményi v. Hungary*, 22254/14, 22 November 2016)

Respect for private life/Respect de la vie privée

Military service performed by a conscript who had not informed the authorities about his lumbar scoliosis: *no violation*

Service militaire d'un appelé n'ayant pas informé les autorités de sa scoliose lombaire : *non-violation*

Kasat – Turkey/Turquie, 61541/09, judgment/arrêt 11.9.2018 [Section II]

Link to the English translation of the summary

En fait – Le requérant fut déclaré apte à faire son service militaire dans l'unité des commandos de montagne. Alors qu'il servait dans l'armée, on lui dia-

gnostiqua une scoliose et une lombalgie. Au terme de plusieurs hospitalisations et d'une opération, il fut mis en arrêt maladie, exempté du service militaire et frappé d'une incapacité de travail de 55 %.

Le requérant tient les autorités militaires pour responsables des séquelles dont il souffre, alléguant qu'il n'était pas apte à servir sous les drapeaux en tant que commando et que l'accomplissement de ses obligations militaires l'a rendu invalide. Ses actions en indemnisation contre l'État n'aboutirent pas.

En droit – Article 8 : Les autorités militaires devaient s'assurer que l'appelé était médicalement apte à supporter les conditions inhérentes à l'unité des commandos et au lieu de son affectation militaire.

À cet égard, le requérant a été soumis à la procédure habituelle d'examen médical sur l'aptitude au service militaire du point de vue de la santé avant de commencer son entraînement, et il a été considéré comme apte à accomplir son service militaire. Par ailleurs, au moment de sa mobilisation, ce dernier n'a pas informé les autorités d'un quelconque problème de santé.

Selon les expertises versées au dossier, l'examen médical initial effectué lors du recrutement pouvait ne pas suffire pour constater que le requérant était atteint d'une scoliose, compte tenu notamment de l'absence de déclaration de la part de l'intéressé, de symptômes francs et de l'emplacement de la zone affectée de la colonne vertébrale.

Après son affectation à une unité de commandos, le requérant a subi un examen médical qui comportait notamment une radiographie du thorax, mais pas de radiographie lombaire. À la suite de cet examen, il a été déclaré apte et a commencé la formation pour devenir un commando.

Or, selon la réglementation, la scoliose rendait l'appelé inapte pour le service militaire. Cela étant, en l'absence de signes évidents d'une maladie invalidante, il aurait été excessif d'exiger de l'État qu'il procédât à un examen plus approfondi que ceux prévus par le règlement des forces armées relatif à l'aptitude physique au service militaire. Il serait également démesuré de demander à l'administration militaire de procéder à des recherches d'imagerie médicale spécifique, comme la radiologie lombaire, pour chaque candidat commando, au motif qu'il était possible qu'il souffrît d'une pathologie sournoise.

Par ailleurs, aucun manque de bonne volonté ne saurait être reproché aux autorités militaires, lesquelles ont réagi correctement et suffisamment rapidement une fois que les problèmes de dos du requérant ont été identifiés. L'intéressé a été hospitalisé et un traitement chirurgical a été mis en place aux frais de l'État. En outre, dès lors que les médecins ont estimé que le requérant ne pouvait plus continuer à faire son service militaire, il en a été exempté. Enfin, aucun lien de causalité entre le service militaire et l'existence, ainsi que la progression, de la maladie dont souffrait le requérant n'a été établi par les expertises médicales menées.

Conclusion : non-violation (unanimité).

La Cour conclut aussi, à l'unanimité, à la violation de l'article 6 § 1, au motif que les officiers de carrière siégeant au sein de la Haute Cour administrative militaire ne bénéficiaient pas des garanties d'indépendance adéquates.

Article 41 : 1 500 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir aussi *Álvarez Ramón c. Espagne* (déc.), 51192/99, 3 juillet 2001 ; *Lütfi Demirci et autres c. Turquie*, 28809/05, 2 mars 2010, Note d'information 128 ; et la fiche thématique Santé)

Respect for private life/Respect de la vie privée

Convention compliance of secret surveillance regime including the bulk interception of external communications: *violations*

Conformité à la Convention d'un régime de surveillance secrète, notamment de l'interception massive de communication vers l'extérieur : *violations*

Big Brother Watch and Others/et autres – United Kingdom/Royaume-Uni, 58170/13 et al., judgment/arrêt 13.9.2018 [Section I]

Lien vers la traduction française du résumé

Facts – The applicants, a number of companies, charities, organisations and individuals made up of three applications to the Court, complained about the scope and magnitude of the electronic surveillance programmes operated by the Government of the United Kingdom. The applicants all believed that due to the nature of their activities, their electronic communications were likely to have either been intercepted by the United Kingdom intelligence services; obtained by the United Kingdom intelligence services after being intercepted by foreign governments; and/or obtained by the United Kingdom authorities from Communications Service Providers (CSPs).

The applicants complained about the Article 8 compatibility of three discrete regimes: the regime for the bulk interception of communications under section 8(4) of the Regulation of Investigatory Powers Act (RIPA); the intelligence sharing regime; and the regime for the acquisition of communications data under Chapter II of RIPA.

The applicants in the third of the joined cases each lodged a complaint before the Investigatory Powers Tribunal (IPT) alleging violations of Articles 8, 10 and 14 of the Convention. As regards interceptions of external communications pursuant to a warrant issued under section 8(4) of RIPA, the IPT found that the regime and safeguards were sufficiently compliant with the requirements the European Court had laid down in *Weber and Saravia v. Germany* (dec.) for the interference to be "in accordance with the law" for the purposes of Article 8 of the Convention. It did, however, find two "technical" breaches of Article 8 concerning in one instance the retention for longer than permitted of lawfully intercepted material and in the other a failure to follow the proper selection-for-examination procedure. The applicants in the first and second of the joined cases did not bring complaints before the IPT.

Law

Article 35 (*exhaustion of domestic remedies*): The IPT was a specialist tribunal with sole jurisdiction to hear allegations of wrongful interference with communications as a result of conduct covered by RIPA. It considered both the generic compliance of the relevant interception regime as well as the specific question whether the individual applicant's rights had, in fact, been breached. Those involved in the authorisation and execution of an intercept warrant were required to disclose to the IPT all the documents it might require, including documents relating to internal arrangements for processing data which could not be made public for reasons of national security, irrespective of whether those documents supported or undermined their defence. The IPT had discretion to hold oral hearings, in public, where possible, and, in closed proceedings, it could appoint Counsel to the Tribunal to make submissions on behalf of claimants who could not be represented. When it determined a complaint, the IPT had the power to award compensation and make any other order it saw fit, including quashing or cancelling any warrant and requiring the destruction of any records. In considering the complaint brought by the applicants in the third of the joined cases, the IPT used all of those powers for the benefit of the applicants.

In view both of the manner in which the IPT had exercised its powers in the past fifteen years and the very real impact its judgments had had on domestic law and practice, the concerns expressed by the Court in *Kennedy v. the United Kingdom* about its effectiveness as a remedy for complaints about the general compliance of a secret surveillance regime were no longer valid.

It appeared to the Court that where the IPT had found a surveillance regime to be incompatible with the Convention, the Government had ensured that any defects were rectified and dealt with. Therefore, while the evidence submitted by the Government might not yet have demonstrated the existence of a "binding obligation" requiring it to remedy any incompatibility identified by the IPT, the Court nevertheless accepted that the practice of giving effect to its findings on the incompatibility of domestic law with the Convention was sufficiently certain for it to be satisfied as to the effectiveness of the remedy.

However, the Court accepted that, at the time the applicants in the first and second of the joined cases introduced their applications, they could not be faulted for having relied on *Kennedy* as authority for the proposition that the IPT was not an effective remedy for a complaint about the general Convention compliance of a surveillance regime. It therefore found that there existed special circumstances absolving those applicants from the requirement that they first bring their complaints to the IPT.

Article 8

(a) *The section 8(4) regime*

(i) *General principles relating to secret measures of surveillance, including the interception of communications* – In its case-law on the interception of communications in criminal investigations, the Court had developed the following six minimum requirements that had to be set out in law in order to avoid abuses of power: the nature of offences which might give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; a limit on the duration of interception; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which intercepted data may or must be erased or destroyed. In *Roman Zakharov v. Russia* [GC], the Court confirmed that the same six minimum requirements also applied in cases where the interception was for reasons of national security; however, in determining whether the impugned legislation was in breach of Article 8, it also had to have regard to the arrangements for supervising the implementation of secret surveillance measures, any notification mechanisms and the remedies provided for by national law.

Review and supervision of secret surveillance measures might come into play at three stages: when the surveillance was first ordered, while it was being carried out, or after it had been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictated that not only the surveillance itself but the accompanying review should be effected without the individual's knowledge. Consequently, since the individual would necessarily be prevented from seeking an effective remedy of his or her own accord or from taking a direct part in any review proceedings, it was essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his or her rights. In a field where abuse was potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it was in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure.

As regards the third stage, after the surveillance had been terminated, the question of subsequent notification of surveillance measures was inextricably linked to the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of monitoring powers. There was in principle little scope for recourse to the courts by the individual concerned unless the latter was advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively or, in the alternative, unless any person who suspected that he or she had been subject to surveillance could apply to courts, whose jurisdiction did not depend on notification to the surveillance subject of the measures taken.

(ii) *The test to be applied* – The Court rejected the applicants' argument that the six minimum requirements should be "updated" by including requirements for objective evidence of reasonable suspicion in relation to the persons for whom data was being sought, prior independent judicial authorisation of interception warrants, and the subsequent notifications of the surveillance subject.

It was clear that bulk interception was a valuable means to achieve the legitimate aims pursued, particularly given the current threat level from both global terrorism and serious crime. Bulk interception was by definition untargeted, and to require "reasonable suspicion" would render the operation of such a scheme impossible. Similarly, the requirement of "subsequent notification" assumed the existence of clearly defined surveillance targets, which was simply not the case in a bulk interception regime. While the Court considered judicial authorisation to be an important safeguard, and perhaps even "best practice", by itself it could neither be necessary nor sufficient to ensure compliance with Article 8 of the Convention. Rather, regard had to be had to the actual operation of the system of interception, including the checks and balances on the exercise of power, and the existence or absence of any evidence of actual abuse.

Accordingly, the Court would examine the justification for any interference by reference to the six minimum requirements, adapting them where necessary to reflect the operation of a bulk interception regime. It would also have regard to the additional relevant factors which it had identified in *Roman Zakharov*.

(iii) *The scope of application of secret surveillance measures* – In addressing the first two minimum requirements, the Court considered that the relevant legal provision was sufficiently clear, giving citizens an adequate indication of the circumstances in which and the conditions on which a section 8(4) warrant might be issued. There was no evidence to suggest that the Secretary of State was authorising warrants without due and proper consideration. The authorisation procedure was subject to independent oversight and the IPT had extensive jurisdiction to examine any complaint of unlawful interception. The Court accepted that the provisions on the duration and renewal of interception warrants, the provisions relating to the storing, accessing, examining and using intercepted data, the provisions on the procedure to be followed for communicating the intercepted data to other parties and the provisions on the erasure and destruction of intercept material were sufficiently clear as to provide adequate safeguards against abuse.

With regard to the selection of communications for examination, once communications had been intercepted and filtered, those not discarded in near real-time were further searched; in the first instance by the automatic application, by computer, of simple selectors (such as email addresses or telephone numbers) and initial search criteria, and subsequently by the use of complex searches. Selectors and search criteria did not need to be made public; nor did they necessarily need to be listed in the warrant ordering interception. Nevertheless, the search criteria and selectors used to filter intercepted communications should be subject to independent oversight; a safeguard which appeared to be absent in the section 8(4) regime. In practice the only independent oversight of the process of filtering and selecting intercept data for examination was the *post factum* audit by the Interception of Communications Commissioner and, should an application be made to it, the IPT. In a bulk interception regime, where the discretion to intercept was not significantly curtailed by the terms of the warrant, the safeguards applicable at the filtering and selecting for examination stage had to necessarily be more robust.

The Court was satisfied that the intelligence services of the United Kingdom took their Convention obligations seriously and were not abusing their powers under section 8(4) of RIPA. Nevertheless, an examination of those powers had identified two principal areas of concern: first, the lack of oversight of the entire selection process, including the selection of bearers for interception, the selectors and search criteria for filtering intercepted communications, and the selection of material for examination by an analyst; and secondly, the absence of any real safeguards applicable to the selection of related communications data for examination. In view of those shortcomings, the Court found that the section 8(4) regime did not meet the "quality of law" requirement and was incapable of keeping the "interference" to what was "necessary in a democratic society".

Conclusion: violation (five votes to two).

(b) *The intelligence sharing regime* – This was the first time that the Court had been asked to consider the Convention compliance of an intelligence sharing regime. The interference in the case had not been occasioned by the interception of communications itself but lay in the receipt of the intercepted material and subsequent storage, examination and use by the intelligence services of the respondent State. The circumstances in which intercept material could be requested from foreign intelligence services had to be set out in domestic law in order to avoid abuses of power. While the circumstances in which such a request could be made might not be identical to the circumstances in which the State might carry out interception itself, they must nevertheless be circumscribed sufficiently to prevent – insofar as possible – States from using that power to circumvent either domestic law or their Convention obligations.

The Court was satisfied that there was a basis in law for the requesting of intelligence from foreign intelligence agencies, that that law was sufficiently accessible and pursued several legitimate aims. Furthermore, the Court considered the relevant domestic law and code indicated with sufficient clarity the procedure for requesting either interception or the conveyance of intercept material from foreign intelligence agencies. There was no evidence of any significant shortcomings in the application and operation of the regime.

Conclusion: no violation (five votes to two).

(c) *The Chapter II Regime* – The Chapter II regime permitted certain public authorities to acquire communications data from Communication Service Providers (CSPs). Domestic law, as interpreted by the domestic authorities in light of judgments of the Court of Justice of the European Union (CJEU), required that any regime permitting the authorities to access data retained by CSPs limited access to the purpose of combating "serious crime", and that access be subject to prior review by a court or independent administrative body. As the Chapter II regime permitted access to retained data for the purpose of combating crime (rather than "serious crime") and, save for where access was sought for the purpose of determining a journalist's source, it was not subject to prior review by a court or independent administrative body, it could not be in accordance with the law within the meaning of Article 8 of the Convention.

Conclusion: violation (six votes to one).

Article 10: The applicants in the second of the joined cases, a journalist and a newsgathering organisation, complained about the interference with confidential journalistic material occasioned by the operation of both the section 8(4) and the Chapter II regimes.

(a) *The section 8(4) regime* – The surveillance measures under the section 8(4) regime were not aimed at monitoring journalists or uncovering journalistic sources. Generally the authorities would only know when examining the intercepted communications if a journalist's communications had been intercepted. The interception of such communications could not, by itself, be characterised as a particularly serious interference with freedom of expression. However, the interference would be greater should those communications be selected for examination and would only be "justified by an overriding requirement in the public interest" if accompanied by sufficient safeguards relating both to the circumstances in which they might be selected intentionally for examination, and to the protection of confidentiality where they had been selected, either intentionally or otherwise, for examination.

It was of particular concern that there were no requirements either circumscribing the intelligence services' power to search for confidential journalistic or other material (for example, by using a journalist's email address as a selector), or requiring analysts, in selecting material for examination, to give any particular consideration to whether such material was or might be involved. Consequently, it would appear that analysts could search and examine without restriction both the content and the related communications data of those intercepted communications.

In view of the potential chilling effect that any perceived interference with the confidentiality of their communications and, in particular, their sources might have on the freedom of the press and, in the absence of any published arrangements limiting the intelligence services' ability to search and examine such mate-

rial other than where "it was justified by an overriding requirement in the public interest", the Court found that there had been a violation of Article 10 of the Convention.

(b) *The Chapter II Regime* – In considering the applicants' Article 8 complaint, the Court had concluded that the Chapter II regime was not in accordance with the law as it permitted access to retained data for the purpose of combating crime (rather than "serious crime") and, save for where access was sought for the purpose of determining a journalist's source, it was not subject to prior review by a court or independent administrative body.

The Court acknowledged that the Chapter II regime afforded enhanced protection where data was sought for the purpose of identifying a journalist's source. Nevertheless, those provisions only applied where the purpose of the application was to determine a source; they did not, therefore, apply in every case where there was a request for the communications data of a journalist, or where such collateral intrusion was likely. Furthermore, in cases concerning access to a journalist's communications data there were no special provisions restricting access to the purpose of combating "serious crime". Consequently, the Court considered that the regime could not be "in accordance with the law" for the purpose of the Article 10 complaint.

Conclusion: violations (six votes to one).

The Court also rejected the complaints under Article 6 and Article 14 combined with Articles 8 and 10 of the Convention as manifestly ill-founded.

Article 41: no claim made in respect of damage.

(See *Weber and Saravia v. Germany* (dec.), 54934/00, 29 June 2006, Information Note 88; *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130; *Roman Zakharov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191; see also *Liberty and Others v. the United Kingdom*, 58243/00, 1 July 2008, Information Note 110; *Malone v. the United Kingdom,* 8691/79, 2 August 1984; *Ben Faiza v. France* (dec.), 31446/12, 8 February 2018)

Respect for private life/Respect de la vie privée

Authorities' refusal to change applicant's ethnicity records: *communicated*

Refus des autorités de modifier le signalement ethnique de la requérante : *affaire communiquée*

Gabel – Azerbaijan/Azerbaïdjan, 62437/10 [Section IV]

Lien vers la traduction française du résumé

The application concerns the domestic authorities' refusal to grant the applicant's request to change her ethnicity records from Russian to German.

Communicated under Articles 6, 8 and 13, and under Article 14 in conjunction with Article 8 of the Convention.

Respect for family life/Respect de la vie familiale
Positive obligations/Obligations positives

Lengthy separation of father and child due to lack of statutory possibility to have visiting rights established during divorce proceedings: *violation*

Séparation prolongée d'un père et de son enfant en raison de l'absence de possibilité légale d'obtenir un droit de visite pendant la procédure de divorce : *violation*

Cristian Cătălin Ungureanu – Romania/Roumanie, 6221/14, judgment/arrêt 4.9.2018 [Section IV]

Lien vers la traduction française du résumé

Facts – In autumn 2012 the applicant's wife moved out of the family home and filed for divorce and custody of their six-year-old son. The applicant lodged an application for an interim injunction, seeking to be granted sole or shared custody of the child or, alternatively, the right to visit the child pending the conclusion of the divorce proceedings. In January 2013 a district court, noting that the applicant had not been prevented from visiting his son in the mother's new home, found that changing the child's residence temporarily would not serve his interests, and that, in any case, the domestic law did not provide for the possibility to have visiting rights established during divorce proceedings. This decision was upheld. The applicant had been unable to see his son from June 2013 till November 2016, when the final decision in the divorce proceedings was issued, granting sole custody to the mother and visiting rights to the applicant.

Law – Article 8: While the domestic courts had not always rejected as inadmissible requests for visiting rights made during divorce proceedings, nothing in the law itself allowed the applicant to expect a different outcome. In fact, the provision of the law in question, by its very nature, removed the factual circumstances of the case from the scope of the domestic courts' examination. It had been a prevalent factor in the domestic courts' decisions. The remaining argument, namely that the applicant had not been prevented from seeing his child, could not

be construed as constituting an effective examination of the child's best interests but had rather been a mere observation of the situation at that particular moment. Moreover, the domestic courts had not examined the precariousness of the situation, nor had they responded to the applicant's request for a more structured visiting plan. They had, as such, left the exercise of a right which was fundamental to both the applicant and his child to the discretion of the applicant's spouse with whom he had had (at the time) a conflict of interest.

In addition, the divorce proceedings had lasted for more than four years, affecting the applicant and his child for about three years and five months. While the underlying problem lay with an insufficient quality of the domestic law, the lengthiness of that period of time led the Court to conclude that the respondent State had failed to discharge its positive obligations under article 8 (see *M and M. v. Croatia*, 10161/13, 3 September 2015, Information Note 188).

Conclusion: violation (unanimously).

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

(See also *Cengiz Kılıç v. Turkey*, 16192/06, 6 December 2011, Information Note 147)

Respect for family life/Respect de la vie familiale

Mother denied contact rights in respect of her child in foster care because of abduction risk: *violation*

Refus à une mère d'un droit de visite pour voir sa fille placée en famille d'accueil parce qu'elle risquait d'être enlevée : *violation*

Jansen – Norway/Norvège, 2822/16, judgment/arrêt 6.9.2018 [Section V]

Lien vers la traduction française du résumé

Facts – In 2011, when her daughter was born, the applicant was 19 years old and was living at home with her parents, Norwegian Roma. Shortly afterwards, she and her daughter were thrown out by the applicant's father and they moved into a family centre – a parent-child institution. They moved between the applicant's home and the family centre several times. During one stay at the family centre, the grandfather stabbed a neighbouring couple who, he believed, had helped the applicant to move to the family centre. After this incident the applicant again returned home. Shortly thereafter, the Child Welfare Service applied for a care order pursuant to domestic law.

In June 2012 the applicant's daughter was moved to an emergency foster home at a secret address, and it was decided that the applicant would have one hour of supervised contact per week because of the risk that the child might be abducted. Several months later, the child was moved from the emergency foster home to her current foster home.

In December 2012 a new care order was issued giving both parents supervised contact of one hour, four times a year with neither of them being entitled to know the child's whereabouts. Subsequently, in June 2013, the City Court passed judgment and ordered that the applicant and the child's father were not entitled to have any contact with her pertaining to the child's best interests on the basis there was a present and obvious risk of kidnapping. The applicant's subsequent legal appeals proved unsuccessful.

Law – Article 8: Based on the assessments of evidence made by the domestic courts, there were indications that there had been a real risk of abduction which emanated predominantly from the applicant's father, but was not limited to him. The applicant's father had stabbed a neighbouring couple in the belief that they had helped the applicant to take the child out of their home; the applicant had been told that her father planned to take her to another country, kill her and take her child; the child's father had received death threats when he had sought to establish his paternity; and a family member had followed one of the foster parents, possibly as part of discovering the child's whereabouts. The Court had no basis for finding that the domestic courts had erred in assessing the abduction risk and qualifying it as "a real risk" in accordance with domestic case-law. The Court also accepted the national authorities' assessment that the consequences of an abduction would have been detrimental for the child's development as she would again have been likely to suffer neglect.

Regarding the procedure, after the care order of December 2012 had been issued, the case had been examined once by the City Court, twice by the High Court, and once in full by the Supreme Court. In addition, a review had been carried out by the Supreme Court's Appeals Leave Committee. The High Court's bench had been composed of three professional judges, a lay judge and a psychologist. Thus, it could not be said that there had been a lack of expert advice. The applicant, with legal aid counsel, had been allowed to present evidence and give testimony in the City Court and on both occasions

in the High Court. Taking all this into account, the domestic decision-making process had been comprehensive and the applicant had been sufficiently involved in it as she had been provided with the requisite protection of her interests and fully able to present her case.

The national courts had not only assessed the situation of the applicant and her daughter at the moment when she had been taken into care, but had followed up on later developments. Thus, the High Court had carried out an extensive assessment of the applicant's recent development and situation at that time. Many different aspects had thus been taken into account in the decision-making process, not only the degree of the risk of abduction, but also the consequences if an abduction were to happen, the child's signs of having suffered neglect, her vulnerability and needs, her interests in knowing her Roma background and culture, and the effects that contact would have had on the foster parents and the conditions in the foster home. Therefore, there were no grounds for contesting that the domestic authorities had carried out a sufficiently in-depth examination of the case or that the decision had been taken based on what had been considered to be in the child's best interests.

The High Court had considered that the risk of abduction had not only related to the moment when contact sessions would take place, but also to the danger of the foster family's home and identity becoming known to the applicant's family. The organisation of such sessions might therefore have been difficult, and any number of sessions could have potentially entailed that information about where the child lived was revealed. However, it had never been foreseen that there would be more than four contact sessions a year, a factor that reduced the risk of the child's whereabouts being revealed. Furthermore, the decision complained of had entailed the danger that family relations between the applicant and her daughter were effectively curtailed. In its decision the High Court had not explicitly mentioned that the applicant and her daughter had not seen each other for three years. Moreover, the High Court's decision had not focused on reuniting the daughter and her mother or on preparing for reunification in the near future, but rather on protecting the child from a potential abduction and its consequences. There was a risk that the child could completely lose contact with her mother. According to the Court's case-law it was imperative to consider the long-term effects which a permanent separation of a child from her natural mother might have (see, *mutatis mutandis*, *Görgülü v. Germany*). This was all the more so as the separation of the child from her mother could also have led to her alienation from her Roma identity.

In sum, the potential negative long-term consequences for the daughter of losing contact with her mother and the positive duty to take measures to facilitate family reunification as soon as reasonably feasible had not been sufficiently weighed in the balancing exercise.

Conclusion: violation (unanimously).

Article 41: EUR 25,000 in respect of non-pecuniary damage.

(See *Görgülü v. Germany*, 74969/01, 26 February 2004)

Positive obligations/Obligations positives

Authorities' failure to prosecute perpetrator of indecent sexual acts against minor: *communicated*

Absence d'inculpation par les autorités de l'auteur d'actes sexuels indécents contre mineur : *affaire communiquée*

K.M.– the former Yugoslav Republic of Macedonia/l'ex-République yougoslave de Macédoine, 59144/16 [Section I]

Lien vers la traduction française du résumé

The applicant, who was 14 years old at the time, reported to the police an alleged incident of indecent behaviour and use of inappropriate language by Gj.K. who had visited her home as a handyman. The prosecutor established that Gj.K. had touched the applicant's breast and caressed her leg. However, he concluded that, in the absence of an actual use of force or threat, those acts could not be qualified as rape or any other offence which was subject to *ex officio* prosecution, but rather as an act of insult, which was subject to private prosecution.

The applicant's subsequent civil action against Gj.K. for insult, which at that point could no longer have been subject to criminal prosecution on account of legislative amendments, was dismissed by two levels of civil courts on the ground that the impugned actions had not amounted to an insult.

Communicated under article 8 of the Convention.

(See also *Söderman v. Sweden* [GC], 5786/08, 12 November 2013, Information Note 168; and *A, B and C v. Latvia*, 30808/11, 31 March 2016)

ARTICLE 10

Freedom of expression/Liberté d'expression

Ban on books by well-known classic Muslim theologian, declared extremist literature: *violation*

Interdiction de livres dont l'auteur est un théologien adepte de l'Islam classique, au motif qu'il s'agit d'une littérature extrémiste : *violation*

Ibragim Ibragimov and Others/et autres – Russia/Russie, 1413/08 and/et 28621/11, judgment/arrêt 28.8.2018 [Section III]

Lien vers la traduction française du résumé

Facts – The applicants published or commissioned the publication of the books from the Risale-I Nur Collection, an exegesis on the Qur'an written by well-known Turkish Muslim scholar Said Nursi in the first half of the 20th century. Muslim authorities in Russia and abroad, as well as Islamic studies scholars, all affirm that his texts belong to moderate mainstream Islam, advocate tolerant relationships and cooperation between religions, and oppose any use of violence. The books have been translated into 50 languages and are available in many countries, both in paper and on the Internet. They were used for religious and educational purposes in Russian mosques and medreses. The books were declared to be extremist literature, resulting in a ban on their publication and distribution, and seizure of undistributed copies, in accordance with the Suppression of Extremism Act. The applicants unsuccessfully challenged this decision.

Law – Article 10 interpreted in the light of Article 9: The interference with the applicants' right to freedom of expression, interpreted in the light of their right to freedom of religion, had a legal basis in the Suppression of Extremism Act. Noting the opinion of the European Commission for Democracy through Law (the Venice Commission), which had found the definition of "extremist activity" to be too broad, imprecise and open to different interpretations, the Court left open the question whether the interference with the applicants' right to freedom of expression could be regarded as "prescribed by law". The contested measures sought to pursue the legitimate aims of preventing disorder and protecting territorial integrity, public safety, and the rights of others.

While the domestic law did not require any element of violence for an activity to be qualified as extremist, the domestic courts had declared Said Nursi's books "extremist" on the grounds of their alleged incitement to "religious discord" and propaganda about people's superiority or deficiency in their attitude toward religion. In making its determination, the domestic courts had not made an independent assessment of the texts, but merely relied on disputed expert opinion, which went far beyond resolving merely linguistic and psychological issues and provided the crucial legal findings as to the extremist nature of the books. The courts had not discussed the necessity of banning the books, having regard to the context in which they were published, their nature and wording, and their potential to lead to harmful consequences. The domestic courts had not even mentioned the effect of the ban on the applicants' rights under Articles 9 and 10. Moreover, they had summarily rejected all evidence submitted by the applicants, which was plainly relevant for the assessment of whether banning the books had been justified: the opinions of Muslim authorities and Islamic studies scholars who had explained the historical context in which the books had been written, their place in the body of Islamic religious literature, in particular the fact that they belonged to moderate rather than radical Islam, their importance for the Russian Muslim community and their general message of tolerance, interreligious cooperation and opposition to violence.

Regarding the first application (no. 1413/08), since the domestic courts had not even indicated what passages they considered "extremist", it was impossible for the applicants to re-publish the books in question after editing out the troublesome passages. The domestic courts' decisions therefore amounted to an absolute ban on publishing and distributing the books.

In the second application (no. 28621/11), the domestic court had concluded that the book at issue in this case treated non-Muslims as inferior to Muslims in so far as it described Muslims as "the faithful" and "the just", and everyone else as "the dissolute", "the philosophers", "the idle talkers" and "little men". The book also proclaimed that not to be a Muslim was an "infinitely big crime". However, although, according to the experts, such statements were common in monotheistic religious texts, the court had taken them out of context and failed to assess them in the light of the book as a whole. Although the impugned statements clearly promoted the idea that it was better to be a Muslim than a non-Muslim, it was significant that they did not insult, hold up to ridicule or slander non-Muslims; nor did they use abusive terms in respect of them or of matters regarded as sacred by them.

Furthermore, neither the domestic court nor the Government had referred to any circumstances indicative of a sensitive background at the mate-

rial time – such as the existence of interreligious tensions or an atmosphere of hostility or hatred between religious communities in Russia – against which the impugned statements could risk unleashing violence, giving rise to serious interreligious frictions or leading to similar harmful consequences. The statements had not been shown to be capable of inciting violence, hatred or intolerance. While the author's intention was to convince the readers to adopt his religious beliefs, that was insufficient, in the Court's view, to justify banning the book. It had never been argued that the content of the book amounted to, or encouraged, improper proselytism, that is attempting to convert people through the use of violence, brainwashing or taking advantage of those in distress or in need. Nor had it been claimed that the book advocated any activities going beyond promoting religious worship and observance in private life of the requirements of Islam, or sought to reorganise the functioning of society as a whole by imposing on everyone its religious symbols or conception of a society founded on religious precepts.

In conclusion, the Court found that the domestic courts in both applications had not applied standards which were in conformity with the principles embodied in Article 10, and had not provided "relevant and sufficient" reasons for the interference. It rejected the Government's preliminary objection under Article 17.

Conclusion: violation (unanimously).

Article 41: EUR 7,500 to Mr Ibragimov in respect of non-pecuniary damage; no claim submitted by other applicants.

Freedom of expression/Liberté d'expression

Conviction and suspended prison sentence for offensive Internet comment against police officers: *violation*

Condamnation à une peine d'emprisonnement avec sursis pour des propos insultants tenus sur internet contre des agents de police : *violation*

Savva Terentyev – Russia/Russie, 10692/09, judgment/arrêt 28.8.2018 [Section III]

Lien vers la traduction française du résumé

Facts – The applicant, a young blogger, posted an online comment labeling all police officers as "lowbrows" as well as "the dumbest and least educated representatives of the animal world" and calling for the "burning of infidel cops in Auschwitz-like ovens" with the aim of "cleansing society of this cop-hoodlum filth". He was convicted of incitement of hatred against police officers as a social group and sentenced to a one-year suspended prison term.

Law – Article 10: The Court proceeded on the assumption that the interference with the applicant's freedom of expression was prescribed by law and pursued a legitimate aim, namely to protect the reputation and rights of the Russian police officers.

The text in question had been framed in very strong words and used vulgar, derogatory and vituperative terms. The key issue was, however, whether the applicant's statements read as a whole and in their context could be seen as promoting violence, hatred or intolerance. In this regard, the applicant's comment had been made in the context of a discussion concerning a matter of general and public concern, namely the alleged involvement of the police in silencing and oppressing the political opposition during the period of an electoral campaign. The comment had showed the applicant's emotional disapproval and rejection of what he had seen as abuse of authority by the police, conveying his sceptical and sarcastic point of view on the moral and ethical standards of the personnel of the Russian police and could therefore be understood as a scathing criticism of the current state of affairs in the Russian police.

Although the passage about "[ceremonial] burning of infidel cops in Auschwitz-like ovens" was particularly aggressive and hostile in tone, it was not, as considered by the domestic courts, a call for the police officers' "physical extermination by ordinary people" but rather a provocative metaphor and an emotional appeal to see the police "cleansed" of corrupt and abusive officers ("infidel cops"). As for the reference to Auschwitz, while Holocaust survivors and especially those who had escaped Auschwitz might be offended by such a statement, the protection of their rights had never been cited by the domestic courts among the reasons for the applicant's conviction. Moreover, the text in question did not reveal any intention to praise or justify the Nazis' practices used at Auschwitz. No supporting arguments had been advanced as to why the Russian police officers could have considered themselves affected by such a reference and, more generally, recourse to the notion of annihilation by fire could not in itself be regarded as incitement to any unlawful action, including violence.

It was also of relevance that the applicant's remarks had not attacked personally any identifiable police officer but rather concerned the police as a public institution, which could hardly be described as a group in need of heightened protection. Being a

part of the security forces of the State, the police should display a particularly high degree of tolerance to offensive speech, unless such inflammatory speech was likely to provoke imminent unlawful actions in respect of their personnel, exposing them to a real risk of physical violence. There was no indication that the comment had been published against a sensitive social or political background or in a tense security situation involving anti-police riots or other circumstances exposing police officers to a real and imminent threat of physical violence. The domestic courts had thus failed to explain why police officers as a social group needed enhanced protection.

As for the potential impact of the impugned comment, the domestic courts had not attempted to assess whether the blog where the applicant had posted his comment was generally highly visited, or to establish the actual number of users who had accessed that blog during the period of one month when the applicant's comment had remained available. In fact, it was the criminal prosecution that had prompted the interest of the public towards the comment, which had seemingly drawn very little public attention previously. The applicant had not been a well-known blogger or a popular user of the social media, let alone a public or influential figure which could have attracted public attention and thus enhanced the potential impact of the impugned statements. The potential of the applicant's comment to reach the public and thus to influence its opinion had therefore been very limited.

With respect to the reasoning of the domestic courts, they had focused on the form and tenor of the the impugned statements, without analysing them in the context of the relevant discussion. Furthermore, no attempt had been made to assess the potential of the statements at hand to provoke any harmful consequences, with due regard to the political and social background, against which they had been made, and to the scope of their reach. The domestic courts had therefore failed to take account of all the facts and relevant factors, hence the reasons given could not be regarded as "relevant and sufficient" to justify the interference with the applicant's freedom of expression.

While offensive, insulting and virulent, the applicant's statements could not be seen as an attempt to incite hatred against the Russian police officers. Nor did they have any potential to provoke violence, thus posing a clear and imminent danger which would have required the applicant's criminal conviction and a suspended prison sentence. The interference had therefore been disproportionate to the legitimate aim invoked.

Conclusion: violation (unanimously).

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

(See also *Dmitriyevskiy v. Russia*, 42168/06, 3 October 2017, Information Note 211)

Freedom of expression/Liberté d'expression

Insufficient protection of confidential journalist material under electronic surveillance schemes: *violations*

Protection insuffisante de matériaux journalistiques visés par des systèmes de surveillance électronique : *violations*

Big Brother Watch and Others/et autres – United Kingdom/Royaume-Uni, 58170/13 et al., judgment/arrêt 13.9.2018 [Section I]

(See Article 8 above/Voir l'article 8 ci-dessus, page 17)

Freedom of expression/Liberté d'expression

Lawyers temporarily barred from representing their terrorist client to avoid transmission of his statements: *inadmissible*

Avocats destitués temporairement de la représentation de leur client terroriste pour éviter la transmission de ses déclarations : *irrecevable*

Tuğluk and Others/et autres – Turkey/Turquie, 30687/05 and/et 45630/05, decision/décision 27.9.2018 [Section II]

Link to the English translation of the summary

En fait – Les requérants, avocats, ont été destitué temporairement de leur fonction de représentants d'Abdullah Öcalan par les autorités judiciaires, afin d'éviter qu'ils ne transmettent à la presse les déclarations de leur client. En effet, les comptes rendus de leurs visites étaient publiés dans les jours qui suivaient dans certains quotidiens, où ils apparaissaient comme étant les opinions de leur client sur la situation actuelle ou ses instructions au PKK (Parti des travailleurs du Kurdistan).

En droit – Article 10 : À supposer que la mesure incriminée constituait une ingérence dans la liberté d'expression des requérants, elle était clairement prévue par la loi et poursuivait les buts de sauvegarde de la défense de l'ordre et de prévention du crime.

La Cour a précédemment jugé dans les affaires *Öcalan c. Turquie* [GC] (46221/99, 12 mai 2005, Note d'information 75) et *Öcalan c. Turquie (n° 2)* (24069/03 et al., 18 mars 2014) que le régime des contacts avec l'extérieur prévu pour les condamnés à perpétuité détenus dans une prison de haute sécurité tendait à limiter les liens existant entre les personnes concernées et leur milieu criminel d'origine, afin de minimiser le risque qu'elles ne maintiennent des contacts personnels avec les structures des organisations criminelles. La Cour a aussi considéré comme étant fondées les préoccupations du gouvernement, qui craignait qu'Abdullah Öcalan pût utiliser les communications avec l'extérieur pour reprendre contact avec des membres du mouvement armé séparatiste dont il était le chef.

Le rôle que jouaient les requérants en tant qu'avocats et intermédiaires entre le client et les juridictions pénales leur imposait un certain nombre d'obligations dans leur conduite. Or les conférences de presse tenues par les requérants après leurs visites à leur client ne concernaient pas la défense de ce dernier et elles ne relevaient pas non plus de l'exercice du droit d'informer le public sur le fonctionnement de la justice, mais elles s'analysaient plutôt en une transmission des considérations de leur client portant, entre autres, sur la stratégie à suivre par son ex-organisation armée, le PKK. Les mesures prises par les autorités nationales visaient à empêcher les requérants d'exploiter leurs visites à leur client pour établir une communication entre ce dernier et son ex-organisation armée, et elles répondaient à un besoin social impérieux, à savoir empêcher le recours à des actes violents et la commission d'actes terroristes.

L'infliction aux requérants d'une mesure procédurale temporaire était proportionnée au but poursuivi, d'autant que, si la durée de la suspension de leur représentation de leur client d'un an et demi ne peut être vue comme négligeable, elle ne saurait pour autant être considérée comme excessive. Cette sanction modérée, qui de surcroît n'a eu aucune répercussion sur les activités professionnelles des requérants vis-à-vis de leurs clients autres qu'Abdullah Öcalan, a constitué une réponse non disproportionnée aux agissements des intéressés dans la mesure où leur conduite aurait contrevenu aux règles régissant leur fonction.

Conclusion : irrecevable (défaut manifeste de fondement).

(Voir aussi *Morice c. France* [GC], 29369/10, 23 avril 2015, Note d'information 184, et la fiche thématique Détention à perpétuité)

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

Prosecution and conviction of activist following dispersal of peaceful assembly: *violation*

Inculpation et condamnation d'un activiste consécutivement à la dispersion d'un rassemblement pacifique : *violation*

Mushegh Saghatelyan – Armenia/Arménie, 23086/08, judgment/arrêt 20.9.2018 [Section I]

Lien vers la traduction française du résumé

Facts – Following the announcement of the preliminary results of the 2008 presidential election, the main opposition candidate called on his supporters to gather at Freedom Square in central Yerevan in order to protest over alleged irregularities in the election process. From 20 February 2008 onwards, daily rallies were held and at times attracted tens of thousands of people. Several hundred demonstrators stayed around the clock, having set up camp in the square. The applicant was an active participant in the rallies. In the early morning of 1 March 2008, about 800 heavily armed police officers moved in and dispersed the demonstration. The applicant fled Freedom Square and was arrested soon thereafter. He was later convicted of two counts of "assault on a police officer" and for illegally carrying a bladed weapon.

Law – Article 5 § 1: Unacknowledged detention of an individual was a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and disclosed a most grave violation of that provision.

The applicant had been taken to the police station at around 6.30 a.m. on 1 March 2008. However, according to the record of his arrest, he had only been arrested at 10.30 p.m. on that day. He had been taken to the police station by force and nothing suggested that he had been free to leave. He had been locked up in a cell during all or part of that period. There was no reason to doubt, therefore, that between 6.30 a.m. and 10.30 p.m. on 1 March 2008 the applicant had been deprived of his liberty within the meaning of Article 5 § 1. The question was whether that deprivation of liberty had complied with the requirement of "lawfulness" within the meaning of Article 5 § 1 of the Convention.

According to the Government, up until 10.30 p.m. the applicant had been formally neither "arrested"

nor a "suspect" within the meaning of domestic law but had had the status of a "brought-in person", having been apparently put through a pre-arrest procedure called "bringing-in". None of the Articles of the Criminal Code of Procedure ("the CCP") contained any rules concerning the alleged status of a "brought-in person". The concept of a "brought-in person" appeared to have been developed for the first time by the Court of Cassation in a decision in 2009. Prior to that, nothing suggested that the relevant provisions of the CCP had been interpreted by the domestic courts in such a manner as to provide for a pre-arrest procedure called "bringing-in". Nor did the particular circumstances of the applicant's case suggest that his deprivation of liberty before 10.30 p.m. had been pursuant to such a procedure. In particular, the only document which mentioned that the applicant had been "brought in" was a handwritten record entitled "record of bringing-in" which lacked any basis in domestic law.

The applicant's status had only been formalised 16 hours after his forced appearance at the police station. During that period the applicant had been left without any sense of certainty as to his personal liberty and security and had been deprived of all the rights enjoyed by an arrested suspect under the CCP, including the right to have a lawyer and to inform his family immediately. The initial sixteen hours of the applicant's deprivation of liberty had been left formally unacknowledged.

Further, the applicant had remained in police custody for at least 84 hours prior to being brought before a judge. That had been in excess of the maximum period of 72 hours permitted by domestic law. Such a continued arrest without a judicial order for the time exceeding the 72-hour period was incompatible with the domestic law.

Conclusion: violation (unanimously).

Article 11

(a) *Whether there had been an interference with the exercise of the right to freedom of peaceful assembly* – Article 11 only protected the right to "peaceful assembly", a notion which did not cover a demonstration where the organisers and participants had violent intentions. There was no evidence to suggest that the demonstrations held at Freedom Square from 20 February 2008 had involved incitement to violence or that there had been any acts of violence prior to the police operation conducted in the early morning of 1 March 2008. The Government's allegation that the demonstrators had been planning to arm themselves to instigate mass disorder was unsubstantiated. There was no evidence to suggest that any firearms, explosives or bladed weapons had been used by the demonstrators during the police operation.

There had therefore been an interference with the applicant's right to freedom of peaceful assembly on account of both the dispersal of the demonstration and his subsequent prosecution, detention and conviction.

(b) *Whether the interference was justified* – The authorities had allowed the assembly, and had not made any attempts to break it up for nine days. The official explanation of the purpose of the police operation of 1 March 2008, to verify information obtained that weapons were to be distributed to the protestors, was not sufficiently credible and the Court had no reason to doubt that the objective of the police intervention had been to disperse the camp and those present at Freedom Square and to prevent the further conduct of the assembly.

The purpose of the demonstration had not been to obstruct the lawful exercise of an activity by others but to have a debate and to create a platform for expression on a public matter of major political importance which was directly related to the functioning of a democracy and was of serious concern to large segments of the Armenian society. Therefore, a greater degree of tolerance should have been demonstrated in the present case than that shown by the authorities.

The actions of the police did not appear to have ever been the subject of an independent and impartial investigation. The dispersal of the assembly at Freedom Square without sufficient justification and apparently without warnings to disperse and with unjustified and excessive use of force was a disproportionate measure which went beyond what it was reasonable to expect from the authorities when curtailing freedom of assembly.

The facts on which the charges against the applicant had been based were not backed by any evidence, were drafted in very general and abstract terms, without any specific details of the acts allegedly committed. It appeared that the applicant had been prosecuted and detained for simply having actively participated in, and possibly organised, the assembly at Freedom Square.

The applicant had been prosecuted and detained on such grounds for at least five months until most of the charges against him had been dropped, mostly for lack of evidence. Practically at the same time, new evidence and charges emerged and the applicant was accused of assaults on police officers and

illegally carrying a knife. The applicant alleged that those charges had been artificial and fabricated in order to convict him at all cost for being an opposition activist. Those allegations did not appear to be without merit. The manner in which the criminal case against the applicant had initially been conducted and the fact that, as already indicated above, he had been prosecuted and detained for almost five months for basically taking an active part in the demonstrations in itself raised questions regarding the motives of the applicant's prosecution. It was unclear why no charges had been brought against the applicant for such a long period of time if a knife had indeed been found in his possession on the very first day of his arrest.

The judgments in the applicant's criminal case were a mere recapitulation of the indictment against him, which in its turn was based entirely on the testimony of the police officers concerned. The domestic courts had failed to carry out a thorough and objective establishment of the facts underlying the charges against the applicant and to demonstrate the rigour and scrutiny which, in the particular circumstances of the case and given the overall context, were required of them in order to ensure an effective implementation of the right to freedom of peaceful assembly guaranteed by Article 11. In such circumstances, it could not be said that the reasons adduced by the domestic courts to justify the interference were genuinely "relevant and sufficient", which stripped the applicant of the procedural protection that he enjoyed by virtue of his rights under Article 11.

Even assuming that the dispersal of the assembly and the applicant's prosecution, detention and conviction had complied with domestic law and pursued one of the legitimate aims enumerated in Article 11 § 2 of the Convention – presumably, prevention of disorder and crime – the measures in question were not necessary in a democratic society. Furthermore, the dispersal of the assembly and the punitive measures taken against the applicant could not but have the effect of discouraging him from participating in political rallies. Undoubtedly, those measures had also had a serious potential to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of both the substantive and procedural limbs of Article 3, having found that the Government had failed to discharge their burden of proof and to provide a satisfactory and convincing application for the applicant's injuries and that no official investigation had been carried out specifically into his allegations of ill-treatment. The Court also held that the domestic courts had failed to provide relevant and sufficient reasons for the applicant's detention in breach of Article 5 § 3. Finally, the Court found a violation of Article 6 § 1 finding that the domestic courts had unreservedly endorsed the police version of events, failed to properly address any of the applicant's submissions and had refused to examine the defence witnesses.

Article 41: EUR 15,600 in respect of non-pecuniary damage.

(See also *Hakobyan and Others v. Armenia*, 34320/04, 10 April 2012; and *Kasparov and Others v. Russia*, 21613/07, 3 October 2013, Information Note 167)

ARTICLE 14

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

National legislation providing, in certain situations, for higher taxation of pension income than earned income: *communicated*

Législation nationale prévoyant, dans certaines hypothèses, une imposition plus élevée pour les revenus tirés de pensions de retraite que pour les revenus salariaux : *affaires communiquées*

Taipale – Finland/Finlande, 5855/18 [Section I]
Tulokas – Finland/Finlande, 5854/18 [Section I]

(See Article 1 of Protocol No. 12 below/Voir l'article 1 du Protocole n° 12 ci-dessous, page 33)

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Detention of human rights defender and search of his home and office for the purpose of silencing and punishing him and impeding his work: *violation*

Détention d'un défenseur des droits de l'homme et perquisition de son domicile et de son bureau afin de le bâillonner, de le punir et d'entraver ses activités : *violation*

Aliyev – Azerbaijan/Azerbaïdjan, 68762/14 and/et 71200/14, judgment/arrêt 20.9.2018 [Section V]

Lien vers la traduction française du résumé

Facts – In 2014 the applicant, a prominent human rights lawyer and civil-society activist in Azerbaijan, was arrested and remanded in custody on charges of illegal entrepreneurship, large-scale tax evasion and aggravated abuse of power. His home and the office of the non-governmental organisation he chaired – the Legal Education Society ("the Association") – were searched in relation to the charges, his and the Association's bank accounts were frozen and a large number of documents, computers and electronic data storage devices were seized. In 2015 he was convicted as charged. In 2016 he was released as his sentence was reduced to five years imprisonment suspended on probation.

The applicant's criminal trial is the subject of a separate application which is pending before the Court.

Law

Article 5 § 1 (c): The applicant had been arrested and detained in the absence of a "reasonable suspicion" of having committed a criminal offence.

Conclusion: violation (unanimously).

Article 8: The domestic court had authorised the search the day before the applicant had been formally charged, justifying it merely by referring in vague terms to the criminal investigation into "breaches of legislation discovered in the activities of a number of non-governmental organisations" without asserting any specific facts related to the suspected crimes. It therefore appeared that the court had not satisfied itself that there had been a reasonable suspicion of the applicant's having committed a criminal offence or that the relevant evidence might be found at the premises to be searched. Furthermore, the administrative irregularities that had allegedly been committed by the applicant with respect to receipt and use of the grants by the Association could not have given rise to liability under criminal law. The search and seizure at the applicant's home and office had therefore not pursued the aim of prevention of a crime or any of the other legitimate aims enumerated in paragraph 2 of Article 8.

Conclusion: violation (unanimously).

Article 18 in conjunction with Articles 5 and 8: The authorities' actions had been driven by improper reasons. The actual purpose of the impugned measures had been to silence and to punish the applicant for his activities in the area of human rights as well as to prevent him from continuing those activities. Proof of an ulterior purpose derived from the following case-specific facts:

(i) The applicant, a human rights defender and more specifically a human rights lawyer, was the legal representative before the Court in a large number of cases and had submitted, on behalf of the Association, communications to the Committee of Ministers concerning execution of the Court's judgments.

(ii) The applicant had been charged with serious criminal offences whose core constituent elements could not reasonably be found in the existing facts.

(iii) The applicant's arrest had been accompanied by stigmatising statements made by public officials against local NGOs and their leaders, including the applicant, who had been labelled as "traitors" and a "fifth column" with the purpose of delegitimising their work.

(iv) The search of the applicant's home and office had not pursued any of the legitimate aims and had been conducted in an arbitrary manner. Furthermore, the authorities had not only seized documents related to the Association's activities, but also taken case files covered by lawyer-client confidentiality, including those related to the applications pending before the Court, in disregard of legal professional privilege.

(v) The Court took into account the general context of increasingly harsh and restrictive legislative regulation of NGO activity and funding in the respondent State which in this instance had led to the prosecution of a NGO activist for an alleged failure to comply with legal formalities of an administrative nature while carrying out his work. Although States could have legitimate reasons to monitor financial operations in accordance with international law with a view to preventing money laundering and terrorism financing, the ability of an association to receive and use funding in order to be able to promote and defend its case constituted an integral part of the right to freedom of association.

(vi) The Court also noted the repercussions of the impugned measures on the applicant's right to freedom of association. As a result of *de facto* criminalisation of his activities and the measures taken against him in this context, he had been prevented from conducting his NGO activity in any meaningful way. Moreover, those measures had had the chilling effect on the civil society at large, whose members often acted collectively within NGOs and who, for fear of prosecution, might as a result have been discouraged from continuing their work of promoting and defending human rights.

(vii) Several notable human rights activists who had cooperated with international organisations for the

protection of human rights, including the Council of Europe, had been similarly arrested and charged with serious criminal offences entailing heavy prison sentences. These facts supported that the measures taken against the applicant had been part of a larger campaign to "crack down on human rights defenders in Azerbaijan, which had intensified over the summer of 2014".

Conclusion: violation (unanimously).

Article 46: Similar violations had been found in four other cases against Azerbaijan. The events examined in all five cases, including the present one, could not be considered as isolated incidents but revealed a troubling pattern of arbitrary arrest and detention of government critics, civil society activists and human rights defenders through retaliatory prosecutions and misuse of criminal law in defiance of the rule of law. The actions of the State stemming from this pattern might give rise to further repetitive applications as reflected by the number of applications raising similar issues which had been either communicated to the Azerbaijani Government or were currently pending before the Court.

Having regard to the specific group of individuals affected by the above-mentioned pattern in breach of Article 18, the necessary general measures to be taken by the respondent State had to focus, as a matter of priority, on the protection of critics of the government, civil society activists and human rights defenders against arbitrary arrest and detention and to ensure the eradication of retaliatory prosecutions and misuse of criminal law against this group of individuals and the non-repetition of similar practices in the future.

As regards the individual measures to be taken in order to achieve *restitutio in integrum*, the Committee of Ministers, which was better placed than the Court to assess the specific measures, should supervise, on the basis of the information provided by the respondent State, and with due regard to the applicant's evolving situation, the adoption of such measures that were feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violations found by the Court.

The Court also found, unanimously, a breach and no breach of Article 3 on the account of the applicant's conditions of detention during two respective periods; no breach of Article 3 on account of his medical treatment in detention; and a violation of Article 5 § 4 due to lack of effective judicial review of the lawfulness of the detention orders.

Article 41: EUR 20,000 in respect of non-pecuniary damage.

(See *Rasul Jafarov v. Azerbaijan*, 69981/14, 17 March 2016, Information Note 194; *Ilgar Mammadov v. Azerbaijan*, 15172/13, 22 May 2014, Information Note 174; *Mammadli v. Azerbaijan*, 47145/14, 19 April 2018; *Rashad Hasanov and Others v. Azerbaijan*, 48653/13 et al., 7 June 2018; *Lutsenko v. Ukraine*, 6492/11, 3 July 2012, Information Note 154; and *Tymoshenko v. Ukraine*, 49872/11, 30 April 2013, Information Note 162)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/Épuisement des voies de recours internes
Effective domestic remedy/Recours interne effectif – United Kingdom/Royaume-Uni

Effectiveness of complaint about the general Convention compliance of a surveillance regime to the Investigatory Powers Tribunal: *admissible*

Effectivité d'un recours devant la Commission des pouvoirs d'enquête concernant la conformité générale à la Convention d'un régime de surveillance : *recevable*

Big Brother Watch and Others/et autres – United Kingdom/Royaume-Uni, 58170/13 et al., judgment/arrêt 13.9.2018 [Section I]

(See Article 8 above/Voir l'article 8 ci-dessus, page 17)

Article 35 § 3 (b)

No significant disadvantage/Aucun préjudice important

Lack of effective judicial supervision of a house search devoid of any financial implications: *preliminary objection dismissed*

Absence de contrôle judiciaire efficace d'une perquisition, sans enjeu financier : *exception préliminaire rejetée*

Brazzi – Italy/Italie, 57278/11, judgment/arrêt 27.9.2018 [Section I]

Link to the English translation of the summary

En fait – La perquisition du domicile secondaire du requérant fut ordonnée par le parquet dans le cadre d'un contrôle fiscal. À l'issue des fouilles, aucun élé-

ment ne fut saisi et la procédure fut classée sans suite par le juge des investigations préliminaires.

Le requérant s'est toujours plaint, sans succès, devant les autorités de l'illégalité de la mesure de perquisition, qu'il considère injustifiée, et allègue devant la Cour européenne ne pas disposer en droit italien d'un contrôle judiciaire efficace.

En droit – Article 35 § 3 b) : L'affaire n'a pas un enjeu financier en soi, puisqu'elle concerne une perquisition domiciliaire n'ayant donné lieu ni à une saisie de biens ni à une autre atteinte au patrimoine. Toutefois, la gravité d'une violation doit être appréciée compte tenu à la fois de la perception subjective du requérant et de l'enjeu objectif d'une affaire donnée. Autrement dit, l'absence de préjudice important peut se fonder sur des éléments tels que les conséquences pécuniaires du litige en question ou l'importance que celui-ci revêt aux yeux du requérant.

Le litige portait sur un point de principe aux yeux du requérant, à savoir le droit de ce dernier au respect de ses biens et de son domicile. L'importance subjective de la question paraît évidente pour le requérant, lequel n'a pas cessé de contester avec force la légalité de la perquisition devant les autorités compétentes. Quant à l'enjeu objectif de l'affaire, celle-ci porte sur l'existence en droit italien d'un contrôle judiciaire efficace vis-à-vis d'une mesure de perquisition, soit une question de principe importante tant au niveau national qu'au niveau de la Convention.

Ainsi, la première condition de l'article 35 § 3 b) de la Convention, à savoir l'absence de préjudice important pour le requérant, n'est pas remplie.

Conclusion : exception préliminaire rejetée (unanimité).

Sur le fond, la Cour juge à l'unanimité que l'ingérence dans le droit au respect du domicile du requérant, à savoir la perquisition litigieuse, n'était pas « prévue par la loi » et a emporté violation de l'article 8 de la Convention, étant donné que la législation nationale, n'exigeant pas un contrôle judiciaire préalable ou un contrôle effectif *a posteriori* de cette mesure, n'a pas offert au requérant suffisamment de garanties contre l'abus ou l'arbitraire.

(Voir aussi *Adrian Mihai Ionescu c. Roumanie* (déc.), 36659/04, 1er juin 2010, Note d'information 131 ; *Giuran c. Roumanie*, 24360/04, 21 juin 2011, Note d'information 142 ; *Shefer c. Russie* (déc.), 45175/04, 13 mars 2012, Note d'information 150 ; et *Eon c. France*, 26118/10, 14 mars 2013, Note d'information 161)

ARTICLE 46

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

Respondent State required to eradicate arbitrary arrests, detention and retaliatory prosecution of government critics, civil society activists and human rights defenders

État défendeur tenu de mettre fin aux arrestations, aux détentions et aux poursuites punitives visant les personnes critiquant le gouvernement, les activistes de la société civile et les défenseurs des droits de l'homme

Aliyev – Azerbaijan/Azerbaïdjan, 68762/14 and/et 71200/14, judgment/arrêt 20.9.2018 [Section V]

(See Article 18 above/Voir l'article 18 ci-dessus, page 29)

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

Peaceful enjoyment of possessions/Respect des biens

Unlawful exposure of property to daily mine detonations in close proximity: *violation*

Exposition irrégulière d'un bien à des détonations quotidiennes de mines à proximité immédiate : *violation*

Dimitar Yordanov – Bulgaria/Bulgarie, 3401/09, judgment/arrêt 6.9.2018 [Section V]

Lien vers la traduction française du résumé

Facts – The applicant owned parts of a plot of land and the buildings standing on it, including his home, in an area where the government decided to create an opencast coalmine close to applicant's village. An expropriation procedure was commenced in 1990 involving numerous properties, including the applicant's, to remove owners from the area to facilitate operation of the mine. After waiting for more than two years to receive his replacement property, the applicant requested that the appropriation be quashed, as he was entitled to do, and continued living in the home. Over the years, the mining operation expanded and at some point detonations were

occurring within 160-180 meters of the applicant's home, despite the legal requirement to maintain a 500-meter "sanitation zone" between non-industrial buildings, such as residential dwellings, and the mining operation.

The applicant abandoned his property in 1997 when his family concluded that continuing to reside there was no longer safe due to cracks in the walls, collapse of the out-buildings, and daily shaking of the home. He unsuccessfully filed several domestic actions for damages. The domestic courts found that these daily detonations in close proximity to the applicant's property were in breach of domestic legislation. However, they were unable to establish a causal link between the detonations and the damage to his home, since due to the passage of time and the destruction of some documents, it had proved impossible to determine the distance between the house and the area where the detonations had been carried out in 1997, when he had abandoned his property.

Law – Article 1 of Protocol No. 1: The Government had not shown that the authorities had intended to honour their legal obligations under the expropriation procedure. The applicant could therefore not be blamed for the expropriation procedure's failure. The mine had been managed by a company that was entirely State-owned. The company had not been engaged in ordinary commercial business, but instead in a heavily regulated field subject to environmental and health-and-safety requirements. It was significant that the decision to create the mine had been taken by the State, which had also expropriated numerous privately owned properties in the area to allow for its functioning. The company was thus the means of conducting a State activity. The authorities, through the failed expropriation of the applicant's property and the work of the mine under what was effectively State control, had been responsible for the applicant's property remaining in the area of environmental hazard, namely the daily detonations in close proximity to the applicant's home. That situation, which had led the applicant to abandon his property, amounted to State interference with the peaceful enjoyment of his "possessions". The detonations within the sanitation zone had been in manifest breach of domestic law. The interference with the peaceful enjoyment of the applicant's possessions had thus not been lawful for the purposes of the analysis under Article 1 of Protocol No. 1.

Conclusion: violation (unanimously).

The Court also found unanimously no violation of Article 6 § 1, as the decisions of the national courts, in particular their conclusion contested by the applicant as to the existence of a causal link between the detonation works at the mine and the damage to his property, had not reached the threshold of arbitrariness and manifest unreasonableness that amounted to a denial of justice.

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

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

General prohibition of discrimination/ Interdiction générale de la discrimination

National legislation providing, in certain situations, for higher taxation of pension income than earned income: *communicated*

Législation nationale prévoyant, dans certaines hypothèses, une imposition plus élevée pour les revenus tirés de pensions de retraite que pour les revenus salariaux : *affaires communiquées*

Taipale – Finland/Finlande, 5855/18 [Section I]
Tulokas – Finland/Finlande, 5854/18 [Section I]

Lien vers la traduction française du résumé

The two applicants retired and started receiving old age pension respectively in 2004 and 2012. From 1 January 2013, amendments in the Income Tax Act entered into force. An additional tax of 6% was imposed on pensioners whose annual pension exceeded EUR 45,000. The amendment was of a permanent nature. The revised Act also imposed an additional tax of 2% on employed tax-payers whose annual income exceeded EUR 100,000. However, that amendment was of temporary nature and only applied for the tax years of 2013-2015. The aims of the amendments were to collect taxes from those whose ability to pay taxes was the highest; to diminish the tax treatment gap between pensions and income received from employment; and to give an incentive for older people to stay longer in working life.

The applicants' annual pensions exceeded the threshold of EUR 45,000. In 2013 and 2014 Mr Taipale was charged around EUR 2,000 in additional taxes, while Mr Tulokas – around EUR 3,000. Their complaints were dismissed.

Communicated under Articles 13 and 14 of the Convention and Article 1 of Protocol No. 12.

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

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

Unjustified dismissal by a Catholic hospital of a Catholic Chief Medical Officer for remarrying after his divorce

Absence de justification au licenciement d'un médecin chef catholique par un hôpital catholique pour son remariage après un divorce

IR – JQ, C-68/17, judgment/arrêt 11.9.2018 (CJEU, Grand Chamber/CJUE, grande chambre)

JQ, de confession catholique, était le chef du service de médecine interne d'un hôpital gèré par IR, une société allemande à responsabilité limitée soumise au contrôle de l'archevêque catholique de Cologne (Allemagne). Le contrat de travail de JQ avait été conclu sur le fondement du règlement fondamental applicable au service ecclésial dans le cadre des relations de travail au sein de l'Église, qui prévoit que la conclusion d'un mariage invalide selon le droit canonique par un employé catholique exerçant des fonctions d'encadrement constitue une violation grave de ses obligations de loyauté et justifie son licenciement.

IR a ainsi licencié JQ après avoir appris que celui-ci s'était marié civilement sans que son premier mariage religieux ait été annulé. Selon IR, JQ a, en concluant un mariage invalide selon le droit canonique, manqué de manière caractérisée à ses obligations de loyauté découlant de son contrat de travail.

JQ a contesté son licenciement devant les juridictions du travail allemandes en faisant valoir que son remariage ne constituait pas un motif valable de licenciement. Selon JQ, son licenciement violerait le principe de l'égalité de traitement dès lors que, conformément au règlement fondamental applicable au service ecclésial dans le cadre des relations de travail au sein de l'Église, le remariage d'un chef de service de confession protestante ou sans confession n'aurait eu aucune conséquence sur la relation de travail avec IR.

Dans ces conditions, la Cour fédérale du travail (*Bundesarbeitsgericht*) demande à la CJUE d'interpréter l'article 4 § 2, second alinéa, de la directive 2000/78/CE[1] qui dispose que, pourvu que ses dispositions soient par ailleurs respectées, la présente directive est donc sans préjudice du droit des Églises et des autres organisations publiques ou privées dont l'éthique est fondée sur la religion ou les convictions, agissant en conformité avec les dispositions constitutionnelles et législatives nationales, de requérir des personnes travaillant pour elles une attitude de bonne foi et de loyauté envers l'éthique de l'organisation.

La CJUE juge qu'une Église ou une autre organisation dont l'éthique est fondée sur la religion ou les convictions, et qui gère un établissement hospitalier constitué sous la forme d'une société de capitaux de droit privé, ne saurait décider de soumettre ses employés exerçant des fonctions d'encadrement à des exigences d'attitude de bonne foi et de loyauté envers cette éthique distinctes en fonction de la confession ou de l'absence de confession de ces employés, sans que cette décision puisse, le cas échéant, faire l'objet d'un contrôle juridictionnel effectif requérant de s'assurer qu'il est satisfait aux critères énoncés à l'article 4 § 2 de la directive 2000/78.

Une différence de traitement, en termes d'exigences d'attitude de bonne foi et de loyauté envers ladite éthique, entre employés occupant des postes d'encadrement, en fonction de leur confession ou de l'absence de confession, n'est conforme à la directive 2000/78 que si, au regard de la nature des activités professionnelles concernées ou du contexte dans lequel elles sont exercées, la religion ou les convictions constituent une exigence professionnelle qui est essentielle, légitime et justifiée eu égard à l'éthique de l'Église ou de l'organisation en cause et conforme au principe de proportionnalité, ce qu'il appartient à la juridiction nationale de vérifier.

En l'occurrence, l'exigence en cause a trait au respect d'un élément déterminé de l'éthique de l'Église catholique, à savoir le caractère sacré et indissoluble du mariage religieux. Or l'adhésion à cette conception du mariage n'apparaît pas nécessaire pour l'affirmation de l'éthique d'IR compte tenu des activités professionnelles exercées par JQ, à savoir la fourniture, dans le milieu hospitalier, de conseils et de soins médicaux ainsi que la gestion du service de médecine interne dont il était le chef. En outre, des postes à responsabilité médicale comportant des fonctions d'encadrement, analogues à celui qui était occupé par JQ, ont été confiés à des employés d'IR n'étant pas de confession catholique et, partant, n'étant pas tenus à la même exigence d'attitude de bonne foi et de loyauté envers l'éthique d'IR. L'adhésion à cette conception du mariage n'apparaît donc pas être une condition essentielle de l'activité professionnelle, ce qu'il appartient, toutefois, à la juridiction de renvoi de vérifier.

1. Directive 2000/78/CE du Conseil du 27 novembre 2000 portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

Enfin, une juridiction nationale saisie d'un litige opposant deux parties privées est tenue, lorsqu'il ne lui est pas possible d'interpréter le droit national applicable de manière conforme à l'article 4 § 2 de la directive 2000/78, d'assurer, dans le cadre de ses compétences, la protection juridique découlant pour les justiciables des principes généraux du droit de l'Union, tels que le principe de non-discrimination en raison de la religion ou des convictions désormais consacré à l'article 21 de la Charte des droits fondamentaux de l'Union européenne, et de garantir le plein effet des droits en découlant, en laissant au besoin inappliquée toute disposition nationale contraire.

L'interdiction de toute discrimination fondée sur la religion ou les convictions revêt ainsi un caractère impératif en tant que principe général du droit de l'Union et se suffit à elle-même pour conférer aux particuliers un droit invocable en tant que tel dans un litige qui les oppose dans un domaine couvert par le droit de l'Union.

Partant, il incombe à la juridiction de renvoi, dès lors qu'elle considérerait se trouver dans l'impossibilité d'assurer une interprétation conforme au droit de l'Union de la disposition nationale en cause, de laisser inappliquée cette disposition.

(Voir aussi l'arrêt de la CJUE *Vera Egenberger – Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, 17 avril 2018, résumé dans la Note d'information 217. S'agissant de la jurisprudence de la CEDH, voir *Lombardi Vallauri c. Italie*, 39128/05, 20 octobre 2009, Note d'information 123 ; *Obst c. Allemagne*, 425/03, 23 septembre 2010, Note d'information 133 ; *Schüth c. Allemagne*, 1620/03, 23 septembre 2010, Note d'information 133 ; et *Siebenhaar c. Allemagne*, 18136/02, 3 février 2011)

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

State Obligations with respect to the right to health and life of older persons

Obligations de l'État s'agissant du droit à la santé et à la vie des personnes âgées

Poblete Vilches et. al./et autres – Chile/Chili, Series C No. 349/Série C n° 349, judgment/arrêt 8.3.2018

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

Mr Poblete Vilches, a 76-year-old man, was admitted twice to a public hospital in January and February 2001. During his first admission, he presented with severe respiratory failure. He underwent a surgical intervention when he was unconscious, without the consent of his family members. He was discharged early and his family had to hire a private ambulance for his transportation. During his second admission, Mr Poblete Vilches remained in the intermediate care unit, despite the fact that according to his medical file he had been referred to the intensive care ward. He also required a mechanical ventilator, which was not provided. As a result, Mr Poblete Vilches passed away. His family filed two criminal complaints which were dismissed. The State of Chile made a partial acknowledgement of international responsibility.

Merits

(a) Article 26 (right to health) in conjunction with Articles 1(1) (obligation to respect and guarantee rights without discrimination), 4 (right to life) and 5 (right to humane treatment) of the American Convention on Human Rights (ACHR): The Inter-American Court of Human Rights (hereafter "the Court") reiterated its jurisprudence set out in the *Lagos del Campo v. Peru* case (Series C No. 340, 31 August 2017, summarised in Information Note 213), regarding the justiciability of Article 26 of the ACHR. The Court ruled for the first time on the right to health, specifically of the elderly, as an autonomous right and as an integral part of economic, social, cultural and environmental rights, through the interpretation of the aforesaid provision.

The Court emphasised that the content of Article 26 gave rise to two types of obligations: the adoption of general measures in a progressive manner and the adoption of immediate measures. Regarding the former, the Court held that States had a specific and constant obligation to move as expeditiously and efficiently as possible towards the full effectiveness of economic, social, cultural and environmental rights. As such, it did not entail that States might indefinitely postpone the adoption of measures to make those rights in question effective. Likewise, the Court found that the principle of non-regression applied with respect to the full exercise of rights already achieved. Regarding immediate obligations, the Court established that those consisted in adopting adequate measures in order to guarantee non-discriminatory access to the benefits recognized for each right. Such measures had to be adequate, deliberate and concrete. The Court delimited its analysis to the scope of the provision of basic and immediate measures.

Regarding the right to health, the Court verified its consolidation: (i) as a justiciable right in light of the ACHR, through the treaty's referral to: a) Articles

34(i), 34(l) and 45(h) of the Charter of the Organization of American States and b) Article XI of the American Declaration of the Rights and Duties of Man, in accordance with the interpretation of Article 29(d) of the ACHR; and (ii) regarding the scope and content of that right for the purposes of the case, through: a) Chilean legislation at the time of the facts and in accordance with the interpretation of Article 29(b) of the ACHR, as well as the regional legislative consensus on said right, and b) the international *corpus iuris* on the right to health. Taking into account the above, the Court derived various standards applicable to the instant case relating to basic and specific health benefits, particularly in relation to situations of medical emergency.

In sum, the Court determined that: (i) the right to health was an autonomous right protected by Article 26 of the ACHR; (ii) that right, in emergency situations, required that States ensured the adequate regulation of health services, providing the necessary services in accordance with the elements of availability, accessibility, quality and acceptability, under conditions of equality and without discrimination, but also providing affirmative measures to vulnerable groups; (iii) the elderly enjoyed a reinforced level of protection with respect to health services of prevention and urgency; (iv) in order to establish the State´s responsibility for deaths in medical institutions, it was necessary to prove the denial of an essential service or treatment despite the predictability of the risk faced by the patient, or a serious medical malpractice, and to corroborate a causal link between the action and the damage; (v) the lack of adequate medical attention could lead to the violation of personal integrity; and (vi) informed consent was an obligation of health institutions, which had the duty to inform patients or, when necessary, their representatives, about the procedures and condition of the patient.

The Court analysed the two admissions to the public hospital and found several omissions in light of those standards described above. It concluded that in the second admission there had been an urgent need for the required health benefits, whose dispensation had been immediately vital and which had not been provided. Thus, the Court concluded that Chile did not guarantee that the health services provided to Mr Poblete Vilches were in accordance with its immediate obligations related to the right to health in emergency situations. The Court also found that Mr Poblete Vilches had been discriminated against because he was an elderly person, and his age had proved to be a limitation for receiving the required medical attention. Finally, the Court concluded that the negligence shown in the second admission had considerably reduced his possibilities of recovery and survival, and that his death was imputable to the State.

Conclusion: violation (unanimously).

(b) Article 26 (right to health) in conjunction with Articles 13 (freedom of thought and expression), 7 (right to personal liberty) and 11 (right to privacy) of the ACHR: The Court held that, taking into account the applicable legislation, Chile had failed to comply with its duty to obtain substitute consent to medical treatment from family members for the non-emergency surgical intervention performed during the first admission, as well as its duty to provide clear and accessible information for family members regarding the treatment and procedures performed on the patient.

Conclusion: violation (unanimously).

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) publish the judgment and its official summary; (ii) conduct a public act of acknowledgment of responsibility; (iii) provide psychological health care to the relatives; (iv) implement permanent human rights education programmes; (v) inform the Court about the progress that had been made at the hospital involved; (vi) strengthen the National Institute of Geriatrics and its incidence in the hospital network; (vii) design a publication or booklet that set out the rights of the elderly in health matters; (viii) adopt the measures necessary to design a general policy of comprehensive protection for the elderly; and (ix) pay pecuniary and non-pecuniary damage, as well as costs and expenses.

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Elections/Élections

President Guido Raimondi was re-elected as President of the Court. He has been a judge at the ECHR since 5 May 2010 and became its President on 1 November 2015. His term as President will finish on 4 May 2019, at the same time as his mandate as judge.

-ooOoo-

Le président Guido Raimondi a été réélu à la présidence de la Cour. Juge à la CEDH depuis le 5 mai 2010, il est devenu son président le 1er novembre

2015. Son mandat de président prendra fin le 4 mai 2019 à l'échéance de son mandat de juge.

Entry into force of Protocol No. 16/Entrée en vigueur du Protocole n° 16

Protocol No. 16 to the Convention came into force on 1 August 2018. It affords the highest courts and tribunals designated by the Contracting States that have ratified Protocol No. 16 the possibility of requesting the Court to give advisory opinions in the context of cases pending before them.

The Convention has been updated with the Protocol being translated into 36 languages (www.echr.coe.int – Official texts – Convention).

Le Protocole n° 16 à la Convention est entré en vigueur le 1er août 2018. Il prévoit la possibilité pour les hautes juridictions des États parties ayant ratifié ce protocole d'adresser des demandes d'avis consultatif à la Cour dans le cadre d'affaires pendantes devant elles.

La Convention a été mise à jour avec le texte de ce protocole dans 36 langues (www.echr.coe.int – Textes officiels – Convention).

New edition of the Rules of Court/Nouvelle édition du règlement de la Cour

A new edition of the Rules of Court which incorporates amendments made by the Plenary Court on 19 September 2016 entered into force on 1 August 2018. It is available on the Court's Internet site (www.echr.coe.int – Official texts – Rules).

-ooOoo-

Une nouvelle édition du règlement de la Cour qui intègre les amendements adoptés par la Cour plénière le 19 septembre 2016 est entrée en vigueur le 1er août 2018. Elle est disponible sur le site internet de la Cour (www.echr.coe.int – Textes officiels – Règlement)

Key cases/Affaires phares

A selection of key cases in the HUDOC database can be identified using this category in the "Importance" filter. It replaces the "Case Reports" category which corresponded since 1998 to the list of cases selected for publication in the *Reports of judgments and decisions*, as the Court will no longer be publishing reports on paper or electronically in PDF format. The mode of citation of such cases has thus changed with effect from 2016.

Une sélection d'affaires phares est identifiable dans la base de données HUDOC au moyen du filtre « Importance ». Elle remplace la dénomination « Recueil » qui correspondait depuis 1998 à la liste des affaires sélectionnées pour publication dans le *Recueil des arrêts et décisions de la Cour*, lequel n'est plus publié ni en version papier ni en format PDF. La manière de citer les affaires a été modifiée en conséquence, à compter de 2016.

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

Reports of Judgments and Decisions/Recueil des arrêts et décisions

Volumes I to VIII and the Index for 2015 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).

-ooOoo-

Les volumes I à VIII ainsi que l'index de l'année 2015 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: new translations/Guides sur la jurisprudence : nouvelles traductions

Translations into French of the new Guide on Article 2 (right to life) and of the updated Guides on Article 5 (right to liberty and security), Article 6 (right to a fair trial – civil limb), Article 8 (right to respect for private and family life) have just been published. The English translation of the updated Guide on Article 9 (freedom of thought, conscience and religion) has also just been published.

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

Guide sur l'article 2 de la Convention (fre)

Guide sur l'article 5 de la Convention (fre)

Guide sur l'article 6 de la Convention (fre)

Guide sur l'article 8 de la Convention (fre)

Guide on Article 9 of the Convention (eng)

Les traductions vers le français du nouveau Guide sur l'article 2 et des Guides mis à jour sur l'article 5 (droit à la liberté et à la sûreté), l'article 6 (droit à un procès équitable – volet civil), l'article 8 (droit au respect de la vie privée et familiale) viennent d'être publiées. La traduction vers l'anglais du Guide mis à jour sur l'article 9 (droit à la liberté de pensée, de conscience et de religion) vient également de paraître.

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

Case-Law Guides: translations into Ukrainian/ Guides sur la jurisprudence : traductions en ukrainien

Translations into Ukrainian of some of the Case-Law Guides have recently been published on the Court's Internet site (www.echr.coe.int – Case-law).

Довідник із застосування статті 4 Конвенції – Заборона рабства і примусової праці

Довідник із застосування статті 9 Конвенції – Свобода думки, совісті і релігії

Довідник із застосування статті 2 Протоколу № 1 – Право на освіту

Посібник зі статті 3 Протоколу № 1 – Право на вільні вибори

Des traductions en ukrainien de certains Guides sur la jurisprudence ont été récemment publiées sur le site internet de la Cour (www.echr.coe.int – Jurisprudence).

New case-law research report/Nouveau rapport de recherche sur la jurisprudence

A new Research Report on extra-territorial jurisdiction entitled "Articles 1 and 5 – Extra-territorial jurisdiction, jurisdiction of territorial State prevented from exercising its authority in part of its territory, and validity of detention and criminal proceedings in *de facto* entities" has just been published (in English only).

All Research Reports are available on the Court's Internet site (www.echr.coe.int – Case-Law).

Un nouveau rapport de recherche sur la juridiction extraterritoriale, intitulé « Articles 1 and 5 – Extra-territorial jurisdiction, jurisdiction of territorial State prevented from exercising its authority in part of its territory, and validity of detention and criminal proceedings in *de facto* entities », vient d'être publié (en anglais uniquement).

Tous les rapports de recherche sont disponibles sur le site internet de la Cour (www.echr.coe.int – Jurisprudence).

Human rights factsheets by country/Fiches « droits de l'homme » par pays

The Country Profiles containing data and information, broken down by individual State, on significant cases considered by the Court or currently pending before it, have been updated. All Country Profiles can be downloaded from the Court's Internet site (www.echr.coe.int – Press).

Les *Fiches pays*, contenant des données et informations par État sur les affaires marquantes examinées par la Cour ou actuellement pendantes devant elles, ont été mises à jour. Toutes les fiches peuvent être téléchargées à partir du site internet de la Cour (www.echr.coe.int – Presse).