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

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Ogică – Romania/Roumanie - 24708/03
Judgment/Arrêt 27.5.2010 [Section III]

En fait – En 2001, le requérant fut placé en détention provisoire à la suite d'une plainte pénale déposée contre lui, mesure qui fut ensuite prorogée tous les trente jours jusqu'à l'issue de la procédure. En 2002, le tribunal de première instance le condamna à une peine d'emprisonnement pour tentative d'escroquerie. En janvier 2003, la cour d'appel confirma ce jugement mais réduisit la durée de la peine. Constatant que celle-ci arrivait à son terme le jour même à minuit, elle ordonna la remise en liberté de l'intéressé. Son greffe prit immédiatement contact avec l'établissement pénitentiaire concerné. Or le secrétariat était fermé et, alors que le requérant ne pouvait être libéré sur la base d'un simple appel téléphonique, nul ne pouvait réceptionner de télécopie. L'intéressé ne fut donc élargi que deux jours plus tard. Devant la Cour européenne, il dénonce les conditions de sa détention provisoire dans les locaux de la police (avec des interruptions dues à des hospitalisations), puis dans la prison.

En droit – Article 3 : a) *Concernant les conditions de détention dans les locaux de la police (DGPMB)* – La Cour fait application du principe *affirmanti incumbit probatio* (« la preuve incombe à celui qui affirme ») lorsque le Gouvernement est le seul à avoir accès aux informations susceptibles de confirmer ou d'infirmer les allégations du requérant. Les thèses des parties quant aux conditions de détention en question sont diamétralement opposées. Toutefois, le simple fait que la version du Gouvernement contredit celle fournie par le requérant ne saurait, en soi, mener la Cour au rejet des allégations de ce dernier comme non étayées. La thèse du Gouvernement n'est ni motivée ni valablement documentée. De plus, elle n'est pas corroborée par les éléments du dossier, qui permettent au contraire d'estimer au-delà de tout doute raisonnable que le requérant a dû subir pendant plusieurs mois et de manière constante l'essentiel des conditions de détention dont il se plaint dans son grief relatif aux locaux de détention de la DGPMB (surpeuplement, insalubrité, manque d'air frais et de lumière naturelle, etc.). Par ailleurs, eu égard aux éléments fournis par le Comité européen pour la prévention de la torture (CPT), la Cour ne saurait conclure que le temps de promenade offert au requérant dans un espace commun de 24 m^2 était de nature à compenser le manque d'espace dans sa cellule. En conclusion, les conditions de détention à la DGPMB étaient de nature à causer au requérant une souffrance allant au-delà de celle que comporte inévitablement une privation de liberté.

b) *Concernant les conditions de détention de l'intéressé en prison* – La Cour rappelle avoir déjà conclu à la violation de l'article 3 dans des affaires similaires qui portaient sur le même établissement. Rien ne permet d'aboutir en l'espèce à une conclusion différente. Les allégations non contredites des parties et les informations émanant notamment du CPT montrent que le requérant n'a disposé dans sa cellule que d'environ 1 m^2 d'espace vital. A l'exception d'environ trente minutes de promenade quotidienne en plein air, l'intéressé était donc confiné dans sa cellule surpeuplée et confronté à des conditions d'hygiène précaires et au manque de chauffage.

Les conditions générales de détention de l'intéressé (conditions d'hygiène, surpeuplement, température des cellules, etc.) sont restées similaires malgré le transfert du requérant des locaux de la DGMPB à la prison et doivent donc être examinées comme une situation continue. Si rien n'indique qu'il y ait eu véritablement intention d'humilier ou de rabaisser le requérant, l'absence d'un tel but ne

saurait exclure un constat de violation de l'article 3. Les conditions de détention en cause, que le requérant a dû supporter pendant une période significative, n'ont pas manqué de le soumettre à une épreuve d'une intensité qui excédait le niveau inévitable de souffrance inhérent à la détention.

Conclusion : violation (unanimité).

Article 5 § 1 : l'arrêt définitif de janvier 2003 a condamné le requérant à une peine d'une durée égale à celle de la détention déjà effectuée jusqu'à cette date et, immédiatement après son prononcé, le greffe de la cour d'appel a pris contact avec la prison aux fins de l'élargissement de l'intéressé. Or ces démarches ont échoué. Soulignant que c'est pendant la journée que le greffe a pris contact avec l'administration de la prison, la Cour ne peut accepter que, en raison des horaires de son secrétariat, une administration pénitentiaire ne prenne pas de mesures pour réceptionner, un vendredi en tout début d'après-midi, un document télécopié nécessaire à la remise en liberté d'un détenu, sachant que la fermeture du service impliquera le maintien en détention de l'intéressé pour quarante-huit heures supplémentaires. Un tel délai ne peut nullement constituer un délai minimum inévitable pour la mise à exécution d'une décision définitive de remise en liberté.

Conclusion : violation (unanimité).

Article 41 : 8 000 EUR pour préjudice moral.

Removal of tissue from deceased without knowledge or consent of family: *communicated*

Prélèvement de tissus sur un défunt à l'insu et sans le consentement de sa famille : *affaire communiquée*

Elberte – Latvia/Lettonie - 61243/08
[Section III]

(See Article 8 below/Voir l'article 8 ci-dessous – page 13)

ARTICLE 4

Forced labour/Travail forcé

Receipt of benefits conditioned by obligation to take up "generally accepted" employment: *inadmissible*

Obligation, pour pouvoir toucher des indemnités, d'être prêt à accepter un emploi « généralement accepté » : *irrecevable*

Schuitemaker – Netherlands/Pays-Bas - 15906/08
Decision/Décision 4.5.2010 [Section III]

Facts – The applicant, a philosopher by profession, has been unemployed and in receipt of benefits since 1983. After a change in the legislation, she was informed that her eligibility for general welfare benefits was dependent on her obtaining and being willing to take up "generally accepted" employment and that non-compliance would lead to a reduction in her benefit payments. In her application to the European Court, the applicant complained that under the new legislation she was required to obtain and accept any kind of work, irrespective of whether or not it was suitable, in breach of Article 4 of the Convention.

Law – Article 4 § 2: Where a State introduced a system of social security, it was fully entitled to lay down conditions for persons wishing to receive benefits from such a system. In particular, a condition to the effect that a person must make demonstrable efforts in order to obtain and take up generally accepted employment could not be considered unreasonable, nor could it be equated with compelling a person to perform forced or compulsory labour within the meaning of Article 4.

Conclusion: inadmissible (manifestly ill-founded).

ARTICLE 5

Article 5 § 1

Lawful arrest or detention/Arrestation ou détention régulières

Applicant's continued detention for two days without legal basis following final decision requiring his release: *violation*

Maintien en détention, sans base légale, pendant deux jours, dans l'attente de l'exécution d'une décision définitive impliquant une remise en liberté : *violation*

Ogică – Romania/Roumanie - 24708/03
Judgment/Arrêt 27.5.2010 [Section III]

(See Article 3 above/Voir l'article 3 ci-dessus – page 7)

ARTICLE 6

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Surrender of suspect to fellow member State despite alleged risk of unfair trial: *inadmissible*

Remise d'un suspect à l'Etat membre dont il relève, malgré le risque allégué de procédure inéquitable : *irrecevable*

Stapleton – Ireland/Irlande - 56588/07
Decision/Décision 4.5.2010 [Section III]

Facts – This case concerned the scheme for the surrender of suspects and convicted persons established by the European Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ("the Framework Decision"). The scheme replaces extradition procedures between Member States.

In 2005 the applicant was arrested in Ireland under a European Arrest Warrant that had been issued the previous year in the United Kingdom in respect of fraud offences he was alleged to have committed there between 1978 and 1982. The United Kingdom authorities maintained that they had only become aware of the applicant's whereabouts in 2001 as he had been living overseas. The applicant opposed his surrender on the grounds that the delay of well over twenty years between the commission of the alleged offences and his arrest had created a real risk that he would not receive a fair trial. That argument was rejected by the Irish Supreme Court, which found, *inter alia*, that the applicant had a remedy for the delay in the United Kingdom courts and it would be demonstrably more efficient and appropriate for that issue to be dealt with there.

Law – Article 6: The facts of the applicant's case did not disclose substantial grounds for believing that there would be a real risk that the applicant would be exposed to a flagrant denial of his Article 6 rights in the United Kingdom, which, as a Contracting Party, had undertaken to abide by its Convention obligations and to secure to everyone within its jurisdiction the rights and freedoms defined therein. Delay in prosecuting a crime did not, necessarily and of itself, render criminal proceedings unfair.

The applicant's submission that all he should have been required to establish in the Irish courts was a real risk of unfairness in the United Kingdom, rather than a real risk of a "flagrant denial" of his rights, was rejected for three reasons. Firstly, such an approach would run counter to the principles that had been established in *Soering v. the United Kingdom* (no. 14038/88, 7 July 1989) and the Court's subsequent jurisprudence. Secondly, the Irish Supreme Court had rightly found that on the facts it would be more appropriate for the United Kingdom courts to hear and determine the applicant's complaints of unfairness. Thirdly, the applicant's submission that he was entitled to have his Convention right protected on the first relevant occasion (in this case before the Irish courts) was misplaced in view of the United Kingdom's status as a Contracting Party to the Convention. This was not a case involving non-derogable rights under Articles 2 and 3 of the Convention and a risk of onward expulsion to a non-Contracting State without a proper examination of the applicant's claim or any proper opportunity to apply to the European Court and request interim measures. The applicant had various remedies available in the United Kingdom courts in respect of any unfairness, such as an application at the outset for a stay on the grounds that he would not receive a fair trial. If such an application proved unsuccessful he could then apply to the European Court under Articles 6 and 34 of the Convention.

Finally, the applicant's submission that pre-trial detention in the United Kingdom would inevitably follow his surrender was neither complete nor convincing as he would have the immediate possibility of applying for bail and raising all relevant criteria.

Conclusion: inadmissible (manifestly ill-founded).

Order of examination of grounds of appeal: *inadmissible*

Ordre d'examen des moyens d'un recours : *irrecevable*

Cortina de Alcocer and/et De Alcocer Torra – Spain/Espagne - 33912/08
Decision/Décision 25.5.2010 [Section III]

En fait – En décembre 2000, l'*Audiencia Provincial* déclara les requérants responsables des délits de faux en document et d'escroquerie mais jugea que ceux-ci étaient prescrits. En mars 2003, le Tribunal suprême considéra l'absence de prescription des délits. Confirmant les conclusions du tribunal *a quo* relativement à la culpabilité des requérants,

il leur imposa des peines de prison. Les requérants formèrent un recours d'*amparo*. En février 2008, le Tribunal constitutionnel rejeta une partie du recours. Ce faisant, il confirma le raisonnement des juridictions inférieures relatif à l'existence d'éléments suffisants pour conclure que les délits en cause avaient bien été perpétrés. Puis, concernant la question de la prescription, il conclut à la violation du droit à un procès équitable en relation avec le droit à la liberté, et annula l'arrêt du Tribunal suprême. Selon les requérants, en concluant au bien-fondé de leur condamnation avant de relever la prescription des faits, le Tribunal constitutionnel aurait violé leurs droits en vertu de l'article 6 § 1 de la Convention et porté atteinte à la présomption d'innocence.

En droit – Article 6 § 1 : *concernant l'ordre d'analyse des griefs soulevés devant le Tribunal constitutionnel* – La haute juridiction expliqua que l'ordre était conforme au critère logique que ce même tribunal avait déjà adopté préalablement. Ainsi, il entreprit l'examen du recours par le grief tiré du droit à un procès équitable. Il justifia ce choix au motif que l'acceptation de ce grief provoquerait la rétroaction de la procédure et rendrait inutile la poursuite de l'analyse du recours d'*amparo*. La haute juridiction motiva suffisamment sa réponse, laquelle ne peut être considérée comme arbitraire, dénuée de fondement ou de nature à entacher l'équité de la procédure. De plus, il n'est pas possible d'affirmer que le Tribunal constitutionnel serait parvenu à un résultat différent s'il avait inversé l'ordre d'analyse des griefs. Au demeurant, l'arrêt de la haute juridiction annula celui du Tribunal suprême dans sa totalité. Les requérants se limitant à contester une question qui relève de la technique juridique interne de l'Etat défendeur, la Cour se doit de signaler que le droit à bénéficier d'un procès équitable n'englobe pas celui de voir les moyens figurant dans le cadre d'un recours donné examinés dans un certain ordre.

Conclusion : irrecevable (défaut manifeste de fondement).

La Cour conclut aussi à l'irrecevabilité du grief concernant la durée de traitement du recours d'*amparo* devant le Tribunal constitutionnel pour non-épuisement des voies de recours internes et celui concernant l'interprétation par le Tribunal suprême de l'application de la prescription à l'égard de la loi pour défaut manifeste de fondement.

Lack of public hearing in summary administrative-offences proceedings: *communicated*

Absence d'audience publique lors d'une procédure administrative simplifiée : *affaire communiquée*

Marguč and Others/et autres – Slovenia/Slovénie - 14889/08 et al.
[Section III]

The applicants were fined by the police for various road-traffic offences. They challenged the payment orders before the local courts, but their requests for judicial protection were refused in summary proceedings without a public hearing. A failure to pay the fines could result in a prison sentence.

Communicated under Article 6 § 1.

ARTICLE 7

Nullum crimen sine lege

Conviction under legislation introduced in 1993 for war crimes committed in Second World War: *no violation*

Condamnation fondée sur une disposition adoptée en 1993 pour crimes de guerre commis durant la Seconde Guerre mondiale : *non-violation*

Kononov – Latvia/Lettonie - 36376/04
Judgment/Arrêt 17.5.2010 [GC]

Facts – In July 1998 the applicant was charged with war crimes arising out of an incident that had occurred more than fifty years earlier during the Second World War, when he was a member of a Soviet commando unit of Red Partisans. The charges were brought under Article 68-3 of the 1961 Criminal Code of the Soviet Socialist Republic of Latvia, a provision dealing with war crimes that had been inserted by the Latvian Supreme Council on 6 April 1993, following Latvian independence. The Criminal Affairs Division of the Latvian Supreme Court found the applicant guilty of various war crimes and sentenced him to twenty-months' imprisonment in view of his age and infirmity. According to the facts as established by the Latvian courts, on 27 May 1944 he had led a unit of Red Partisans on a punitive expedition on the village of Mazie Bati (which was then under German administration) following reports that certain of its inhabitants had betrayed another group of Partisans to the Germans. The unit had entered the village dressed in German uniforms and, after finding rifles and grenades supplied by

the Germans, had set fire to buildings and killed nine of the villagers, including three women, one in the final stages of pregnancy. None of those who died had been armed, or had attempted to escape or offered resistance. According to the applicant, the victims of the attack were collaborators who had delivered a group of Partisans into the hands of the Germans some three months earlier. His unit had been instructed by an *ad hoc* Partisan tribunal to capture those responsible so that they could be brought to trial, but he had not personally led the operation or entered the village.

In his application to the European Court, the applicant complained that the acts of which he had been accused had not, at the time of their commission, constituted an offence under either domestic or international law. He further maintained that in 1944, as a young soldier in a combat situation behind enemy lines, he could not have foreseen that his acts would constitute war crimes or that he would be prosecuted. In his submission, his conviction following Latvian independence in 1991 owed more to political expedience than to any real wish to fulfil international obligations to prosecute war criminals. In a judgment of 24 July 2008 a Chamber of the Court found, by four votes to three, that there had been a violation of Article 7 § 1 of the Convention (see Information Note no. 110).

Law – Article 7: The Court was not called upon to rule on the applicant's individual criminal responsibility as that was primarily a matter for the domestic courts. Its function was to examine whether, under the law as it stood on 27 May 1944, there had been a sufficiently clear legal basis for the applicant's convictions, whether their prosecution had become statute-barred in the interim, and whether the offences of which the applicant was ultimately convicted had been defined with sufficient accessibility and foreseeability. Since the factual evidence was disputed, the Court began its analysis on the basis of the hypothesis that was most favourable to the applicant, namely that the villagers were not ordinary civilians, but "combatants" or "civilians who had participated in hostilities".

(a) *Legal basis for the crimes in 1944* – The applicant had been convicted under Article 68-3 of the 1961 Criminal Code, a provision that had been introduced by the Supreme Council on 6 April 1993. Although Article 68-3 gave examples of acts considered to be war crimes, it relied on "relevant legal conventions" for a precise definition. Accordingly, the applicant's conviction had been based on international rather than domestic law.

The Court reviewed the position under international law in 1944. It noted that, following an extensive period of codification going back to the mid-nineteenth century, the Charter of the International Military Tribunal of Nuremberg had provided a non-exhaustive definition of war crimes for which individual criminal responsibility was retained. There had been agreement in contemporary doctrine that international law, in particular the Hague Convention and Regulations 1907, had already defined war crimes and required individuals to be prosecuted, so that the Charter was not *ex post facto* criminal legislation. Throughout that period of codification, domestic criminal and military tribunals had been the primary mechanism for the enforcement of the laws and customs of war, with international prosecution being the exception. Accordingly, the international liability of the State based on treaties and conventions did not preclude the customary responsibility of States to prosecute and punish individuals for violations of the laws and customs of war. International and national law served as a basis for domestic prosecutions and liability. In particular, where national law did not provide for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning. Accordingly, the Court considered that by May 1944 war crimes had been defined as acts contrary to the laws and customs of war and international law had defined the basic principles underlying, and an extensive range of acts constituting, such crimes. States were at least permitted (if not required) to take steps to punish individuals for war crimes, including on the basis of command responsibility.

The Court went on to consider, in the light of the "two cardinal principles" of humanitarian law – the "protection of the civilian population and objects" and the "obligation to avoid unnecessary suffering to combatants" – whether there had been a sufficiently clear and contemporary legal basis for the *specific* war crimes of which the applicant had been convicted. These crimes had included the ill-treatment, wounding and killing of the villagers, their treacherous wounding and killing, the burning to death of a pregnant woman and attacks on undefended localities.

As to the first of these offences, having regard notably to Article 23(c) of the Hague Regulations 1907, the murder and ill-treatment of the villagers had violated the fundamental rule that an enemy rendered *hors de combat* – in this case not carrying arms – was protected. Such persons were not required to have a particular legal status or to have formally surrendered. As combatants, the villagers

would also have been entitled to protection as prisoners of war under the control of the applicant and his unit and their subsequent ill-treatment and summary execution would have been contrary to the numerous rules and customs of war protecting prisoners of war. As regards the second offence, the domestic courts had reasonably relied on Article 23(b) of the Hague Regulations to found a separate conviction of treacherous wounding and killing for unlawfully inducing (by wearing German uniforms) the enemy to believe they were not under threat of attack. There had also been a plausible legal basis for convicting the applicant of the third offence (the burning to death of the expectant mother) given the special protection to which women had been entitled during war since as early as the Lieber Code 1863. Lastly, as regards the fourth offence, Article 25 of the Hague Regulations prohibited attacks against undefended localities except where "imperatively demanded by the necessities of war". There was nothing to suggest that that exception had applied in the applicant's case. Accordingly, the Court was satisfied that each of these offences had constituted a war crime. As the person who had organised, commanded and led the Partisan unit that had carried out the attack, the applicant had assumed command responsibility for those acts.

In conclusion, even assuming that the deceased villagers could be considered to have been "civilians who had participated in hostilities" or "combatants", there had been a sufficiently clear legal basis, having regard to the state of international law in 1944, for the applicant's conviction and punishment for war crimes as the commander of the unit responsible for the attack on Mazie Bati. If the villagers were considered to have been "civilians", they would have been entitled to even greater protection.

(b) *Whether the charges were statute-barred* – A domestic prosecution for war crimes in 1944 would have required reference to international law, not only as regards the definition of such crimes, but also as regards the determination of any limitation period. Accordingly, any domestic limitation period was not applicable. The essential question, therefore, was whether at any point prior to the applicant's prosecution, such action had become statute-barred by international law. International law was silent on the subject in 1944 and had not fixed any limitation period since. It followed that the applicant's prosecution had not been statute-barred.

(c) *Foreseeability* – The international laws and customs of war were sufficient, of themselves, to found individual criminal responsibility in 1944, so the fact that they were not referred to in the domestic legislation at that time could not be decisive. They constituted detailed *lex specialis* regulations fixing the parameters of criminal conduct in a time of war and were primarily addressed to armed forces and, in particular, commanders. Given his position as a commanding military officer, the applicant could reasonably have been expected to take special care in assessing the risks the Mazie Bati operation entailed. Even the most cursory reflection would have indicated that the flagrantly unlawful ill-treatment and killing of the villagers risked constituting war crimes for which, as commander, he could be held individually and criminally accountable. The Court rejected the applicant's submission that his prosecution had been politically unforeseeable, as it was both legitimate and foreseeable for a successor State to bring criminal proceedings against those who had committed crimes under a former regime. Successor courts could not be criticised for applying and interpreting the legal provisions in force at the relevant time during the former regime in the light of both the principles governing a State subject to the rule of law and the core principles on which the Convention system was built, particularly where the right to life was at stake. Those principles were applicable to a change of regime of the nature which had taken place in Latvia following independence.

Accordingly, at the time they were committed, the applicant's acts had constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war.

Conclusion: no violation (fourteen votes to three).

ARTICLE 8

Private life/Vie privée

Refusal to make medication available to assist suicide of a mental patient: *admissible*

Refus d'octroi de médicaments nécessaires au suicide d'un malade psychique : *recevable*

Haas – Switzerland/Suisse - 31322/07
Decision/Décision 20.5.2010 [Section I]

En fait – Le requérant souffre d'un grave trouble affectif bipolaire depuis une vingtaine d'années. Considérant que sa maladie le privait de vivre dans la dignité, il demanda à une association de droit

privé suisse proposant en particulier une assistance au suicide de l'aider dans cette démarche. Afin d'obtenir une substance mortelle soumise à prescription médicale, le requérant s'adressa à plusieurs médecins psychiatres en vain. Il demanda alors à différentes autorités l'autorisation de se procurer ladite substance dans une pharmacie, sans ordonnance, par l'intermédiaire de l'association, mais ses démarches n'aboutirent pas. Le requérant recourut devant le Tribunal fédéral contre les décisions de refus, qui rejeta les recours en novembre 2006.

En droit – Article 8 : le requérant, ressortissant suisse, même s'il était domicilié hors du territoire de l'Etat défendeur pendant une partie de la procédure, s'est adressé aux autorités de celui-ci afin de se procurer une substance mortelle sans ordonnance et par l'intermédiaire d'une association de droit privé suisse. Après avoir été débouté par les autorités, il a saisi les tribunaux compétents, qui ont rejeté ses demandes sur le fond. A aucun moment ceux-ci ne se sont déclarés incompétents *ratione loci* pour connaître de la cause du requérant. Ainsi, les questions soulevées dans la présente requête entrent dans la juridiction de l'Etat défendeur au sens de l'article 1 de la Convention et elles engagent sa responsabilité internationale. La Cour est compétente *ratione loci* pour connaître de la présente requête. A la lumière de l'ensemble des arguments des parties, le grief formulé par le requérant pose de sérieuses questions de fait et de droit, qui ne peuvent être résolues à ce stade de l'examen de la requête, mais qui nécessitent un examen au fond.

Conclusion : recevable (majorité).

Private and family life/Vie privée et familiale

Removal of tissue from deceased without knowledge or consent of family: *communicated*

Prélèvement de tissus sur un défunt à l'insu et sans le consentement de sa famille : *affaire communiquée*

Elberte – Latvia/Lettonie - 61243/08
[Section III]

After the applicant's husband died in a car accident, his body was transferred to a forensic centre with a view to establishing the cause of death. Tissue was removed from the body prior to burial. The applicant only became aware of this two years later, when the police opened an official inquiry into the illegal removal of organs and tissue from corpses by the forensic centre, allegedly for use by a German pharmaceutical company engaged in the manufacture of bioimplants. Under the terms of the agreement with the German company, tissue could be removed as long as the deceased had not objected during his lifetime and as long as his relatives did not object (although they were never contacted specifically about this issue). The police investigation was subsequently discontinued on the grounds that the applicable law provided for the "presumed consent" of the deceased's family.

Communicated under Articles 3 and 8, with separate questions concerning the applicant's victim status and the exhaustion of domestic remedies.

Family life/Vie familiale

Order annulling adoption following the divorce of the adoptive parents: *violation*

Décision de justice annulant une adoption à la suite du divorce des parents adoptifs : *violation*

Kurochkin – Ukraine - 42276/08
Judgment/Arrêt 20.5.2010 [Section V]

Facts – The applicant and his wife adopted an orphan. The marriage subsequently broke down and the applicant brought divorce proceedings. The wife sought an annulment of the adoption on the grounds that the child had been violent towards her and that the applicant had refused to stop the attacks. Her application was contested by both the applicant and the child, who wished to continue to live together. Following the couple's divorce (and the applicant's remarriage) the domestic courts annulled the adoption and made an order for the child to be placed in care on the grounds that the applicant had failed to show that he was able to influence the boy positively and secure his normal personal development. The child nevertheless continued to live with the applicant, who was subsequently appointed the child's guardian by the authorities.

Law – Article 8: This was not a case of a parent being declared unfit to care for a child because of physical or mental illness or violent or abusive conduct. Instead, the reason given by the domestic courts for annulling the adoption was that the applicant lacked authority over the child and had failed to show that he could ensure its proper upbringing. That conclusion had been based on evidence that the child had been aggressive to the adoptive mother. However, she and the applicant had divorced, so there did not appear to be any

reason why the annulment of the adoption order in her favour should also have necessitated the applicant's separation from the boy. The domestic courts' assertion that annulment could also be considered a sanction for the boy's behaviour did not appear to be a relevant reason for splitting up an established family unit. Furthermore, the domestic authorities did not appear to have carried out a careful assessment of the impact which the annulment of the adoption might have on the child's well-being or to have explored other less far-reaching alternatives that would be in line with the State's obligation to promote family unity. Instead, despite the fact that both the applicant and the boy had expressed the wish to remain together as a family, the authorities had laid the burden of proof on the applicant to show that he was able to influence and bring up the child properly. The boy had continued to live with the applicant after the orders annulling the adoption and requiring the child to be put in care were made and the child-welfare authority had subsequently appointed the applicant the child's guardian with responsibilities for his upbringing and development. These developments did not appear to support the domestic courts' findings that the applicant was incapable of ensuring the child's upbringing in a family environment. In sum, the findings of the domestic courts had not been supported by relevant and sufficient reasons such as to justify the interference with the applicant's family life.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 in respect of non-pecuniary damage.

Correspondence/Correspondance

Proportionality and safeguards of legislation on interception of internal communications: *no violation*

Proportionnalité et garanties de la législation sur l'interception des communications internes : *non-violation*

Kennedy – United Kingdom/ Royaume-Uni - 26839/05
Judgment/Arrêt 18.5.2010 [Section IV]

Facts – The applicant was convicted of manslaughter and sentenced to a term of imprisonment. His case was controversial on account of missing and conflicting evidence. After being released from prison in 1996, he started a business. He alleged that local calls to his telephone were not being put through to him and that he was receiving a number of time-wasting hoax calls. Suspecting that his business mail, telephone and email communications were being intercepted because of his high profile case and his subsequent involvement in campaigning against miscarriages of justice, the applicant complained to the Investigatory Powers Tribunal ("IPT"). He sought the prohibition of any communication interception by the intelligence agencies and the "destruction of any product of such interception". He also requested specific directions to ensure the fairness of the proceedings before the IPT, including an oral hearing in public, and a mutual inspection of witness statements and evidence between the parties. The IPT proceeded to examine the applicant's specific complaints in private. In 2005 it ruled that no determination had been made in his favour in respect of his complaints. This meant either that there had been no interception or that any interception which took place was lawful.

Law – Article 8

(a) *Existence of an "interference"* – In order to assess, in a particular case, whether an individual could claim an interference as a result of the mere existence of legislation permitting secret surveillance measures, the Court had to have regard to the availability of any remedies at the national level and the risk of secret surveillance measures being applied to him. Where there was no possibility of challenging the alleged application of secret surveillance measures at domestic level, widespread suspicion and concern among the general public that secret surveillance powers were being abused could not be said to be unjustified. In such cases, even where the actual risk of surveillance was low, there was a greater need for scrutiny by the Court. The applicant had failed to demonstrate a reasonable likelihood that there had been actual interception in his case. However, in the light of his allegations that any interception was taking place without lawful basis in order to intimidate him, it could not be excluded that secret surveillance measures had been applied to him or that, at the material time, he had been potentially at risk of being subjected to such measures.

(b) *Justification for the interference* – The interference in question had pursued the legitimate aims of protecting national security and the economic well-being of the country and preventing crime. In addition, it had been carried out on the basis of the Regulation of Investigatory Powers Act 2000 ("RIPA"), supplemented by the Interception of Communications Code of Practice. The Court was required to examine the proportionality of the

RIPA legislation itself and the safeguards built into the system allowing for secret surveillance. In the circumstances, the lawfulness of the interference was closely related to the question whether the "necessity" test had been complied with in respect of the RIPA regime. The Court therefore examined the RIPA regime with reference to each of the safeguards and guarantees against abuse that had been outlined in *Weber and Saravia v. Germany* ((dec.), no. 54934/00, 29 June 2006, Information Note no. 88) and, where relevant, to its findings in respect of the previous legislation at issue in *Liberty and Others v. the United Kingdom* (no. 58243/00, 1 July 2008, Information Note no. 110).

(i) *Nature of the offences*: RIPA provided that interception could only take place where the Secretary of State believed that it was necessary in the interests of national security, for the purposes of preventing or detecting serious crime or for the purposes of safeguarding the economic well-being of the United Kingdom. The Court found this provision sufficiently clear, given that the condition of foreseeability did not require States to set out exhaustively by name the specific offences which may give rise to interception.

(ii) *Categories of persons targeted*: Unlike the *Liberty and Others* case, the present case concerned internal communications. Under RIPA, it was possible for the communications of any person in the United Kingdom to be intercepted. However, warrants were required clearly to specify the interception subject. The indiscriminate capturing of vast amounts of communications was not permitted. In the circumstances, no further clarification of the categories of persons liable to have their communications intercepted could reasonably be required.

(iii) *Duration of telephone tapping*: RIPA clearly stipulated the period after which an interception warrant would expire and the conditions under which a warrant could be renewed. The renewal or cancellation of interception warrants was under the systematic supervision of the Secretary of State. The overall duration of any interception measures depended on the complexity and duration of the investigation in question and, provided that adequate safeguards existed, it was not unreasonable to leave this matter to the discretion of the domestic authorities. The Court found the relevant domestic provisions sufficiently clear.

(iv) *Procedure for examining, using and storing data*: Interception warrants for internal communications related to one person or one set of premises only, thereby limiting the scope of the authorities' discretion to intercept and listen to private communications. Moreover, any captured data which were not necessary for any of the authorised purposes had to be destroyed.

(v) *Processing and communication of intercept material*: Domestic law strictly limited the number of persons to whom intercept material could be disclosed, imposing a requirement for the appropriate level of security clearance as well as a requirement to communicate data only so much as the individual needed to know, in particular, a summary only would be disclosed whenever sufficient. Intercept material, as well as copies and summaries, were to be handled and stored securely and to be inaccessible to those without the necessary security clearance. A strict procedure for security vetting was in place. The Court was thus satisfied that the provisions provided adequate safeguards for the protection of any data obtained.

(vi) *Destruction of intercept material*: The material was to be destroyed as soon as there were no longer any grounds for its retention. The necessity of such retention was to be reviewed at appropriate intervals.

(vii) *Supervision of the RIPA regime*: Apart from the periodic review of interception warrants and materials by intercepting agencies and, where appropriate, the Secretary of State, the Interception of Communications Commissioner established under RIPA was tasked with overseeing the general functioning of the surveillance regime and the authorisation of interception warrants in specific cases. The Commissioner was independent of the executive and the legislature and was a person who held or had held high judicial office. The obligation on intercepting agencies to keep records ensured that the Commissioner had effective access to details of surveillance activities undertaken. In addition, any person who suspected that his communications had been or were being intercepted could apply to the IPT, which was an independent and impartial body. The jurisdiction of the IPT did not depend on notification to the interception subject that there had been an interception of his communications. When the IPT found in the applicant's favour, it could quash any interception order, require destruction of intercepted material and order compensation. The publication of the IPT's legal rulings further enhanced the level of scrutiny over secret surveillance activities in the United Kingdom. Finally, the reports of the Commissioner scrutinised any errors which had occurred in the operation of the legislation. There was no evidence that any deliberate abuse of interception powers was taking place.

The domestic law on the interception of internal communications together with the clarifications brought by the publication of the Interception of Communications Code of Practice indicated with sufficient clarity the procedures for the authorisation and processing of interception warrants as well as the processing, communicating and destruction of intercept material collected. Having regard to the safeguards against abuse in the procedures as well as the more general safeguards offered by the supervision of the Commissioner and the review of the IPT, the impugned surveillance measures, in so far as they might have been applied to the applicant, had been justified under Article 8 § 2 of the Convention.

Conclusion: no violation (unanimously).

Article 6 § 1: The restrictions on the procedure before the IPT had not violated the applicant's right to a fair trial. In reaching this conclusion, the Court emphasised the breadth of access to the IPT enjoyed by those complaining about interception within the United Kingdom and the absence of any evidential burden to be overcome in order to lodge an application with the IPT. In order to ensure the efficacy of the secret surveillance regime, and bearing in mind the importance of such measures to the fight against terrorism and serious crime, the Court considered that the restrictions on the applicant's rights in the context of the proceedings before the IPT had been both necessary and proportionate and had not impaired the very essence of the applicant's Article 6 rights.

Conclusion: no violation (unanimously).

ARTICLE 9

Freedom of religion/Liberté de religion

Conviction of conscientious objector for refusing to perform military service: *case referred to the Grand Chamber*

Condamnation d'un objecteur de conscience refusant d'accomplir son service militaire: *affaire renvoyée devant la Grande Chambre*

Bayatyan – Armenia/Arménie - 23459/03
Judgment/Arrêt 27.10.2009 [Section III]

The applicant, a Jehovah's Witness, had refused to serve in the military on conscientious grounds. He was convicted of draft evasion and given a prison sentence. In his application to the European Court, he complained that his conviction had violated his right to freedom of religion. In a judgment of 27 October 2009 (see Information Note no. 123) a Chamber of the Court held, by six votes to one, that there had been no violation of his rights as Article 9 could not be interpreted as guaranteeing a right to refuse military service on conscientious grounds. Even though, given Armenia's official commitment to recognising the right to conscientious objection, the applicant could have had a legitimate expectation that he would be allowed to perform civil service instead of serving a prison sentence, the authorities could not be regarded as having breached their Convention obligations by convicting him for his refusal to serve in the military.

On 10 May 2010 the case was referred to the Grand Chamber at the applicant's request.

Constitutional amendment prohibiting the building of minarets: *communicated*

Modification de la constitution interdisant la construction de minarets: *affaires communiquées*

Ouardiri – Switzerland/Suisse - 65840/09
Association « Ligue des musulmans de Suisse » and Others/et autres – Switzerland/Suisse - 66274/09
[Section I]

Dans l'affaire *Ouardiri*, le requérant est un particulier de confession musulmane travaillant pour une fondation qui œuvre sur la question islamique et le reste du monde.

Dans l'affaire *Association « Ligue des musulmans de Suisse » et autres*, les requérants sont trois associations et une fondation dont les missions ont pour points communs la religion musulmane.

En juillet 2008, une initiative populaire « Contre la construction des minarets » (ci-après « l'initiative ») accompagnée de 113 540 signatures de citoyens, ayant pour objet une révision partielle de la Constitution, fut déposée auprès de la Chancellerie fédérale. En août 2008, le Conseil fédéral (Gouvernement) déposa auprès de l'Assemblée fédérale (Parlement fédéral) un projet d'arrêté fédéral relatif à l'initiative. Un message accompagnant le projet signifiait les risques d'atteinte aux articles 9 et 14 de la Convention. En juin 2009, l'Assemblée fédérale adopta un arrêté fédéral validant l'initiative, la soumettant au vote du peuple et des cantons, stipulant qu'elle entraînera modification de la Constitution et recommandant au peuple et aux cantons de rejeter l'initiative. Une votation populaire eut lieu en novembre 2009. Selon les résultats encore provisoires, 53,4 % des personnes ayant

participé au scrutin acceptèrent l'initiative et seuls quatre cantons la refusèrent.

Communiquées sous l'angle de l'article 9, de l'article 14 combiné à l'article 9, et des articles 34 et 35 § 1.

ARTICLE 10

Freedom of expression/Liberté d'expression

Dismissal of trade unionists for offensive and humiliating publication: *case referred to the Grand Chamber*

Licenciement de syndicalistes pour une publication offensante et humiliante : *affaire renvoyée devant la Grande Chambre*

Aguilera Jiménez and Others/et autres – Spain/Espagne - 28389/06 et al.
Judgment/Arrêt 8.12.2009 [Section III]

Employés par une société où ils étaient livreurs et membres de la commission exécutive d'un syndicat, les six requérants furent licenciés à la suite de la publication, dans le bulletin d'information du syndicat, d'une caricature et d'articles visant le directeur des ressources humaines et d'autres salariés. Ils contestèrent cette décision en justice. Le juge du travail estima leur licenciement justifié, au motif que la publication en cause était offensante, portait atteinte à l'honneur et à la dignité des personnes visées et dépassait les limites de la liberté d'expression. La juridiction d'appel confirma cette décision pour quatre des requérants, mais jugea abusif le licenciement des deux autres, faute de preuves de leur participation directe aux faits, et ordonna leur réintégration ou leur indemnisation. Le recours en cassation des requérants fut rejeté par le Tribunal suprême, et leur recours d'*amparo* fut déclaré irrecevable par le Tribunal constitutionnel.

Par un arrêt du 8 décembre 2009, où seules les requêtes des requérants n'ayant pas obtenu gain de cause devant les juridictions internes ont été déclarées recevables et examinées au fond, une chambre de la Cour a conclu, par six voix contre une, à la non-violation de l'article 10 de la Convention. Elle a estimé que les juridictions espagnoles avaient analysé minutieusement les faits litigieux pour juger que le dessin et les articles constituaient, de par leur gravité et leur ton, des attaques personnelles, offensantes, outrancières, gratuites et nullement nécessaires à la légitime défense des intérêts des requérants, qui avaient dépassé les limites acceptables du droit de critique. Ce faisant, les juridictions nationales avaient mis en balance les intérêts en conflit, et leurs décisions ne pouvaient être considérées ni comme déraisonnables ni comme arbitraires. Dès lors, les autorités n'avaient pas outrepassé leur marge d'appréciation en sanctionnant les requérants.

Le 10 mai 2010, l'affaire a été renvoyée devant la Grande Chambre à la demande de la partie requérante.

Conviction for publication of allegations insinuating that a Muslim professor had taken part in terrorist activities: *violation*

Condamnation pour la publication d'allégations insinuant la participation d'un professeur musulman à une activité terroriste : *violation*

Brunet Lecomte and/et Lyon Mag – France - 17265/05
Judgment/Arrêt 6.5.2010 [Section V]

En fait – Les requérants sont le directeur de publication et la société éditrice du magazine *Lyon Mag'*. Le numéro d'octobre 2001 titrait : « Exclusif, Sondage SOFRES, Les musulmans de l'agglomération face au terrorisme. Enquête : Faut-il avoir peur des réseaux islamistes à Lyon ? ». Il reproduisait sur les trois quarts de la couverture une photographie de T. avec pour légende « T., Un des leaders musulmans les plus influents à Lyon » et un article lui était consacré (« T. l'ambigu »). Saisi par T., le tribunal correctionnel conclut au caractère diffamatoire de la publication mais prononça une relaxe et débouta T. de son action civile en raison de la bonne foi des requérants. La cour d'appel infirma le jugement en 2003 constatant que le délit de diffamation publique envers un particulier était constitué. Elle condamna le premier requérant à payer des dommages-intérêts à T. et déclara la société requérante civilement responsable. En 2004, la Cour de cassation rejeta le pourvoi des requérants.

En droit – Article 10 : la condamnation pour diffamation s'analyse en une ingérence dans l'exercice par les requérants de leur droit à la liberté d'expression, prévue par la loi et poursuivant le but de la protection de la réputation ou des droits d'autrui. La cour d'appel s'est fondée sur le texte litigieux et n'a pas jugé pertinentes les offres de preuve formulées par les requérants et a rejeté l'exception de bonne foi. La Cour estime cependant que les éléments textuels et les insinuations incriminés doivent être examinés dans leur contexte, à

savoir la publication d'une série d'articles résultant d'une enquête de trois semaines de terrain sur les réseaux islamistes locaux. Ensuite, T., en tant que professeur et sans être comparé à un personnage public, s'est exposé à la critique journalistique par la publicité qu'il a donnée à certaines de ses idées ou convictions, et peut donc s'attendre à un contrôle minutieux de ses propos. Les nombreux documents contenus dans l'offre de preuve et produits devant la Cour font clairement état du danger que représentent les discours de T. De plus, l'article se fonde notamment sur l'interdiction qui avait été faite à celui-ci, quelques années auparavant, ainsi qu'à son frère, de pénétrer sur le territoire français sur la base d'éléments, dûment mentionnés, émanant du service français des renseignements généraux. Dès lors, lesdits propos reposaient sur une base factuelle. De surcroît, la multiplicité et le sérieux des sources consultées et de l'enquête réalisée, conjugués à la modération et à la prudence des propos tenus, permettent de conclure à la bonne foi des requérants. Les propos litigieux publiés par l'organe de presse informé ne dépassent pas les limites de la critique admissible en la matière. Surtout, la marge d'appréciation dont disposaient les autorités pour juger de la nécessité de la sanction était particulièrement restreinte. Les écrits litigieux publiés très peu de temps après les attentats du 11 septembre 2001 portaient sur ce débat politique d'une actualité immédiate replacé dans le contexte local. Par conséquent, l'intérêt des requérants à communiquer et celui du public à recevoir des informations sur un sujet d'intérêt global et sur ses répercussions directes pour l'ensemble de l'agglomération lyonnaise est de nature à l'emporter sur le droit de T. à la protection de sa réputation. Ainsi, les motifs avancés par les juridictions pour justifier la condamnation des requérants n'étaient pas pertinents et suffisants. Enfin, une amnistie de 2002 a mis fin à l'action publique exercée contre les requérants. Seule l'action civile subsistait, ayant donné lieu à leur condamnation solidaire à 2 500 EUR de dommages et intérêts. Au vu des faits leur étant reprochés, pareille condamnation est disproportionnée. Aussi l'ingérence dans l'exercice par les requérants de leur droit à la liberté d'expression n'était pas nécessaire dans une société démocratique.

Conclusion : violation (cinq voix contre deux).

Re-entry ban on American academic for controversial statements on Kurdish and Armenian issues: *violation*

Interdiction faite à une universitaire américaine de revenir dans le pays en raison de déclarations controversées sur des questions kurdes et arméniennes : *violation*

Cox – Turkey/Turquie - 2933/03
Judgment/Arrêt 20.5.2010 [Section II]

Facts – The applicant, a US citizen, had worked in two Turkish universities in the 1980s. She was expelled and banned from re-entering the country in 1986 on account of statements she had made in front of students and colleagues that "Turks had assimilated Kurds" and that they "had expelled and massacred Armenians". She was also expelled on two further occasions. In 1996 the applicant brought proceedings requesting that the ban be lifted, but her claim was dismissed.

Law – Article 10: Even though the right of a foreigner to enter or remain in a country was as such not guaranteed by the Convention, immigration controls were to be exercised consistently with Convention obligations. The applicant was precluded from re-entering the country on grounds of her controversial statements concerning Kurdish and Armenian issues, which continued to be the subject of heated debate, not only in Turkey, but also internationally. Opinions expressed on such issues by one side might offend the other, but a democratic society required tolerance and broadmindedness in the face of controversial expressions. Moreover, when, as in the applicant's case, the interference with a Convention right consisted of a denial of re-entry to a country, the Court was empowered to examine the grounds for that ban. However, from the domestic courts' reasoning it was impossible to conclude how and why the applicant's views had been deemed harmful to Turkey's national security. Nor could it be accepted that "the situation complained of did not fall within the ambit of any of the applicant's fundamental rights". Bearing in mind that it had never been suggested that the applicant had committed an offence or shown that she had ever been engaged in any activities which could clearly be seen as harmful to Turkey, the reasons adduced by the domestic courts could not be regarded as sufficient and relevant justification for the interference with her right to freedom of expression.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 in respect of non-pecuniary damage.

ARTICLE 34

Victim/Victime

Intervening domestic friendly settlement for payment of judgment debt following substantial delays in payment: *victim status upheld*

Conclusion au niveau interne d'un accord de règlement amiable pour le remboursement d'une créance reconnue en justice, à la suite d'importants retards de paiement : *qualité de victime reconnue*

Düzdemir and/et Güner – Turkey/Turquie - 25952/03 and/et 25966/03
Judgment/Arrêt 27.5.2010 [Section II]

Facts – The applicants obtained final judgment debts against their employer, a municipality, after being laid off. Several years later, after the applicants had complained to the European Court, the municipality entered into friendly-settlement agreements with them and paid the outstanding amounts. Notwithstanding those agreements, the applicants claimed compensation in the proceedings before the Court for pecuniary damage equal to the return on investment they would have received had they been paid promptly and for non-pecuniary damage incurred as a result of the delays in payment. The Government argued that the agreements had resolved the matter before the Court and that the applicants had therefore lost their victim status.

Law – (a) *Admissibility:* Article 6 § 1 of the Convention and Article 1 of Protocol No. 1 – Although the friendly-settlement agreements with the municipality stipulated that the applicants waived any outstanding claims to compensation, rights and other credits against the payment of certain lump sums, they covered only claims under Article 1 of Protocol No. 1. The "matter" which had been resolved, therefore, was solely the "deprivation of property" complaint. The payment of the outstanding amounts had not remedied the applicants' complaint under Article 6 § 1 of the Convention concerning crucial employment issues caused by the authorities' protracted failure to execute the domestic judgments. Accordingly, the friendly-settlement agreements had deprived the applicants of victim status only in respect of the Article 1 of Protocol No. 1 complaint and the complaint under Article 6 § 1 was admissible.

Conclusion: admissible under Article 6 § 1 (unanimously); inadmissible under Article 1 of Protocol No. 1 (unanimously).

(b) *Merits*: Article 6 § 1 – The Court held that, by failing for several years to take the necessary measures to comply with final judicial decisions, the authorities had deprived the provisions of Article 6 § 1 of most of their useful effect.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 each in respect of non-pecuniary damage.

ARTICLE 35

Article 35 § 3

Competence *ratione materiae*/Compétence *ratione materiae*

Refusal to reopen civil proceedings following finding of Article 6 violation not based on relevant new grounds capable of giving rise to a fresh violation: *inadmissible*

Refus de rouvrir une procédure civile, après un constat de violation de l'article 6, non fondé sur de nouveaux éléments pertinents susceptibles de mener à un nouveau constat de violation : *irrecevable*

Steck-Risch and Others/et autres – Liechtenstein - 29061/08
Decision/Décision 11.5.2010 [Section V]

Facts – In a judgment of 19 May 2005 (application no. 63151/00) the European Court found a violation of the applicants' right to a fair trial in that they had not been afforded an opportunity to comment on their opponent's observations in proceedings for compensation before an administrative court. The Court declined, however, to make an award in respect of pecuniary damage as it found that there was no causal link between the violation found and the alleged damage and it was not called upon to speculate on what the outcome would have been if the proceedings had complied with the requirements of Article 6 § 1. In the absence of exceptional circumstances, the Court also refused the applicants' request for an order requiring the domestic proceedings to be reopened. The applicants subsequently lodged a request with the domestic courts to reopen the proceedings. In dismissing an appeal by the applicants against a refusal to grant that request, the Constitutional Court held that Liechtenstein law did not provide for the reopening of proceedings

in such circumstances. Further, while it expressly accepted the European Court's finding of a violation, it considered that that finding had constituted sufficient redress in the circumstances of the case.

In a fresh application to the European Court, the applicants complained under Article 6 of the Convention that the domestic courts' decision not to reopen the compensation proceedings constituted a continuous violation of their right to a fair trial and of their right of access to court.

Law – Article 6 § 1: In order to determine its competence *ratione materiae*, the Court had to ascertain whether the applicants' new application contained relevant new information possibly entailing a fresh violation of Article 6, or whether it concerned only the execution of the initial application without raising any relevant new facts. The Court distinguished the present case from *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*[1] on two counts. Firstly, whereas the Swiss Federal Court in the latter case had mainly relied on new grounds in deciding to dismiss a request to reopen the domestic proceedings, the Liechtenstein Constitutional Court in the applicants' case had dismissed a like request essentially because municipal law did not provide for the reopening of domestic proceedings following a finding by the European Court of a violation. The Constitutional Court had, moreover, expressly acknowledged the violation. Accordingly, its refusal to reopen the proceedings had not been based on relevant new grounds capable of giving rise to a fresh violation. As to the second distinguishing feature between the two cases, the Court noted that, unlike the position in *Verein gegen Tierfabriken Schweiz (VgT) (no. 2)*, the Committee of Ministers in the applicants' case had not, when deciding to end its supervision of the execution of the judgment, been under the misapprehension that the applicants would be able to request the reopening of the domestic proceedings. While these considerations were not intended to detract from the importance of ensuring that domestic procedures were in place which allowed a case to be revisited in the light of a finding that Article 6 had been violated, the present application had to be rejected as being incompatible *ratione materiae* with the provisions of the Convention.

Conclusion: inadmissible (incompatible *ratione materiae*).

1. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, 30 June 2009, Information Note no. 120.

ARTICLE 37

Article 37 § 1

Continued examination not justified/
Poursuite de l'examen non justifiée

Unilateral declaration affording adequate redress and announcing introduction of general remedial measures for length-of-proceedings complaints: *struck out*

Déclaration unilatérale offrant une réparation adéquate et annonçant l'adoption de mesures générales de réparation pour les plaintes concernant la durée d'une procédure : *radiation du rôle*

Facondis – Cyprus/Chypre - 9095/08
Decision/Décision 27.5.2010 [Section I]

Facts – In proceedings before the European Court concerning the length of civil proceedings before the domestic courts, the Government made a unilateral declaration in which they expressly acknowledged violations of Article 6 § 1 and Article 13 of the Convention and offered to pay the applicant EUR 17,000 in respect of damage and costs and expenses. The Government further indicated that a Bill was pending before the legislature that would provide remedies for length-of-hearing complaints in civil and administrative proceedings, including proceedings concluded before the legislation came into force. Courts hearing such complaints would have the power to award compensation and to make orders expediting the proceedings. Regulatory measures were also being introduced with a view to addressing the underlying problem of unreasonable delays. Lastly, the Cypriot Supreme Court was conducting a review of the rules of civil procedure and had proposed a series of practical measures to help speed up the system, including the accelerated transcription of court records, the computerisation of the judicial service and disciplinary measures against judges guilty of delays. In these circumstances, the Government requested the Court to strike out the application in accordance with Article 37 of the Convention.

Law – Article 37: In view of the clear acknowledgment of a breach of Articles 6 § 1 and 13 of the Convention, the entry into force of Law no. 2(I)/2010 establishing national remedies for complaints of a violation of the reasonable-time requirement, and the adequate financial compensation that had been afforded, the Court was satisfied

that respect for human rights did not require it to continue with the examination of this part of the application.

Conclusion: struck out (unanimously).

ARTICLE 46

Execution of a judgment – Measures of a general character/Exécution des jugements – Mesures générales

Respondent State required to take general measures to put an end to unlawful occupation of land

Etat défendeur tenu de prendre des mesures générales pour prévenir l'occupation illégale de biens immobiliers

Sarıca and/et Dilaver – Turkey/Turquie - 11765/05
Judgment/Arrêt 27.5.2010 [Section II]

(See Article 1 of Protocol No. 1 below/Voir l'article 1 du Protocole nº 1 ci-dessous – page 23)

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

Peaceful enjoyment of possessions/Respect des biens

Inability to recover possession of flat on account of service in military forces involved in war hostilities in the country: *violation*

Impossibilité pour le requérant de reprendre possession d'un appartement au motif qu'il a servi dans les forces militaires ayant pris part aux hostilités dans le pays : *violation*

Đokić – Bosnia and Herzegovina/ Bosnie-Herzégovine - 6518/04
Judgment/Arrêt 27.5.2010 [Section IV]

Facts – During the 1980s, the applicant was working as a lecturer at a military school based in Sarajevo and was allocated a military flat. In March 1992 he sought to buy the flat. However, even though he paid the purchase price in full, the local authorities refused to register his title to the property because the sale of military flats had temporarily been put on hold. At around the same time the war started in Bosnia and Herzegovina. The applicant's military school was transferred to Serbia and the applicant left Sarajevo to join the armed forces of the Federal Republic of Yugoslavia. After the war, the applicant tried to recover possession of the flat, but his request was refused since he was unable to prove that he had been a refugee or a displaced person as required under the relevant legislation. Even after a subsequent change in the law, a restriction remained in respect of persons seeking to recover possession of military flats who had served in the army of one of the successor states to the former Yugoslavia. The applicant's subsequent appeal to the Human Rights Commission was also rejected since the Commission held that his service in the forces of the Federal Republic of Yugoslavia had demonstrated his disloyalty to Bosnia and Herzegovina. Given the serious shortage in housing and the fact that the applicant was entitled to compensation, the interference with his property rights had been justified.

Law – Article 1 of Protocol No. 1: The Court was aware of the strong local opposition to those who had served in the military forces of the Federal Republic of Yugoslavia returning to their pre-war homes. This was due to their participation in military operations in Bosnia and Herzegovina, and in particular Sarajevo, which had been subjected to blockages, daily shelling and sniping throughout the war. However, there was no indication that the applicant had in any way participated in any military operations or war crimes in Bosnia and Herzegovina. He had been treated differently merely because of his service in those forces, which was indicative of his ethnic origin. As regards the Government's argument relating to the shortage of housing and the need to accommodate destitute members of the local armed forces, the statistical data provided did not show that the free housing space had in fact been used to accommodate those deserving of protection. The figures simply confirmed that most military flats were allocated to war veterans, invalids and families of killed members of the local army, without indicating their housing situation or their income. Finally, neither the amount of compensation the applicant would be entitled to receive nor the refund calculated on the amount paid for the Sarajevo flat was reasonably related to the flat's market value. In such circumstances, the Court concluded that a fair balance between the applicant's property rights and the requirements of the public interest had not been struck.

Conclusion: violation (unanimously).

Article 41: EUR 60,000 in respect of pecuniary damage and EUR 5,000 in respect of non-pecuniary damage.

Possessions/Biens
Peaceful enjoyment of possessions/Respect des biens

Eviction of an internally displaced person from State-owned accommodation after ten years' uninterrupted good-faith occupation: *violation*

Personne déplacée interne expulsée de son logement appartenant à l'Etat après dix ans d'occupation ininterrompue et de bonne foi : *violation*

Saghinadze and Others/et autres – Georgia/Géorgie – 18768/05
Judgment/Arrêt 27.5.2010 [Section II]

Facts – The applicants were internally displaced persons (IDPs) who had fled Abkhazia (Georgia) in 1993, abandoning their homes and property there following the armed conflict of 1992-93. In 1994 the first applicant, a high-ranking official in the Abkhazian Ministry of the Interior, was offered the post of Head of the Investigative Department within the Georgian Ministry of the Interior. He and his family were subsequently settled in a cottage belonging to the Ministry that was intended to provide accommodation to exiled staff members. The first applicant and his family, along with eight other homeless relatives, started living in the cottage and using the adjacent plot of land where they grew vegetables and fruit, and kept poultry and small livestock. In 1998 the first applicant retired from the Ministry, which, in a letter to him and to the relevant local-government authorities, confirmed that he held legitimate possession of the cottage and adjacent premises, but that his possession was of a temporary nature and for an unspecified period of time. After the Rose Revolution in 2003, the first applicant was called out of retirement by the newly appointed Minister of the Interior and agreed to lead the investigation into a high-profile criminal case. According to him, the findings of the investigation proved inconvenient for certain high-ranking officials and the then Prosecutor General personally asked him to drop it. In 2004 that Prosecutor General was appointed Minister of the Interior and allegedly ousted the first applicant from office. In November 2004, in the first applicant's absence, a group of about sixty armed special-force agents wearing black balaclava-like masks broke into the cottage and, without any legal document authorising their actions, forcibly ousted the family members and relatives present in the cottage at the time. Police officers remained stationed in the cottage and on the adjoining land after the eviction. The courts dismissed the first applicant's civil claims and criminal complaints. Subsequently the first applicant was convicted of various offences and sentenced to seven years in prison.

Law –

Admissibility: Only the first applicant had pursued his complaints before the national judicial authorities. Consequently, the Court rejected the complaints of the rest of the applicants for failure to exhaust the domestic remedies available in Georgia.

Article 3: As regards the allegedly degrading manner in which the eviction had taken place, the first applicant had not been at home during the eviction and so could not claim personally to have been a victim of it.

Conclusion: inadmissible (incompatible *ratione personae*).

Article 1 of Protocol No. 1: (a) *Existence of a "possession"* – The first applicant had not been squatting the cottage as it had been offered to him by his employer, the Ministry of the Interior, which, in accordance with a ministerial order, had been authorised to use the cottage for the purpose of housing staff members displaced from Abkhazia. Even assuming that there had existed a more appropriate formal procedure for the transfer of the cottage to the first applicant, the authorities could not reasonably have been expected to follow up in detail every housing situation given there had been about 300,000 IDPs to care for at the time. More importantly, having regard to the authorities' manifest tolerance of the first applicant's exclusive, uninterrupted and open use of the cottage and the adjacent premises for more than ten years, such possession maintained its good-faith character, even in the absence of a registered property title. Moreover, by adopting various legal acts, the State had confirmed the IDPs' rights in the housing sector and established solid guarantees for their protection. The most conspicuous and authoritative amongst these was the Internally Displaced Persons and Refugees Act of 28 June 1996, which recognised that an IDP's possession of a dwelling in good faith constituted a right of a pecuniary nature. Thus, it was not possible to evict an IDP against his or her will from an occupied dwelling without offering in exchange either similar accommodation or appropriate monetary compensation.

In sum, the first applicant had had a right to use the cottage as his accommodation and this right had a clear pecuniary dimension. It should therefore be regarded as "a possession" for the purposes of Article 1 of Protocol No. 1.

(b) *Existence of an interference and its justification* – It was not in dispute between the parties that there had been interference with the first applicant's right to the peaceful enjoyment of his possessions. The only lawful way for the Ministry of the Interior to have reclaimed the cottage from the first applicant would have been to bring adversarial proceedings in court. However, the eviction and dispossession had occurred in the absence of any court decision, pursuant to an oral order by the Minister of the Interior. In the subsequent court proceedings brought by the first applicant, the courts had failed to acknowledge that he had been in continuous good-faith possession of the cottage for over ten years and that his eviction and dispossession had been carried out unlawfully. They had likewise not afforded him the protection provided for in the relevant domestic laws concerning IDPs. The Supreme Court in particular had contradicted its own earlier case-law in which it had prevented a State agency from retrieving a State-owned dwelling from IDPs. In sum, the interference with the first applicant's peaceful enjoyment of his possessions had not been lawful, whilst the subsequent judicial review had been arbitrary and amounted to a denial of justice.

Conclusion: violation (six votes to one).

Article 8: The taking of the cottage, which had been the first applicant's home for more than ten years, had also constituted an unlawful interference with his right to respect for his home.

Conclusion: violation (unanimously).

Article 41: The most appropriate form of redress would be to have the cottage restored to the first applicant's possession pending the establishment of conditions which would allow his return, in safety and with dignity, to his place of habitual residence in Abkhazia, Georgia. Alternatively, should the return of the cottage prove impossible, the first applicant's claim could also be satisfied by providing him, as an internally displaced person, with other proper accommodation or reasonable compensation, the amount of which should be agreed on by the parties within six months from the date on which the judgment became final. Should the parties fail to reach agreement within that period, the Court reserved the right to fix the further procedure under Article 41 of the Convention, in order to determine itself the amount of such compensation. The Court also awarded the first applicant EUR 15,000 in respect of non-pecuniary damage.

Deprivation of property/Privation de propriété

Constructive expropriation without payment of compensation: *violation*

Expropriation de fait sans indemnisation : *violation*

Sarıca and/et Dilaver – Turkey/Turquie - 11765/05
Judgment/Arrêt 27.5.2010 [Section II]

En fait – En 1983, constatant l'intégration de fait dans une zone militaire de trois de ses terrains, un propriétaire demanda à bénéficier d'une expropriation en bonne et due forme. L'administration ne donna pas suite mais en 2001, se prévalant d'une prescription acquisitive de vingt ans, elle engagea une action judiciaire tendant à faire enregistrer sans indemnisation les terrains au nom du Trésor. Le propriétaire introduisit quant à lui une action en dommages et intérêts pour obtenir réparation du préjudice causé par l'expropriation de fait. En 2003, le tribunal de grande instance donna gain de cause aux requérants, ayants droit du propriétaire entre-temps décédé, condamnant l'administration à leur verser une indemnité majorée d'intérêts moratoires au taux légal, et ordonnant le transfert de propriété au Trésor. La Cour de cassation confirma ce jugement en 2004. Plus tard, les requérants demandèrent à l'administration que les intérêts moratoires soient calculés sur la base du taux maximum applicable aux dettes publiques. Cependant, les indemnités qui leur furent finalement versées fin 2004 étaient assorties du taux d'intérêt légal, moins élevé.

En droit – Article 1 du Protocole nº 1 : l'ingérence s'analyse en une privation de propriété. L'expropriation de fait permet à l'administration d'occuper un bien immobilier et d'en transformer irréversiblement la destination, de telle sorte qu'il soit considéré comme acquis au patrimoine public sans qu'il y ait eu le moindre acte formel et déclaratoire du transfert de propriété. En l'absence d'un tel acte, le seul élément permettant de légitimer le transfert du bien occupé et de garantir rétroactivement une certaine sécurité juridique est le jugement du tribunal saisi qui ordonne le transfert de propriété après avoir constaté l'illégalité de l'occupation dénoncée

et alloué aux demandeurs des dommages et intérêts. Cette pratique oblige les intéressés, qui juridiquement demeurent propriétaires de leurs biens, à ester en justice contre l'administration qui, jusqu'alors, n'a jamais eu à justifier son acte par un quelconque motif d'utilité publique. Or, en matière d'expropriation formelle, la procédure est déclenchée par l'administration expropriante, qui doit en principe supporter les frais de justice à défaut de règlement amiable. Le constat d'une expropriation de fait tend dans tous les cas à entériner juridiquement une situation irrégulière volontairement créée par l'administration et à permettre à celle-ci de tirer bénéfice de son comportement illégal. L'expropriation de fait expose les justiciables au risque d'un résultat imprévisible et arbitraire. Ce procédé n'est pas apte à assurer un degré suffisant de sécurité juridique et ne saurait remplacer une expropriation en bonne et due forme. En l'espèce, les intéressés ont subi une expropriation de fait. En l'absence d'un acte formel d'expropriation, l'issue de la procédure n'était pas prévisible pour eux. Ils n'ont été fixés quant à la privation de leurs terrains qu'au moment où la Cour de cassation a confirmé le transfert de propriété. En outre, la Cour européenne ne saurait admettre que le taux d'intérêt maximal applicable aux dettes publiques soit réservé aux expropriations formelles et qu'une expropriation irrégulière en la forme soit majorée d'un taux moins élevé, car cela incite l'administration à privilégier pour des raisons économiques les expropriations sans base légale. En conséquence, l'ingérence litigieuse n'est pas conforme au principe de légalité et elle a donc enfreint le droit des requérants au respect de leurs biens.

Conclusion : violation (unanimité).

Article 46 : la Cour, au vu du nombre élevé de requêtes dont elle se trouve saisie sur la question des expropriations de fait, estime que cette violation tire son origine d'un problème structurel lié à des agissements extrajudiciaires par lesquels l'administration turque s'approprie des biens de manière irrégulière. Des mesures générales au niveau national s'imposent sans aucun doute dans le cadre de l'exécution du présent arrêt, mesures qui doivent prendre en considération les nombreuses personnes touchées. Ainsi, l'Etat défendeur devrait avant tout s'efforcer de prévenir toute occupation illégale de biens immobiliers, qu'il s'agisse d'occupation sans titre depuis le début ou d'occupation initialement autorisée et devenue sans titre par la suite. Dans cette optique, il serait concevable de n'autoriser l'occupation de tels biens que lorsqu'il est établi que le projet et les décisions d'expropriation ont été adoptés dans le respect des règles fixées par la loi et qu'ils sont assortis d'une ligne budgétaire apte à garantir une indemnisation rapide et adéquate des intéressés. En outre, l'Etat défendeur devrait décourager les pratiques non conformes aux règles de l'expropriation en bonne et due forme, en adoptant des dispositions dissuasives et en recherchant, le cas échéant, les responsabilités des auteurs de telles pratiques.

Article 41 : 1 800 EUR conjointement aux requérants pour préjudice moral.

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

Free expression of opinion of people/ Libre expression de l'opinion du peuple

Vote

Automatic loss of right to vote as a result of partial guardianship order: *violation*

Perte automatique du droit de vote consécutivement à un placement sous tutelle partielle : *violation*

Alajos Kiss – Hungary/Hongrie - 38832/06
Judgment/Arrêt 20.5.2010 [Section II]

Facts – The applicant, who had some years earlier been diagnosed with manic depression, was placed under partial guardianship in 2005 after a court found that, while he was able to take care of himself adequately, he was sometimes irresponsible with money and occasionally aggressive. Under section 14 of the Civil Code a partial guardianship order enables the court to limit the legal capacity – in particular, as regards financial matters – of persons with "diminished faculties". However, by virtue of Article 70(5) of the Hungarian Constitution, such an order also entails the automatic loss of the right to vote. The applicant was therefore prevented from voting in legislative elections in April 2006.

Law – Article 3 of Protocol No. 1: The Court accepted that the measure of disenfranchisement pursued a legitimate aim, namely to ensure that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs. It noted, however, that the restriction did not distinguish between persons under total guardianship and those under partial guardianship

and affected a significant number of people. While it accepted that it was for the national legislature to decide on the procedure for assessing the fitness to vote of the mentally disabled, there was no evidence in the applicant's case that the Hungarian legislature had ever sought to weigh up the competing interests or to assess the proportionality of the restriction. The Court could not accept that an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties, fell within an acceptable margin of appreciation. The State had to have very weighty reasons when applying restrictions on fundamental rights to particularly vulnerable groups in society, such as the mentally disabled, who were at risk of legislative stereotyping, without an individualised evaluation of their capacities and needs. The applicant had lost his right to vote as a result of the imposition of an automatic, blanket restriction. It was questionable to treat people with intellectual or mental disabilities as a single class and the curtailment of their rights had to be subject to strict scrutiny. Accordingly, the indiscriminate removal of voting rights without an individualised judicial evaluation, solely on the grounds of mental disability necessitating partial guardianship, could not be considered compatible with the legitimate grounds for restricting the right to vote.

Conclusion: violation (unanimously).

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

RULE 39 OF THE RULES OF COURT / ARTICLE 39 DU RÈGLEMENT DE LA COUR

Interim measures/Mesures provisoires

Expulsion despite interim measure

Expulsion en dépit d'une mesure provisoire

Mannai – Italy/Italie - 9961/10

Le requérant, ressortissant tunisien, a été arrêté en Autriche le 20 mai 2005 sur la base d'un mandat d'arrêt émis par les autorités italiennes dans le cadre d'une enquête en relation avec des actes de terrorisme international. Il a été expulsé vers l'Italie le 20 juillet 2005 et condamné à cinq ans de prison à la suite d'un jugement prononcé le 5 octobre 2006, lequel prévoyait son expulsion une fois sa peine purgée. Le 19 février 2010, la Cour européenne a demandé aux autorités italiennes de ne pas expulser le requérant vers la Tunisie jusqu'à nouvel ordre (mesure provisoire prise en vertu de l'article 39 du règlement de la Cour). En dépit de cette indication, l'expulsion a eu lieu le 1er mai 2010.

Link to the statement by the Secretary General of the Council of Europe

Lien vers la déclaration du Secrétaire Général du Conseil de l'Europe

REFERRAL TO THE GRAND CHAMBER / RENVOI DEVANT LA GRANDE CHAMBRE

Article 43 § 2

The following cases have been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

Les affaires suivantes ont été déférées à la Grande Chambre en vertu de l'article 43 § 2 de la Convention :

Bayatyan – Armenia/Arménie - 23459/03
Judgment/Arrêt 27.10.2009 [Section III]

(See Article 9 above/Voir l'article 9 ci-dessus – page 16)

Aguilera Jiménez and Others/et autres – Spain/Espagne - 28389/06 et al.
Judgment/Arrêt 8.12.2009 [Section III]

(See Article 10 above/Voir l'article 10 ci-dessus – page 17)