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

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Armani Da Silva – United Kingdom/Royaume-Uni - 5878/08
[Section IV]

The applicant is a relative of Mr Jean Charles de Menezes, who was mistakenly identified as a terrorist suspect and shot dead on 22 July 2005 by two special firearms officers in London. The shooting occurred the day after a police manhunt was launched to find those responsible for four unexploded bombs that had been found on three underground trains and a bus in London. It was feared that a further bomb attack was imminent. Two weeks earlier, the security forces had been put on maximum alert after more than fifty people had died when suicide bombers detonated explosions on the London transport network. Mr de Menezes lived in a block of flats that shared a communal entrance with another block where two men suspected of involvement in the failed bombings lived. As he left for work on the morning of 22 July, he was followed by surveillance officers, who thought he might be one of the suspects. Special firearms officers were dispatched to the scene with orders to stop him boarding any underground trains. However, by the time they arrived, he had already entered Stockwell tube station. There he was followed onto a train, pinned down and shot several times in the head.

The case was referred to the Independent Police Complaints Commission (IPCC), which in a report dated 19 January 2006 made a series of operational recommendations and identified a number of possible offences that might have been committed by the police officers involved, including murder and gross negligence. Ultimately, however, it was decided not to press criminal or disciplinary charges against any individual police officers in the absence of any realistic prospect of their being upheld. Subsequently, a successful prosecution was brought against the police authority under the Health and Safety at Work Act 1974. The authority was ordered to pay a fine of 175,000 pounds sterling plus costs, but in a rider to its verdict that was endorsed by the judge, the jury absolved the officer in charge of the operation of any "personal culpability" for the events. At an inquest in 2008 the jury returned an open verdict after the coroner had excluded unlawful killing from the range of possible verdicts. The family also brought a civil action in damages which resulted in a confidential settlement in 2009.

In her application to the European Court, the applicant complains about the decision not to prosecute any individuals in relation to Mr de Menezes' death. In particular, she alleges that the evidential test used by prosecutors to determine whether criminal charges should be brought is arbitrary and subjective; that decisions regarding prosecutions should be taken by a court rather than a public official or at least be subject to more intensive judicial scrutiny; and that the procedural duty under Article 2 of the Convention was not discharged by the prosecution of the police authority for a health and safety offence.

Communicated under Articles 2 (procedural aspect) and 13.

ARTICLE 3

Inhuman or degrading treatment/Traitement inhumain ou dégradant
Positive obligations/Obligations positives

Failure to ensure appropriate medical treatment for person injured in police custody: *violation*

Manquement des autorités à veiller à ce qu'une personne blessée par des policiers pendant sa garde à vue bénéficie de soins médicaux appropriés : *violation*

Umar Karatepe – Turkey/Turquie - 20502/05
Judgment/Arrêt 12.10.2010 [Section II]

En fait – En 2003, le requérant fut arrêté et placé en garde à vue avec une trentaine d'autres personnes pour avoir participé à une manifestation. Conduit au palais de justice en vue de son audition, il aurait été frappé par un policier qui lui aurait causé un traumatisme crânien. Transféré au service de neurologie, l'intéressé se vit refuser par les médecins de l'hôpital la réalisation de la tomographie recommandée, au motif qu'il ne pouvait avancer les frais d'examen. Il fut reconduit au commissariat puis libéré. Les actions du requérant et du parquet contre les policiers échouèrent. Enfin, une action

engagée par le requérant contre le médecin-chef de l'hôpital pour manquement à ses devoirs aboutit à une décision de relaxe.

En droit – Article 3 (volet matériel)

a) *Concernant les coups* – Il n'est pas contesté que le requérant a été blessé par des policiers pendant sa garde à vue. Le rapport médical établi peu après atteste que les lésions causées ont atteint le minimum de gravité requis pour tomber sous le coup de l'article 3. Quoi qu'il en soit, la force utilisée contre le requérant n'était pas nécessaire pour l'immobiliser, les policiers ayant disposé pour cela d'autres moyens. En outre, il n'a pas été établi que le requérant s'en soit pris physiquement à eux et qu'il ait fait preuve d'une agressivité telle qu'il ait fallu le maîtriser par la force. Le Gouvernement n'a donc pas démontré que la force employée était justifiée et non excessive. De plus, cet usage de la force est à l'origine de lésions qui ont causé au requérant une souffrance s'analysant en un traitement inhumain et dégradant.

Conclusion: violation (six voix contre une).

b) *Concernant les soins médicaux* – Le transfert du requérant au service de neurologie pour des examens complémentaires était un acte médical important pour déterminer la gravité des lésions et leurs conséquences. En insistant pour que l'intéressé paye au préalable les frais relatifs à l'acte médical, le médecin-chef de l'hôpital a entravé son accès à des soins médicaux appropriés. Or l'Etat devait veiller à ce que le requérant reçoive les soins nécessaires tant qu'il était sous son contrôle. Enfin, après le retour de celui-ci au commissariat puis sa libération, ni la police ni le procureur ne se sont souciés des éventuelles conséquences des coups pour sa santé. Le fait que le requérant, blessé pendant sa garde à vue, ait été privé de soins médicaux appropriés parce qu'il n'avait pas avancé les frais médicaux a porté atteinte à sa dignité. La manière dont les autorités médicales et judiciaires se sont occupées de lui a méconnu l'obligation positive qui leur incombait au titre de l'article 3. Le requérant a subi une épreuve considérable qui lui a causé des angoisses et des souffrances allant au-delà de celles que comporte inévitablement toute privation de liberté. Le défaut de soins médicaux appropriés a constitué un traitement inhumain et dégradant.

Conclusion: violation (unanimité).

La Cour a également conclu, par six voix contre une, à la violation de l'article 5 § 1 c), la garde à vue du requérant n'ayant pas été prorogée conformément à la disposition pertinente du droit interne.

Article 41 : 12 000 EUR pour préjudice moral.

ARTICLE 5

Article 5 § 1

Deprivation of liberty/Privation de liberté

Containment of peaceful demonstrators within a police cordon for over seven hours: *communicated*

Manifestants pacifiques maintenus par la police à l'intérieur d'un cordon de sécurité pendant plus de sept heures : *affaire communiquée*

Austin and Others/et autres – United Kingdom/Royaume-Uni - 39692/09, 40713/09 and/et 41008/09
[Section IV]

On 1 May 2001 a large demonstration against capitalism and globalisation took place in London. The organisers gave no notice to the police of their intentions and publicity material they distributed beforehand included incitement to looting and violence and multiple protests all over London. The intelligence available to the police indicated that, in addition to peaceful demonstrators, between 500 and 1,000 violent and confrontational individuals were likely to attend. In the early afternoon a large crowd made its way to Oxford Circus, so that by the time of the events in question some 3,000 people were within the Circus and several thousands more were gathered in the streets outside. In order to prevent injury to people and property, the police decided that it was necessary to contain the crowd by forming a cordon blocking all exit routes from the area. Because of violence and the risk of violence from individuals inside and outside the cordon, and because of a policy of searching and establishing the identity of those within the cordon suspected of causing trouble, many peaceful demonstrators and passers-by, including the applicants, were not released for several hours.

Following these events, the first applicant brought a test case in the High Court for damages for false imprisonment and a breach of her Convention rights. Her claim was dismissed and that decision was upheld on appeal. In a unanimous ruling, the House of Lords found that there had been no deprivation of liberty within the meaning of Article 5

since the intention of the police had been to protect both demonstrators and property from violence, and the containment had continued only as long as had been necessary to meet that aim. In its view, the purpose of the confinement or restriction of movement and the intentions of those responsible for imposing were relevant to the question of whether there had been deprivation of liberty and measures of crowd control that were proportionate and undertaken in good faith in the interests of the community did not infringe the Article 5 rights of individual members of the crowd whose freedom of movement was restricted.

Communicated under Article 5 § 1.

ARTICLE 6

Article 6 § 1 (civil)

Right to a court/Droit à un tribunal

Obligation to submit to arbitration as a result of clause agreed by third parties: *violation*

Obligation de recourir à un arbitrage en vertu d'une clause contractée par des tiers : *violation*

Suda – Czech Republic/
République tchèque - 1643/06
Judgment/Arrêt 28.10.2010 [Section V]

En fait – Le requérant était actionnaire minoritaire d'une société anonyme, C. En novembre 2003, l'assemblée générale de la société pris la décision à la majorité (sans la voix du requérant qui vota contre) de la suppression de C. sans liquidation et de la reprise de ses biens par son actionnaire principal, la société E. La valeur de rachat des actions détenues par les actionnaires minoritaires, dont le requérant, était déterminée contractuellement. En vertu d'une clause d'arbitrage incluse dans le contrat, le réexamen du règlement fut soustrait à la compétence des juridictions ordinaires et soumis à la procédure arbitrale. Les recours judiciaires du requérant tendant à faire réexaminer et invalider le montant du règlement accordé selon le contrat susmentionné n'aboutirent pas.

En droit – Article 6 § 1 : la présente espèce ne concerne ni un arbitrage volontaire, ni un arbitrage forcé imposé par la loi, mais un arbitrage contracté par des tiers, à savoir la société dont le requérant était actionnaire minoritaire et l'actionnaire principal de celle-ci. La Cour est appelée à confronter aux exigences de l'article 6 § 1 une situation déterminée qui obligeait le requérant à recourir à l'arbitrage en vertu d'une clause qu'il n'avait pas contractée. Celui-ci a saisi de suite les tribunaux ordinaires qui ont conclu que ladite clause avait été valablement contractée et ont prononcé l'extinction de l'instance sans décider du fond de l'affaire. Le requérant ne pouvait dès lors que s'adresser aux arbitres désignés par la clause en question et attendre qu'ils se prononcent sur leur compétence pour connaître de l'affaire. Cependant, si le requérant avait procédé ainsi, il se serait exposé au risque que les arbitres, inscrits sur la liste d'une société privée et guidés par le règlement de cette dernière que l'intéressé n'avait pas choisie, statuent non seulement sur leur compétence mais aussi, en cas d'acceptation de la compétence, sur le fond de l'affaire. Ainsi, les arbitres imposés au requérant auraient indirectement décidé de l'ampleur de la compétence des tribunaux ordinaires car, s'ils avaient rendu une sentence arbitrale sur le fond de l'affaire, un éventuel recours du requérant au tribunal aurait été limité à des questions procédurales. C'est seulement si les arbitres avaient considéré que la clause d'arbitrage litigieuse ne pouvait pas fonder leur compétence que le tribunal ordinaire aurait pu statuer sur le fond de l'affaire. Il est évident que la procédure arbitrale ne remplirait pas en l'espèce deux des exigences fondamentales de l'article 6 § 1, à savoir celle de la juridiction légale, d'une part, car la clause d'arbitrage litigieuse donnait le pouvoir de décider à des arbitres inscrits sur la liste d'une société à responsabilité limitée qui n'est pas un tribunal arbitral établi par la loi, et celle de la publicité des débats, d'autre part, car la procédure arbitrale n'aurait pas été publique alors que le requérant n'a aucunement renoncé à ce droit. Enfin, les réglementations nationales sur les sociétés, organisant les rapports des actionnaires entre eux, sont indispensables à toute vie sous un régime de marché. Il en découle parfois l'obligation faite aux actionnaires minoritaires de céder leurs actions à l'actionnaire majoritaire. Pour éviter un déséquilibre tel qu'il aboutirait à dépouiller arbitrairement et injustement une personne au profit d'une autre, la Cour estime qu'il convient d'offrir aux actionnaires minoritaires des moyens de défense appropriés. Or, en l'espèce, obliger le requérant à porter sa contestation de nature patrimoniale devant des arbitres ne remplissant pas les garanties fondamentales de l'article 6 § 1, garanties auxquelles l'intéressé n'avait pas renoncées, emporte violation de son droit à un tribunal.

Conclusion : violation (unanimité).

Article 41 : constat de violation suffisant en lui-même pour le préjudice moral.

Access to court/Accès à un tribunal

Imposition of small fines by courts for vexatious applications for rectification of judgments: *inadmissible*

Imposition par des tribunaux d'amendes modérées pour sanctionner des actions vexatoires tendant à la rectification de jugements : *irrecevable*

Toyaksi and Others/et autres – Turkey/Turquie - 43569/08 et al.
Decision/Décision 20.10.2010 [Section IV]

Facts – The applicants were issued with fines ranging from 120 to 170 Turkish liras[1] by the Court of Cassation and the Supreme Military Administrative Court under section 442 of the Code of Civil Procedure after unsuccessfully seeking the rectification of judgments that had been delivered by those courts. In their applications to the European Court, the applicants complained that the imposition of fines for having used a statutory legal remedy had violated their right of access to court.

Law – Article 6 § 1: The imposition of a fine in order to prevent a build-up of cases before the courts and to ensure the proper administration of justice was not, as such, in conflict with the right of access to court. The fines imposed on the applicants had constituted a penalty for vexatious rectification proceedings before the higher courts. None of the applicants had complained that they had been unable to have their cases heard due to the fines and their right of access to court had not been impaired in any way as they had had the opportunity to have their cases examined thoroughly before two levels of jurisdiction prior to their requests for rectification. There was no evidence that the amount of the fines had constituted a substantial economic burden. Accordingly, and in the specific circumstances of the case, the applicants' right of access to court had not been violated.

Conclusion: inadmissible (manifestly ill-founded).

Article 7: The impugned fine did not constitute a penalty within the meaning of this provision, its sole purpose being the proper administration of justice.

Conclusion: inadmissible (*ratione materiae*).

Fair hearing/Procès équitable

Divergences in case-law of administrative and administrative military courts: *case referred to the Grand Chamber*

Disparités de jurisprudence entre une juridiction administrative et une juridiction administrative militaire : *affaire renvoyée devant la Grande Chambre*

Nejdet Şahin and/et Perihan Şahin – Turkey/Turquie - 13279/05
Judgment/Arrêt 27.5.2010 [Section II]

Le fils des requérants, pilote dans l'armée, trouva la mort en mai 2001 dans un accident au cours duquel son avion s'écrasa lors d'un transport de troupes sur le territoire turc. Les parents demandèrent sans succès le bénéfice de la pension mensuelle pour ayants droit prévue par la loi relative à la lutte contre le terrorisme. Ils saisirent le tribunal administratif, puis ils portèrent leur affaire devant la Haute Cour administrative militaire. Les requérants se plaignent d'une divergence dans l'appréciation que les juridictions administratives ordinaires et les juridictions administratives militaires ont faite des circonstances de l'accident d'avion. Alors que les premières ont établi l'existence d'un lien de causalité entre cet événement et la lutte contre le terrorisme – condition *sine qua non* de l'admissibilité au bénéfice des droits à pension prévus –, les secondes ont conclu à l'absence d'un tel lien.

Par un arrêt du 27 mai 2010, une chambre de la Cour a conclu, par six voix contre une, à la non-violation de l'article 6 § 1 de la Convention, en considérant que les requérants ne sauraient prétendre avoir subi un déni de justice en raison de l'examen de leur litige par ces juridictions ou de la solution retenue par ces dernières dans les circonstances de l'espèce.

Le 4 octobre 2010, l'affaire a été renvoyée devant la Grande Chambre à la demande des requérants.

Tribunal established by law/Tribunal établi par la loi

Decision by district-court president acting in his administrative capacity to reassign case to himself for judicial decision: *violation*

Décision du président d'un tribunal de district, prise dans le cadre de ses fonctions administratives, de se réattribuer une affaire à trancher : *violation*

DMD Group, a.s. – Slovakia/Slovaquie - 19334/03
Judgment/Arrêt 5.10.2010 [Section IV]

1. Approximately EUR 60 to EUR 90 at the material time.

Facts – The applicant company sought to enforce a substantial financial claim against another company through proceedings in a district court. In 1999 a newly appointed president of the court in question decided to reassign the case to himself. On the same day he ruled that the enforcement of the applicant company's claim by the sale of shares was improper and discontinued the proceedings. The applicant company had no right of appeal. It subsequently brought a constitutional complaint in which it alleged that the president's decision to reassign the case to himself had deprived it of a hearing by a tribunal established by law and that frequent modifications to the district court's work schedule had made the process of assigning and reassigning cases uncontrollable and opaque. Dismissing that complaint, the Constitutional Court found that the case had been reassigned to help ensure the equal distribution of cases concerning enforcement proceedings and complied with the applicable rules. Between 1 March and 15 July 1999, a total of 348 cases were reassigned between the various sections of the district court in question, 49 of them to the president's section. The president made further amendments to the work schedule throughout the year.

Law – Article 6 § 1: The object of the term "established by law" was to ensure that judicial organisation in a democratic society did not depend on the discretion of the executive, but was regulated by law emanating from Parliament. Nor, in countries where the law was codified, could the organisation of the judicial system be left to the discretion of the judicial authorities, although that did not mean that the courts did not have some latitude to interpret relevant domestic legislation. Where a judge combined both judicial and administrative functions, the paramount importance of judicial independence and legal certainty required rules that were of particular clarity and clear safeguards to ensure objectivity and transparency, and, above all, to avoid any appearance of arbitrariness in the assignment of cases. The rules that had been applied in the applicant company's case were far from exhaustive and left significant latitude to the district-court president, as evidenced by the number of modifications made to the court's work schedule in 1999 and the absence of specific safeguards, such as a requirement to notify a superior court. Furthermore, the applicant company's case had been reassigned by an individual decree rather than as part of a general reorganisation of the workload. It was not possible, on the basis of the information available, to verify whether it had been reassigned on objective grounds or whether any administrative discretion had been exercised within transparent parameters. What was clear though was that the president of the district court had, in his judicial capacity, ruled on the applicant company's case (involving a claim of approximately EUR 2,900,000) in private on the same day that, acting in his administrative capacity, he had reassigned it to himself. Since his judicial decision had completed the proceedings and was not subject to appeal, the applicant company had been deprived of the possibility of raising any objections and of potentially challenging him for bias. It followed that the reassignment of case was not compatible with the applicant company's right to a hearing before a tribunal established by law.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of non-pecuniary damage.

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Criminal conviction based on statement made by defendant in police custody after swearing oath normally reserved for witnesses: *violation*

Condamnation pénale fondée sur l'audition d'un gardé à vue ayant dû prêter serment en tant que témoin : *violation*

Brusco – France - 1466/07
Judgment/Arrêt 14.10.2010 [Section V]

En fait – Agressé en 1998 par deux individus cagoulés, un homme porta plainte contre le requérant, qui par la suite fut également mis en cause par l'un des agresseurs présumés. Dans le cadre d'une commission rogatoire, le requérant fut interpellé et placé en garde à vue. Avant d'être interrogé par les policiers, il dut prêter le serment prévu pour les témoins. Il avoua avoir recruté les deux individus pour qu'ils fassent peur à la victime mais nia avoir commandité une agression physique. Il fut mis en examen et placé en détention provisoire. En 2002, il fut condamné à une peine d'emprisonnement, jugement plus tard confirmé en appel. La Cour de cassation rejeta ses pourvois.

En droit – Article 6 §§ 1 et 3 : lorsqu'il a dû prêter serment, le requérant était en garde à vue. A l'époque, le placement en garde à vue n'était pas subordonné à l'existence d'indices graves et concordants concernant la commission d'une infraction par l'intéressé ou de raisons plausibles de

soupçonner celui-ci. Or, au moment dont il est question, le requérant était visé par une plainte de la victime et avait été expressément mis en cause par l'un des agresseurs présumés comme étant le commanditaire de l'opération. Ainsi, les autorités judiciaires et policières avaient des raisons plausibles de le soupçonner d'avoir participé à l'infraction, et l'argument selon lequel il a été entendu comme simple témoin est inopérant. Par ailleurs, l'interpellation et la garde à vue du requérant pouvaient avoir et ont eu des répercussions importantes sur sa situation, puisqu'à la suite de cela il a été mis en examen et placé en détention provisoire. Partant, lors de sa garde à vue et de sa prestation de serment, le requérant faisait l'objet d'une accusation en matière pénale et bénéficiait du droit de ne pas contribuer à sa propre incrimination et de garder le silence. Les déclarations faites par lui après la prestation de serment ont été utilisées par les juridictions pénales pour établir les faits et le condamner. L'obligation de prêter serment avant de déposer a constitué une forme de pression sur lui, compte tenu notamment du risque de poursuites pénales en cas de témoignage mensonger. La Cour note qu'en 2004 le législateur est intervenu pour préciser que l'obligation de prêter serment et de déposer n'est pas applicable aux personnes gardées à vue sur commission rogatoire d'un juge d'instruction.

En outre, le requérant ne semble pas avoir été informé au début de son interrogatoire de son droit de se taire, de ne pas répondre aux questions ou de ne répondre qu'à certaines questions. N'ayant pu intervenir que vingt heures après le début de la garde à vue, son avocat n'a pu l'informer de ses droits ou l'assister lors de sa déposition, comme l'exige l'article 6. Il s'ensuit qu'il y a eu atteinte au droit de l'intéressé de ne pas contribuer à sa propre incrimination et de garder le silence.

Conclusion : violation (unanimité).

Article 41 : 5 000 EUR pour préjudice moral.

Equality of arms/Egalité des armes

Examination of appeal on points of law by Supreme Court at preliminary hearing held in presence of public prosecutor but in absence of accused: *violation*

Examen d'un pourvoi en cassation par la Cour suprême lors d'une audience préliminaire tenue en présence du procureur mais en l'absence de l'accusé : *violation*

Zhuk – Ukraine - 45783/05
Judgment/Arrêt 21.10.2010 [Section V]

Facts – The applicant was convicted of drug-dealing and sentenced to four years' imprisonment. He appealed to the Supreme Court of Ukraine, challenging his conviction on points of law. He also expressed his wish to be present at the hearing. He was no longer legally represented. In 2005, in the presence of the public prosecutor but in the absence of the applicant, a panel of three judges of the Supreme Court examined the case on the merits and dismissed his appeal.

Law – Article 6 § 1: In compliance with the domestic law, the Supreme Court had held a preliminary hearing in order to decide whether the appeal before it was sufficiently well-founded to warrant its examination in a public hearing in the presence of all necessary parties. Thus, the applicant's chance to be present and, accordingly, to make oral submissions at the hearing depended on whether his appeal passed the sifting-out procedure. While the lack of a public hearing before a jurisdiction whose competence was limited to questions of law might not be in breach of Article 6 § 1 *per se*, this was true in so far as the relevant court held a hearing in camera. This had not been so in the instant case: the prosecutor had had the advantage of being present at that preliminary hearing, unlike any other party, and to make oral submissions to the three-judge panel with a view to having the applicant's appeal dismissed and his conviction upheld. Procedural fairness required, however, that the applicant should also have been given an opportunity to make oral submissions in reply. The panel had dismissed the appeal at the preliminary hearing, thus dispensing with a public hearing which the applicant, who had requested that the hearing be held in his presence, would have been able to attend. Therefore, the procedure before the Supreme Court of Ukraine had not enabled the applicant to participate in the proceedings in conformity with the principle of equality of arms.

Conclusion: violation (unanimously).

Article 41: EUR 1,200 in respect of non-pecuniary damage.

Independent and impartial tribunal/Tribunal indépendant et impartial

Doubts as to impartiality where two out of three members of bench who had ordered applicant's

detention pending trial subsequently sat on bench that convicted him: *violation*

Mise en cause de l'impartialité de deux des trois membres composant la formation judiciaire qui a ordonné la détention provisoire puis a condamné au fond le requérant : *violation*

Cardona Serrat – Spain/Espagne - 38715/06
Judgment/Arrêt 26.10.2010 [Section III]

En fait – Une procédure pénale fut diligentée devant le juge d'instruction à l'encontre du requérant. L'affaire fut ensuite renvoyée en jugement devant l'*Audiencia Provincial*. En janvier 2002, le ministère public sollicita que l'intéressé soit mis en détention provisoire communiquée et sans caution, afin d'assurer sa présence à l'audience et compte tenu du caractère délictueux des faits. Par une ordonnance de février 2002, une chambre de l'*Audiencia Provincial* composée de trois juges ordonna la détention provisoire du requérant. Ce dernier demanda par la suite la récusation des deux membres de la chambre ayant ordonné sa détention provisoire qui devaient aussi faire partie de la chambre devant décider du bien-fondé de l'affaire. Après le rejet de la demande de récusation, une chambre de l'*Audiencia Provincial* reconnut en mai 2002 le requérant coupable d'un délit continu d'abus sexuels avec la circonstance aggravante de récidive et le condamna à une peine de quatre ans et six mois d'emprisonnement. Les recours du requérant contre la prétendue partialité du tribunal n'aboutirent pas.

En droit – Article 6 § 1 : il n'y a aucun élément susceptible de mettre en doute l'impartialité subjective des magistrats concernés. En l'occurrence, la crainte d'un manque d'impartialité tient principalement au fait que deux des trois membres, dont le président, de la formation de jugement de l'*Audiencia Provincial* ayant condamné le requérant avaient auparavant fait partie de la chambre du même tribunal ayant décidé sa mise en détention provisoire. La chambre de l'*Audiencia Provincial* ne s'est pas limitée à accorder la prorogation de la détention provisoire du requérant, mais a ordonné elle-même son placement en détention provisoire. Par cette décision, elle a modifié, à son détriment, la situation du requérant, à qui le juge d'instruction avait accordé la liberté provisoire auparavant dans le cadre de la même procédure pénale. Pour motiver d'office sa décision, la chambre ne s'est pas limitée à une appréciation sommaire des faits reprochés pour justifier la pertinence de la mesure de détention provisoire sollicitée par le ministère public, mais, au contraire, s'est prononcée sur l'existence d'un risque que le requérant intimide les témoins à charge. La chambre de l'*Audiencia Provincial* a renvoyé au code de procédure pénale pour constater que les conditions pour l'application de la mesure provisoire en cause étaient réunies. Or un des articles exigeait du tribunal notamment de s'assurer de l'existence de motifs suffisants pour considérer la personne faisant l'objet de la décision de placement en détention pénalement responsable du délit. Les termes employés par la chambre de l'*Audiencia Provincial*, lus à la lumière dudit article, pouvaient donner à penser au requérant qu'il existait, aux yeux des juges de la chambre, des indices suffisants pour permettre de conclure qu'un délit avait été commis et qu'il était pénalement responsable de ce délit. Ainsi, le requérant pouvait raisonnablement craindre que les juges avaient une idée préconçue sur la question sur laquelle ils étaient appelés à se prononcer ultérieurement en tant que membres de la formation de jugement. En l'espèce est en cause l'impartialité de deux des trois membres, dont le président, de la chambre de l'*Audiencia Provincial* qui a condamné le requérant en mai 2002. Cet élément permet de distinguer la présente espèce d'autres affaires où était en cause l'impartialité d'un seul juge au sein d'une juridiction collégiale. Dans les circonstances de la cause, l'impartialité objective de la juridiction de jugement pouvait paraître sujette à caution. Il s'ensuit que les appréhensions du requérant à cet égard pouvaient passer pour objectivement justifiées.

Conclusion : violation (unanimité).

Article 6 § 3

Rights of defence/Droits de la défense

Failure to inform person in police custody before questioning of right not to incriminate himself and to remain silent: *violation*

Manquement à informer un gardé à vue, dès le début de son interrogatoire, de son droit de ne pas s'auto-incriminer et de garder le silence : *violation*

Brusco – France - 1466/07
Judgment/Arrêt 14.10.2010 [Section V]

(See Article 6 § 1 above/Voir l'article 6 § 1 ci-dessus – page 13)

ARTICLE 8

Private life/Vie privée
Positive obligations/Obligations positives

Failure of authorities to implement court orders intended to afford applicant protection from violent husband: *violation*

Manquement des autorités à faire exécuter des décisions de justice visant à protéger la requérante contre un mari violent : *violation*

A. – Croatia/Croatie - 55164/08
Judgment/Arrêt 14.10.2010 [Section I]

Facts – Between November 2003 and June 2006, the applicant's husband, who has been diagnosed as suffering from severe mental disorders with a tendency towards violent and impulsive behaviour, subjected the applicant to repeated psychological and physical violence including death threats and blows and kicks to the head, face and body. She was often abused in front of their daughter, who was herself the subject of violence on several occasions. The marriage ended in divorce in 2006. Between 2004 and 2009 various sets of criminal and minor-offences proceedings were brought against the husband and a number of protective measures were ordered. However, only some were implemented. For example, an eight-month prison sentence handed down in October 2006 following death threats was not served and the husband failed to undergo psycho-social treatment that had been ordered. He is currently serving a three-year prison sentence for making death threats against a judge.

Law – Article 8: In view of the applicant's credible assertions that over a prolonged period her husband had presented a threat to her physical integrity and repeatedly attacked her the State authorities had been under a positive obligation to protect her from his violent behaviour. However, they had failed adequately to discharge that obligation. Firstly, in a case such as this, involving a series of violent acts by the same person against the same victim, the applicant would have been more effectively protected if the authorities had viewed the situation as a whole, rather than resorting to numerous sets of separate proceedings. Secondly, although various protective measures had been ordered, many of them – such as periods of detention, fines, psycho-social treatment and even a prison term – were not enforced, thus undermining their deterrent effect. There had been lengthy delays in securing compliance with the recommendations that had been made for continuing psychiatric treatment and even then this had only been in the context of criminal proceedings unrelated to the violence against the applicant. Indeed, it was still uncertain whether the husband had in fact undergone the treatment. In sum, the authorities' failure to implement the measures aimed at addressing the psychiatric condition which appeared to be at the root of the husband's violent behaviour and at providing the applicant with protection against further violence had left her at risk for a prolonged period.

Conclusion: violation (unanimously).

Article 14: The applicant had not produced sufficient prima facie evidence to show that the measures or practices adopted in Croatia in the context of domestic violence, or the effects of such measures or practices, were discriminatory.

Conclusion: inadmissible (manifestly ill-founded).

Article 41: EUR 9,000 in respect of non-pecuniary damage.

(See also *Opuz v. Turkey*, no. 33401/02, 9 June 2009, Information Note no. 120)

Private life/Vie privée

Removal of judge from office for reasons partly related to her private life: *violation*

Révocation d'une magistrate, motivée en partie par sa conduite dans le cadre de sa vie privée : *violation*

Özpınar – Turkey/Turquie - 20999/04
Judgment/Arrêt 19.10.2010 [Section II]

En fait – Magistrate de profession, la requérante fit l'objet d'une enquête disciplinaire en 2002. On lui reprochait notamment de prétendues relations personnelles avec un avocat, dont les clients auraient de ce fait bénéficié de décisions judiciaires favorables, ainsi que le non-respect des horaires de travail et le port de tenues vestimentaires et d'un maquillage inconvenants. De nombreux témoins, qui livrèrent des déclarations contradictoires, furent entendus et les dossiers traités par la requérante furent examinés. Aucun élément de l'enquête ne fut communiqué à l'intéressée. Le dossier d'enquête disciplinaire fut transmis au Conseil supérieur de la magistrature, qui en 2003 révoqua la requérante de ses fonctions, au motif en particulier qu'elle avait porté atteinte à la dignité et à l'honneur de la profession. L'intéressée demanda,

en vain, le réexamen de cette décision. Puis elle forma opposition contre la révocation, mesure que le Conseil supérieur de la magistrature confirma en 2004, après l'avoir entendue. La requérante fut informée du rejet de son action mais ne se vit pas notifié les motifs de cette décision.

En droit – Article 8 : la décision de révocation litigieuse était directement liée aux agissements et relations de la requérante dans le cadre professionnel mais aussi privé. De plus, sa réputation était mise en cause. Il y a donc eu ingérence dans le droit au respect de la vie privée de l'intéressée, dont on peut considérer que le but légitime relevait de l'obligation de retenue faite aux magistrats afin de préserver leur indépendance et l'autorité de leurs décisions. Concernant ce qui, dans la procédure contre la requérante, portait sur ses agissements dans le cadre de ses fonctions, on ne saurait parler d'une ingérence dans la vie privée. Les devoirs déontologiques d'un magistrat peuvent en effet empiéter sur sa vie privée lorsque son comportement porte atteinte à l'image ou à la réputation de l'institution judiciaire. Cependant, l'intéressée n'en demeurait pas moins un individu bénéficiant de la protection de l'article 8. Même si certaines attitudes qui lui étaient attribuées – notamment la prise de décisions motivées par des considérations personnelles – pouvaient justifier sa révocation, l'enquête n'a pas étayé ces accusations et a pris en compte de nombreux agissements sans rapport avec l'activité professionnelle de la requérante. Par ailleurs, peu de garanties ont été offertes à celle-ci pendant la procédure, puisqu'elle n'a été entendue que très tardivement par le Conseil supérieur de la magistrature et qu'avant cela elle ne s'était pas vu communiquer les rapports d'enquête. Or tout magistrat faisant l'objet d'une révocation basée sur des motifs liés à la vie privée et familiale doit être protégé contre l'arbitraire, notamment par une procédure contradictoire devant un organe de contrôle indépendant et impartial. Cela était d'autant plus vrai, dans le cas de l'intéressée, que la révocation de son poste de magistrat lui faisait perdre automatiquement la possibilité d'exercer la profession d'avocat. Partant, l'atteinte à la vie privée de la requérante n'était pas proportionnée au but légitime poursuivi.

Conclusion : violation (unanimité).

Article 13 combiné avec l'article 8 : la requérante a emprunté, sans succès, la voie de l'opposition contre les décisions du Conseil supérieur de la magistrature. Or la Cour a déjà eu l'occasion de dire que l'impartialité de cet organe, dans ses formations d'examen des oppositions, était sérieusement sujette à caution. En outre, dans la procédure en question, aucune distinction n'a été opérée entre les manifestations de la vie privée de l'intéressée sans lien direct avec l'exercice de ses fonctions et celles qui pouvaient en avoir un. Partant, la requérante n'a pas bénéficié d'une voie de recours répondant aux exigences minimales de l'article 13 pour soumettre son grief tiré de l'article 8.

Conclusion : violation (unanimité).

Private life/Vie privée
Positive obligations/Obligations positives

Video surveillance of supermarket cashier suspected of theft: *inadmissible*

Surveillance vidéo d'une caissière de supermarché soupçonnée de vol : *irrecevable*

Köpke – Germany/Allemagne - 420/07
Decision/Décision 5.10.2010 [Section V]

Facts – The applicant, a supermarket cashier, was dismissed without notice for theft, following a covert video surveillance carried out by her employer with the help of a private detective agency. She unsuccessfully challenged her dismissal before the labour courts. Her constitutional complaint was likewise dismissed.

Law – Article 8: A video recording of the applicant's conduct at her workplace had been made without prior notice on the instruction of her employer. The images thereby obtained had been processed and examined by several fellow employees and used in the public proceedings before the labour courts. The applicant's "private life" within the meaning of Article 8 § 1 had therefore been concerned by these measures. The Court had to examine whether the State, in the context of its positive obligations under Article 8, had struck a fair balance between the applicant's right to respect for her private life and both her employer's interest in protection of its property rights, guaranteed by Article 1 of Protocol No. 1, and the public interest in the proper administration of justice.

At the relevant time, the conditions under which an employer could resort to the video surveillance of an employee in order to investigate a criminal offence the employee was suspected of having committed in the course of his or her work had not yet been laid down in statute law. However, the Federal Labour Court had developed in its case-law important safeguards against arbitrary interference with the employee's right to privacy. This case-law had been applied by the domestic

courts in the applicant's case. Moreover, covert video surveillance at the workplace following substantiated suspicions of theft did not affect a person's private life to such an extent as to require a State to set up a legislative framework in order to comply with its positive obligations under Article 8. As noted by the German courts, the video surveillance of the applicant had only been carried out after losses had been detected during stocktaking and irregularities discovered in the accounts of the department where she worked, raising an arguable suspicion of theft committed by the applicant and another employee, who were the only employees to have been targeted by the surveillance measure. The measure had been limited in time (two weeks) and had only covered the area surrounding the cash desk and accessible to the public. The visual data obtained had been processed by a limited number of persons working for the detective agency and by staff members of the employer. They had been used only in connection with the termination of her employment and the proceedings before the labour courts. The interference with the applicant's private life had thus been restricted to what had been necessary to achieve the aims pursued by the video surveillance. The domestic courts had further considered that the employer's interest in the protection of its property rights could only be effectively safeguarded by collecting evidence in order to prove the applicant's criminal conduct in the court proceedings. This had also served the public interest in the proper administration of justice. Furthermore, the covert video surveillance of the applicant had served to clear from suspicion other employees. Moreover, there had not been any other equally effective means to protect the employer's property rights which would have interfered to a lesser extent with the applicant's right to respect for her private life. The stocktaking could not clearly link the losses discovered to a particular employee. Surveillance by superiors or colleagues or open video surveillance did not have the same prospects of success in discovering a covert theft.

In sum, there was nothing to indicate that the domestic authorities had failed to strike a fair balance, within their margin of appreciation, between the applicant's right to respect for her private life and both her employer's interest in the protection of its property rights and the public interest in the proper administration of justice. However, the balance struck between the interests at issue by the domestic authorities did not appear to be the only possible way for them to comply with their obligations under the Convention. The competing interests concerned might well be given a different weight in the future, having regard to the extent to which intrusions into private life were made possible by new, more sophisticated technologies.

Conclusion: inadmissible (manifestly-ill-founded).

Family life/Vie familiale

Decision to deprive applicant of parental responsibilities and to authorise the adoption of her son by his foster parents: *no violation*

Déchéance de l'autorité parentale de la requérante et autorisation de l'adoption de son fils par sa famille d'accueil : *non-violation*

Aune – Norway/Norvège – 52502/07
Judgment/Arrêt 28.10.2010 [Section I]

Facts – When five months old, the applicant's son A., who was born in 1998, was taken unconscious to hospital and treated for a brain haemorrhage. Shortly afterwards, aware that his parents had a history of drug abuse and suspecting that he had been ill-treated, the authorities placed him in compulsory foster care, initially as an interim emergency measure and then permanently. The applicant has spent periods in detoxification centres since 2000. Since the autumn of 2005, she has been drug-free, has set up a business with her current partner, obtained a driving licence and planned to take up studies. In 2005 the local social affairs board (the "Board") deprived the applicant of her parental responsibilities with respect to A. and authorised his adoption by his foster parents. That decision was ultimately upheld on appeal by the Supreme Court in 2007 after it found that, despite positive developments in her situation, the applicant was unable to provide A. with proper care. Furthermore, although well adjusted in his new family, A. remained vulnerable, and needed reassurance that he would stay with his foster parents. Indeed, his need for absolute emotional security was likely to increase as he grew up as he became aware that both his mother and father had been heavy drug abusers and that he had been exposed to serious ill-treatment. Nor could the Court ignore the fact that the biological family, particularly the applicant's father and his partner, had protested about A.'s placement as they had fostered the applicant's other son and considered that the two boys should be together. There was a possibility that that conflict would continue if he was not adopted. It was also emphasised that A.'s

foster parents had facilitated contact with the biological family far beyond their entitlement, both as regards the circle of people concerned and the extent of the contact. Indeed, there was no doubt that that openness to permitting contact would continue.

Law – Article 8: The interference with the applicant's private and family life had had a legal basis and pursued the legitimate aim of protecting the best interests of her son. For formal reasons, the Court had no jurisdiction under the Convention to examine the justification for the compulsory public-care measures. The only question that the Court could examine was whether it had been necessary to replace the foster-care arrangement with a more far-reaching type of measure, namely deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicant's legal ties with her son would be broken. Bearing in mind that authorisation of adoption against the will of the parents should be granted only in exceptional circumstances, the Court was satisfied that such circumstances had existed in the applicant's case. The applicant had not questioned the social authority and national court findings concerning the suitability of her son's foster parents or his attachment to them. Furthermore, nothing had come to light in the proceedings before the Court which would make it differ from the Supreme Court's conclusion that the applicant was unable to provide proper care for her son. A. had no real attachment to his biological parents and the social ties between the applicant and A. had been very limited. Indeed, A.'s particular need for security – which would no doubt increase with time – had been significantly challenged by the applicant's wish for A. to live with her father and by the conflict around A.'s placement in foster care. The applicant had stated clearly before the Court that there was no risk that the earlier conflicts would resume as she would not seek to have A. returned to live with her and that she considered it was in his best interest to grow up with his foster parents. However, from the material submitted to the Court and the pleadings of the applicant's lawyer, it appeared that there had still been a latent conflict which could challenge A.'s particular vulnerability and need for security. Adoption would counter such an eventuality. Moreover, from what the Court understood, the disputed measures corresponded to A.'s wishes.

As to the doubt raised by the applicant about whether the foster parents would continue to be open to contact (in the event of adoption it no longer being the applicant's legal right to have such contact), the Court observed that, after the Supreme Court's judgment, the number of visits had remained the same, which clearly confirmed that the national courts had been correct in their assessment of the foster parents' good will. The disputed measures had not in fact prevented the applicant from continuing to have a personal relationship with A. and had not "cut him off from his roots".

The Court was therefore satisfied that the decision to deprive the applicant of parental responsibilities and to authorise the adoption had been supported by relevant and sufficient reasons and had been proportionate to the legitimate aim of protecting A.'s best interests.

Conclusion: no violation (unanimously).

Refusal to grant adoptive parent order revoking adoption: *inadmissible*

Refus à un parent adoptif d'obtenir la révocation de l'adoption de sa fille : *irrecevable*

Goția – Romania/Roumanie - 24315/06
Decision/Décision 5.10.2010 [Section III]

En fait – En 1983, la requérante et son époux reçurent l'autorisation de l'adoption plénière d'une enfant née en 1976. Le père adoptif, époux de la requérante, décéda en 1992. En 2004, la requérante demanda la révocation de l'adoption au motif que sa fille adoptive âgée à l'époque de vingt-huit ans, avait un mauvais comportement envers elle. Elle fut déboutée de ces recours. En 2006, elle formula une nouvelle demande de révocation de l'adoption, qui fut déclarée irrecevable.

En droit – Article 8 : les juridictions nationales ont déclaré irrecevable, pour défaut de qualité pour agir, la demande formée par la requérante de révocation de l'adoption car le droit roumain réserve cette possibilité à la personne adoptée. De plus, dans un arrêt amplement motivé, la Cour constitutionnelle a estimé la loi pertinente conforme à la Constitution. Par ailleurs, on ne saurait déduire de la Convention européenne en matière d'adoption des enfants, ratifiée par la Roumanie en mai 1993, que l'Etat partie à cette convention ait l'obligation d'adopter une législation qui prévoie la révocation d'une adoption à la demande du parent adoptif. Ainsi, le fait de refuser à la requérante le droit d'obtenir la révocation de l'adoption de sa fille, qui plus est vingt et un ans après le prononcé de l'adoption, n'apparaît pas comme étant contraire aux

dispositions de l'article 8. En l'espèce, les autorités nationales n'ont pas outrepassé leur marge d'appréciation.

Conclusion: irrecevable (défaut manifeste de fondement).

ARTICLE 10

Freedom to receive information/Liberté de recevoir des informations
Freedom to impart information/Liberté de communiquer des informations

Denial of Internet access to prisoner: *communicated*

Refus d'autoriser à un détenu l'accès à Internet : *affaire communiquée*

Jankovskis – Lithuania/Lituanie - 21575/08
[Section II]

The applicant, who is currently serving a prison sentence, asked the prison authorities to grant him Internet access as he was considering enrolling on a university course, but his request was refused. That decision was upheld by the domestic courts, with the Supreme Administrative Court ruling that the prison authorities would be acting *ultra vires* if they allowed prisoners to use the Internet. It also considered that allowing prisoners Internet access would hamper the fight against crime as it would not be possible fully to monitor their activities.

Communicated under Article 10.

Freedom to impart information/Liberté de communiquer des informations

Unjustified withdrawal of copies of municipal newspaper by editor-in-chief following publication: *violation*

Retrait injustifié par le rédacteur en chef d'exemplaires d'un journal municipal après publication : *violation*

Saliyev – Russia/Russie - 35016/03
Judgment/Arrêt 21.10.2010 [Section I]

Facts – The applicant, the president of a non-governmental organisation, wrote an article criticising a deal for the acquisition of shares in a local energy producing company by a group of Moscow-based firms which the editor-in-chief of a municipally-owned newspaper agreed to publish. However, a number of copies of the issue containing the article were withdrawn from the news-stands shortly after distribution and later destroyed. The editor-in-chief resigned shortly afterwards. Following a complaint by the applicant to the regional prosecutor's office, the investigator in charge of the case decided not to open a criminal investigation after finding that the decision to withdraw the copies had been taken by the editor-in-chief in person in order to avoid potential lawsuits. The applicant unsuccessfully challenged that decision in the criminal courts. He also brought civil proceedings which were dismissed on the grounds that, as the owner, the newspaper was free to dispose of copies of the issue as it wished and that there had been no contract between the applicant and the newspaper obliging the latter to distribute the issue containing the article.

Law – Article 10: The Court noted that copies of the newspaper had been withdrawn and destroyed after the article had been accepted by the editorial board, and after it had been printed and made public. After publication, any decision limiting the circulation of the article had to be regarded as an interference with the applicant's freedom of expression and not as a problem of right of access to the press, which enjoyed only minimal, if any, protection under the Convention. Further, the main reason for the withdrawal had been the content of the article. The Government had conceded that the editor-in-chief had withdrawn the newspapers for fear of possible civil or administrative sanctions. The withdrawal therefore amounted to interference with the applicant's rights under Article 10.

Although the Court accepted that the withdrawal had been ordered by the editor-in-chief, it nevertheless found on the facts that it amounted to a decision by "public authority" for the purposes of Article 10. In that connection, it noted that the newspaper's independence was severely limited by the existence of strong institutional and economic links with the municipality and by the constraints attached to the use of its assets and property, which the municipality owned. Though a professional journalist with his own ideas and opinions, the editor-in-chief had been appointed and paid by the municipality and was required by virtue of his status to ensure the newspaper's loyalty to the municipality. His decision to withdraw the newspaper could be characterised as an act of policy-driven censorship in which he had implemented the general policy line of the municipality as its agent. Further, under domestic law municipal authorities were treated on the same footing as federal or regional bodies for many purposes so

that, even if their competence was limited, their powers could not be characterised as anything other than public. The order to withdraw the copies of the newspaper thus constituted interference by "public authority".

The Court was prepared to accept that the interference was prescribed by law and pursued the legitimate aim of protecting "the reputation or rights of others".

As to the question whether the withdrawal had been "necessary in a democratic society", the applicant had reported on a matter relating to the management of public resources that lay at the core of the media's responsibility and the right of the public to receive information and so attracted maximum protection under Article 10. However, instead of analysing the content or the form of the article to see whether the applicant had exceeded the limits of permissible criticism, the domestic courts had simply treated his complaint as a business matter. Yet the relationship between a journalist and an editor-in-chief was not only or always a business relationship. In the applicant's case it was not such a relationship, as the newspaper was, according to its own charter, a municipal institution created not as a profit-making business but as a forum for informing the public about local social, political and cultural issues. The domestic courts had effectively based their findings on the mistaken assumption that the case was basically about an owner's right to freely dispose of his property, without examining the reasons for the withdrawal of the copies or balancing the applicant's freedom of expression against any other interests that may have been at stake. Accordingly, the decision-making process in this case was deficient and the domestic courts' decisions had not contained any justification from the standpoint of Article 10 for the withdrawal of the newspaper. As to the critical views stated by the applicant in his article, they had been reasonably supported by facts which had never been challenged and had been expressed in an acceptable form. The withdrawal of the newspapers containing the applicant's article had, therefore, not been necessary in a democratic society.

Conclusion: violation (unanimously).

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique
Freedom of association/Liberté d'association

Repeated refusals to authorise gay-pride parades: *violation*

Refus répétés d'autoriser des défilés de la Gay Pride : *violation*

Alekseyev – Russia/Russie - 4916/07, 25924/08 and/et 14599/09
Judgment/Arrêt 21.10.2010 [Section I]

Facts – The applicant was one of the organisers of a series of marches planned to be held in Moscow in 2006, 2007 and 2008 to draw public attention to discrimination against the gay and lesbian community in Russia and to promote tolerance and respect for human rights. The organisers informed the mayor's office of their intention to hold the marches and undertook to cooperate with the law-enforcement authorities in ensuring safety and respect for public order and to comply with noise restrictions. Their requests were, however, turned down on public-order grounds after petitions were received from people opposed to the marches. In the authorities' view, there was a risk of a violent reaction degenerating into disorder and mass riots. The mayor and his staff were also quoted in the media as saying that no gay parade would be allowed in Moscow under any circumstances "as long as the city mayor held his post" and that the mayor further called for an "active mass media campaign … with the use of petitions brought by individual and religious organisations" against the gay-pride marches. The organisers subsequently informed the mayor's office of their intention to hold short pickets instead, but were again refused permission. The applicant mounted an unsuccessful challenge in the domestic courts against the decisions not to allow the marches or the pickets.

Law – Article 11: The Government had argued that the bans were justified both on safety grounds and for the protection of morals. As the first of these grounds, the mere risk of a demonstration creating a disturbance was not sufficient. If every probability of tension and heated exchanges between opposing groups were to warrant a ban, society would be deprived from hearing differing views on questions which offended the sensitivity of the majority opinion. The Moscow authorities had repeatedly, over a period of three years, failed to carry out adequate assessments of the risk to the safety of the participants and to public order. In the event of a counter-demonstration by those opposed to the marches, the authorities could have made arrangements to ensure that both events proceeded peacefully and lawfully, thus allowing

both sides to express their views without clashing. Any threats of or incitement to violence against the participants could have been adequately dealt with through the prosecution of those responsible. Instead, by banning the marches, the authorities had effectively endorsed the intentions of those clearly and deliberately intent on disrupting a peaceful demonstration in breach of the law and public order.

In any event, the safety considerations had been of secondary importance in the decisions of the authorities, who had mainly been guided by the prevailing moral values of the majority. The mayor had on many occasions expressed his determination to prevent gay parades as he found them inappropriate. The Government had also stated in their submissions to the Court that such events had to be banned as a matter of principle because gay propaganda was incompatible with religious doctrines and public morals, and could harm children and vulnerable adults. The Court stressed, however, that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. The purpose of the marches and picketing had been to promote respect for human rights and tolerance towards sexual minorities. There had been no intention to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views. Indeed, the authorities had indicated that it was not the behaviour or the attire of the participants that the authorities found objectionable but the fact that they wished to openly identify themselves as gay men or lesbians, individually and as a group. The Court rejected the Government's claim that, in the absence of a European consensus in this sphere, they were entitled to a wide margin of appreciation. While noting that there was in fact a European consensus on a whole range of matters relating to the rights of homosexuals, it went on to state that in any event the issue of consensus was not relevant because conferring substantive rights on homosexual persons was fundamentally different from recognising their right to campaign for such rights. There was no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly. It was only through fair and public debate that society could address such complex issues as gay rights, which in turn would benefit social cohesion as all views would be heard. An open debate of the kind the applicant had repeatedly but unsuccessfully attempted to launch could not be replaced by officials spontaneously expressing uninformed views they considered popular. Consequently, the decisions to ban the events in question had not been based on an acceptable assessment of the relevant facts, did not meet a pressing social need and were thus not necessary in a democratic society.

Conclusion: violation (unanimously).

Article 13: In the absence of a legally binding rule requiring the authorities to issue a final decision before the dates on which the marches were planned, the judicial remedy available to the applicant was of a *post hoc* nature and not capable of affording adequate redress in respect of the alleged violations of the Convention.

Conclusion: violation (unanimously).

Article 14: The main reason for the bans on the gay marches was the authorities' disapproval of demonstrations which they considered promoted homosexuality. In that connection, the Court could not disregard the strong personal opinions publicly expressed by the Moscow mayor and the undeniable link between those statements and the bans. The applicant had thus suffered a difference in treatment on the grounds of his and other participants' sexual orientation for which the Government had not provided any valid justification.

Conclusion: violation (unanimously).

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

ARTICLE 13

Effective remedy/Recours effectif

Judge denied an effective remedy in respect of Article 8 complaint: *violation*

Magistrate privée d'un recours effectif qui lui eût permis de soumettre son grief tiré de l'article 8 : *violation*

Özpınar – Turkey/Turquie - 20999/04
Judgment/Arrêt 19.10.2010 [Section II]

(See Article 8 above/Voir l'article 8 ci-dessus – page 16)

ARTICLE 14

Discrimination – Article 8

Prohibition under domestic law on the use of ova and sperm from donors for in *vitro* fertilisation: *case referred to the Grand Chamber*

Interdiction en droit interne d'utiliser des ovules et du sperme provenant de donneurs en vue d'une fécondation *in vitro* : *affaire renvoyée devant la Grande Chambre*

S.H. and Others/et autres – Austria/Autriche - 57813/00
Judgment/Arrêt 1.4.2010 [Section I]

The applicants are two married couples. Both couples suffer from infertility and wish to use medically assisted procreation techniques. In the case of the first couple only *in vitro* fertilisation ("IVF") with the use of sperm from a donor would allow them to have a child of whom one of them is the genetic parent. The second couple require IVF with the use of ova from a donor if they are to have a genetically linked child. However, both of these possibilities are ruled out by the Austrian Artificial Procreation Act ("the Act"), which prohibits the use of sperm from a donor for IVF and ova donation in general. The Act does, however, allow other assisted procreation techniques, in particular IVF with ova and sperm from the spouses or cohabitating partners themselves (homologous methods) and, in exceptional circumstances, donation of sperm when it is introduced into the reproductive organs of a woman. The applicants applied to the Constitutional Court, which found that there had been an interference with their right to respect for family life; however, it considered that the interference had been justified, as the Act aimed at preventing unusual relationships (namely the division of motherhood into a biological aspect and the aspect of "carrying the child") and the exploitation of women.

In its judgment of 1 April 2010 (see Information Note No. 129), a Chamber of the Court held, by fives votes to two, that there had been a violation of Article 14 in conjunction with Article 8, as the couple requiring IVF with the use of ova from a donor had suffered an unjustified discriminatory treatment in comparison with a couple using artificial procreation techniques without resorting to ova donation. The Chamber also held, by six votes to one, that there had been a violation of Article 14 in conjunction with Article 8, as the couple requiring a sperm donation for IVF had suffered an unjustified discriminatory treatment in comparison with a couple using a sperm donation for *in vivo* fertilisation.

On 4 October 2010 the case was referred to the Grand Chamber at the Government's request.

Difference in treatment between male and female military personnel regarding rights to parental leave: *violation*

Différence de traitement opérée en fonction du sexe parmi le personnel militaire, concernant le droit au congé parental : *violation*

Konstantin Markin – Russia/Russie – 30078/06
Judgment/Arrêt 7.10.2010 [Section I]

Facts – Under Russian law civilian fathers and mothers are entitled to three years' parental leave to take care of their minor children and to a monthly allowance for part of that period. The right is expressly extended to female military personnel, but no such provision is made in respect of male personnel. The applicant, a divorced serviceman, applied for three years' parental leave to bring up the three children of the marriage, but this was refused on the grounds that there was no basis for his claim in domestic law. He was subsequently granted approximately two years' parental leave plus financial aid by his superiors in view of his difficult personal circumstances. He nevertheless lodged a complaint with the Constitutional Court in which he submitted that the legislation was incompatible with the constitutional guarantee of equal rights. Dismissing that complaint, the Constitutional Court held that the prohibition on servicemen taking parental leave was based on the special legal status of the military and the need to avoid large numbers of military personnel becoming unavailable to perform their duties. It noted that servicemen assumed the obligations connected with their military status voluntarily and were entitled to early termination of service should they decide to take care of their child personally. The right for servicewomen to take parental leave had been granted on an exceptional basis and took into account the limited participation of women in the military and the special social role of women associated with motherhood.

Law

(a) *Admissibility* – Article 34: The Court rejected the Government's submission that the domestic

authorities' decision to grant him parental leave and financial aid meant that the applicant could no longer claim victim status. There had been no express acknowledgment of a breach of the Convention. Nor could the decision be interpreted as an acknowledgement in substance, as it had been taken by reference to the applicant's difficult family and financial situation, not on the grounds of any statutory entitlement or of any recognition that there had been a breach of his right to equal treatment.

Article 37 – Despite the measures taken by the domestic authorities to redress the applicant's individual situation, the Court considered that it was not appropriate to strike the application out of its list. The impugned legislation remained in force and the application concerned an important question of general interest – alleged discrimination against male military personnel regarding entitlement to parental leave – which had not yet been examined by the Court. Respect for human rights thus required the further examination of the application on the merits with a view to elucidating, safeguarding and developing the standards of protection under the Convention.

Conclusion: preliminary objections dismissed (unanimously).

(b) *Merits* – Article 14 in conjunction with Article 8: Parental leave and parental allowances came within the scope of Article 8 thus making Article 14 applicable. Accordingly, while the States had no obligation under Article 8 to create a parental-leave scheme, where they did decide to do so, this had to be in a manner that was compatible with Article 14.

The applicant had been denied parental leave on a combination of two grounds: his sex and his military status. As to the first of these grounds the Court was not convinced by the Constitutional Court's argument that the different treatment of male and female military personnel was justified by the special social role of mothers in the upbringing of children. In contrast to maternity leave and associated allowances, which were primarily in- tended to enable the mother to recover from the fatigue of childbirth and to breastfeed, parental leave and parental-leave allowances related to the subsequent period and were intended to enable the parent to stay at home to look after the infant personally. At that point in a child's upbringing, both parents were "similarly placed". Further, the legal situation as regards parental-leave allowances had evolved since the Court's judgment in *Petrovic v. Austria* (no. 20458/92, 27 March 1998), in which the respondent State in that case had been allowed a broad margin of appreciation in the absence of any European consensus on the subject. Society had since moved towards a more equal sharing between men and women of responsibility for the upbringing of their children as demonstrated by the fact that the legislation in an absolute majority of Contracting States now provided that parental leave could be taken by both mothers and fathers. That being so, Russia could not therefore rely on the absence of a common standard to justify the difference in treatment.

As to the second ground, the applicant's military status, the Court considered that servicemen and servicewomen were in an analogous situation in their relations with their children and that very weighty reasons were required to justify a difference in treatment regarding their relations with their new-born children. The aim of the limitation of servicemen's rights – protecting national security through ensuring the operational effectiveness of the army – was without doubt legitimate. As to whether it was proportionate, the Court was not convinced by the Constitutional Court's argument that allowing servicemen to take parental leave would adversely affect the fighting power and operational effectiveness of the armed forces. There had been no evidentiary basis for that assertion. Instead, the Constitutional Court had based its decision on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the interest of maintaining operational effectiveness against the conflicting interest of protecting servicemen against discrimination in the sphere of family life and promoting the best interests of their children. The fact that in the armed forces women were less numerous than men could not justify disadvantaging the latter, and the argument that servicemen wishing to take personal care of their children were free to resign was particularly striking, given the difficulty they would be liable to encounter in directly transferring essentially military qualifications and experience to civilian life. Accordingly, the reasons adduced by the Constitutional Court had provided insufficient justification for the much stronger restrictions imposed on servicemen; the difference in treatment could not be said to be reasonably and objectively justified and amounted to discrimination on the ground of sex.

Conclusion: violation (six votes to one).

Article 5 of Protocol No. 7 – In response to the applicant's complaint that the provisions of domestic law restricting parental leave to servicewomen had violated his right to equality between spouses, the Court observed that in accordance with the Explanatory Report to Protocol No. 7, the rights and responsibilities concerned by the right to equality between spouses were of a private-law character and Article 5 did not apply to other fields of law, such as administrative, fiscal, criminal, social, ecclesiastical or labour law. In the Court's view, the right to parental leave undoubtedly belonged to the sphere of labour law and formed part of the relations between employer and employee rather than between spouses. In any event, the impugned legislation favoured servicewomen irrespective of their marital status and thus concerned inequality between the sexes rather than inequality between spouses.

Conclusion: incompatible *ratione materiae* (unanimously).

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

Article 46: Respondent Government to amend legislation with a view to putting an end to the discrimination against male military personnel as far as their entitlement to parental leave is concerned.

Refusal to grant welfare benefits to foreign nationals: *violation*

Refus d'accorder des prestations sociales à des étrangers : *violation*

Fawsie – Greece/Grèce - 40080/07
Saidoun – Greece/Grèce - 40083/07
Judgments/Arrêts 28.10.2010 [Section I]

En fait – M^me^ Fawsie est une ressortissante syrienne, et M^me^ Saidoun une ressortissante libanaise. Officiellement reconnues comme réfugiées politiques, ainsi que leurs enfants, depuis 1998 et 1995 respectivement, elles résident légalement en Grèce. En 2005, la direction des allocations familiales rejeta les demandes des requérantes de se voir attribuer l'allocation de mère de famille nombreuse. La décision de rejet précisait que les requérantes ne possédaient pas la qualité de mère de famille nombreuse au sens de la loi, car ni elles ni leurs enfants n'avaient la nationalité grecque ou la nationalité d'un des Etats membres de l'Union européenne ou étaient des réfugiés d'origine grecque. Les recours des requérantes à l'encontre de cette décision furent vains. En 2008, le législateur modifia la loi en question, qui prévoit désormais que les réfugiés reconnus officiellement comme tels, ainsi que leurs familles, sont inclus parmi les ayants droit à l'allocation pour famille nombreuse.

En droit – Article 14 combiné avec l'article 8

a) *Applicabilité* – L'attribution de l'allocation pour famille nombreuse permet à l'Etat de témoigner son respect pour la vie familiale au sens de l'article 8 et entre donc dans le champ d'application de ce dernier. Partant, l'article 14 combiné avec cette disposition trouve à s'appliquer en l'espèce.

b) *Fond* – La Cour ne met pas en doute la volonté du législateur grec de faire face autant que faire se peut au problème démographique du pays. Toutefois, elle ne saurait partager la pertinence du critère choisi, fondé essentiellement sur la nationalité grecque ou l'origine grecque, d'autant que ce critère n'était pas uniformément appliqué dans la législation et la jurisprudence dominantes à l'époque des faits. Seules des considérations très fortes peuvent amener à estimer compatible avec la Convention une différence de traitement exclusivement fondée sur la nationalité. La Cour note que le Conseil d'Etat avait en 2000 donné raison à une personne dans une situation similaire à celle des requérantes. En outre, dès 1997, le statut d'ayants droit à l'allocation a été reconnu aux nationaux des Etats membres de l'Union européenne, puis, en 2000, aux nationaux des Etats parties de l'Espace économique européen et finalement, à partir de 2008, aux réfugiés tels que les requérants. Enfin, selon la Convention de Genève relative au statut des réfugiés, à laquelle la Grèce est partie, les Etats doivent accorder aux réfugiés résidant régulièrement sur leur territoire le même traitement en matière d'assistance et de secours publics qu'à leurs nationaux. Ainsi, le refus des autorités d'accorder une allocation pour famille nombreuse aux requérantes n'avait pas de justification raisonnable.

Conclusion : violation (unanimité).

Article 41 : 13 190,52 EUR pour dommage matériel et 1 500 EUR pour préjudice moral dans l'affaire *Fawsie* ; 6 938,88 EUR pour dommage matériel et 1 500 EUR pour préjudice moral dans l'affaire *Saidoun*.

ARTICLE 34

Hinder the exercise of the right of petition/ Entraver l'exercice du droit de recours

Authorities' refusal to provide imprisoned applicant with copies of documents required for his application to the Court: *violation*

Refus des autorités de fournir à un requérant détenu copie de documents requis pour sa requête à la Cour : *violation*

Naydyon – Ukraine - 16474/03
Judgment/Arrêt 14.10.2010 [Section V]

Facts – A regional court of appeal refused to provide the applicant, who was serving a prison sentence, with copies of documents he had requested in connection with his application to the European Court, on the ground that, following the completion of the proceedings, it was under no obligation to send copies of documents from case files, except for court decisions.

Law – Article 34: The Court took note of the applicant's specific situation at the time he had lodged and pursued his present application. In particular, the criminal proceedings against him had been completed and the case file was kept at the trial court. Since he was in prison, the applicant could not consult the file himself. He had no contact with his family and only limited contact with the outside world. The applicant's property had been confiscated following his conviction and he had no source of income. No legal aid was available to him. Therefore, to complete his present application, the applicant had been dependent on the authorities. However, they had not taken into account his specific situation. Despite the fact that he had clearly stated that he needed the copies in connection with his application to the Court, his requests had been refused. As a result, the Court had had to ask the Government to provide the documents concerned. Even though the Government had now submitted the documents, this did not preclude the Court from ruling on the issue arising under Article 34. In the present circumstances, the authorities' failure to ensure the applicant was provided with a possibility of obtaining copies of documents he needed to substantiate his application had amounted to an unjustified interference with his right of individual petition.

Conclusion: violation (unanimously).

ARTICLE 35

Article 35 § 1

Effective domestic remedy/Recours interne efficace – Czech Republic/République tchèque

Purely compensatory remedy for violation of the "speediness" requirement under Article 5 § 4: *effective remedy*

Recours purement indemnitaire pour violation de l'exigence de « bref délai » consacrée par l'article 5 § 4 : *recours effectif*

Knebl – Czech Republic/ République tchèque - 20157/05
Judgment/Arrêt 28.10.2010 [Section V]

En fait – Dans sa requête devant la Cour européenne, le requérant dénonce notamment le non-respect de l'exigence de « bref délai » prévue à l'article 5 § 4 de la Convention, dans le contexte d'une décision rendue sur sa demande d'élargissement alors qu'il était en détention provisoire.

En droit – Article 35 § 1 : le Gouvernement excipe du non-épuisement des voies de recours internes, estimant que le requérant aurait dû introduire une demande en dommages-intérêts (loi n° 82/1998, telle que modifiée par la loi n° 160/2006). La Cour observe qu'il avait été soutenu par plusieurs Etats défendeurs dans des affaires récentes qu'une action en indemnisation fondée sur la responsabilité des autorités nationales constituait un recours effectif au regard, entre autres, de l'exigence de « bref délai » consacrée par l'article 5 § 4. Elle admet également que sa jurisprudence n'apporte pas une réponse claire et laisse, pour une large part, la question ouverte. Tout en soulignant l'importance des recours préventifs, la Cour concède qu'ils peuvent difficilement être mis en place lorsqu'il s'agit de la durée d'un examen de la légalité de la détention. En effet, les contraintes temporelles de l'exigence de « bref délai » sont tellement strictes qu'il semble improbable qu'une autorité supplémentaire puisse encore être saisie, pendant ce délai, afin d'ordonner une éventuelle accélération dudit réexamen. Par conséquent, en cas de non-respect par les tribunaux internes de cette exigence, elle estime qu'un recours indemnitaire peut en principe être considéré comme effectif, à condition qu'il puisse aboutir à un constat de violation de la Convention et à l'octroi d'une réparation appropriée, notamment au titre du préjudice moral. En outre, la Cour ne

voit pas d'obstacle à ce qu'un tel recours indemnitaire soit examiné par les juridictions civiles.

La Cour ayant déjà jugé (décision *Vokurka c. République tchèque*, nº 40552/02, 16 octobre 2007) que le recours indemnitaire introduit par la loi modificative nº 160/2006 pouvait être considéré comme effectif quant au « délai raisonnable » exigé par l'article 6 § 1 de la Convention, elle ne voit pas d'obstacle à ce que ce recours puisse s'appliquer en matière de célérité du réexamen de la légalité de la détention au sens de l'article 5 § 4.

En revanche, la Cour précise qu'étant donné que la Cour constitutionnelle tchèque ne peut prendre des mesures concrètes en vue de faire accélérer une procédure ni accorder aux justiciables une quelconque indemnité, le recours constitutionnel ne représente pas un recours adéquat et effectif devant être épuisé au regard du grief tiré du « bref délai » au sens de l'article 5 § 4.

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

Par ailleurs, la Cour dit qu'il n'y a pas eu violation de l'article 5 § 3 de la Convention, mais que l'article 5 § 4 a été violé en ce que le requérant n'a pas eu d'audition personnelle.

Effective domestic remedy/Recours interne efficace – Poland/Pologne

Claim for compensation for infringement of personal rights under Articles 24 and 448 of the Civil Code on account of prison overcrowding: *effective remedy*

Action en réparation pour atteinte aux droits de la personne fondée sur les articles 24 et 448 du code civil, du fait de la surpopulation carcérale : *recours effectif*

Łatak – Poland/Pologne - 52070/08
Łomiński – Poland/Pologne - 33502/09
Decisions/Décisions 12.10.2010 [Section IV]

Facts – In its pilot judgments of 22 October 2009 in the cases of *Orchowski v. Poland* and *Norbert Sikorski v. Poland* (nos. 17885/04 and 17559/05, Information Note no. 123), the Court concluded that from 2000 until at least mid-2008 there had been a structural problem of overcrowding in Polish prisons and remand centres. It went on to require the respondent State to take general measures under Article 46 of the Convention to solve the problem and to provide redress for past violations.

The issue of overcrowding also came before the domestic authorities giving rise to a series of landmark judgments by both the Supreme and Constitutional Courts and to legislative reform. Thus, in a judgment of 28 February 2007 the Supreme Court had acknowledged for the first time a detainee's right to lodge a claim against the State for compensation for infringement of his personal rights under Articles 24 and 448 of the Civil Code on account of overcrowding and conditions of detention. Following a series of diverging interpretations of that decision by the lower courts, it reaffirmed that principle in a further judgment of 17 March 2010. In a separate development, the Constitutional Court had ruled on 26 May 2008 that Article 248 of the Code of Execution of Criminal Sentences, which effectively allowed the indefinite and arbitrary placement of detainees in cells below the statutory minimum size, was unconstitutional and would lose its binding force within eighteen months. As a result, the Code was amended on 9 October 2009 so as to restrict the period for which detainees could be temporarily held in undersized cells to ninety days in emergencies and fourteen days in other, specified, circumstances. Provision was also made for prison sentences to be suspended where the prison population exceeded overall capacity.

The applications in the instant cases were lodged in October 2008, before the delivery of the pilot judgments in *Orchowski* and *Norbert Sikorski*. The Court accepted that both applicants had been held in overcrowded conditions for various periods ending on 26 November 2009 (in the case of Mr Łatak) and 6 December 2009 (Mr Łomiński). In all, there are some 270 similar cases currently pending before the Court.

Law – Article 35 § 1: The Government argued that both applicants had failed to exhaust domestic remedies as, in their submission, they could have (a) lodged a claim for compensation under Articles 24 and 448 of the Civil Code or (b) used the remedies available under the Code of Execution of Criminal Sentences.

(a) *Claim for compensation under Articles 24 and 448 of the Civil Code* – Since this remedy had been made available following the Court's pilot judgments in *Orchowski* and *Norbert Sikorski* relating to similar complaints, its effectiveness was to be assessed by reference to the current situation, not to the date the applications were lodged. The Court had noted in those judgments that the domestic civil courts' practice allowing prisoners to claim compensation was only just beginning to take shape

and that there were divergences of interpretation. However, following the delivery of the Supreme Court's second judgment of 17 March 2010 a fully consolidated, consistent and established civil-court practice regarding the interpretation and application of Articles 24 and 448 of the Civil Code in overcrowding cases had emerged that unambiguously confirmed the effectiveness of that remedy. Not only had that judgment reaffirmed the principles stated in the Supreme Court's 2007 ruling it had also, and more importantly, given supplementary guidance as to how the civil courts should verify and assess the justification for any reduction in the statutory minimum cell space.

However, given that that remedy could not be considered effective until the Supreme Court's judgment of 17 March 2010, only those applicants in respect of whom the three-year domestic limitation period had not yet expired and who still had adequate time to prepare and bring a claim under Articles 24 and 448 of the Civil Code could reasonably be required to make use of it. In practical terms, this meant that in all cases in which the alleged violation had come to an end in or after June 2008, either through the applicant's release or transfer to Convention-compliant conditions, he or she would be required to bring a civil action for compensation under Articles 24 and 448. In selecting that date, the Court was guided by the need to apply Article 35 § 1 with a degree of flexibility, by the fact that overcrowding had continued until at least mid-2008 by which time the Constitutional Court had itself identified the systemic violation of Article 3 and, lastly, by the need for applicants to have adequate time to have realistic recourse to the remedy bearing in mind the three-year domestic time-limit. As the violations alleged in both Mr Łatak's and Mr Łomiński's cases had ceased after June 2008, they were required to exhaust the remedy.

Conclusion: inadmissible (non-exhaustion).

(b) *Code of Execution of Criminal Sentences* – The remedy under the original legislation could not be considered effective for the reasons stated in the pilot judgments. As to the remedy under the amended legislation, the Court was not required to pronounce on its effectiveness as the applicants had already been moved into suitable cells by the time it came into force. However, with respect to the potential general impact of the remedy on the handling of future similar applications, the Court noted that the amended provisions not only specified the circumstances in which the minimum-space requirement could be reduced and set time-limits, they also afforded detainees a new legal means of contesting decisions to reduce cell space. Accordingly, without prejudice to the examination of the procedure in the particular circumstances of subsequent applications, it could not be excluded that applicants would be required to use the new complaints system in future cases.

Conclusion: preliminary objection dismissed (unanimously).

Article 35 § 3

No significant disadvantage/Absence de préjudice important

Complaint concerning EUR 150 fine and deduction of one point from driving licence: *inadmissible*

Grief concernant une amende de 150 EUR et le retrait d'un point du permis de conduire : *irrecevable*

Rinck – France - 18774/09
Decision/Décision 19.10.2010 [Section V]

En fait – Le requérant, avocat de profession, reçut un avis de contravention à la suite d'un contrôle de vitesse automatisé. Ayant lu dans un magazine de la presse automobile une enquête sur la fiabilité du type d'appareil utilisé lors du contrôle, il demanda à l'administration différents documents techniques, mais sa demande fut refusée. A l'audience, estimant que le bon fonctionnement de l'appareil était suffisamment établi par son homologation et la preuve de sa vérification annuelle, la juridiction rejeta la demande de l'intéressé, le déclara coupable des faits, et le condamna à une amende de 150 EUR. La Cour de cassation rejeta le pourvoi formé par le requérant, jugeant notamment que les dispositions légales en vertu desquelles le procès-verbal valait jusqu'à preuve contraire n'étaient pas incompatibles avec le principe de l'égalité des armes. Le requérant se vit ensuite retirer un point de son permis de conduire en raison de cette infraction. Devant la Cour européenne, il se plaint d'une rupture de l'égalité des armes en raison du refus du ministère public de produire des informations techniques en sa possession.

En droit – Article 35 § 3 b) : la notion de « préjudice important » renvoie à l'idée que la violation d'un droit doit atteindre un seuil minimum de gravité pour justifier un examen par une juridiction inter-

nationale. L'appréciation de ce seuil est, par nature, relative et dépend des circonstances de l'espèce, devant tenir compte tant de la perception subjective du requérant que de l'enjeu objectif du litige. Elle renvoie ainsi à des critères tels que l'impact monétaire de la question litigieuse ou l'enjeu de l'affaire pour l'intéressé. En l'espèce, le préjudice allégué par le requérant – 150 EUR d'amende, 22 EUR de frais de procédure et le retrait d'un point de son permis de conduire – était particulièrement réduit, et aucun élément du dossier n'indique que l'intéressé se trouvait dans une situation économique telle que l'issue du litige aurait eu des répercussions importantes sur sa vie personnelle. Le fait que le requérant ait pu percevoir la solution de ce litige comme une question de principe ne saurait suffire. Dès lors, le requérant n'a pas subi un « préjudice important » au regard de son droit à un procès équitable.

Par ailleurs, aucun impératif tiré de l'ordre public européen ne justifie de poursuivre l'examen du grief, le mécanisme de charge de la preuve des contraventions, ainsi que la question de la limitation des droits de la défense, notamment en ce qui concerne la divulgation par l'accusation d'éléments pertinents, ayant déjà fait l'objet de décisions de la Cour. Enfin, l'affaire a été dûment examinée par une juridiction interne, aucune question sérieuse relative à l'interprétation ou à l'application de la Convention ou au droit national n'ayant été laissée sans réponse.

Les trois conditions du nouveau critère de recevabilité sont, par conséquent, réunies.

Conclusion : irrecevable (absence de préjudice important).

ARTICLE 46

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

Respondent State required to introduce legislation to end discrimination between male and female military personnel regarding rights to parental leave

Etat défendeur tenu d'adopter une législation visant à mettre fin à la discrimination fondée sur le sexe parmi le personnel militaire, concernant le droit au congé parental

Konstantin Markin – Russia/Russie - 30078/06
Judgment/Arrêt 7.10.2010 [Section I]

(See Article 14 above/Voir l'article 14 ci-dessus – page 23

Respondent State required to take general measures to secure restitution of nationalised immovable property

Etat défendeur tenu de prendre des mesures générales pour la restitution de biens immeubles nationalisés

Maria Atanasiu and Others/et autres – Romania/ Roumanie
- 30767/05 and/et 33800/06
Judgment/Arrêt 12.10.2010 [Section III]

En fait – En mars 2005, la Haute Cour de cassation et de justice déclara l'action en revendication d'un appartement nationalisé appartenant aux deux premières requérantes irrecevable, au motif qu'elles devaient suivre la procédure de restitution ou d'indemnisation alors en vigueur imposée par la loi nº 10/2001 sur le régime juridique des immeubles nationalisés. Puis, n'ayant pas eu de réponse dans le délai légal à leur demande de restitution de l'appartement, introduite par la suite en vertu de cette dernière loi, les requérantes formèrent une action contre la mairie qui fut condamnée en avril 2005 par la Haute Cour de cassation et de justice à rendre une décision. A ce jour, l'examen de la demande d'indemnisation par la mairie n'a toujours pas abouti. La troisième requérante se plaint de l'impossibilité d'obtenir une indemnisation, sur le fondement de la loi nº 10/2001, pour le préjudice subi du fait de la nationalisation d'un terrain utilisé par une université alors qu'un arrêt définitif de la Haute Cour de cassation et de justice de mars 2006 établit que la requérante avait droit à des dédommagements. En juin 2010, le gouvernement roumain a indiqué que sa demande allait être traitée en priorité. A ce jour, aucune indemnité ne lui a été versée.

En droit – Article 6 § 1 : les deux premières requérantes ont subi une charge disproportionnée, portant atteinte à la substance même de leur droit d'accès à un tribunal.

Conclusion : violation (unanimité).

Article 1 du Protocole nº 1 : l'absence d'indemnisation injustifiée et l'incertitude quant à la date à laquelle les requérantes pourront la percevoir leur a imposé une charge disproportionnée et excessive, incompatible avec le droit au respect de leurs biens garanti par l'article 1 du Protocole nº 1.

Conclusion : violation (unanimité).

Article 46 : a) *Application de la procédure d'arrêt pilote* – L'inefficacité du mécanisme d'indemnisation ou de restitution continue à être un problème récurrent et à grande échelle malgré l'adoption des arrêts[1] *Viaşu*, *Faimblat* et *Katz*, dans lesquels la Cour a indiqué au gouvernement roumain que des mesures générales s'imposaient pour permettre la réalisation effective et rapide du droit à restitution. Ainsi, les présentes affaires se prêtent à l'application de la procédure d'arrêt pilote.

b) *Existence d'une pratique incompatible avec la Convention* – Les autorités internes ont pallié à la complexité des dispositions législatives en adoptant une loi qui a établi une procédure administrative d'indemnisation commune à l'ensemble des biens immeubles revendiqués, mais sa mise en pratique se révèle ne pas être assez efficace. En effet, la Haute Cour de cassation et de justice a requis que les dossiers soient examinés dans un délai raisonnable mais, en l'absence d'un délai légal contraignant, cette obligation risque d'être théorique et illusoire et le droit d'accès à un tribunal pour dénoncer le retard accumulé dans le traitement des dossiers menace d'être vidé de son contenu. En outre, la législation en matière de biens immeubles nationalisés fait peser une charge très importante sur le budget de l'Etat qui est difficile à supporter. La cotation en bourse du Fonds *Proprietatea*, pourtant prévue dès 2005, n'a toujours pas abouti, alors même que le transfert d'une partie des bénéficiaires des titres de dédommagement vers le marché boursier allégerait la pression budgétaire.

c) *Mesures à caractère général* – La Cour attire l'attention sur la résolution Res(2004)3 et la recommandation Rec(2004)6 du Comité des Ministres du Conseil de l'Europe adoptées le 12 mai 2004. Elle suggère en outre que l'Etat doit garantir par des mesures légales et administratives appropriées le respect du droit de propriété de toutes les personnes se trouvant dans une situation similaire à celle des requérantes, en tenant compte des principes énoncés par la jurisprudence de la Cour concernant l'application de l'article 1 du Protocole n° 1. Ces objectifs pourraient être atteints, par exemple, par l'amendement du mécanisme de restitution et la mise en place d'urgence de procédures simplifiées et efficaces, fondées sur des mesures législatives et sur une pratique judiciaire et administrative cohérente, qui puissent ménager un juste équilibre entre les différents intérêts en jeu. Laissant à l'Etat défendeur la latitude nécessaire à cet exercice d'une exceptionnelle difficulté, elle prend acte avec intérêt de la proposition du Gouvernement d'établir des délais contraignants pour l'ensemble des étapes administratives, sous réserve que cette mesure soit réaliste et soumise au contrôle juridictionnel. Par ailleurs, les autorités roumaines pourraient s'inspirer des mesures prises par d'autres Etats, telles que la refonte de la législation permettant un système d'indemnisation plus prévisible, ou encore le plafonnement et l'échelonnement des indemnisations sur une plus longue période.

d) *Procédure à suivre dans les affaires similaires* – La procédure d'arrêt pilote ayant pour vocation de permettre un redressement rapide au niveau national à toutes les personnes affectées par le problème structurel identifié par l'arrêt pilote, et compte tenu du nombre très important de requêtes dirigées contre la Roumanie portant sur le même type de contentieux, la Cour décide d'ajourner pour une période de dix-huit mois à compter de la date à laquelle le présent arrêt deviendra définitif l'examen de toutes les requêtes résultant de la même problématique générale, en attendant l'adoption par les autorités roumaines de mesures aptes à offrir un redressement adéquat à l'ensemble des personnes concernées par les lois de réparation.

Article 41 : 65 000 EUR pour dommage matériel et préjudice moral aux deux premières requérantes ; 115 000 EUR pour dommage matériel et préjudice moral à la troisième requérante.

1. *Viaşu c. Roumanie*, n° 75957/01, arrêt du 9 décembre 2008, Note d'information n° 114 ; *Faimblat c. Roumanie*, n° 23066/02, et *Katz c. Roumanie*, n° 23066/02, arrêts du 13 janvier 2009 et du 20 janvier 2009 respectivement, Note d'information n° 115.

ARTICLE 5 OF PROTOCOL No. 7 / ARTICLE 5 DU PROTOCOLE N° 7

Equality between spouses/Egalité entre époux

Alleged inequality of rights of male and female military personnel to parental leave: *inadmissible*

Prétendue inégalité fondée sur le sexe parmi le personnel militaire, concernant le droit au congé parental : *irrecevable*

Konstantin Markin – Russia/Russie - 30078/06
Judgment/Arrêt 7.10.2010 [Section I]

(See Article 14 above/Voir l'article 14 ci-dessus – page 23)

REFERRAL TO THE GRAND CHAMBER / RENVOI DEVANT LA GRANDE CHAMBRE

Article 43 § 2

Nejdet Şahin and/et Perihan Şahin – Turkey/Turquie - 13279/05
Judgment/Arrêt 27.5.2010 [Section II]

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

S.H. and Others/et autres – Austria/Autriche - 57813/00
Judgment/Arrêt 1.4.2010 [Section I]

(See Article 14 above/Voir l'article 14 ci-dessus – page 23)