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

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Alleged failure by police to take all reasonably available measures to protect schoolchildren and their parents from sectarian violence: *inadmissible*

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P.F. and/et E.F. – United Kingdom/ Royaume-Uni - 28326/09
Decision/Décision 23.11.2010 [Section IV]

Facts – The first applicant was the mother of the second applicant, who was a pupil at a Catholic primary school situated in Belfast (Northern Ireland). During the autumn of 2001 loyalists staged protests along the route the second applicant (and other pupils) used to get to school. Owing to sectarian tensions in the area, the police believed that there was a risk that violence could erupt in other parts of the city if they were forcibly to end the protest. They therefore decided to exercise restraint. Instead of breaking up the protest, they placed themselves between the protesters and the parents and children walking to school and used their shields to protect them against missiles. The protest lasted more than two months. During this period none of the children were physically injured, but they were subjected to sectarian abuse and intimidation as they walked to school every day. The first applicant brought judicial-review proceedings on behalf of herself and her daughter for a declaration that the authorities had failed to secure the effective implementation of the criminal law and to ensure safe passage for her, her daughter and the other pupils to the school. Her application was dismissed in a decision that was upheld on appeal.

Law – Article 3: The behaviour of the loyalist protesters, which was premeditated, had continued for two months and was designed to cause fear and distress to young children and their parents making their way to school, had reached the minimum level of severity required to fall within the scope of Article 3. The police had possessed more than sufficient foreknowledge of that treatment to trigger their obligation to take preventive action. Accordingly, the primary question for the Court was whether the police could be said to have taken all reasonable steps to prevent ill-treatment.

In answering that question, the Court had to bear in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which had to be made in terms of priorities and resources. The obligation to take "all reasonable steps" had to be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities. It followed that the police had to be afforded a degree of discretion in taking operational decisions. Such decisions were almost always complicated and the police, who had access to information and intelligence not available to the general public, were usually in the best position to make them. This was especially the case in a situation as volatile and unpredictable as the one pertaining in north Belfast during the summer and early autumn of 2001, where riots, sectarian murders and violent disorder had erupted.

In view of that context, the Court accepted that the police had taken all reasonable steps to protect the applicants. First, they had followed a course of action they reasonably believed would end the protest with minimal risk to the children, their parents and the community at large. They had intelligence which suggested that a more direct approach could increase the risk to the parents and children walking to the school, lead to further attacks on Catholic schools and also result in increased violence in north Belfast. It could not, therefore, be said that they had either disregarded the risk to the applicants, or given greater priority to the "unspecified risk of disturbances elsewhere". Secondly, they had not stood by and done nothing: rather, they had placed themselves as a shield between the protesters and the parents and children at considerable cost to themselves, with forty-one officers being injured during the operation. By contrast, no child had sustained any physical injury during the whole period. Thirdly, requiring the police in Northern Ireland to forcibly end every violent protest would likely place a disproportionate burden on them, especially where such an approach could result in the escalation of violence across the province. In a highly charged community dispute, most courses of action would have inherent dangers and difficulties and it had to be permissible for the police to take all of those dangers and difficulties into consideration before choosing the most appropriate response. Consequently, the applicants had not demonstrated that the authorities had failed do all that could be reasonably expected of them to protect them from ill-treatment.

Conclusion: inadmissible (manifestly ill-founded).

The Court also declared inadmissible as being manifestly ill-founded the applicants' complaints under Articles 8, 13 and 14 of the Convention.

ARTICLE 5

Article 5 § 1

Procedure prescribed by law/Voies légales

Deprivation of liberty following extraordinary appeal by Procurator-General: *case referred to the Grand Chamber*

Privation de liberté à la suite d'un recours extraordinaire du procureur général : *affaire renvoyée devant la Grande Chambre*

Creangă – Romania/Roumanie - 29226/03
Judgment/Arrêt 15.6.2010 [Section III]

Le 16 juillet 2003, le requérant se présenta au parquet national anticorruption à 9 h du matin. A 10 h, il fut interrogé par un procureur. Il fut retenu jusqu'à 20 h, heure à laquelle il fut informé des soupçons portés à son encontre. Le Parquet national anticorruption ordonna ensuite son placement en détention provisoire pour trois jours, à savoir du 16 juillet 22 h au 18 juillet 22 h. Le 18 juillet 2003, la cour militaire d'appel, dans une formation de juge unique, prolongea sa détention provisoire pour vingt-sept jours. Le même jour, un mandat d'arrêt fut délivré au nom du requérant. Le 21 juillet 2003, la Cour suprême de justice fit droit au recours contre la légalité de la formation qui avait prononcé le jugement, cassa le jugement rendu en premier ressort et ordonna la remise en liberté du requérant, qui s'effectua le jour même. Le procureur général forma par la suite devant la Cour suprême de justice un recours en annulation contre cet arrêt. Par un arrêt définitif du 25 juillet 2003 rendu par une formation de neuf juges, la haute juridiction fit droit au recours et cassa l'arrêt du 21 juillet. Le 25 juillet 2003, le requérant fut placé en détention provisoire. En juillet 2004, la cour militaire d'appel ordonna la remise en liberté du requérant, en remplaçant la mesure de détention provisoire par l'interdiction de quitter le pays.

Par un arrêt du 15 juin 2010, une chambre de la Cour a conclu, à l'unanimité, d'une part à la violation de l'article 5 § 1 pour absence de base légale concernant la privation de liberté du requérant le 16 juillet 2003 de 10 h à 22 h et son placement en détention le 25 juillet 2003 à la suite du recours en annulation, et d'autre part à la non-violation de l'article 5 § 1 pour ce qui est de l'insuffisance de motivation de son placement en détention à titre provisoire du 16 au 18 juillet 2003.

Le 22 novembre 2010, l'affaire a été renvoyée devant la Grande Chambre à la demande du Gouvernement.

Article 5 § 3

Brought promptly before judge or other officer/Traduit aussitôt devant un juge ou un autre magistrat

Detainee brought before public prosecutor who was under authority of executive and parties: *violation*

Détenue traduite devant le procureur dépendant à l'égard de l'exécutif et des parties : *violation*

Moulin – France - 37104/06
Judgment/Arrêt 23.11.2010 [Section V]

En fait – Le 13 avril 2005, la requérante, avocate à Toulouse, fut placée en garde à vue à Orléans. Elle fut ensuite conduite à Toulouse, aux fins d'une perquisition de son cabinet en sa présence par deux juges d'instruction d'Orléans. Comme ils intervenaient en dehors de leur ressort de compétence territoriale, la garde à vue a été prolongée le 14 avril 2005 par un juge d'instruction, lequel n'a cependant pas entendu la requérante pour examiner le bien-fondé de sa détention. La garde à vue prit fin le 15 avril 2005, date à laquelle l'intéressée fut présentée au procureur adjoint de Toulouse, qui ordonna sa conduite en maison d'arrêt en vue de son transfèrement ultérieur devant les juges d'instruction à Orléans. Elle fut présentée le 18 avril 2005 à ces derniers, qui procédèrent à son interrogatoire de « première comparution » et la mirent en examen. La requérante fut placée en détention provisoire.

En droit – Article 5 § 3 : pendant la période qui s'est écoulée entre son placement en garde à vue le 13 avril 2005 et sa présentation aux deux juges d'instruction le 18 avril 2005, pour l'interrogatoire de « première comparution », la requérante n'a pas été entendue personnellement par les juges en vue

d'un examen par ces derniers sur le bien-fondé de la détention. Cette période de plus de cinq jours relève des premières heures après l'arrestation, au cours desquelles la requérante se trouvait aux mains des autorités. Puis la requérante a été présentée au procureur adjoint le 15 avril 2005, après la fin de sa garde à vue. Le procureur adjoint, amovible, est un membre du ministère public placé sous l'autorité du ministre de la Justice, membre du gouvernement, et donc du pouvoir exécutif. Le lien de dépendance effective entre le ministre de la Justice et le ministère public fait l'objet d'un débat au plan interne. Cependant, il n'appartient pas à la Cour de prendre position dans ce débat qui relève des autorités nationales. Dans ce cadre, elle considère que, du fait de leur statut ainsi rappelé, les membres du ministère public, en France, ne remplissent pas l'exigence d'indépendance à l'égard de l'exécutif qui, selon une jurisprudence constante, compte, au même titre que l'impartialité, parmi les garanties inhérentes à la notion autonome de « magistrat » au sens de l'article 5 § 3. Par ailleurs, la loi confie l'exercice de l'action publique au ministère public. Indivisible, le parquet est représenté auprès de chaque juridiction répressive de première instance et d'appel. Or les garanties d'indépendance à l'égard de l'exécutif et des parties excluent notamment qu'il puisse agir par la suite contre le requérant dans la procédure pénale. Il importe peu qu'en l'espèce le procureur adjoint exerçait ses fonctions dans un ressort territorial différent de celui des deux juges d'instruction, la Cour ayant déjà jugé que le fait pour le procureur d'un district, après avoir prolongé une privation de liberté, d'avoir ensuite transféré le dossier dans un autre parquet n'emportait pas sa conviction. Dès lors, le procureur adjoint, membre du ministère public, ne remplissait pas, au regard de l'article 5 § 3, les garanties d'indépendance exigées par la jurisprudence pour être qualifié, au sens de cette disposition, de « juge ou (...) autre magistrat habilité par la loi à exercer des fonctions judiciaires ». En conséquence, la requérante n'a été présentée à une telle autorité, en l'espèce les juges d'instruction, en vue de l'examen du bien-fondé de sa détention que le 18 avril 2005, soit plus de cinq jours après son arrestation et son placement en garde à vue. Or la Cour rappelle qu'elle a jugé qu'une période de garde à vue de quatre jours et six heures sans contrôle judiciaire allait au-delà des strictes limites de temps fixées par l'article 5 § 3.

Conclusion : violation (unanimité).

Article 41 : 5 000 EUR pour préjudice moral.

ARTICLE 6

Article 6 § 1 (civil)

Fair hearing/Procès équitable

Lack of uniform interpretation of law by county courts sitting as courts of final instance in collective dismissal cases: *violation*

Manque d'uniformité dans l'interprétation du droit par les tribunaux départementaux siégeant en dernier ressort dans les affaires de licenciement collectif : *violation*

Ştefănică and Others/et autres – Romania/Roumanie - 38155/02
Judgment/Arrêt 2.11.2010 [Section III]

Facts – The applicants were part of a large group of employees who sought compensation following their collective dismissal as a result of the restructuring of their state-owned employer. Their claims were dismissed by a county court sitting as a court of final instance on the grounds that they did not meet the statutory conditions for an entitlement to compensation. They were refused leave to bring an extraordinary appeal before the Supreme Court of Justice. The claims of other employees in different county courts were, however, successful, although the reasoning varied. In their application to the European Court, the applicants complained that the domestic courts had adopted conflicting solutions in respect of similar legal issues

Law – Article 6 § 1: Once a solution was adopted by a State to regulate the collective dismissal of hundreds of persons from state-owned companies, it had to be implemented with reasonable clarity and coherence in order to avoid, in so far as possible, uncertainty and ambiguity for those affected by the measures. Although the applicants' claims for compensatory payments had been dismissed, awards had been made to persons in similar situations by other county courts in final decisions, so revealing an inconsistent approach by the domestic courts in the interpretation of the statutory conditions for making an award. The Court acknowledged that a lower court's appreciation of the facts and assessment of the evidence could lead to different outcomes for parties with broadly similar grievances. That reality did not, *per se*, entail a violation of the principle of legal certainty. However, a problem did arise where, as in the applicants' case, there were divergences in the application of substantively similar legal provi-

sions to persons in near identical groups. There had been no remedy to resolve such divergences, as the county courts had sat as courts of final instance and the Supreme Court of Justice could not intervene in the ordinary proceedings. As to the possibility of an extraordinary appeal to that court, the applicants' requests for leave had been refused and although other claimants had been successful in such an appeal, the Supreme Court's decision had concerned only their individual case and was not meant to settle conflicting interpretations of national law. In any event, where the intervention of the Supreme Court was only possible by means of an extraordinary appeal, that in itself contradicted the principle of legal certainty. In sum, the inconsistent adjudication of claims brought by many persons in similar situations had led to a state of uncertainty that had deprived the applicants of a fair hearing.

Conclusion: violation (unanimously).

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

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Lack of adequate procedural safeguards to enable accused to understand reasons for jury's guilty verdict in assize court: *violation*

Absence de garanties procédurales suffisantes pour permettre à un accusé de comprendre le verdict de culpabilité rendu par un jury populaire en cour d'assises : *violation*

Taxquet – Belgium/Belgique - 926/05
Judgment/Arrêt 16.11.2010 [GC]

En fait – En 2003-2004, le requérant comparut avec sept coaccusés devant la cour d'assises pour être jugé des chefs d'assassinat d'un ministre d'Etat et de tentative d'assassinat de la compagne de ce dernier. Pour rendre son verdict, le jury populaire eut à répondre à trente-deux questions, dont quatre concernaient le requérant. Les jurés ayant rendu un verdict de culpabilité à son égard, l'intéressé fut condamné à vingt ans d'emprisonnement. Il fut débouté de son pourvoi en cassation contre l'arrêt de la cour d'assises.

Par un arrêt du 13 janvier 2009, une chambre de la Cour européenne a conclu à l'unanimité à la violation de l'article 6 § 1 de la Convention, en raison du défaut de motivation de l'arrêt de la cour d'assises (voir la Note d'information n° 115).

En droit – Article 6 § 1 : plusieurs Etats membres du Conseil de l'Europe possèdent un système de procès avec jury populaire dans le cadre duquel les magistrats professionnels ne peuvent pas participer aux délibérations des jurés sur le verdict. Ce système, qui procède de la volonté légitime d'associer les citoyens à l'action de la justice, notamment à l'égard des actions les plus graves, ne saurait ici être remis en cause. Il ressort de la jurisprudence de la Cour que l'absence de motivation d'un verdict rendu par un jury populaire n'emporte pas en soi violation de l'article 6. Il n'en demeure pas moins que, pour que les exigences d'un procès équitable soient respectées, des garanties suffisantes doivent permettre à l'accusé et au public de comprendre le verdict rendu. Ces garanties peuvent consister par exemple à fournir aux jurés des instructions ou éclaircissements sur les problèmes juridiques posés ou les éléments de preuve produits, à leur soumettre des questions précises et non équivoques qui donneront une trame au verdict, ou à compenser l'absence de motivation des réponses du jury. Or, en l'espèce, ni l'acte d'accusation ni les questions posées au jury ne comportaient des informations suffisantes quant à l'implication du requérant dans la commission des infractions qui lui étaient reprochées. L'acte d'accusation désignait chacun des crimes dont le requérant était accusé mais ne montrait pas quels étaient les éléments qui, pour l'accusation, pouvaient être retenus contre lui. Quant aux questions soumises par le président de la cour d'assises au jury, elles étaient laconiques et identiques pour tous les accusés. Même combinées avec l'acte d'accusation, elles ne permettaient pas au requérant de savoir quels éléments et circonstances avaient conduit les jurés à rendre à son égard un verdict de culpabilité. L'intéressé n'a pas été en mesure de comprendre, notamment, quel rôle précis le jury lui attribuait par rapport à ses coaccusés, pourquoi la qualification d'assassinat avait été retenue plutôt que celle de meurtre, et pourquoi la circonstance aggravante de préméditation avait été retenue à son encontre s'agissant de la tentative de meurtre de la compagne du ministre d'Etat. Cette déficience est d'autant plus problématique que l'affaire était complexe sur les plans juridique et factuel, et que le procès a duré plus de deux mois et impliqué de nombreuses auditions. Enfin, le système national ne prévoit pas la possibilité d'interjeter appel contre un arrêt de cour d'assises. Quant au pourvoi en cassation, il ne porte que sur des points de droit et, dès lors, ne peut éclairer adéquatement une personne sur les raisons

de sa condamnation. Partant, le requérant n'a pas bénéficié de garanties suffisantes pour lui permettre de comprendre le verdict de condamnation prononcé contre lui, et la procédure a revêtu un caractère inéquitable.

Conclusion : violation (unanimité).

Article 41 : 4 000 EUR pour préjudice moral.

Undercover police operation resulting in conviction for drug-trafficking offences: *no violation*

Opération d'infiltration policière ayant abouti à une condamnation pour infractions relevant du trafic de stupéfiants : *non-violation*

Bannikova – Russia/Russie - 18757/06
Judgment/Arrêt 4.11.2010 [Section I]

Facts – In her application to the European Court, the applicant complained of police entrapment that had resulted in her being convicted of drug-trafficking offences. Between 23 and 27 January 2005 the Federal Security Service ("FSB") recorded a series of telephone conversations between the applicant and a fellow suspect S., who brought the applicant a supply of cannabis on 28 January 2005. The same day the acting regional chief of the FSB authorised an undercover operation in the form of a test purchase, which was carried out the next day by an undercover agent, B, who purported to be a buyer. At her trial, the applicant submitted that she had been harassed and threatened by one Vladimir into selling the cannabis. She was convicted of selling cannabis to B. and of conspiracy and sentenced to four years' imprisonment. Her appeal was dismissed after the regional court rejected her argument of incitement by State agents on the grounds that her participation in the drug sale on 29 January 2005 had been established on the basis of multiple items of evidence and was not denied by her.

Law – Article 6 § 1: The first question to be examined by the Court when confronted with a plea of entrapment was whether the State agents carrying out the undercover activity had remained within the limits of "essentially passive" behaviour or gone beyond them, acting as *agents provocateurs*. In addressing that question, the Court would apply the substantive test of incitement, which entailed examining whether there were objective suspicions that the applicant had been involved in or was predisposed to criminal activity, whether the undercover agents had merely "joined" the criminal acts or had instigated them, and whether they had subjected the applicant to pressure to commit the offence. Unless the applicant's allegations were wholly improbable, it was for the authorities to show that there had been no incitement. The Court found it beyond doubt that undercover agent B. had merely "joined in" the criminal acts rather than instigated them as, by the time of B.'s first encounter with the applicant on 29 January 2005, the FSB was already in possession of the recordings of her conversations with S. concerning the drug deal. However, it could not determine with certainty whether Vladimir's alleged involvement was also part of the undercover operation, as the applicant seemed to be alleging, and if so, whether he had exerted pressure on her to commit the offence.

Where, as here, the substantive test was inconclusive, the Court had to go on to examine whether the applicant had been able to raise the issue of incitement effectively in the domestic proceedings and how the domestic court had dealt with that plea. In that connection, it reiterated that, for a plea of incitement to be effectively addressed, the national court had to have established in adversarial proceedings the reasons why the operation had been mounted, the extent of police involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected. The Court accepted that the recordings of the applicant's conversation with S. – in which previous drug sales, unsold drugs, potential customers and the prospects of a future deal had all been mentioned – were highly relevant to the conclusion that the applicant had had a pre-existing intent to sell drugs. Furthermore, B. had been called and cross-examined at the hearing and the applicant had had the possibility of putting questions to him concerning Vladimir's identity and his alleged role as the FSB informant or as an *agent provocateur*. However, no such link – or indeed the existence of any such person – had been established as a result. As to the additional materials the applicant had alleged should have been before the trial court, the Court found that they would have been of no assistance to her, were superfluous or did not exist.

In sum, the applicant's plea of incitement had been adequately addressed by the domestic courts, which had taken the necessary steps to uncover the truth and to eradicate the doubts as to whether she had committed the offence as a result of incitement by an *agent provocateur*. Their conclusion that there had been no entrapment had therefore been based on a reasonable assessment of evidence that was relevant and sufficient.

Conclusion: no violation (unanimously).

(See also *Ramanauskas v. Lithuania* [GC], 5 February 2008, no. 74420/01, Information Note no. 105)

Lack of public hearing before appeal court deciding issues of fact: *violation*

Absence d'audience publique devant la juridiction de recours ayant statué en fait : *violation*

García Hernández – Spain/Espagne - 15256/07
Judgment/Arrêt 16.11.2010 [Section III]

En fait – Médecin, la requérante fit l'objet d'une procédure pénale, au terme de laquelle elle fut condamnée pour avoir causé des lésions par négligence à un patient.

En droit – Article 6 § 1 : en première instance, le juge pénal avait statué sur la base de plusieurs éléments probatoires. Après la tenue d'une audience publique, au cours de laquelle il a pu se fonder sa propre conviction, il avait conclut à l'absence de négligence de la part de la requérante et l'avait acquittée. Puis l'*Audiencia Provincial* infirma le jugement entrepris et estima, sans entendre personnellement ni la requérante ni les témoins qui avaient déposé devant le juge pénal, que le poste occupé par cette dernière exigeait une diligence accrue, supérieure à celle dont elle avait fait preuve vis-à-vis du patient concerné. La Cour estime que les questions traitées étant essentiellement de nature factuelle, la condamnation de la requérante en appel après un changement dans l'appréciation des éléments tels que le comportement de la requérante, sans que celle-ci ait eu l'occasion d'être entendue personnellement et de les contester moyennant un examen contradictoire au cours d'une audience publique, n'est pas conforme avec les exigences d'un procès équitable.

Conclusion : violation (unanimité).

(Voir aussi *Bazo González c. Espagne*, n° 30643/04, 16 décembre 2008, Note d'information n° 114, et *Igual Coll c. Espagne*, n° 37496/04, 10 mars 2009, Note d'information n° 117)

Independent tribunal/Tribunal indépendant

Independence of assessors (assistant judges): ***violation***

Indépendance des assesseurs (juges assistants) : ***violation***

Henryk Urban and/et Ryszard Urban – Poland/Pologne - 23614/08
Judgment/Arrêt 30.11.2010 [Section IV]

Facts – In 2006 a district court, composed of an assessor, convicted the applicants of failing to disclose their identity to the police and sentenced them to a fine. Their appeal was dismissed in 2007. Under Polish law, a candidate for the office of district-court judge must first serve a minimum of three years as an assessor. Assessors are legally qualified and appointed by the Minister of Justice. In October 2007 the Constitutional Court held that the vesting of judicial powers in assessors by the Minister of Justice (representing the executive) was unconstitutional since assessors did not offer the guarantees of independence that were required of judges. In particular, the Minister of Justice could effectively dismiss an assessor. The Constitutional Court ordered that the unconstitutional provision should be repealed within eighteen months. It did not order an immediate repeal as assessors constituted nearly 25% of the judicial personnel in the district courts and their immediate removal would have seriously undermined the administration of justice. That period was also necessary for Parliament to enact new legislation. In the interim the assessors were allowed to continue adjudicating. Having regard to the constitutional importance of the finality of rulings, the Constitutional Court held that its judgment could not serve as a ground for reopening cases which had been decided by the assessors. In 2009 the office of assessor was abolished. In their application to the European Court the applicants alleged that the district court that had heard their case was not an "independent tribunal".

Law – Article 6 § 1: The Court's task in the present case was not to rule *in abstracto* on the compatibility with the Convention of the institution of assessors or other similar officers which existed in certain member States, but to examine the manner in which Poland regulated the status of assessors. The assessor who had heard the applicants' case had lacked the independence required by Article 6 § 1, the reason being that she could have been removed by the Minister of Justice at any time during her term of office and there had been no adequate guarantees protecting her against the arbitrary exercise of that power by the Minister. The Government's statistics indicating that the Minister of Justice had never exercised the power to remove an assessor did not, in the Court's view, invalidate the reasons for the finding of unconstitutionality. Moreover, according to the Constitutional Court,

review by the second-instance court could not remedy the initial lack of independence, as the second-instance court did not have the power to quash the judgment on the ground that the district court had been composed of an assessor. There had accordingly been a violation of Article 6 § 1. Having regard to the principle of legal certainty, the Court considered that in the present case there were no grounds which would require it to direct the reopening of the applicants' case. It would, however, not exclude taking a different approach in a case where, for example, the circumstances gave rise to legitimate grounds for believing that the Minister had or could reasonably be taken to have an interest in the proceedings.

Conclusion: violation (unanimously).

Article 41: The finding of a violation constituted in itself sufficient just satisfaction in respect of any non-pecuniary damage. The authorities of the respondent State had taken the requisite measures to remedy the deficiency underlying the instant case. Moreover, according to the Constitutional Court, there was no automatic correlation between that deficiency and the validity of each and every ruling given previously by assessors in individual cases. Accordingly, in this particular context, there was no call for reopening all proceedings in which the assessors had participated at the first-instance level. In the absence of any evidence to support the applicants' claim as to costs and expenses, no award was made under this head. In the light of the reasons underlying the finding of a violation in the instant case and the fact that the authorities had taken adequate measures to address the deficiency at issue, there was no justification for awarding legal costs.

Article 6 § 3 (c)

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

Lack of personal contact prior to appeal hearing with legal-aid counsel who had to plead the applicant's case on the basis of submissions of another lawyer: *violation*

Absence de contact personnel avant une audience d'appel avec un avocat commis d'office qui a dû plaider l'affaire du requérant sur la base d'un mémoire établi par un autre avocat : *violation*

Sakhnovskiy – Russia/Russie - 21272/03
Judgment/Arrêt 2.11.2010 [GC]

Facts – In 2001 the applicant was convicted of murder and sentenced to a term of imprisonment. In 2002 the Supreme Court dismissed his appeal. In 2007 the Presidium of the Supreme Court granted a request for supervisory review, quashed the appeal decision and remitted the case for fresh examination, finding that the applicant's right to legal assistance had been violated at the appeal hearing. In the new appeal proceedings the applicant followed the hearing from a detention facility by video link as the Supreme Court rejected his request to attend it in person. Before the start of the hearing he was introduced to his new legal-aid counsel, who was present in the courtroom, and they were allowed fifteen minutes of confidential communication by video link. The applicant attempted to refuse the assistance of the counsel on the grounds that he had never met her in person. The Supreme Court rejected his objection to the counsel's assistance as unreasonable, noting that the applicant had not requested replacement counsel or leave to retain counsel privately. In a separate decision the Supreme Court decided that it would not accept a new statement of appeal from the applicant and would consider his position on the basis of the submissions made by his former counsel before the previous appeal hearing in 2002. On the same day the Supreme Court examined the merits of the case and upheld the judgment of 2001.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (c)

(a) *Victim status* – The authorities had acknowledged the original violation of the applicant's rights under Article 6, at least as regards the lack of appropriate legal aid in the appeal proceedings of 2002. However, in the Court's opinion, the mere reopening of the case had not been sufficient to deprive the applicant of his victim status. This view was closely linked to the particular features of the Russian system of supervisory review, as it operated at the material time. In the first place, there were no limits as to the number of times or the circumstances in which the case could be reopened. Second, reopening was at the discretion of the State prosecutor or judge who decided whether a supervisory-review complaint or application deserved to be examined on the merits. Whether it was a prosecutor lodging an application for reopening or the president of the court reversing a decision of a judge not to entertain a supervisory-review complaint, the decision might be taken

proprio motu. This would make it possible for the respondent State to evade the Court's substantive review by continuously reopening the proceedings. Moreover, domestic proceedings were frequently reopened at the instigation of the Russian authorities when they learned that the case had been admitted for examination in Strasbourg. Sometimes it benefited the applicant, in which case the reopening served a useful purpose. However, given the ease with which the Government used this procedure, there was also a risk of abuse. If the Court were to accept unconditionally that the mere fact of reopening the proceedings was to have the automatic effect of removing the applicant's victim status, the respondent State would be capable of thwarting the examination of any pending case by having repeated recourse to supervisory-review proceedings, rather than correcting the past violations by giving the applicant a fair trial. To ascertain whether or not the applicant retained his victim status the Court would consider the proceedings as a whole, including the proceedings which had followed the reopening. This approach enabled a balance to be struck between the principle of subsidiarity and the effectiveness of the Convention mechanism. In the instant case, the mere reopening of the proceedings by way of supervisory review had failed to provide appropriate and sufficient redress for the applicant.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Re-communication of applicant's complaint* – The Government had argued that the Court should have brought to their attention the applicant's complaints concerning the second set of appeal proceedings. The applicant had complained about the second appellate hearing of November 2007 by submitting additional pleadings in March 2008. A copy of those pleadings had been sent to the Government in good time. Nothing had prevented the Russian authorities from submitting comments in turn. As the Court had later accepted the Government's request for the examination of the case by the Grand Chamber, the Government had had yet another opportunity to make comments. Therefore, the Government had been placed on an equal footing with the applicant to present their position in the case.

(c) *Waiver of legal assistance* – In 2007 the applicant had expressed his dissatisfaction with how his legal assistance had been organised by the Supreme Court and had refused to accept his newly-appointed lawyer's services. Indeed, he had not asked for a replacement lawyer or for an adjournment of the hearing, but, given that he had had no legal training, he could not have been expected to make specific legal claims. His failure to do so could not, therefore, be considered a waiver of his right to legal assistance.

(d) *Effectiveness of legal assistance* – It was clear that for the authorities the case was complex enough to require the assistance of a professional lawyer. While the newly-appointed lawyer was qualified and had *a priori* been prepared to assist the applicant, these arguments were not decisive. The applicant had been able to communicate with the lawyer for only fifteen minutes, immediately before the start of the hearing. Given the complexity and seriousness of the case, the time allotted had clearly not been sufficient for the applicant to discuss the case and make sure that the lawyer's knowledge of the case and legal position were appropriate. Moreover, it was questionable whether communication by video link had offered sufficient privacy. In the case at hand, the applicant had had to use the video-conferencing system installed and operated by the State. He might legitimately have felt ill at ease when he discussed his case with the lawyer. The Government had not explained why it had been impossible to make different arrangements for the applicant's legal assistance. It was true that transporting the applicant to Moscow for a meeting with his lawyer would have been a lengthy and costly operation. While emphasising the central importance of effective legal assistance, the Court had to examine whether in view of this particular geographic obstacle the Government had undertaken measures which had sufficiently compensated for the limitations of the applicant's rights. Nothing had prevented the authorities from organising at least a telephone conversation between the applicant and the lawyer more in advance of the hearing. Nor had anything prevented them from appointing a lawyer from the town where the applicant was held who could have visited the applicant in the detention centre and been with him during the hearing. Furthermore, it was unclear why the Supreme Court had not assigned the representation of the applicant to the lawyer who had already defended him before the first-instance court and prepared the original statement of appeal. Finally, the Supreme Court could have adjourned the hearing on its own motion so as to give the applicant sufficient time to discuss the case with the new lawyer. The arrangements made by the Supreme Court had been insufficient and had not secured effective legal assistance to the applicant during the second set of appeal proceedings. Accordingly, the second set of appeal proceedings had failed to cure

the defects of the first: in neither 2002 nor 2007 had the applicant been able to enjoy effective legal assistance.

Conclusion: violation (unanimously).

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

ARTICLE 8

Private life/Vie privée

Conviction of university professor for refusing to comply with court order requiring him to grant access to research materials: *no violation*

Condamnation d'un professeur d'université pour refus d'obtempérer à une décision judiciaire lui ayant ordonné de permettre l'accès à des éléments de recherche : *non-violation*

Gillberg – Sweden/Suède - 41723/06
Judgment/Arrêt 2.11.2010 [Section III]

Facts – The applicant, a university professor was responsible for a research project on hyperactivity and attention-deficit disorders in children that was carried out between 1977 and 1992. According to the applicant, the university's ethics committee had made it a precondition for the project that sensitive information about the participants would be accessible only to him and his staff, and he had therefore promised absolute confidentiality to the patients and their parents. In 2002, a researcher from another university and a paediatrician requested access to the research material. After their requests were refused by the university they appealed to the administrative court of appeal, which found that they had shown a legitimate interest and should be granted access to the material on conditions which included restrictions on its use and a ban on removing copies from the university premises. The applicant, however, refused to hand over the material, which was eventually destroyed by colleagues. The applicant was subsequently prosecuted and convicted of misusing his office. His conviction was upheld by the court of appeal, which held that he had wilfully disregarded the obligations of his office by failing to comply with the judgments of the administrative court of appeal.

Law – While on the face of it the case raised important ethical issues involving such matters as medical research, public access to information and the interests of children participating in research, the Court noted that the sole issue before it was whether the applicant's conviction and sentence for disregarding his obligations as a public official were compatible with the Convention. The applicant did not represent the children or families and his complaints concerning the outcome of the civil proceedings were inadmissible as they had been lodged out of time.

Article 8: Leaving open the question whether there had been an interference with the applicant's right to respect for his private life, the Court found that the conviction was in accordance with the domestic law and pursued the legitimate aims of preventing disorder and crime and protecting the rights and freedoms of others.

As to whether the interference had been necessary in a democratic society, the Court noted that, by virtue of its obligation under the Convention to ensure that final binding judicial decisions do not remain inoperative to the detriment of one party, the respondent State had been under a duty to react to the applicant's refusal to comply with the judgments granting the two external researchers access to the research material. The applicant had argued that the domestic authorities' response had been disproportionate in that the court of appeal had failed to take two important mitigating factors – his obligations under the confidentiality undertakings, and his aim of protecting the integrity of the informants and research participants – into account. The Court noted, however, that there was no evidence that the university ethics committee had required an absolute promise of confidentiality, while the assurances the applicant had given to the research participants had, according to the domestic courts, gone beyond what was permitted by the domestic law. Further, as regards the protection of the integrity of the informants and participants, the question of whether the documents were to be released had been settled in the civil proceedings, during which the university had been given the opportunity to present its case. Whether or not it considered that the orders for release were based on erroneous or insufficient grounds, what mattered was that the university administration had understood that it was required to release the documents without delay and that for a considerable period the applicant had intentionally failed to comply with his obligations as a public official arising from the court orders. In rejecting these mitigating circumstances, the court of appeal had not overstepped its margin of appreciation or acted arbitrarily and the sentences it had imposed were not disproportionate.

Conclusion: no violation (five votes to two).

Article 10: The Court accepted that doctors, psychiatrists and researchers may have a similar interest to journalists in protecting their sources and to lawyers in protecting professional secrecy with clients. However, the applicant had been convicted for misuse of office for refusing to make documents available in accordance with the instructions he had received from the university administration pursuant to the judgments of the administrative court of appeal. His conviction did not as such concern the university's or his own interest in protecting professional secrecy with clients or the participants in the research. That part had been settled by the administrative courts' judgments, in relation to which the Court was prevented from examining any alleged violation of the Convention. In these circumstances, the Court was not convinced that the outcome of the criminal proceedings against the applicant had amounted to an interference with his rights within the meaning of Article 10. It did not, however, need to examine that issue further since in any event, for the reasons stated with respect to the Article 8 complaint, there was nothing to suggest that the court of appeal's judgment was arbitrary or disproportionate.

Conclusion: no violation (unanimously).

Private life/Vie privée
Home/Domicile
Positive obligations/Obligations positives

Inadequacy of measures taken by State to curb road-traffic noise: *violation*

Caractère inadéquat des mesures prises par l'Etat pour réduire le bruit de la circulation automobile : *violation*

Deés – Hungary/Hongrie - 2345/06
Judgment/Arrêt 9.11.2010 [Section II]

Facts – In order to avoid a recently introduced toll, heavy traffic that would normally have taken a nearby stretch of motorway took an alternative route along the street where the applicant lived. According to the applicant, the resulting noise and pollution made his house almost uninhabitable. He subsequently sought compensation from the road-maintenance authority after noting that cracks had appeared in the walls of his house. On the basis of decibel readings taken in the street, a court-appointed expert concluded that although the noise levels were above the statutory limit, the vibrations were not strong enough to have caused the cracks. On the basis of that report and after noting that the authorities had taken extensive measures to divert traffic from the street through the construction of by-passes and the imposition of access and speed restrictions, the domestic courts dismissed the applicant's claims.

Law – Article 8: The State had been called on to strike a balance between the interests of the road-users and of local inhabitants. While recognising the complexity of the State's tasks in handling infrastructure issues potentially involving considerable time and resources, the Court considered that the measures taken by the authorities had consistently proved insufficient, so exposing the applicant to excessive noise disturbance over a substantial period and imposing a disproportionate individual burden on him. Although the vibration or noise caused by the traffic had not been substantial enough to cause damage to the applicant's house, the noise had, according to the expert measurements, exceeded the statutory level by between 12% and 15%. There had thus existed a direct and serious nuisance which affected the street in which the applicant lived and had prevented him from enjoying his home. The respondent State had accordingly failed to discharge its positive obligation to guarantee the applicant's right to respect for his home and private life.

Conclusion: violation (unanimously).

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

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

Family life/Vie familiale

Revocation, on account of unsatisfactory conduct by both parents, of order for return of applicant's daughter following her abduction by mother: *no violation*

Révision, en défaveur du requérant, de la décision ordonnant le retour de sa fille enlevée irrégulièrement par la mère, pour comportement des parents jugé inadéquat : *non-violation*

Serghides – Poland/Pologne - 31515/04
Judgment/Arrêt 2.11.2010 [Section IV]

En fait – Le requérant, ressortissant britannique, demanda le retour au Royaume-Uni de sa fille mineure, emmenée illégalement en Pologne par sa mère, ressortissante polonaise.

En droit – Article 8 : en avril 2004, les autorités ont ordonné le retour immédiat de l'enfant au Royaume-Uni, puis elles ont ouvert sans délai une procédure visant à l'exécution de la décision en question. Néanmoins celle-ci n'a jamais abouti, et l'exécution est devenue sans objet environ un an et demi plus tard car la décision censée en faire l'objet a été modifiée le 10 mai 2005 en défaveur du requérant. Les autorités ont invoqué le changement des circonstances pertinentes qui s'était opéré et qui aurait rendu le départ de l'enfant au Royaume-Uni préjudiciable à ses intérêts, au sens de la Convention de La Haye sur les aspects civils de l'enlèvement international d'enfants de 1980. En effet, une tentative manquée du père de retirer l'enfant à sa mère en vue de l'emmener au Royaume-Uni, en dépit de la procédure pendante en Pologne, tendant à exécuter la décision ordonnant le retour de l'enfant auprès de son père, aurait eu un impact négatif sur l'état émotionnel de l'enfant. Il aurait contribué à la détérioration des liens affectifs entre le requérant et sa fille, phénomène qui a encore été amplifié par la suite par le comportement de la mère de l'enfant. Ainsi, il n'apparaît pas que le passage du temps en rapport avec la durée des procédures ait été le principal facteur responsable du changement des circonstances pertinentes. En revanche, dans une large mesure, le comportement des parents de l'enfant, jugé inadéquat par les experts, en serait la cause. En outre, alors que le requérant était conseillé par un professionnel, il n'a pas usé des moyens disponibles en droit interne pour maintenir le contact avec sa fille durant cette période décisive pour sa relation avec l'enfant. Aussi les procédures litigeuses ont duré au total environ trois ans et demi. Au cours de cette période, les autorités ne sont pas restées inactives. Elles ont effectué des actes en vue de la solution de l'affaire, et des audiences ont été régulièrement tenues dans l'ensemble. Au vu de ces éléments, la révision, en défaveur du requérant, de la décision ordonnant le retour de sa fille au Royaume-Uni ne saurait être imputée, pour l'essentiel, au comportement des autorités nationales.

Conclusion : non-violation (quatre voix contre trois).

Positive obligations/Obligations positives

Failure to prevent unlawful operation of computer club causing noise and nuisance in block of flats: *violation*

Manquement à empêcher le fonctionnement illicite d'un club informatique source de nuisances, sonores et autres, dans un immeuble: *violation*

Mileva and Others/et autres – Bulgaria/Bulgarie
- 43449/02 and/et 21475/04
Judgment/Arrêt 25.11.2010 [Section V]

Facts – The applicants lived in flats in the same residential building in the centre of Sofia. In May 2000 a company rented a flat situated on the ground floor of the building and, without obtaining the requisite permissions, started running a computer club. The club was open twenty-four hours a day, seven days a week, and hosted forty-six computers and two vending machines. The club's clients, mostly teenagers and young adults, often gathered outside the building, where they shouted, drank alcohol and sometimes broke the front door and continued creating havoc in the lobby. The applicants made numerous complaints to the police and the municipal authorities about the noise and disturbance. In July 2002 the regional building-control directorate prohibited the use of the flat hosting the club, but its decision was not enforced, partly because the competent court twice suspended its enforcement following applications by the club's owner. The computer club continued to operate until November 2004.

Law – Article 8: The manner in which the computer club was run, its opening hours and the noise produced by its clients had affected the applicants' homes as well as their private and family lives. Despite receiving many complaints and being aware that the club was operating without the necessary license, the police and the municipal authorities had failed to take action to protect the well-being of the applicants in their homes. In particular, although the building-control authorities had in July 2002 prohibited the use of the flat as a computer club, their decision had never been enforced, partly as a result of the two court decisions to suspend its enforcement and the inordinate protraction of those proceedings. In addition, it was not until November 2003, some two and a half years after the club had started functioning, that the municipality had imposed a condition requiring the club's managers to have clients enter the club through a rear door. That condition had been completely disregarded by the club and the applicants submitted that it could not, in any event, have been met given the building's layout. In conclusion, the respondent State had failed to approach the matter with due diligence and thus

to discharge its positive obligation to ensure the applicants' respect for their homes and their private and family lives.

Conclusion: violation (unanimously).

Article 41: Sums ranging between EUR 6,000 and EUR 8,000 to each applicant in respect of non-pecuniary damage.

Failure to sufficiently protect wife from violent husband: *violation*

Manquement à protéger suffisamment une femme contre un mari violent : *violation*

Hajduová – Slovakia/Slovaquie - 2660/03
Judgment/Arrêt 30.11.2010 [Section IV]

Facts – In August 2001 the applicant's former husband A. verbally and physically assaulted her in a public place. Although the applicant suffered only minor injuries, out of fear for her life and safety she and her children moved out of the family home and into the premises of a non-governmental organisation. A week later A. repeatedly made death threats against the applicant. Criminal proceedings were instituted against him and he was remanded in custody. In the course of the proceedings, expert witnesses established that A. was suffering from a serious personality disorder. On 7 January 2002 a district court convicted him and ordered him to undergo in-patient psychiatric treatment. A. was then transferred to a hospital, but did not receive any treatment and was released a week later. Following his release, A. repeatedly threatened the applicant and her lawyer. He was again arrested and the district court subsequently arranged for his psychiatric treatment in accordance with its previous order.

Law – Article 8: Even though A.'s repeated threats had never materialised, they were enough to affect the applicant's psychological integrity and well-being, so as to give rise to the State's positive obligations under Article 8. A. had been convicted as a result of his violent behaviour towards the applicant, but following his transfer to hospital the district court had failed to discharge its statutory obligation to order the hospital to detain him and provide him with the necessary psychiatric treatment. It was therefore the domestic authorities' inactivity that had enabled him to continue to threaten the applicant and her lawyer. Only after the applicant filed a fresh criminal complaint did the police take it upon themselves to intervene. Consequently, the lack of sufficient measures in response to A.'s behaviour, and in particular the district court's failure to order his detention for psychiatric treatment following his conviction, had amounted to a breach of the State's positive obligations under Article 8.

Conclusion: violation (unanimously).

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

ARTICLE 10

Freedom of expression/Liberté d'expression

Conviction of university professor for refusing to comply with court order requiring him to grant access to research materials: *no violation*

Condamnation d'un professeur d'université pour refus d'obtempérer à une décision judiciaire lui ayant ordonné de permettre l'accès à des éléments de recherche : *non-violation*

Gillberg – Sweden/Suède - 41723/06
Judgment/Arrêt 2.11.2010 [Section III]

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

Freedom to impart information/Liberté de communiquer des informations

Failure to allocate radiofrequencies to licensed television broadcaster: *relinquishment in favour of the Grand Chamber*

Non-attribution de radiofréquences au détenteur d'une concession de radiodiffusion télévisuelle : *dessaisissement au profit de la Grande Chambre*

Centro Europa 7 S.r.l. – Italy/Italie - 38433/09
[Section II]

En 1999, les autorités compétentes octroyèrent à la société requérante une concession l'autorisant à installer et à exploiter un réseau de radiodiffusion télévisuelle en technique analogique. La concession renvoyait, pour l'attribution des radiofréquences, à un plan national d'attribution, qui ne fut toutefois jamais mis en œuvre. Contrairement aux chaînes existantes, lesquelles disposaient déjà de radiofréquences en vertu des dispositions transitoires, la société requérante ne put jamais émettre. En 2003, elle saisit les tribunaux nationaux d'une demande visant, notamment, à la reconnaissance de son droit

à obtenir l'attribution de radiofréquences et à la réparation du préjudice subi. Le Conseil d'Etat décida de saisir la Cour de justice des Communautés européennes d'une question préjudicielle concernant l'interprétation du droit communautaire relatif à la libre prestation de services et à la concurrence. Dans un arrêt du 31 janvier 2008, la Cour de justice jugea que les dispositions communautaires en question devaient être interprétées de façon à s'opposer, en matière de radiodiffusion télévisuelle, à une législation nationale dont l'application conduit à ce qu'un opérateur titulaire d'une concession soit dans l'impossibilité d'émettre à défaut de radiofréquences d'émission octroyées sur la base de critères objectifs, transparents, non discriminatoires et proportionnés. Par la suite, le Conseil d'Etat ordonna au Gouvernement de traiter la demande de radiofréquences introduite par la société requérante en respectant ces critères et condamna le ministère de tutelle à verser un peu plus d'un million d'euros de dommages-intérêts à la société requérante.

Dans sa requête devant la Cour européenne, la société requérante dénonce la violation des articles 6, 10 et 14, combiné avec l'article 10, de la Convention, ainsi que de l'article 1 du Protocole nº 1.

ARTICLE 14

Discrimination (Article 8)

Publications allegedly insulting to the Roma community: *case referred to the Grand Chamber*

Publications estimées offensantes pour la communauté rom : *affaire renvoyée devant la Grande Chambre*

Aksu – Turkey/Turquie - 4149/04
and/et 41029/04
Judgment/Arrêt 27.7.2010 [Section II]

In 2000 the Ministry of Culture published a book entitled *The Gypsies of Turkey*, written by an associate professor. The applicant protested to the Ministry, claiming that the book contained expressions that humiliated and debased Gypsies. He brought proceedings in damages against the Ministry and the author of the book. The courts dismissed the applicant's claim finding that the book was the result of academic research, based on scientific data and examined social structures of Gypsies in Turkey. The expressions at issue did not, therefore, insult the applicant.

Meanwhile, in 1998 a non-governmental association, financed by the Ministry of Culture, published a dictionary entitled *Turkish Dictionary for Pupils*. The applicant brought civil proceedings against the publisher claiming that certain entries in the dictionary were insulting to and discriminatory against Gypsies. The domestic courts dismissed the applicant's claim finding that the definitions and expressions in the dictionary were based on historical and sociological reality and that there had been no intention to humiliate or debase an ethnic group. Moreover, there were other similar expressions in Turkish concerning other ethnic groups, which existed in dictionaries and encyclopaedias.

In a judgment of 20 July 2010 a Chamber of the Court found, by four votes to three, that there had been no violation of Article 14 taken in conjunction with Article 8 (see Information Note no. 132).

On 22 November 2010 the case was referred to the Grand Chamber at the applicant's request.

Discrimination with regard to binational's couple choice of surname: *violation*

Discrimination dans le contexte du choix du nom de famille des couples binationaux : *violation*

Losonci Rose and/et Rose – Switzerland/Suisse - 664/06
Judgment/Arrêt 9.11.2010 [Section I]

En fait – Le droit du nom est régi en Suisse par le principe de l'unité du nom de famille. Ce nom est automatiquement celui du mari, sauf si les époux effectuent une demande commune pour que ce soit celui de la femme. L'époux d'origine étrangère peut demander que son nom soit régi par son droit national.

Les requérants sont un ressortissant hongrois et son épouse, de nationalité suisse. Avant leur mariage, ils indiquèrent à l'état civil qu'ils souhaitaient garder leurs noms respectifs plutôt que de choisir un double nom pour l'un d'eux. Face au refus des autorités, les intéressés décidèrent pour pouvoir se marier de choisir le nom de l'épouse comme nom de famille. Après le mariage, le requérant demanda, en vertu de son droit national, que fût remplacé dans le registre de l'état civil le double nom choisi provisoirement par son seul nom d'origine, sans modification du nom de son épouse. Le Tribunal fédéral rejeta la demande, estimant que le choix antérieur du requérant de porter le nom de sa

femme comme nom de famille avait rendu caduc son souhait de soumettre son nom au droit hongrois. Selon les requérants, une telle situation n'aurait pas pu se produire s'ils avaient été de sexe inverse, car le nom du mari serait automatiquement devenu le nom de famille et la femme aurait pu librement soumettre la détermination de son nom à son droit national.

En droit – Article 14 combiné avec l'article 8 : alors que, dans le cas de figure d'un homme suisse et d'une femme d'origine étrangère, la femme peut choisir de soumettre son nom à son droit national, un tel choix n'est pas possible dans le cas d'une femme suisse qui épouse un homme d'origine étrangère si ceux-ci optent pour le nom de la femme comme nom de famille, comme le firent les requérants. Dès lors, ces derniers peuvent se prétendre victimes d'un traitement différent entre des personnes placées dans des situations analogues. Selon les autorités nationales, l'ingérence litigieuse visait le but légitime de manifester l'unité de la famille à travers l'unité du nom de famille. Or, en ce qui concerne les mesures à prendre en la matière, seules des raisons impérieuses peuvent justifier une différence de traitement fondée sur le sexe. Un consensus se dessine au sein des Etats membres du Conseil de l'Europe quant au choix du nom de famille des époux sur un pied d'égalité, et les travaux des Nations unies vont dans le sens de la reconnaissance du droit pour chaque conjoint de conserver l'usage de son nom de famille original ou de participer sur un pied d'égalité au choix d'un nouveau nom de famille. Or le requérant a été empêché de garder son nom après le mariage, ce qu'il aurait pu faire si les intéressés avaient été de sexe inverse. Par ailleurs, on ne saurait considérer que le requérant n'a pas subi de préjudice grave, car le nom, élément d'individualisation principal d'une personne au sein de la société, appartient au noyau dur des considérations relatives au droit au respect de la vie privée et familiale. Ainsi, la justification avancée par le Gouvernement ne paraît pas raisonnable et la différence de traitement constatée s'avère discriminatoire. Il s'ensuit que le régime en vigueur dans l'Etat défendeur engendre une discrimination entre les couples binationaux, selon que c'est l'homme ou la femme qui possède la nationalité de cet Etat.

Conclusion : violation (unanimité).

Article 41 : 10 000 EUR conjointement aux deux requérants pour préjudice moral.

Restriction on transexual's access to her child: *no violation*

Restriction du régime de visites d'une transsexuelle à son enfant : *non-violation*

P.V. – Spain/Espagne - 35159/09
Judgment/Arrêt 30.11.2010 [Section III]

En fait – La requérante est une transsexuelle passée du sexe masculin au sexe féminin. Avant son changement de sexe, elle avait été mariée et avait eu un fils. En 2002, le juge prononça la séparation de corps des conjoints et homologua leur convention amiable prévoyant l'attribution de la garde de l'enfant à la mère, une autorité parentale conjointe et un régime de visites en faveur du père. En 2004, l'ex-épouse demanda le retrait de l'autorité parentale du père et la suspension du régime de visites, alléguant notamment qu'il suivait un traitement pour changer de sexe. Le juge de première instance décida uniquement de restreindre le régime de visites, décision que confirma l'*Audiencia Provincial*. En 2008, la requérante fut déboutée du recours *d'amparo* qu'elle avait formé.

En droit – Article 8 combiné avec l'article 14 : la transsexualité de la requérante est à l'origine de la procédure entamée par l'ex-épouse pour faire modifier les mesures adoptées lors de la séparation de corps. Or la transsexualité est à n'en pas douter couverte par l'article 14. Dans leurs décisions, les juridictions nationales ont insisté sur le fait que la transsexualité de la requérante n'était pas le motif de la restriction du régime de visites initial. Elles ont pris en compte l'instabilité émotionnelle de la requérante et le risque qu'elle soit transmise à l'enfant – âgé de six ans au début de la procédure interne – et perturbe son équilibre psychologique. Le Tribunal constitutionnel a ainsi évoqué l'existence d'un risque certain de préjudice à l'intégrité psychique et au développement de la personnalité de l'enfant, compte tenu de son âge. L'instabilité de la requérante a été constatée par une expertise psychologique établie à la demande du juge de première instance, et l'intéressée s'y est soumise volontairement et ne l'a pas contestée en temps utile. En outre, le juge de première instance n'a privé la requérante ni de l'autorité parentale ni de son droit de visite, comme l'avait demandé la mère, mais a adopté un régime de visites évolutif et contrôlé, conformément aux recommandations de l'expertise. Le raisonnement des juridictions internes donne à penser que la transsexualité de la requérante n'a pas été déterminante dans la décision de modifier le régime de visites initial. C'est l'intérêt supérieur de l'enfant qui a primé, conduisant

les tribunaux à opter pour un régime plus restrictif qui permettrait à l'enfant de s'habituer progressivement au changement de sexe de son géniteur. Cette conclusion est renforcée par le fait que le régime de visites a été élargi à deux reprises en 2006, alors que la condition sexuelle de la requérante demeurait la même.

Conclusion : non-violation (unanimité).

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

Refusal to recognise applicant as heir of man she had married in purely religious ceremony: *no violation*

Refus de reconnaitre le statut d'ayant-droit de son mari à une femme mariée uniquement religieusement : *non-violation*

Şerife Yiğit – Turkey/Turquie - 3976/05
Judgment/Arrêt 2.11.2010 [GC]

En fait – La requérante contracta en 1976 un mariage religieux et son mari décéda en 2002. En 2003, elle introduisit, en son nom et celui de sa fille, une action visant à obtenir la reconnaissance de son mariage et l'inscription de sa fille au registre d'état civil en tant que fille de son mari. Le tribunal de grande instance accepta cette dernière demande mais rejeta celle relative au mariage. La requérante fit par ailleurs une demande à la caisse de retraite pour qu'elle et sa fille puissent bénéficier de la pension de retraite et de l'assurance maladie du défunt. Ils furent accordés à la fille, mais pas à la mère, au motif que le mariage n'était pas reconnu légalement. La requérante fit appel de cette décision, en vain.

Par un arrêt du 20 janvier 2009, une chambre de la Cour a conclu, par quatre voix contre trois, à la non-violation de l'article 8 (voir la Note d'information nº 115).

En droit – Article 14 combiné avec l'article 1 du Protocole nº 1

a) *Applicabilité* – Selon la loi et la jurisprudence nationale, seul le conjoint marié conformément au code civil hérite des droits sociaux du défunt époux. Toutefois, même si l'article 1 du Protocole nº 1 ne comporte pas un droit à percevoir de quelconques prestations sociales, lorsqu'un Etat décide de créer un régime de prestations il doit le faire d'une manière compatible avec l'article 14. Or la requérante se plaint de ne pas avoir bénéficié des droits sociaux de son défunt conjoint pour un motif discriminatoire, à savoir son statut de femme mariée sous le régime religieux. En conséquence, l'article 14 de la Convention, combiné avec l'article 1 du Protocole nº 1, s'applique en l'espèce.

b) *Fond*

i. *Si la nature civile ou religieuse d'un mariage peut être à l'origine d'une discrimination prohibée par l'article 14* : sans être mariée légalement, la requérante a vécu pendant vingt-six ans avec son concubin, jusqu'au décès de celui-ci, dans le cadre d'une relation de type monogamique, et elle a eu avec lui six enfants. Le tribunal du travail a rejeté la demande de la requérante tendant à l'obtention de droits sociaux au titre de son défunt concubin parce que l'intéressée n'avait pas été mariée civilement. Le cas d'espèce fait partie des « situations » personnelles susceptibles d'être à l'origine d'une discrimination prohibée par l'article 14, dès lors qu'il n'est pas contesté que la différence de traitement subie par la requérante quant aux prestations en question a pour seul motif la nature non civile du mariage qu'elle a contracté avec son concubin.

ii. *Si la différence de traitement avait une justification objective et raisonnable* : le mariage civil monogamique obligatoire à célébrer préalablement à toute union religieuse a été institué pour protéger la femme. La différence de traitement en question poursuivait ainsi pour l'essentiel les buts légitimes du maintien de l'ordre public et de la protection des droits et libertés d'autrui.

La requérante ne saurait se prévaloir d'une espérance légitime de pouvoir bénéficier des droits sociaux au titre de son concubin. Les règles qui définissent les conditions de fond et de forme du mariage civil sont claires et accessibles, et les modalités de célébration du mariage civil sont simples et n'imposent pas aux intéressés une charge excessive. De surcroît, la requérante a disposé d'un laps de temps suffisamment long, soit vingt-six ans, pour contracter un mariage civil. Elle n'est donc pas fondée à soutenir que les démarches qu'elle dit avoir entamées pour régulariser sa situation ont été entravées par la lourdeur ou la lenteur des procédures administratives. Quant à savoir si le fonctionnaire du registre d'état civil aurait pu ou dû régulariser d'office sa situation sur le fondement des lois d'amnistie adoptées au sujet des enfants nés hors mariage, s'il est vrai que l'Etat peut réglementer le mariage civil, il ne saurait pour autant obliger les personnes relevant de sa juridiction à se marier civilement. Ensuite, les lois d'amnistie mentionnées n'ont que pour objet d'améliorer la situation des enfants. Ainsi, il existait un rapport raisonnable de proportionnalité entre la différence

de traitement litigieuse et le but légitime poursuivi. La différence en question avait donc une justification objective et raisonnable.

Conclusion : non-violation (unanimité).

Article 8 : la Grande Chambre souscrit pleinement au constat de la chambre qui a conclu à l'applicabilité de l'article 8. Le fait qu'ils aient opté pour le mariage religieux comme régime matrimonial et ne se soient pas mariés civilement n'a pas entraîné des sanctions administratives ou pénales de nature à empêcher la requérante de mener sa vie familiale de manière effective. Partant, aucune atteinte de l'Etat à la vie familiale de l'intéressée n'est à relever. Dès lors, l'article 8 ne saurait s'interpréter comme imposant à l'Etat l'obligation de reconnaître le mariage religieux. Il n'impose pas à l'Etat d'instaurer un régime spécial pour une catégorie particulière de couples non mariés. Ainsi le fait que la requérante n'ait pas la qualité d'héritière, conformément à la loi, n'implique pas qu'il y ait eu atteinte à ses droits en méconnaissance de l'article 8.

Conclusion : non-violation (unanimité).

(Voir, *a contrario*, *Muñoz Díaz c. Espagne*, nº 49151/07, 8 décembre 2009, Note d'information nº 125)

Refusal, under terms of bilateral agreement, of Estonian pension to servicemen in receipt of Russian military pension: *no violation*

Refus de l'Etat défendeur, dans le contexte d'un accord bilatéral, de verser une pension à des militaires bénéficiant déjà d'une pension militaire de l'Etat russe : *non-violation*

Tarkoev and Others/et autres – Estonia/Estonie
- 14480/08 and/et 47916/08
Judgment/Arrêt 4.11.2010 [Section V]

Facts – In 1994, on concluding a treaty for the withdrawal of Russian troops from Estonian territory, Estonia and the Russian Federation signed a bilateral agreement whereby retired Russian (Soviet) military personnel on the territory would be entitled to apply for residence permits in Estonia and to receive a Russian military pension. Alternatively, provided they had reached the minimum age for retirement under Estonian law and had worked there for at least fifteen years (excluding time spent in Russian (Soviet) military service), they could apply for an Estonian pension, in which case the Russian pension would be suspended. The applicants, who were former Russian (Soviet) military personnel, were in receipt of both pensions until payments of the Estonian old-age pension were discontinued when the Estonian authorities learned that they were also in receipt of a Russian military pension. In their application to the European Court, the applicants complained that they had been discriminated against when compared to other persons who fulfilled the conditions for the receipt of the Estonian pension. In that connection, they noted that there was no prohibition under Estonian law on receiving an Estonian pension concurrently with a foreign pension and that none of Estonia's other bilateral agreements on social insurance prohibited the award of an Estonian pension to persons who satisfied the conditions for entitlement.

Law – Article 14 in conjunction with Article 1 of Protocol No. 1: Although there was no obligation on a State under Article 1 of Protocol No. 1 to create a welfare or pension scheme, if a State did decide to do so the legislation had to be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements. Article 14 was therefore applicable.

The difference in the applicants' treatment compared to other persons who had completed at least fifteen years of pensionable employment in Estonia was not based on the applicants' nationality or ethnic origin and it was questionable whether it was based on any other personal characteristic or "status". However, it was not necessary to determine that matter because the applicants were not, in any event, in a comparable situation with any other group of pensioners eligible for an Estonian pension.

Firstly, the applicants had received the Russian military pension on the basis of the bilateral agreement that had been signed in 1994 in connection with the withdrawal of the Russian troops. That agreement only applied to persons who had already retired and were in receipt of the Russian military pension when it was signed. The conditions on which the Estonian authorities had agreed to accept the continued presence of Russian military retirees on their territory had to be seen in the context of the Russian Federation's primary obligation to secure the withdrawal of its forces. The agreement did not concern any military pensioners who had moved to Estonia after it was signed. Secondly, those Russian military pensioners who had remained in Estonia had been fully aware at the time that receipt of a Russian military pension would mean that they would not be

entitled to an additional Estonian pension if they started or continued work in the civil sphere in Estonia. Thirdly, under the terms of the agreement, the applicants were guaranteed a pension at least equal to the minimum pension in Estonia. Lastly, if not in receipt of the Russian military pension they were entitled to apply for the Estonian old-age pension. While in such a case their years of service in the Russian (Soviet) army would not be taken into account for the calculation of their Estonian pension, Estonia could not be considered responsible for any pension payments for such service. Service in the Russian (Soviet) armed forces formed no part of pensionable employment for anyone under the Estonian legislation, so there was no room to find any different treatment of the applicants in that respect.

Conclusion: no violation (unanimously).

Statutory obligation on car insurers to pay percentage of premiums to bodies responsible for road safety: *inadmissible*

Obligation légale pour des assureurs automobiles de verser un pourcentage des primes à des organes chargés de la sécurité routière : *irrecevable*

Allianz-Slovenská poisťovňa, a.s., and Others/ et autres – Slovakia/Slovaquie - 19276/05
Decision/Décision 9.11.2010 [Section IV]

(See Article 1 of Protocol No. 1 below/Voir l'article 1 du Protocole nº 1 ci-dessous – page 29)

ARTICLE 34

Victim/Victime

Reopening of proceedings by way of supervisory review: *victim status upheld*

Réouverture d'une procédure par le biais d'un recours en supervision : *qualité de victime maintenue*

Sakhnovskiy – Russia/Russie - 21272/03
Judgment/Arrêt 2.11.2010 [GC]

(See Article 6 § 3 (c) above/Voir l'article 6 § 3 c) ci-dessus – page 15)

Attribution of right relied on to municipality, a governmental organisation, not its members: *inadmissible*

Attribution du droit invoqué à la commune, une organisation gouvernementale, et non à ses membres : *irrecevable*

Demirbaş and Others/et autres – Turkey/Turquie - 1093/08 et al.
Decision/Décision 9.11.2010 [Section II]

En fait – Des conseillers municipaux dénonçaient en leur nom personnel la dissolution du conseil municipal motivée par le fait que celui-ci avait utilisé des langues non officielles dans ses activités.

En droit – Article 34 :

a) *Introduction des requêtes au nom des requérants* – L'ingérence concerne la commune car les actes et publications en langues non officielles ont été réalisés par les requérants dans le cadre de leurs fonctions officielles municipales et ont été financés sur son budget. Par ailleurs, tous les membres du conseil, y compris les membres dissidents, ont été déchus de leurs fonctions, et l'emploi d'une autre langue dans les activités privées est totalement libre. Les requérants, en tant que personnes physiques, disposent de la liberté de s'exprimer sur la nécessité de prestations multilingues par les communes. Mais, lorsqu'en leur qualité de maire et de membres du conseil municipal ils prennent la décision d'utiliser des langues non officielles dans les actes et activités de la commune, c'est la liberté d'expression de la personne morale dont ils font partie qui entre en jeu de par la dissolution de celle-ci. La liberté invoquée est donc attribuable à cette personne morale, et non pas aux requérants eux-mêmes. Admettre que les requérants ont pu introduire ces requêtes en leur nom reviendrait à contourner non seulement la jurisprudence existante mais aussi l'article 34, car cela ouvrirait à toute organisation gouvernementale la possibilité d'introduire ce genre de requêtes, par le biais des personnes physiques qui les constituent ou qui les représentent, pour tout acte réprimé par le gouvernement défendeur dont ils dépendent et au nom duquel ils exercent la puissance publique. En l'espèce, les requérants ont fait usage de leurs prérogatives de puissance publique car, à l'inverse, ils n'auraient pas eu la qualité de partie dans cette procédure en droit interne. De plus, les trois acteurs du procès, la commune, le ministère de l'Intérieur et les autorités judiciaires menant la procédure interne représentent à chaque fois le pouvoir public et donc l'Etat défendeur. Ainsi, les droits et libertés invoqués par les requérants ne les concernent pas

individuellement mais sont attribuables à la commune. Pour les mêmes motifs, les requérants ne peuvent pas être qualifiés de « groupe de particuliers » se prétendant victime d'une violation des droits reconnus dans la Convention, au sens de l'article 34.

b) *Le statut de la commune* – Celui-ci a été défini dans la décision rendue dans l'affaire *Döşemealtı Belediyesi c. Turquie* (nº 50108/06, 23 mars 2010, Note d'information nº 128). Le litige en droit interne ne concerne que la dissolution du conseil municipal, et il est relatif au droit de ce dernier de mener, en tant qu'organe de décision d'une collectivité locale, des activités officielles pour la commune. Par conséquent, il a un caractère strictement « public » et, en tant que tel, peut difficilement être considéré comme concernant des « droits et obligations de caractère civil » au sens de l'article 6 § 1. Au vu de ce qui précède, et conformément à sa jurisprudence bien établie, la Cour conclut à l'absence de qualité des collectivités locales pour introduire une requête en vertu de l'article 34.

Conclusion: irrecevable (incompatibilité *ratione personae*).

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/Epuisement des voies de recours internes – Finland/Finlande

Complaint under Compensation for Excessive Duration of Judicial Proceedings Act: *effective remedy*

Recours fondé sur la loi sur l'indemnisation pour durée excessive d'une procédure judiciaire : *recours effectif*

Ahlskog – Finland/Finlande - 5238/07
Decision/Décision 9.11.2010 [Section IV]

Facts – On 25 January 2007 the applicant lodged an application with the European Court in which he complained of the length of criminal proceedings that had been pending against him before the domestic courts since October 2000. On 1 January 2010 the State introduced new legislation – the Compensation for Excessive Duration of Judicial Proceedings Act no. 362/2009 – which provided a remedy for the excessive length of civil and criminal proceedings. The remedy was specifically designed to accelerate such proceedings and to afford compensation for any damage incurred.

Law – Article 35 § 1: The Government raised a preliminary objection that the applicant had failed to exhaust the new remedy. In view of the wording of the new legislation and recent decisions of the domestic courts that indicated that were awarding relief of a compensatory nature under the Act, the Court was satisfied that the new remedy was effective in the sense that it was capable of providing adequate redress for the excessive length of proceedings in civil and criminal cases, provided that the impugned proceedings were still pending. Following its approach in Italian, Croatian, Slovak and Polish length-of-proceedings cases and taking into account the purpose and nature of the remedy, as well as the principle of subsidiarity, the applicant was instructed to exhaust the new remedy despite the fact that he had lodged his case with the Court prior to the remedy's introduction.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Article 35 § 3

Abuse of the right of application/Requête abusive

Length-of-proceedings complaints in small-claims cases by litigious applicant: *inadmissible*

Griefs d'un requérant procédurier relatifs à la durée excessive de procédures portant sur des sommes modestes : *irrecevable*

Dudek – Germany/Allemagne - 12977/09 et al.
Decision/Décision 23.11.2010 [Section V]

Facts – In his application to the European Court, the applicant complained under Articles 6 and 13 of the Convention about the length of proceedings he had issued against a dentist's association in the domestic courts for sums ranging from between EUR 70 and EUR 300.

Law – Article 35 § 3: In view of the pettiness of the sums involved, the Court had to determine whether the complaints were admissible under this provision as amended by Protocol No. 14. The applications could not be dismissed under the new – no significant disadvantage – requirement as, in the absence of an effective domestic remedy against

the excessive length of civil proceedings under German law, the case had not been "duly considered by a domestic tribunal".

As to whether the applications amounted to an abuse of the right of individual application, the Court considered that its approach in its decision in *Bock v. Germany* (no. 22051/07, 19 January 2010, Information Note no. 125) remained applicable following the entry into force of Protocol No. 14 as the wording of Article 35 § 3 clearly established that the new requirement was an alternative to and not a replacement of the other inadmissibility criteria. The High Contracting Parties clearly wished the Court to devote more time to cases warranting consideration on the merits, whether seen from the perspective of the legal interest of the individual applicant or considered from the broader perspective of the law of the Convention and the European public order to which it contributed, and had invited it to give full effect to the new admissibility criterion and to consider other possibilities of applying the principle *de minimis non curat praetor*. The criteria for abuse of the right of individual application as established in *Bock* had been met: firstly, no important questions of principle had been involved; secondly, the applicant's conduct of litigation was not beyond reproach (he had a tendency to issue proceedings in parallel, to lodge voluminous submissions out of time and to make wholly disproportionate claims); and, lastly, the length-of-proceedings issue had already been dealt with by the Court in numerous cases, including cases against the respondent Government.

Conclusion: inadmissible (abuse of the right of individual application).

ARTICLE 41

Just satisfaction/Satisfaction équitable

Respondent State required to secure execution of just-satisfaction award by facilitating re-establishment of contact with applicant expelled to non-member State

Etat défendeur tenu d'assurer le paiement de la somme accordée au titre de la satisfaction équitable, en facilitant le rétablissement des contacts avec le requérant expulsé vers un Etat non-membre

Muminov – Russia/Russie - 42502/06
Judgment (Just satisfaction)/Arrêt (Satisfaction équitable) 4.11.2010 [Section I]

In the principal judgment delivered on 11 December 2008, the Court had found, in particular, that the applicant's expulsion to Uzbekistan had given rise to violations of Articles 3 and 13 of the Convention. The Court had also stated in this connection that the absence of any reliable information as to the applicant's situation after his expulsion to Uzbekistan, except for the fact of his conviction, remained a matter of grave concern.

Article 41: The Court's decision to reserve the examination of the question concerning just satisfaction had been, *inter alia*, due to the fact that the applicant had no longer been within the jurisdiction of the respondent State and that after his removal to Uzbekistan he had been convicted and sent to serve a prison sentence in an unspecified detention facility. All contact between him and his representative or between him and the Court had been interrupted. In fact, the Court had had no means of renewing contact with the applicant. Nor had there been any prospect of making any other arrangements which would allow execution of any just satisfaction award made by the Court. Indeed, since the applicant remained within the jurisdiction of a State which was not a High Contracting Party to the Convention, the execution of a just-satisfaction award might prove difficult in the circumstances of the case. In the Court's view, in such a situation it could be expected of the respondent Government that they would cooperate fully in the conduct of the subsequent proceedings, in particular by helping, by appropriate means, to re-establish contact between the applicant and his representative and/or between the applicant and the Court. However, it did not appear that such cooperation had been forthcoming. The Court awarded the applicant EUR 20,000 in respect of non-pecuniary damage and held that the respondent State shall secure, by appropriate means, the execution of the just-satisfaction award, in particular, by facilitating contact between the applicant, on the one hand, and the Committee of Ministers of the Council of Europe acting under Article 46 of the Convention, the applicant's representative in the Convention proceedings or any other person entitled or authorised to represent the applicant in the enforcement proceedings, on the other.

Conclusion: EUR 20,000 in respect of non-pecuniary damage (unanimously).

ARTICLE 46

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

Respondent State required to take measures to enable serving prisoners to vote

Etat défendeur tenu de prendre des mesures afin de permettre aux détenus qui purgent une peine de voter

Greens and/et M.T. – United Kingdom/ Royaume-Uni - 60041/08 and/et 60054/08
Judgment/Arrêt 23.11.2010 [Section IV]

Facts – In its judgment in *Hirst v. the United Kingdom (no. 2)*[1], the Grand Chamber held that the domestic legislation that imposed a blanket restriction on the right to vote of all convicted prisoners in detention, irrespective of the length of their sentence, the nature or gravity of their offence and their individual circumstances, violated Article 3 of Protocol No. 1. That legislation has not been amended and, as a result, the applicants, as serving prisoners, had been ineligible to vote in both the European Parliamentary elections in June 2009 and the general election in May 2010.

Law – The Court found a violation of Article 3 of Protocol No. 1 and no violation of Article 13 of the Convention. As to Article 41, it noted that, while it was a cause for regret and concern that in the five years which had passed since the *Hirst* judgment no amending measures had been brought forward by the Government, aggravated or punitive damages were not appropriate. The finding of a violation, taken together with the Court's directions under Article 46, constituted sufficient just satisfaction.

Article 46: In view of the United Kingdom's lengthy delay in implementing the decision in *Hirst* and the significant number of repetitive applications that had been received by the Court shortly before and since the May 2010 general election, the Court decided to apply the pilot-judgment procedure.

(a) *Specific measures* – The Court had received approximately 2,500 applications in which a similar complaint had been made, around 1,500 of which had been registered and were awaiting a decision. The number continued to grow and, with each relevant election which passed without amended legislation, there was the potential for numerous new cases to be lodged, there being an estimated 70,000 serving prisoners in the United Kingdom at any one time, all of whom were potential applicants. The failure of the United Kingdom to introduce the legislative proposals was not only an aggravating factor as regards its responsibility under the Convention, but also represented a threat to the future effectiveness of the Convention system. While the Court did not consider it appropriate to specify the content of future legislative proposals, the lengthy delay to date had demonstrated the need for a timetable. Accordingly, the United Kingdom was required to introduce legislative proposals to amend the legislation concerned within six months of the instant judgment becoming final, with a view to the enactment of an electoral law to achieve compliance with the Court's judgment in *Hirst* according to any timescale determined by the Committee of Ministers.

(b) *Comparable cases* – Given the findings in the present judgment, and in *Hirst*, it was clear that every comparable case pending before the Court which satisfied the admissibility criteria would give rise to a violation of Article 3 of Protocol No. 1. No individual examination of comparable cases was required in order to assess appropriate redress and no financial compensation was payable. The only relevant remedy was a change in the law. In the light of that and the six-month deadline fixed for introducing legislative proposals, the Court considered that the continued examination of each comparable case was no longer justified. An amendment to the electoral law to achieve compliance with *Hirst* would also result in compliance with the present and any future judgment in any comparable case. In those circumstances, the Court did not think anything was to be gained, or that justice would be best served, by the repetition of its findings in a lengthy series of similar cases, which would be a significant drain on its resources and add to its already considerable caseload. In particular, such an exercise would not contribute usefully or in any meaningful way to the strengthening of human-rights protection under the Convention. The Court accordingly considered it appropriate to discontinue its examination of all registered applications raising similar complaints pending compliance by the United Kingdom with the instruction to introduce legislative proposals. In the event of such compliance, the Court proposed to strike out all such registered cases, without prejudice to its power to restore them to the list should the United Kingdom fail to comply. The

1. 6 October 2005, no. 74025/01, Information Note no. 79.

Court also considered it appropriate to suspend the treatment of such applications which had not yet been registered, as well as future applications, without prejudice to any decision to recommence treatment of those cases if necessary.

ARTICLE 57

Reservations/Réserves

Latvia's reservation under Article 1 of Protocol No. 1 in respect of unlawfully expropriated property and privatisation: *reservation not applicable*

Réserve de la Lettonie concernant l'article 1 du Protocole nº 1, relative aux biens illégalement expropriés et à la privatisation : *réserve non applicable*

Liepājnieks – Latvia/Lettonie - 37586/06
Decision/Décision 2.11.2010 [Section III]

Facts – Since 1969 the applicant had lived in a nationalised flat on the basis of a lease agreement concluded for an indefinite term. Following the restoration of Latvia's independence in 1991, all decrees on nationalisation were declared null and void and such buildings were to be restored to their previous owners or their heirs. Former lease agreements concluded with tenants continued to be binding and, for the first seven years, the tenants could not be evicted without being offered alternative accommodation. Until 2007 the amount of rent payable had had a statutory limit set by the State, but after that date owners were free to increase it. In August 2008 the applicant moved out of his flat, allegedly because he could no longer afford to pay the rent. He never instituted proceedings challenging the amount of rent, but instead lodged a civil and, subsequently, an administrative claim against the local authorities and the State for compensation. His claims were rejected after the domestic courts concluded that he had no subjective right to compensation under domestic law.

Law – The Government argued that the Court was precluded from examining the case by virtue of Latvia's reservation under Article 1 of Protocol No. 1, which had been declared compatible with Article 57 of the Convention in a previous case (*Kozlova and Smirnova v. Latvia* (dec.), no. 57381/00, 23 October 2001, Information Note no. 35). The reservation related to laws regulating the restoration or compensation to former owners of, *inter alia*, nationalised property during the Soviet regime and to laws concerning privatisation. However, the subject-matter of the domestic proceedings in the applicant's case was not the restoration or compensation of unlawfully expropriated property, nor was it privatisation. Former owners or their legal heirs were not involved in those proceedings, which concerned primarily the alleged violation by the State of the applicant's 1969 lease. Finally, the domestic courts had not examined or applied the laws on property reforms as listed in the reservation. For these reasons, Latvia's reservation could not be applicable to the applicant's case. However, given that the applicant had voluntarily moved out of the flat without an eviction order ever being issued, the Court considered that he could no longer claim to be a victim of the alleged violation of his property rights.

Conclusion: inadmissible (incompatible *ratione personae*).

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

Peaceful enjoyment of possessions/Respect des biens

Statutory obligation on car insurers to pay percentage of premiums to road-safety bodies: *inadmissible*

Obligation légale pour des assureurs automobiles de verser un pourcentage des primes à des organes chargés de la sécurité routière : *irrecevable*

Allianz-Slovenská poisťovňa, a.s., and Others/ et autres – Slovakia/Slovaquie - 19276/05
Decision/Décision 9.11.2010 [Section IV]

Facts – In their application to the European Court, the applicants, who are private insurance companies, complained of their statutory obligation to pay 8% of premiums collected for road-traffic insurance to the Ministry of the Interior for the benefit of the emergency services and other road-safety bodies.

Law – Article 1 of Protocol No. 1: The obligation to pay the contributions amounted to an interference with the applicant companies' right to the peaceful enjoyment of their possessions. That interference had a legal basis and pursued the legitimate aim of road safety that was "in accordance with the general interest". The duty to transfer 8% of col-

lected premiums was imposed not only on the applicant companies but on all providers of insurance for liability for damage caused by the operation of motor vehicles and only in respect of premiums collected for providing this specific type of insurance. No specific facts or arguments had been submitted to establish, by means of calculation or other verifiable assessment, that the scope of the duty under the legislation was prohibitive, oppressive or otherwise disproportionate.

Conclusion: inadmissible (manifestly ill-founded).

Article 14 in conjunction with Article 1 of Protocol No. 1: The applicant companies had argued that they were in an analogous situation to other entrepreneurs but had been treated differently in that they were required to make contributions under the legislation. The Court noted, however, that the applicant companies' situation appeared to be different from that of other entrepreneurs, including insurers who did not provide road-accident insurance and that in providing that specific type of insurance they had the advantage of a secure market created by the statutory duty of all road users to take out such insurance. All providers of insurance in that market were subject to the same regime as the applicant companies. In any event, even assuming that they could be considered to be in a relevantly similar situation to that of other entrepreneurs, the reasons given for disposing of the applicant companies' complaint under Article 1 of Protocol No. 1 sufficed to show objective and reasonable justification for any difference of treatment.

Conclusion: inadmissible (manifestly ill-founded).

Deprivation of property/Privation de propriété

Compensation award for expropriation wholly absorbed by legal costs: *violation*

Indemnité d'expropriation totalement absorbée par les frais de justice : *violation*

Perdigão – Portugal - 24768/06
Judgment/Arrêt 16.11.2010 [GC]

En fait – Les requérants demandèrent une indemnité d'expropriation de plus de vingt millions d'euros, qui devait couvrir les bénéfices qu'ils auraient pu tirer de l'exploitation d'une carrière existant sur leur terrain exproprié. La cour d'appel rejeta leurs prétentions, considérant que ces bénéfices éventuels ne devaient pas être pris en compte, et fixa l'indemnité à environ 197 000 EUR. Cependant, les frais de justice qui furent réclamés aux requérants, en tant que partie perdante dans cette procédure, excédaient cette somme, de sorte que non seulement l'indemnité d'expropriation revint finalement à l'Etat, mais les requérants durent encore s'acquitter de 15 000 EUR supplémentaires. Par un arrêt du 4 août 2009, une chambre de la Cour a conclu, par cinq voix contre deux, à la violation de l'article 1 du Protocole n° 1 (voir la Note d'information n° 122).

En droit – Article 1 du Protocole n° 1 : a) *Applicabilité* – Le grief des requérants porte sur l'application faite en leur cause de la réglementation relative aux frais de justice qui doivent être considérés comme des « contributions » au sens de l'article 1 du Protocole n° 1.

b) *Fond* – Les requérants ne discutent pas la légalité de l'expropriation et la réglementation portant sur les frais de justice qui a été appliquée. En outre, la procédure n'a jamais parue arbitraire. Les Etats contractants jouissent d'une large marge d'appréciation pour pouvoir prendre les mesures qu'ils estiment nécessaires pour protéger l'intérêt général d'un financement équilibré des systèmes de justice. Cependant, le résultat auquel tend l'article 1 du Protocole n° 1 n'a pas été atteint dans l'application qui a été faite de ce système au cas concret : non seulement les requérants ont été dépossédés de leur terrain, mais ils ont dû en outre verser 15 000 EUR à l'Etat. Le comportement des requérants a certainement contribué au montant élevé des frais de justice car ils ont demandé un montant bien supérieur à ceux des différents rapports d'expertise produits lors de la procédure et, compte tenu de la législation portugaise en la matière, la fixation à ce niveau de la somme demandée a eu une influence sur le montant final des frais de justice. En outre, leur contestation du montant demandé au titre des frais de justice par les juridictions internes a donné lieu à de nombreuses décisions de justice. Cependant, ni le comportement des requérants ni l'activité procédurale déployée en l'espèce ne peuvent justifier que la somme à acquitter au titre des frais de justice ait été fixée à un niveau tel qu'il en est résulté une absence totale de dédommagement, alors qu'une expropriation était en cause. Ainsi, les requérants ont eu à supporter une charge exorbitante qui a rompu le juste équilibre devant régner entre l'intérêt général de la communauté et les droits fondamentaux de l'individu.

Conclusion : violation (quatorze voix contre trois).

Article 41 : 190 000 EUR pour dommage matériel et préjudice moral.

Control of the use of property/Réglementer l'usage des biens

Refusal by State to honour contractual obligations following introduction of new regulations: *violation*

Refus de l'Etat d'honorer ses obligations contractuelles à la suite de l'adoption de nouvelles règles : *violation*

Richet and/et Le Ber – France -
8990/07 and/et 23905/07
Judgment/Arrêt 18.11.2010 [Section V]

En fait – Les requérants héritèrent d'une île. En 1969, l'Etat manifesta son intérêt pour son acquisition auprès de la famille qui souhaitait céder une partie de ses terrains. Des promesses de vente furent signées en décembre 1970 et il fut convenu de la conservation de terrains et de la construction de biens immobiliers. En janvier 1971, la commission nationale des opérations immobilières et de l'architecture émit un avis favorable à la réalisation de cette opération et précisa que le nombre de mètres carrés éligibles au droit de construire devait être invariable et ne pouvait être affecté par les vicissitudes du groupement d'urbanisme. Les ventes eurent lieu en mai 1971. En 1978, un projet de plan d'occupation des sols (POS) de la commune fut élaboré en vue de classer en zone inconstructible l'île en raison de sa valeur environnementale. Constatant que ce projet ne tenait aucunement ou partiellement pas compte des engagements de l'Etat résultant des actes de vente, les requérants saisirent les autorités, notamment le préfet, en vain. Le POS fut approuvé en 1985. Dès lors, les demandes respectives de permis de construire des requérants furent refusées. Ils saisirent en vain les juridictions administratives et judiciaires.

En droit – Article 1 du Protocole nº 1

a) *Sur l'existence d'un bien* – La garantie que les requérants puissent non seulement rester sur l'île sur une partie des terrains conservés mais également conserver le droit à construire certains édifices sur leurs terrains figure dans les principaux documents en rapport avec la vente. Les actes de vente et tout autre document y relatif ne précisent à aucun moment que la faculté de construire serait conditionnée aux règles d'urbanisme. Les requérants étaient titulaires de droits de construire aux termes des actes de vente et ils avaient une espérance légitime de pouvoir exercer ces droits dans les conditions contractuelles. Ils sont dès lors titulaires d'un « bien » au sens de l'article 1 du Protocole nº 1.

b) *Sur l'observation de l'article 1 du Protocole nº 1* – Les requérants ont subi une ingérence dans leur droit de propriété ayant été empêchés par les autorités de jouir de leur droit de construire sur les parcelles conservées dans les conditions prévues par les actes de vente. Ces interdictions s'analysaient en une réglementation de « l'usage des biens » des intéressés, au sens du deuxième alinéa de l'article 1 du Protocole nº 1. Il ne fait aucun doute que l'Etat, en concluant à l'amiable les contrats de vente, entendait poursuivre un but légitime d'intérêt général, à savoir la protection de l'environnement et en particulier la préservation de l'île, et que l'ingérence litigieuse poursuivait le même objectif. Les requérants ne sauraient se voir reprocher de ne pas avoir réalisé les constructions prévues dans les actes de vente avant l'adoption du POS. Lorsqu'ils ont été informés d'un changement éventuel des règles d'urbanisme et de l'adoption d'un POS de la commune en remplacement du groupement d'urbanisme, ils se sont adressés aux autorités pour leur rappeler les engagements contractuels de l'Etat et s'assurer que les documents d'urbanisme les respecteraient. Ces démarches sont restées sans effet. Les requérants ont ensuite saisi les deux ordres juridictionnels pour d'obtenir soit l'exécution des contrats, soit leur résolution ou une indemnisation en réparation du préjudice subi par eux, en vain. Outre le fait que l'Etat, compte tenu de ses compétences et l'ampleur de son autorité, a joué un rôle actif, décisif dans les négociations et la rédaction des actes de vente, les autorités étaient conscientes de leurs engagements contractuels, de leur portée, ainsi que de leur impact sur l'environnement de l'île. Pour autant, elles n'ont pris aucune mesure de nature à honorer leurs engagements. Dans l'hypothèse où les constructions prévues dans les contrats auraient effectivement été en opposition avec la préservation du site, les autorités auraient dû proposer aux requérants une compensation matérielle ou financière en réparation du préjudice subi du fait du non-respect des actes de vente. Ainsi, le comportement des autorités a privé les requérants, tant de la possibilité de jouir effectivement de leurs droits que d'obtenir, à défaut, soit la remise en cause des actes de vente, soit une indemnisation pour le préjudice subi. Il s'ensuit qu'ils ont eu à supporter une charge spéciale et exorbitante qui a rompu le juste équilibre à ménager entre la protection de leur propriété et les exigences de l'intérêt général.

Conclusion : violation (unanimité).

Article 41 : 700 000 EUR à M^me^ Le Ber et 800 000 EUR conjointement aux autres requérants, pour dommage matériel ; 10 000 EUR à M^me^ Le Ber et 3 000 EUR à chacun des autres requérants, pour préjudice moral.

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

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

Failure for more than thirty years to introduce legislation giving practical effect to expatriates' constitutional right to vote in parliamentary elections from overseas: *case referred to the Grand Chamber*

Absence de concrétisation législative de la Constitution depuis plus de trois décennies afin de donner la possibilité de voter lors des élections législatives depuis le lieu de résidence à l'étranger : *affaire renvoyée devant la Grande Chambre*

Sitaropoulos and/et Giakoumopoulos – Greece/Grèce - 42202/07
Judgment/Arrêt 8.7.2010 [Section I]

En septembre 2007 par télécopie adressée à l'ambassadeur de Grèce en France, les requérants, résidents permanents en France, exprimèrent leur souhait d'exercer leur droit de vote en France lors des élections législatives en Grèce. L'ambassadeur leur répondit que leur demande ne pouvait être satisfaite « pour des raisons objectives », à savoir l'absence d'une réglementation législative, nécessaire pour définir les « mesures spéciales (...) de mise en place de centres électoraux au sein des ambassades et des consulats ». En conséquence, les requérants n'exercèrent pas leur droit de vote lors des élections.

Par un arrêt du 8 juillet 2010 (voir la Note d'information n° 132), la Cour a conclu, par cinq voix contre deux, à la violation de l'article 3 du Protocole n° 1, en considérant que le manque de mesures effectives de la part de l'Etat afin de mettre en application l'article de la Constitution qui habilite le législateur à fixer les modalités d'exercice du droit de vote pour les électeurs expatriés a porté atteinte au droit à des élections libres.

Le 22 novembre 2010, l'affaire a été renvoyée devant la Grande Chambre à la demande des requérants.

ARTICLE 3 OF PROTOCOL No. 7 / ARTICLE 3 DU PROTOCOLE N° 7

New or newly discovered facts/Faits nouveaux ou nouvellement révélés

Compensation following reversal of a criminal conviction in the light of a change in political regime: *inadmissible*

Indemnisation en cas d'annulation, motivée par un changement de régime politique, d'une condamnation pénale : *irrecevable*

Bachowski – Poland/Pologne - 32463/06
Decision/Décision 2.11.2010 [Section IV]

Facts – In 1959 the applicant was convicted of the "dissemination of false information" and sentenced to three years' imprisonment for circulating leaflets criticising the Soviet Union's domination of Poland. In 2001 his conviction was reversed following a cassation appeal brought by the Ombudsman on his behalf. In those proceedings the Supreme Court held that the applicant had not committed the offence of which he had been convicted and that his conviction had been based on an unacceptable interpretation and application of the substantive criminal law. In 2004 a regional court awarded him compensation. The applicant unsuccessfully appealed against the level of that award, which he considered too low.

Law – Article 3 of Protocol No. 7: The Court concurred with the conclusions of the domestic courts overturning the applicant's conviction. It would be incompatible with both the tenets of the rule of law and respect for human rights if a criminal conviction manifestly motivated by the goals of an oppressive political regime remained valid after the convicted person requested to have it reversed in accordance with the applicable provisions of domestic law. However, the applicant's acquittal was the result of a reassessment by the Supreme Court of the evidence which had already been used and was known to the court in 1959, not of new facts. In this context, the Court noted the statements in the Explanatory Report that Article 3 of Protocol No. 7 was applicable only when the original conviction had been reversed because of a new or newly discovered fact showing conclusively that in the original proceedings there had been a serious failure in the judicial process. This indicated that it was the intention of the drafters to delineate the scope of the application of Article 3 of Protocol No. 7 in a narrow manner, with the right to compensation

being excluded in respect of reversals of conviction that were based on some other ground than that related to new or newly discovered facts. Therefore, the circumstances of the case did not fall within the scope of Article 3 of Protocol No. 7.

Conclusion: inadmissible (incompatible *ratione materiae*).

REFERRAL TO THE GRAND CHAMBER / RENVOI DEVANT LA GRANDE CHAMBRE

Article 43 § 2

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

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

Aksu – Turkey/Turquie - 4149/04 and/et 41029/04
Judgment/Arrêt 27.7.2010 [Section II]

(See Article 14 above/Voir l'article 14 ci-dessus – page 21)

Creangă – Romania/Roumanie - 29226/03
Judgment/Arrêt 15.6.2010 [Section III]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus – page 10)

Sitaropoulos and/et Giakoumopoulos – Greece/Grèce - 42202/07
Judgment/Arrêt 8.7.2010 [Section I]

(See Article 3 of Protocol No. 1 above/Voir l'article 3 du Protocole nº 1 ci-dessus – page 32)

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER / DESSAISISSEMENT AU PROFIT DE LA GRANDE CHAMBRE

Article 30

Centro Europa 7 S.r.l. – Italy/Italie - 38433/09
[Section II]

(See Article 10 above/Voir l'article 10 ci-dessus – page 20)