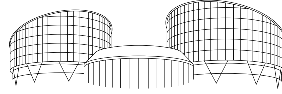

Information Note on the Court's case-law
Note d'information sur la jurisprudence de la Cour

Provisional version/Version provisoire

No./N° 136 December/Décembre 2010

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TABLE OF CONTENTS / TABLE DES MATIÈRES

ARTICLE 2

Life/Vie
Effective investigation/Enquête efficace

* Fatal shooting of handcuffed prisoner by soldier during attempted escape: *communicated*
* Mort d'un détenu menotté ayant pris la fuite à la suite du tir d'un soldat qui l'accompagnait : *affaire communiquée*

Ülüfer – Turkey/Turquie - 23038/07 9

Positive obligations/Obligations positives
Effective investigation/Enquête efficace

* Alleged suicide of a Roma suspect while in police custody and lack of independent and effective investigation: *violations*
* Prétendu suicide d'un suspect rom en garde à vue et absence d'enquête indépendante et effective : *violations*

Mižigárová – Slovakia/Slovaquie - 74832/01 9

* Inadequate medical treatment of a deaf and mute man in police custody: violations
* Caractère inadéquat des soins médicaux reçus par un homme sourd-muet en garde à vue : *violations*

Jasinskis – Latvia/Lettonie - 45744/08 10

ARTICLE 3

Inhuman or degrading treatment/Traitement inhumain ou dégradant

* Religiously motivated attacks by private individuals on a Hare Krishna member: *violation*
* Agressions fondées sur des motifs religieux et perpétrées par des particuliers contre un membre de la communauté Hare Krishna : *violation*

Milanović – Serbia/Serbie - 44614/07 11

Degrading treatment/Traitement dégradant
Positive obligations/Obligations positives

* Failure to test detainee for tuberculosis on arrival in prison: *violation*
* Absence de dépistage d'un détenu, à l'arrivée en prison, pour identifier l'existence d'une tuberculose : *violation*

Dobri – Romania/Roumanie - 25153/04 11

ARTICLE 5

Article 5 § 1

Procedure prescribed by law/Voies légales

* Failure to adhere strictly to domestic-law rules governing detention with a view to deportation: *violation*
* Absence de respect strict des critères du droit interne pour détenir le requérant en vue de son expulsion : *violation*

Jusic – Switzerland/Suisse - 4691/06 12

Lawful arrest or detention/Arrestation ou détention régulières

* Arbitrary detention of minors in a juvenile holding facility: *violation*
* Détention arbitraire de mineurs dans un centre de détention pour mineurs : *violation*

Ichin and Others/et autres – Ukraine - 28189/04 and/et 28192/04 13

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations/Droits et obligations de caractère civil
Access to court/Accès à un tribunal

* Prison board's repeated refusal, with no right of appeal to the administrative courts, to grant prisoner temporary leave: *violation*
* Refus répétés d'une commission pénitentiaire d'accorder une autorisation de sortie à un détenu sans recours possible devant une juridiction administrative : *violation*

Boulois – Luxembourg - 37575/04 13

Access to court/Accès à un tribunal

* Fixing of court fees payable by creditor of insolvent company by reference to total value of claim: *no violation*
* Frais de justice dus par un créancier d'une entreprise insolvable fixés en fonction du montant total du litige : *non-violation*

Urbanek – Austria/Autriche - 35123/05 14

ARTICLE 8

Private life/Vie privée

* Restrictions on obtaining an abortion in Ireland: *violation/no violation*
* Restrictions à l'avortement en Irlande : *violation/non-violation*

A, B and/et C – Ireland/Irlande [GC] - 25579/05 15

* Liability of health professionals to conviction effectively depriving expectant mothers of right to medical assistance for home births: violation
* Risque de condamnation pour des professionnels de la santé, qui en pratique prive les femmes enceintes du droit à une assistance médicale pour accoucher à domicile : *violation*

Ternovszky – Hungary/Hongrie - 67545/09 17

Family life/Vie familiale

* Refusal to grant long-term cohabitee privilege against testifying in criminal proceedings against partner: *relinquishment in favour of the Grand Chamber*
* Refus de dispenser une femme partageant depuis longtemps la vie d'un suspect de témoigner contre celui-ci dans le cadre d'une procédure pénale : *dessaisissement au profit de la Grande Chambre*

Van der Heijden – Netherlands/Pays-Bas - 42857/05 18

Family life/Vie familiale
Positive obligations/Obligations positives

* Inability of biological father to establish in law his paternity of children born to a married woman with whom he had been cohabiting: *no violation*
* Impossibilité, pour un père biologique, de faire établir légalement sa paternité à l'égard d'enfants nés d'une femme mariée pendant la période où ils vivaient ensemble : *non-violation*

Chavdarov – Bulgaria/Bulgarie - 3465/03 18

Expulsion

* Deportation order against long-term illegal immigrant: *deportation would not constitute a violation*
* Mesure d'éloignement à l'encontre d'un immigré de longue durée en situation irrégulière : *l'expulsion n'emporterait pas violation*

Gezginci – Switzerland/Suisse - 16327/05 19

ARTICLE 9

Manifest religion or belief/Manifester sa religion ou sa conviction

* Refusal to provide Buddhist prisoner with meat-free diet: *violation*
* Refus d'assurer à un détenu bouddhiste un régime alimentaire végétarien : *violation*

Jakóbski – Poland/Pologne - 18429/06 20

ARTICLE 10

Freedom of expression/Liberté d'expression

* Award of damages against public servant for comments made to press concerning confidential report on conduct of Court of Cassation judge: *no violation*
* Condamnation d'un fonctionnaire à verser des dommages et intérêts pour ses propos dans la presse concernant un rapport confidentiel sur un membre de la Cour de cassation : *non-violation*

Poyraz – Turkey/Turquie – 15966/06 20

ARTICLE 12

Right to marry/Droit au mariage

* Requirement of certificate of approval for immigrants wishing to marry other than in the Church of England: *violation*
* Nécessité d'obtenir une autorisation pour les immigrants souhaitant se marier en dehors de l'Eglise anglicane : *violation*

O'Donaghue and Others/et autres – United Kingdom/Royaume-Uni - 34848/07 21

ARTICLE 14

Discrimination (Article 3)

* Religiously motivated attacks by private individuals on a Hare Krishna member: *violation*
* Agressions fondées sur des motifs religieux et perpétrées par des particuliers contre un membre de la communauté Hare Krishna : *violation*

Milanović – Serbia/Serbie - 44614/07 23

Discrimination (Article 9)

* Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *violation*
* Impossibilité pour des Eglises réformistes d'assurer un enseignement religieux dans les écoles et de célébrer des mariages religieux officiellement reconnus : *violation*

Savez crkava "Riječ života" and Others/et autres – Croatia/Croatie - 7798/08 24

Discrimination (Article 12)

* Requirement of certificate of approval for immigrants wishing to marry other than in the Church of England: *violation*
* Nécessité d'obtenir une autorisation pour les immigrants souhaitant se marier en dehors de l'Eglise anglicane : *violation*

O'Donaghue and Others/et autres – United Kingdom/Royaume-Uni - 34848/07 24

ARTICLE 35

Article 35 § 3 b)

No significant disadvantage/Absence de préjudice important

* Complaints concerning substantial delays in recovering judgment debts exceeding 200 euros: *preliminary objection dismissed*
* Griefs relatifs aux délais significatifs de recouvrement de créances reconnues par la justice portant sur des montants supérieurs à 200 euros : *exception préliminaire rejetée*

Gaglione and Others/et autres – Italy/Italie - 45867/07 et al. 25

ARTICLE 46

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

* Respondent State required to take all necessary measures to ensure that requests relating to execution of sentence can be examined by a court satisfying Article 6 § 1 requirements
* Etat défendeur tenu de prendre toutes les mesures nécessaires pour qu'une demande en matière d'exécution des peines puisse être examinée par un tribunal remplissant les conditions de l'article 6 § 1

Boulois – Luxembourg - 37575/04 25

* Respondent State required to take measures to restore effectiveness of Pinto remedy
* Etat défendeur tenu de prendre des mesures pour rétablir l'efficacité du recours « Pinto »

Gaglione and Others/et autres – Italy/Italie - 45867/07 et al. 25

* Respondent State required to provide within one year domestic remedy for length of proceedings before the administrative courts
* Etat défendeur tenu d'instituer, dans un délai d'un an, un recours interne en matière de durée de procédure devant les juridictions administratives

Vassilios Athanasiou and Others/et autres – Greece/Grèce - 50973/08 26

Execution of a judgment – Individual measures/Exécution des arrêts – Mesures individuelles

* Respondent State required to hold new, independent investigation into proportionality of use of lethal force
* Etat défendeur tenu de procéder à une nouvelle enquête, cette fois indépendante, sur la proportionnalité du recours à la force meurtrière

Abuyeva and Others/et autres – Russia/Russie - 27065/05 27

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

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

* Statutory ban on landlord terminating a long lease: *no violation*
* Interdiction légale pour un propriétaire de résilier un bail locatif de longue durée : *non-violation*

Almeida Ferreira and/et Melo Ferreira – Portugal - 41696/07 28

ARTICLE 2 OF PROTOCOL No. 1 / ARTICLE 2 DU PROTOCOLE N° 1

Right to education/Droit à l'instruction

* Measures taken by authorities of "Moldavian Republic of Transdniestra" against schools refusing to use Cyrillic script: *relinquishment in favour of the Grand Chamber*
* Mesures prises par les autorités de la « République moldave de Transnistrie » contre les écoles refusant d'employer l'alphabet cyrillique : *dessaisissement au profit de la Grande Chambre*

Catan and Others/et autres – Moldova and Russia/Moldova et Russie - 43370/04, 8252/05 and/et 18454/06 29

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

General prohibition of discrimination/Interdiction générale de la discrimination

* Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *Article 1 of Protocol No. 12 applicable*
* Impossibilité pour des Eglises réformistes d'assurer un enseignement religieux dans les écoles et de célébrer des mariages religieux officiellement reconnus : *article 1 du Protocole nº 12 applicable*

Savez crkava "Riječ života" and Others/et autres – Croatia/Croatie - 7798/08 29

RELINQUISHMENT IN FAVOUR OF THE GRAND CHAMBER / DESSAISISSEMENT AU PROFIT DE LA GRANDE CHAMBRE 29

RECENT COURT PUBLICATIONS / PUBLICATIONS RÉCENTES DE LA COUR 29

ARTICLE 2

Life/Vie
Effective investigation/Enquête efficace

Fatal shooting of handcuffed prisoner by soldier during attempted escape: *communicated*

Mort d'un détenu menotté ayant pris la fuite à la suite du tir d'un soldat qui l'accompagnait : *affaire communiquée*

Ülüfer – Turkey/Turquie - 23038/07
[Section II]

En avril 2003, le fils de la requérante, détenu pour vol dans une prison militaire, fut conduit au tribunal correctionnel par un moyen de transport public. Il était accompagné par deux soldats et un officier. A la sortie de l'audience, alors qu'ils attendaient à l'arrêt de bus pour retourner à la prison, le détenu, menotté, prit la fuite. Malgré les avertissements et les deux tirs de sommation des soldats qui le poursuivaient, il continua à courir. Un des soldats tira un coup de feu qui le blessa grièvement. Trois jours plus tard, le fils de la requérante décéda à l'hôpital. Le rapport d'autopsie fit état de la présence d'un orifice d'entrée de la balle dans le dos et d'un orifice de sortie au niveau du ventre. En juillet 2003, le procureur de la République engagea une action pénale contre le soldat pour homicide volontaire. Il considéra qu'il avait outrepassé ses pouvoirs et que l'article du code pénal prévoyant l'immunité de quiconque a agi en vertu d'un ordre officiel ne s'appliquait pas en l'espèce. En octobre 2004, la cour d'assises acquitta le soldat au motif que celui-ci avait agi dans le cadre de l'article du code pénal précité. En juin 2006, la Cour de cassation approuva le jugement de première instance. La requérante saisit le tribunal administratif d'un recours en dommages-intérêts à l'encontre du ministère de l'Intérieur. Le tribunal la débouta en concluant à l'absence d'un lien de causalité entre la mort du fils de la requérante et une quelconque faute imputable à l'administration. Tous les recours de la requérantes furent vains.

Communiquée sous l'angle de l'article 2 (volets matériel et procédural) et de l'article 13.

Positive obligations/Obligations positives
Effective investigation/Enquête efficace

Alleged suicide of a Roma suspect while in police custody and lack of independent and effective investigation: *violations*

Prétendu suicide d'un suspect rom en garde à vue et absence d'enquête indépendante et effective : *violations*

Mižigárová – Slovakia/Slovaquie - 74832/01
Judgment/Arrêt 14.12.2010 [Section IV]

Facts – The applicant's husband, a twenty-year old Roma man in good health, was arrested on suspicion of theft. He was questioned by four policemen and then by a lieutenant, an off-duty officer with whom he had had previous encounters. During the latter interrogation, he was shot in the abdomen with the lieutenant's service pistol. He died four days later in hospital. The investigation concluded that he had forcibly taken the gun from the lieutenant and shot himself. Subsequently, the lieutenant was convicted of injury to health caused by negligence in the course of duty and sentenced to one year's imprisonment, suspended for a two-and-a-half-year probationary period. The applicant's claims for damages were dismissed by the courts.

Law – Article 2

(a) *Substantive aspect* – Even if the Court were to accept, despite the improbability of such a hypothesis, that the applicant's husband had committed suicide, the obligation of the authorities to protect the health and well-being of persons in detention encompassed an obligation to take reasonable measures to protect them from harming themselves. There was insufficient evidence to enable the Court to establish whether the authorities had been aware of a suicide risk. However, there were certain basic precautions which police and prison officers should be expected to take in all cases in order to minimise any potential risk. First, compelling reasons had to be given as to why the interrogation of a suspect had been entrusted to an armed police officer. Second, the regulations required police officers to secure their service weapons in order to avoid any "undesired consequences". The domestic courts had held that the lieutenant's failure properly to secure his service weapon had amounted to negligence which had resulted in the death of the applicant's husband. Consequently, even if he had committed suicide as alleged by the investigative authorities, they had been in violation of their obligation to take reasonable measures to protect his health and well-being while in police custody.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The initial forensic examination of the crime scene had been conducted by local police officers. Officers from the Ministry of the Interior had not arrived until the following

day. However, even after they had taken over the investigation, the officers and technicians from the lieutenant's district had continued to be involved. The investigation had therefore not been sufficiently independent. Moreover, no attempt appeared to have been made to investigate the allegation made by the applicant's husband himself that the lieutenant had given him the firearm. No gunpowder residue test had been conducted in the immediate aftermath of the shooting, which could have excluded or confirmed the possibility that the lieutenant had pulled the trigger. Thus, there had been a failure by the investigators to take reasonable steps to secure evidence which had, in turn, undermined their ability to determine beyond any doubt who was responsible for the death. Finally, the authorities had failed to investigate the applicant's allegation that her husband had been ill-treated by the police officers, even though the autopsy report indicated that he had injuries to his face, shoulder and ear. In sum, no meaningful investigation had been conducted at the domestic level capable of establishing the true facts surrounding the death of the applicant's husband.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 2

(a) *Substantive aspect* – While the lieutenant's conduct during the applicant's detention called for serious criticism, there had been no evidence that it had been racially motivated. The Court did not consider that the authorities' failure to carry out an effective investigation into the alleged racist motive for the incident should shift the burden of proof to the Government.

Conclusion: no violation (six votes to one).

(b) *Procedural aspect* – The Court noted with concern the international reports concerning police brutality towards Roma in Slovakia. In respect of persons of Roma origin, it would not exclude the possibility that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive. However, in the present case the Court was not persuaded that the objective evidence was sufficiently strong in itself to suggest the existence of such a motive. Moreover, the applicant had not made an allegation of racial bias at any point during the investigation.

Conclusion: no violation (six votes to one).

Article 41: EUR 45,000 in respect of non-pecuniary damage.

Inadequate medical treatment of a deaf and mute man in police custody: *violations*

Caractère inadéquat des soins médicaux reçus par un homme sourd-muet en garde à vue : *violations*

Jasinskis – Latvia/Lettonie - 45744/08
Judgment/Arrêt 21.12.2010 [Section III]

Facts – After a night of drinking with friends, the applicant's son, who was deaf and mute, fell down a flight of stairs, injuring his head and losing consciousness for several minutes. The police called to the scene were informed of the events and of the son's sensory disabilities. They took him to the police station to sober up, without waiting for an ambulance which had also meanwhile been called. The police officer on duty noted a graze on the son's face, but when the ambulance crew contacted the police they were informed that no medical examination was needed since the son was simply intoxicated. After being locked up in a cell, the son knocked on the doors and walls for a while, but to no avail. He had no means of communicating with the police officers since none of them appeared to understand sign language and the notepad which he normally used to communicate had been taken away from him. The following morning, seven hours after taking him into custody, the police officers unsuccessfully tried to wake the applicant's son up, but although he managed to open his eyes he was otherwise unresponsive. Another seven hours later, after finding that the son had been "sleeping for too long", the police called an ambulance and he was finally taken to hospital only after repeated requests by the applicant. He died several hours later and a subsequent autopsy confirmed multiple injuries to the head and brain as the cause of death.

In the course of the subsequent investigation, an expert report was issued on the quality of the medical care that had been provided to the applicant's son. It noted several shortcomings in his treatment at the police station, such as a lack of information on his condition during his detention and the delays in calling an ambulance. The police department where the son had been detained also launched an internal inquiry into the circumstances of his death. However, it terminated the investigation on three occasions, concluding that the officers on duty had acted in line with the applicable laws and regulations. Each of those decisions was subsequently quashed by the competent public prosecutor's office. After the third decision to terminate the investigation and at the insistence of the appli-

cant, the case was finally submitted to the Bureau of Internal Security for further investigation. Having heard further witnesses, that Bureau ultimately decided to terminate the investigation, finding that the police had acted with due care. The applicant's appeals against that decision were dismissed.

Law – Article 2 (substantive aspect): The Court noted that persons with disabilities were particularly vulnerable when in custody and that the police had been properly informed of the applicant's son's sensory disabilities and of his injury. However, they had not had him medically examined when they took into custody, as they were specifically required to do by the standards of the European Committee for the Prevention of Torture (CPT). Not had they given him any opportunity to provide information about his state of health, even after he kept knocking on the doors and the walls of the sobering-up cell. Taking into account that he was deaf and mute, the police had a clear obligation under the domestic legislation and international standards, including the United Nations Convention on the Rights of Persons with Disabilities, to at least provide him with a pen and paper to enable him to communicate his concerns. Finally, it was of particular concern that almost seven hours had passed between the son's "refusing to wake up" and an ambulance being called. Not getting up for some fourteen hours could hardly be explained by simple drunkenness. In conclusion, given their failure to seek a medical opinion or to call an ambulance for almost seven hours after failing to awake the victim, the police had failed to fulfil their duty to safeguard his life.

Conclusion: violation (unanimously).

Article 2 (procedural aspect): The initial investigation into the son's death was conducted by the very same authority which had been implicated in the events resulting in the death. It could not, therefore, be said to have been effective since it did not comply with the minimum standard of investigatory independence. The investigation had then been taken over by the Bureau of Internal Security, which questioned the five police officers who had been present at the police station in the days prior to the death and drew its own conclusions which coincided with those reached by the implicated police department's internal inquiry. Without drawing general conclusions about the independence of the Bureau, the Court considered that the investigation it had carried out was defective for several reasons. Firstly, it was not until some eighteen months after the death that the investigation was transferred away from the institution implicated in the events and the Bureau did not adopt its decision until almost a year later still. A more prompt reaction by an independent authority would have enabled more evidence to be gathered, for instance, from the pathologist who performed the autopsy or from the scene of the son's fall or the cell where he was detained. Secondly, the investigation carried out by the Bureau failed to provide answers to several questions that would have been crucial in determining the individual responsibility of the police officers, for example, regarding the quality of the medical treatment in the sobering-up centre. Nor had the investigators assessed whether refusing to have the son medically examined on his arrest and subsequently delaying him medical assistance were compatible with the police's duties under domestic law and the special needs of persons with disabilities. Lastly, the Court could not disregard the fact that responsibility for the investigation had been passed back and forth between the police and various prosecutors' offices three times.

Conclusion: violation (unanimously).

Article 41: EUR 50,000 in respect of non-pecuniary damage.

ARTICLE 3

Inhuman or degrading treatment/Traitement inhumain ou dégradant

Religiously motivated attacks by private individuals on a Hare Krishna member: *violation*

Agressions fondées sur des motifs religieux et perpétrées par des particuliers contre un membre de la communauté Hare Krishna : *violation*

Milanović – Serbia/Serbie - 44614/07
Judgment/Arrêt 14.12.2010 [Section II]

(See Article 14 below/Voir l'article 14 ci-dessous – page 23)

Degrading treatment/Traitement dégradant Positive obligations/Obligations positives

Failure to test detainee for tuberculosis on arrival in prison: *violation*

Absence de dépistage d'un détenu, à l'arrivée en prison, pour identifier l'existence d'une tuberculose : *violation*

Dobri – Romania/Roumanie - 25153/04
Judgment/Arrêt 14.12.2010 [Section III]

En fait – Le 20 octobre 2002, le requérant fut placé en garde à vue, examiné par un médecin généraliste qui le déclara en bonne santé avec un appareil respiratoire normal, puis placé en détention provisoire le lendemain. En avril 2003, le tribunal le condamna pour vol aggravé à une peine de quatre ans et six mois de prison ferme. En juillet 2003, le requérant fut transféré dans une prison où les médecins découvrirent sa tuberculose et le traitèrent en conséquence.

En droit – Article 3 : lors du placement du requérant en garde à vue, le 20 octobre 2002, le médecin conclut, après l'avoir examiné mais sans avoir réalisé de test spécifique de dépistage de la tuberculose, qu'il était cliniquement en bonne santé. Par ailleurs, les médecins ayant traité le requérant entre 1987 et 2002 pour une affection du foie n'ont relevé aucune pathologie pulmonaire chez le requérant. En juillet 2003, soit environ dix mois après son placement en garde à vue, les médecins de l'hôpital de la prison diagnostiquèrent une tuberculose chez le requérant, et un traitement spécifique lui fut appliqué à partir de septembre 2003. Cependant, outre l'obligation positive de préserver la santé et le bien-être d'un prisonnier, notamment par l'administration des soins médicaux requis, l'article 3 impose préalablement à l'Etat l'obligation positive de procéder à un dépistage précoce des détenus, à l'arrivée en prison, pour identifier les porteurs d'un germe ou d'une maladie contagieuse, les isoler et les soigner efficacement. Cela d'autant plus que les autorités pénitentiaires ne peuvent pas ignorer l'état infectieux de leurs détenus et, ce faisant, en exposer d'autres au risque réel de contracter des maladies graves. Les soins médicaux dispensés au requérant semblent avoir été suffisants et adéquats. Toutefois, après avoir suspecté chez le requérant l'existence d'une tuberculose pulmonaire, les autorités du centre de détention le placèrent dans des conditions de détention susceptibles d'aggraver son état de santé (surpeuplement et absence d'hygiène). En tout état de cause, en l'absence de preuve contraire, on peut déduire que le requérant a développé un épisode tuberculeux alors qu'il se trouvait sous la responsabilité de l'Etat, entre la date de son placement en garde à vue et la date du dépistage de la maladie, en raison des mauvaises conditions de détention. Les conditions de détention combinées avec la tuberculose développée par le requérant, pendant plus de huit mois, s'analysent en un traitement dégradant.

Conclusion : violation (unanimité).

Article 41 : 12 000 EUR pour préjudice moral.

ARTICLE 5

Article 5 § 1

Procedure prescribed by law/Voies légales

Failure to adhere strictly to domestic-law rules governing detention with a view to deportation: *violation*

Absence de respect strict des critères du droit interne pour détenir le requérant en vue de son expulsion : *violation*

Jusic – Switzerland/Suisse - 4691/06
Judgment/Arrêt 2.12.2010 [Section I]

En fait – Le requérant est un ressortissant de Bosnie-Herzégovine résidant en Suisse, où sa demande d'asile fut rejetée. Il a été détenu pendant vingt-deux jours en vue de son expulsion qui n'a pas eu lieu.

En droit – Article 5 § 1 : le requérant a été débouté de sa demande d'asile sans que la décision ordonnant son éloignement et celle de sa famille soit mise en œuvre. Or, à la suite de la décision de mai 2005, le requérant ne pouvait plus ignorer qu'il devait quitter le pays avec sa famille et qu'à défaut de départ volontaire une mesure d'éloignement serait mise à exécution, le cas échéant par la force. Ainsi, le cas relève du deuxième volet de la lettre f) de l'article 5 § 1, dans la mesure où la procédure d'expulsion contre le requérant et sa famille était « en cours » lors de sa mise en détention en août 2005. Pour le tribunal le fait que le requérant avait clairement et plusieurs fois manifesté son intention de ne pas rentrer dans son pays d'origine et le fait que son épouse avait refusé de signer l'accusé de réception d'un plan de vol prévu en août 2005 seraient des indices importants qui permettaient d'admettre que le requérant voulait se soustraire à l'exécution du renvoi. La Cour ne partage pas cet avis et estime que l'application du droit interne faite par les autorités nationales ne cadre pas en l'espèce avec l'exigence d'une interprétation restrictive à laquelle est soumis l'article 5. En effet, il existait certes une décision de renvoi exécutoire. Toutefois, le requérant a décliné son identité exacte ainsi que celle de son épouse dès son arrivée en Suisse ; il a déposé une carte d'identité et s'est toujours présenté aux convocations du Service cantonal de la population. Il avait quatre enfants à sa charge, tous mineurs, et son épouse souffrait d'une maladie psychique. Il n'existait donc pas d'« indices concrets » permettant de supposer que le requérant entendait

« se soustraire au refoulement », comme le prévoyait la loi pour motiver l'incarcération. En particulier, le refus exprimé à plusieurs reprises par le requérant de quitter le territoire suisse ne saurait être interprété comme son intention de « se soustraire » à la décision de renvoi. Ainsi, les autorités nationales compétentes n'ont pas respecté les critères établis par l'article pertinent de l'ancienne loi fédérale sur le séjour et l'établissement des étrangers. La détention du requérant n'est donc pas intervenue selon les voies légales.

Conclusion : violation (unanimité).

La Cour a aussi conclu, à l'unanimité, à la non-violation de l'article 5 § 5, le droit du requérant à réparation du fait de la violation de l'article 5 § 1 se trouvant assuré à un degré suffisant de certitude.

Article 41 : 10 000 EUR pour préjudice moral.

Lawful arrest or detention/Arrestation ou détention régulières

Arbitrary detention of minors in a juvenile holding facility: *violation*

Détention arbitraire de mineurs dans un centre de détention pour mineurs : *violation*

Ichin and Others/et autres – Ukraine
- 28189/04 and/et 28192/04
Judgment/Arrêt 21.12.2010 [Section V]

Facts – The second and fourth applicants, minors at the material time, stole some food and kitchen appliances from a school canteen. They were questioned by the police and confessed to the theft. They also returned some of the stolen goods. A court ordered both boys to be placed in a juvenile holding facility as they were considered capable of committing socially dangerous acts, evading the investigation and interfering with the course of justice. They remained in detention for thirty days. The criminal proceedings against them were eventually terminated as they were under the age of criminal responsibility.

Law – Article 5 § 1: The procedure for placement of a minor in a special holding facility was provided for by the Code of Criminal Procedure. The circumstances of the present case, however, cast doubts as to whether the scope and manner of application of this procedure was sufficiently well-defined to avoid arbitrariness. The authorities had summoned the applicants as court witnesses in a criminal case opened against unknown perpetrators, even though the identity of the offenders had been established by that time. The decision to detain them did not appear to be for any of the purposes listed in Article 5 § 1 (c). No investigative measures had been taken while the applicants had been detained, and the criminal proceedings against them had been started twenty days after their release although they could not be criminally responsible given that they were under age. In addition, the juvenile holding facility where they had been placed could not be considered a place for "educational supervision" within the meaning of Article 5 § 1 (d), as it was an establishment for the temporary isolation of minors, including those who had committed an offence. It did not appear from the case materials that the applicants had participated in any educational activities during their stay there or that their detention had been related to any such purpose. Consequently, their detention had not fallen under the permissible exceptions of Article 5 § 1 (d) either. In sum, the applicants had been detained in an arbitrary manner.

Conclusion: violation (unanimously).

Article 41: EUR 6,000 to each of the second and fourth applicants in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations/Droits et obligations de caractère civil Access to court/Accès à un tribunal

Prison board's repeated refusal, with no right of appeal to the administrative courts, to grant prisoner temporary leave: *violation*

Refus répétés d'une commission pénitentiaire d'accorder une autorisation de sortie à un détenu sans recours possible devant une juridiction administrative : *violation*

Boulois – Luxembourg - 37575/04
Judgment/Arrêt 14.12.2010 [Section II]

En fait – Le requérant purge actuellement une peine de quinze ans de réclusion. Entre 2003 et 2006, il présenta six demandes d'autorisation de sortie (« congé pénal »), motivées notamment par le souhait d'accomplir des formalités administratives et de suivre des cours en vue de l'obtention de

diplômes. Ses demandes furent toutes rejetées par la commission pénitentiaire. L'intéressé attaqua les deux premières décisions de refus par un recours en annulation devant le tribunal administratif, lequel se déclara incompétent pour en connaître. La cour administrative confirma ce jugement.

En droit – Article 6 § 1

a) *Recevabilité* – Il paraît clair qu'une contestation a surgi dès lors que la commission pénitentiaire a décidé de refuser les différentes demandes de congé pénal basées sur un projet de réinsertion professionnelle et sociale. Cette contestation, réelle et sérieuse, concernait l'existence même du droit à un congé pénal, et elle s'est poursuivie devant les juridictions administratives. L'issue devant la commission pénitentiaire et les juridictions administratives était directement déterminante pour le droit allégué en l'espèce. Par ailleurs, eu égard à l'existence d'une loi et d'un règlement en la matière, le requérant peut de manière défendable soutenir qu'il dispose en tant que détenu d'un droit à l'octroi d'un congé pénal, sous réserve qu'il remplisse les conditions prévues. Les restrictions au droit à un tribunal ici alléguées concernent du reste un ensemble de droits que le Conseil de l'Europe a reconnus aux détenus dans les Règles pénitentiaires européennes. On peut donc parler en l'espèce de l'existence d'une contestation sur des droits, au sens de l'article 6 § 1. En outre, le litige en question mettait en cause l'intérêt du requérant à réorganiser sa vie professionnelle et sociale à la sortie de prison. La restriction alléguée relève des droits de la personne, eu égard à l'importance de l'intérêt du requérant à retrouver une place dans la société. Une resocialisation était capitale pour la protection de son droit de mener une vie privée sociale et de développer son identité sociale. En conséquence, le grief du requérant est compatible *ratione materiae* avec la Convention dès lors qu'il a trait à l'article 6 sous son volet civil.

Conclusion : recevable (majorité).

b) *Fond* – Il ressort d'une loi de 1986 que les décisions relatives aux demandes de congé pénal sont prises par le procureur général d'Etat ou son délégué, par accord à la majorité d'une commission pénitentiaire qui comprend, outre ledit procureur général ou son délégué, un magistrat du siège et un magistrat d'un des parquets. La loi en question n'organise pas de débats publics devant cette commission. Après avoir introduit chacune de ses demandes de congé pénal, le requérant s'est vu communiquer la décision de refus par l'intermédiaire du directeur du centre pénitentiaire, sans que la commission pénitentiaire ne se soit prononcée à l'issue d'une procédure organisée. Ce constat suffit en soi pour amener à conclure que la commission pénitentiaire ne satisfait pas aux exigences requises d'un tribunal au sens de l'article 6 § 1. Il n'y aurait pas pour autant violation de la Convention si la procédure en question avait ultérieurement été contrôlée par un organe judiciaire de pleine juridiction présentant les garanties de l'article 6. Le requérant a introduit un recours en annulation des deux premières décisions de refus de la commission pénitentiaire, mais tant le tribunal administratif que la cour administrative se sont déclarés incompétents pour en connaître. Les juridictions administratives n'ayant pas statué sur le bien-fondé du recours en annulation, force est de constater que l'absence de toute décision sur le fond a vidé de sa substance le contrôle du juge administratif sur les décisions de la commission pénitentiaire. Par ailleurs, la loi de 1986 n'offre pas en la matière d'autre recours à un détenu.

Conclusion : violation (quatre voix contre trois).

Article 41 : 5 000 EUR pour préjudice moral.

Article 46 : l'Etat défendeur et tous ses organes sont invités à prendre toutes les mesures nécessaires pour faire en sorte qu'une demande en matière d'exécution des peines puisse être examinée par un tribunal remplissant les conditions de l'article 6 § 1.

Access to court/Accès à un tribunal

Fixing of court fees payable by creditor of insolvent company by reference to total value of claim: *no violation*

Frais de justice dus par un créancier d'une entreprise insolvable fixés en fonction du montant total du litige : *non-violation*

Urbanek – Austria/Autriche - 35123/05
Judgment/Arrêt 9.12.2010 [Section I]

Facts – The applicant brought court proceedings under section 110 of the Insolvency Act for a declaratory decision that a company which had gone into liquidation owed him some EUR 2,400,000. The court fixed the fee payable to it as a percentage of that sum, which it regarded as the amount in dispute, rather than as a percentage of the much lesser amount the applicant actually expected to recover (EUR 36,000) from the company's assets. As a result, the applicant was charged almost EUR 30,000 instead of EUR 550 in court fees. In his application to the European Court, he complained of a breach of his right of access to court.

Law – Article 6 § 1: There were a number of factors that distinguished the applicant's case from cases in which the Court had found a violation of the right of access to a court on account of excessive court fees. Firstly, the conduct of the proceedings under section 110 of the Insolvency Act was not dependent on the fees being paid: the domestic courts were required to conduct the proceedings regardless of whether the fees were paid or not. Secondly, although the applicant had asserted that the level of fees he was required to pay was excessive, there was nothing unusual in a system in which court fees for pecuniary claims were dependent on the amount in dispute. The applicant's argument that the fees should have been fixed by reference to the amount he was likely to receive in the insolvency proceedings as opposed to the amount he had claimed was based on speculation, namely that the fees might exceed the amount he finally obtained. Moreover, as the domestic courts had rightly pointed out, the risk of a claimant having to pay fees which exceeded the final award was not confined to claims made in the context of insolvency proceedings. Such a risk could not in itself invalidate a system linking court fees to the amount in dispute. Lastly, the court-fee system at issue appeared sufficiently flexible, as there had been a number of possibilities at the applicant's disposal to obtain full or partial exemption from the requirement to pay court fees if he was eligible for legal aid or was liable to suffer particular hardship. In sum, it had been within the State's margin of appreciation to link the court fees in respect of pecuniary claims to the amount in dispute and there was no reason of principle to distinguish the proceedings under section 110 of the Insolvency Act from other civil proceedings. Accordingly, the very essence of the applicant's right of access to court had not been impaired.

Conclusion: no violation (unanimously).

ARTICLE 8

Private life/Vie privée

Restrictions on obtaining an abortion in Ireland: *violation/no violation*

Restrictions à l'avortement en Irlande : *violation/non-violation*

A, B and/et C – Ireland/Irlande - 25579/05
Judgment/Arrêt 16.12.2010 [GC]

Facts – Abortion is prohibited under Irish criminal law by sections 58 and 59 of the Offences Against the Person Act 1861. A referendum held in 1983 resulted in the adoption of Article 40.3.3 of the Irish Constitution (the Eighth Amendment) whereby the State acknowledged the right to life of the unborn and, with due regard to the equal right to life of the mother, guaranteed to respect the mother in national laws. That provision was interpreted by the Supreme Court in its seminal judgment in the *X* case in 1992 as meaning that abortion in Ireland was lawful if there was a real and substantial risk to the life of the mother which could only be avoided by termination of her pregnancy. The Supreme Court stated at the time that it found it regrettable that the legislature had not enacted legislation regulating that constitutionally guaranteed right. A further referendum in 1992 resulted in the Thirteenth and Fourteenth Amendments to the Constitution, which lifted a previously existing ban on travelling abroad for abortion and allowed information about lawfully available abortions abroad to be disseminated in Ireland.

All three applicants were resident in Ireland at the material time, had become pregnant unintentionally and had decided to have an abortion as they considered that their personal circumstances did not permit them to take their pregnancies to term. The first applicant was an unemployed single mother. Her four young children were in foster care and she feared that having another child would jeopardise her chances of regaining custody after sustained efforts on her part to overcome an alcohol-related problem. The second applicant did not wish to become a single parent. Although she had also received medical advice that she was at risk of an ectopic pregnancy, that risk had been discounted before she had the abortion. The third applicant, a cancer patient, was unable to find a doctor willing to advise whether her life would be at risk if she continued to term or how the foetus might have been affected by contraindicated medical tests she had undergone before discovering she was pregnant. As a result of the restrictions in Ireland all three applicants were forced to seek an abortion in a private clinic in England in what they described as an unnecessarily expensive, complicated and traumatic procedure. The first applicant was forced to borrow money from a money lender, while the third applicant, despite being in the early stages of pregnancy, had to wait for eight weeks for a surgical abortion as she could not find a clinic willing to provide a medical abortion (drug-induced miscarriage) to a non-resident because of the need for follow-up. All three applicants experienced compli-

cations on their return to Ireland, but were afraid to seek medical advice there because of the restrictions on abortion.

In their applications to the European Court, the first and second applicants complained that they were not entitled to abortion in Ireland as Irish law did not allow abortion for reasons of health and/or well-being, but solely when there was an established risk to the mother's life. The third applicant complained that, although she believed her pregnancy put her life at risk, there was no law or procedure through which she could have established that and so obviate the risk of prosecution if she had an abortion in Ireland.

Law – Article 8: While Article 8 could not be interpreted as conferring a right to abortion, the first and second applicants' inability to obtain an abortion in Ireland for reasons of health and/or well-being, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, came within the scope of their right to respect for their private lives.

(a) *First and second applicants* – Having regard to the broad concept of private life within the meaning of Article 8, including the right to personal autonomy and to physical and psychological integrity, the prohibition of the termination, for reasons of health and/or well-being, of the first and second applicants' pregnancies amounted to an interference with their right to respect for their private lives. That interference was in accordance with the law and pursued the legitimate aim of the protection of the profound moral values of a majority of the Irish people as reflected in the 1983 referendum.

In view of the acute sensitivity of the moral and ethical issues raised, a broad margin of appreciation was, in principle, to be accorded to the Irish State in determining whether a fair balance had been struck between the protection accorded under Irish law to the right to life of the unborn and the conflicting rights of the first and second applicants to respect for their private lives. Although there was a consensus amongst a substantial majority of the Contracting States towards allowing abortion on broader grounds than those accorded under Irish law, that consensus did not decisively narrow the broad margin of appreciation of the State. Since there was no European consensus on the scientific and legal definition of the beginning of life and since the rights claimed on behalf of the foetus and those of the mother were inextricably interconnected, the margin of appreciation accorded to the State as regards how it protected the unborn necessarily translated into a margin of appreciation as to how it balanced the conflicting rights of the mother.

A choice had emerged from the lengthy, complex and sensitive debate in Ireland as regards the content of its abortion laws. While Irish law prohibited abortion in Ireland for health and well-being reasons, it allowed women the option of seeking an abortion abroad. Legislative measures had been adopted to ensure the provision of information and counselling about the options available, including abortion services abroad, and to ensure any necessary medical treatment both before and after an abortion. The importance of the role of doctors in providing information and their obligation to provide all appropriate medical care, notably post-abortion, was emphasised in the Crisis Prevention Agency's work and documents and in professional medical guidelines. The first two applicants had not demonstrated that they had lacked relevant information or necessary medical care as regards their abortions.

Accordingly, regard being had to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the prohibition in Ireland of abortion for health and well-being reasons, based on the profound moral views of the Irish people, had not exceeded the State's margin of appreciation. The impugned prohibition had thus struck a fair balance between the first and second applicants' right to respect for their private lives and the rights invoked on behalf of the unborn.

Conclusion: no violation in respect of first and second applicants (eleven votes to six).

(b) *The third applicant* – The third applicant's complaint concerned the respondent State's alleged failure to introduce a procedure by which she could have established whether she qualified for a lawful abortion in Ireland on grounds of the risk to her life. She had a rare form of cancer and, on discovering she was pregnant, had feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment in Ireland while pregnant. The Court considered that the establishment of any such relevant risk to her life caused by her pregnancy clearly concerned fundamental values and essential aspects of her right to respect for her private life.

There were a number of concerns regarding the effectiveness of the only non-judicial means of determining such a risk – the ordinary medical consultation process – on which the Government had relied. The first of these was that the ground

upon which a woman could seek a lawful abortion in Ireland – a real and substantial risk to life which could only be avoided by a termination of the pregnancy – was expressed in broad terms. No criteria or procedures had been laid down in Irish law governing how that risk was to be measured or determined. Nor was there any framework in place to resolve, in a legally binding way, differences of opinion between a woman and her doctor or between different doctors. Against this background of substantial uncertainty, it was evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, with women risking conviction and doctors risking both conviction and disciplinary action.

As to the judicial procedures that had been proposed by the Government, a constitutional action to determine the third applicant's qualification for a lawful abortion in Ireland was not an effective means of protecting her right to respect for her private life. Constitutional courts were not the appropriate fora for the primary determination, which would largely be based on medical evidence, of whether a woman qualified for an abortion and it was inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable. Nor was it clear how an order requiring doctors to carry out an abortion would be enforced. As to the Government's submission that the third applicant could have made an application under the European Convention on Human Rights Act 2003 for a declaration of incompatibility of the relevant provisions of the 1861 Act and damages, such a declaration placed no legal obligation on the State to amend domestic law and could not form the basis of an obligatory award of monetary compensation.

Consequently, neither the medical consultation nor litigation options constituted effective and accessible procedures that would allow the third applicant to establish her right to a lawful abortion in Ireland. The uncertainty generated by the lack of legislative implementation of Article 40.3.3 of the Constitution and by the lack of effective and accessible procedures to establish a right to an abortion had resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland and the reality of its practical implementation. No convincing explanation had been forthcoming for the failure to implement Article 40.3.3, despite recognition that further legal clarity was required. In sum, the authorities had failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which she could have established whether she qualified for a lawful abortion in Ireland.

Conclusion: violation in respect of the third applicant (eleven votes to six).

Article 41: EUR 15,000 to the third applicant in respect of non-pecuniary damage.

Liability of health professionals to conviction effectively depriving expectant mothers of right to medical assistance for home births: *violation*

Risque de condamnation pour des professionnels de la santé, qui en pratique prive les femmes enceintes du droit à une assistance médicale pour accoucher à domicile : *violation*

Ternovszky – Hungary/Hongrie - 67545/09
Judgment/Arrêt 14.12.2010 [Section II]

Facts – In her application to the European Court, the applicant, a pregnant mother who wished to give birth at home, complained that she was effectively prevented from obtaining adequate professional assistance if she exercised that choice by domestic legislation[1] which potentially rendered any health professional assisting a home birth liable to conviction and a fine.

Law – Article 8: "Private life" incorporated the right to respect for the decision to become a parent which in turn included the right to choose the circumstances in which one gave birth. Although the applicant was not prevented as such from giving birth at home, legislation arguably dissuaded health professionals from providing the requisite assistance and thus constituted interference with the exercise of her right.

As to whether that interference was "in accordance with the law", the Court considered that, where choices related to the exercise of the right to respect for private life occurred in a legally regulated area, the State should provide adequate legal protection to the right in the regulatory scheme, notably by ensuring that the law was accessible and foreseeable. While the State had a wide margin of appreciation,

1. Section 101(2) of Government Decree no. 218/1999 (XII.28).

the regulation had to ensure a proper balance between societal interests and the right at stake. In the context of home birth, this implied the mother being entitled to a legal and institutional environment that enabled her choice to be fulfilled, except where other rights rendered restrictions necessary. Although the question whether home birth carried significantly higher risks than a hospital birth was a matter of debate in medical circles, the right to choice in matters of child delivery included the right to legal certainty that the choice was lawful and not subject to sanctions, directly or indirectly. In that connection, the domestic legislation could reasonably be seen as contradictory. While the Health Care Act 1997 recognised patients' right to self-determination, section 101(2) of the Government Decree sanctioned health professionals who carried out activities within their qualifications in a manner incompatible with the law or their licence. In at least one case proceedings had been instituted against a health professional for having assisted home birth. Although the Government had recognised the need for regulations in this field, none had been introduced. The Court therefore concluded that the matter of health professionals assisting home births was surrounded by legal uncertainty prone to arbitrariness. Because of the absence of specific and comprehensive legislation and of the permanent threat posed to health professionals inclined to assist home births, the applicant's choices had been limited. That situation was incompatible with the notion of "foreseeability" so that the interference was not "in accordance with the law".

Conclusion: violation (six votes to one).

Article 41: No claim made in respect of damage.

Family life/Vie familiale

Refusal to grant long-term cohabitee privilege against testifying in criminal proceedings against partner: *relinquishment in favour of the Grand Chamber*

Refus de dispenser une femme partageant depuis longtemps la vie d'un suspect de témoigner contre celui-ci dans le cadre d'une procédure pénale : *dessaisissement au profit de la Grande Chambre*

Van der Heijden – Netherlands/Pays-Bas - 42857/05
[Section III]

The applicant was summoned as a witness in connection with a criminal investigation into a fatal shooting, but refused to testify before the investigating judge on the grounds that her fifteen-year cohabition with the principal suspect by whom she had two children entitled her to the same testimonial privilege as was accorded to spouses and registered partners of suspects under the Code of Criminal Procedure. She was subsequently detained for twelve days for failure to comply with a judicial order to testify. On appeal the Supreme Court ruled that testimonial privilege as laid down in the domestic law sought to protect "family life" between spouses and registered partners only, not between other partners, even if long-term cohabitees. Any difference in treatment to which that situation could be said to give rise was objectively and reasonably justified by the need for the truth to be uncovered and for legal certainty when making exceptions to the statutory duty to testify.

In her application to the European Court, the applicant alleged a violation of Article 8, taken alone and together with Article 14.

Family life/Vie familiale
Positive obligations/Obligations positives

Inability of biological father to establish in law his paternity of children born to a married woman with whom he had been cohabiting: *no violation*

Impossibilité, pour un père biologique, de faire établir légalement sa paternité à l'égard d'enfants nés d'une femme mariée pendant la période où ils vivaient ensemble : *non-violation*

Chavdarov – Bulgaria/Bulgarie - 3465/03
Judgment/Arrêt 21.12.2010 [Section V]

En fait – En 1989, le requérant s'installa avec une femme mariée (mais vivant séparément de son époux), qui entre 1990 et 1998 donna naissance à trois enfants alors qu'ils vivaient ensemble. L'époux de la femme apparaît comme étant le père des enfants dans les trois actes de naissance, et les enfants portent son nom de famille. Fin 2002, la femme quitta le requérant et les enfants pour s'établir avec un autre partenaire. Depuis lors, le requérant vit avec les trois enfants. Début 2003, il consulta un avocat dans la perspective de faire reconnaître sa paternité, mais l'avocat l'informa

que le droit interne ne lui permettait pas de contester la présomption de paternité de l'époux de son ex-compagne. Le requérant saisit donc la Cour européenne directement, quelques jours plus tard.

En droit – Article 8

a) *Existence d'une vie familiale* – Les treize ans de cohabitation entre le requérant et son ancienne compagne et la naissance des trois enfants au cours de cette période indiquent que l'on est en présence d'une cellule familiale de fait, au sein de laquelle l'intéressé a pu développer des liens affectifs avec les enfants. Son attachement à leur égard ressort également des démarches qu'il a rapidement entreprises après la séparation en vue de pallier l'absence de tout lien de filiation entre les enfants et lui, ainsi que du fait que les enfants habitent apparemment avec lui depuis la séparation. Il y a donc lieu de considérer que les liens existant entre le requérant et les trois enfants dont il affirme être le géniteur constituent une vie familiale au sens de la Convention.

b) *Obligations positives* – Les Etats jouissent d'une certaine marge d'appréciation dans la réglementation de la filiation paternelle, domaine où interviennent diverses considérations morales, éthiques, sociales ou religieuses. Les données relatives à vingt-quatre Etats parties à la Convention révèlent l'absence de consensus sur le point de savoir si la législation interne doit permettre au père biologique de contester la présomption de paternité du mari. En l'espèce, l'existence de la famille monoparentale de fait formée par le requérant et les trois enfants n'a été menacée à aucun moment, ni par les autorités ni par la mère ou le mari de celle-ci. Même si l'intéressé ne peut pas intenter d'action en contestation de la filiation paternelle des trois enfants, le droit interne ne le privait pas de toute possibilité d'établir un lien de paternité vis-à-vis de ceux-ci ou de pallier les inconvénients d'ordre pratique engendrés par l'absence d'un tel lien. Il pouvait notamment solliciter l'adoption des enfants ou demander aux services sociaux le placement des enfants sous sa responsabilité en tant que proche de mineurs abandonnés. Etant donné que le requérant n'a pas démontré s'être prévalu de ces possibilités, on ne saurait tenir les autorités de l'Etat pour responsables de sa propre passivité. Le respect des intérêts légitimes des enfants a également été assuré par la législation interne. Partant, le juste équilibre entre les intérêts de la société et ceux des personnes concernées n'a pas été méconnu en l'espèce.

Conclusion : non-violation (unanimité).

Expulsion

Deportation order against long-term illegal immigrant: *deportation would not constitute a violation*

Mesure d'éloignement à l'encontre d'un immigré de longue durée en situation irrégulière : *l'expulsion n'emporterait pas violation*

Gezginci – Switzerland/Suisse - 16327/05
Judgment/Arrêt 9.12.2010 [Section I]

En fait – Le requérant est un ressortissant turc ayant séjourné en Suisse depuis 1978, avec autorisations de séjour de 1980 à 1998 et illégalement le reste du temps. En 1997, les autorités nationales décidèrent de ne pas renouveler son autorisation de séjour et, quelques mois plus tard, fixèrent à mars 1999 le délai de son éloignement hors de Suisse. Cependant, le requérant ne quitta pas le pays. En 2003, après un grave accident du travail, il déposa une demande d'autorisation de séjour pour raisons humanitaires, que les autorités rejetèrent. Peu après, son épouse lui confia leur fille, alors âgée de onze ans, puis repartit sans laisser de traces. Le requérant a exercé sans succès plusieurs recours et demeure sous le coup de la mesure d'éloignement.

En droit – Article 8 : compte tenu de la très longue durée du séjour du requérant en Suisse, le refus de lui octroyer une autorisation de séjour pour raisons humanitaires constitue une ingérence dans son droit au respect de sa vie privée. Cette ingérence était prévue par la loi et poursuivait les buts légitimes que sont le bien-être économique du pays, la défense de l'ordre et la prévention des infractions pénales, ainsi que la protection des droits et libertés d'autrui. Pour déterminer si elle était nécessaire dans une société démocratique, il y a lieu de prendre en compte divers critères. Tout d'abord, les condamnations dont le requérant a fait l'objet entre 1982 et 1992 ne sont pas lourdes, et depuis 1993 son comportement ne semble pas avoir été mis en cause d'un point de vue purement pénal. Ensuite, le requérant a séjourné en Suisse environ trente ans grâce à la grande compréhension des autorités à partir de 1999, abstraction faite des périodes pendant lesquelles il s'est rendu à l'étranger. Par ailleurs, le requérant a conservé en Turquie un certain cercle familial qui pourrait le soutenir dans sa réintégration sociale et professionnelle dans ce pays, dont il maîtrise parfaitement la langue. Des considérations semblables s'appliqueraient s'il optait pour la Roumanie, pays qu'il connaît par ses visites, où vit son épouse, où sa fille a passé une grande

partie de sa vie et où il semble avoir exercé une activité lucrative. En outre, il a clairement démontré par son comportement qu'il ne pouvait et ne voulait pas s'intégrer au monde du travail en Suisse. Quant à sa fille, étant donné qu'elle a passé la plus grande partie de sa vie en Roumanie et en Turquie, pays dont elle possède les nationalités et dont elle parle vraisemblablement les langues, on pouvait raisonnablement s'attendre à ce qu'elle puisse s'y réadapter en cas de retour. Enfin, l'état de santé du requérant n'est pas susceptible de constituer un obstacle significatif à son intégration en Turquie, étant donné qu'il y disposerait des médicaments et soins nécessaires et y toucherait sans doute une rente d'invalidité. Dès lors, compte tenu en particulier de la nature irrégulière du séjour du requérant en Suisse depuis 1997, de son absence de volonté de s'y intégrer, de son manque de respect des règles nationales et du fait que le lien avec son pays d'origine ne semble pas totalement rompu, l'Etat défendeur peut passer pour avoir ménagé un juste équilibre entre les intérêts de l'intéressé et de sa fille d'une part, et son propre intérêt à contrôler l'immigration d'autre part.

Conclusion : l'expulsion n'emporterait pas violation (cinq voix contre deux).

ARTICLE 9

Manifest religion or belief/Manifester sa religion ou sa conviction

Refusal to provide Buddhist prisoner with meat-free diet: *violation*

Refus d'assurer à un détenu bouddhiste un régime alimentaire végétarien : *violation*

Jakóbski – Poland/Pologne - 18429/06
Judgment/Arrêt 7.12.2010 [Section IV]

Facts – In his application to the European Court, the applicant, a practising Buddhist who was serving a prison sentence, complained that he was unable to obtain a meat-free diet in prison.

Law – Article 9: The applicant's decision to adhere to a vegetarian diet could be regarded as motivated or inspired by a religion (Buddhism) and was not unreasonable. Consequently, the refusal of the prison authorities to provide him with a such a diet fell within the scope of Article 9. While the Court was prepared to accept that a decision to make special arrangements for one prisoner within the system could have financial implications for the custodial institution, it had to consider whether the State had struck a fair balance between the different interests in play. The applicant had merely asked to be granted a diet without meat products. His meals did not have to be prepared, cooked and served in a prescribed manner, nor did he require any special products. He was not offered any alternative diet, and the Buddhist Mission was not consulted on the issue of the appropriate diet. The Court was not persuaded that the provision of a vegetarian diet would have entailed any disruption to the management of the prison or a decline in the standards of meals served to other prisoners and noted that Committee of Ministers' Recommendation Rec(2006)2 on the European Prison Rules advised that prisoners should be provided with food that took into account their religion. It therefore concluded that the authorities had failed to strike a fair balance between the applicant's and the prison authorities' interests.

Conclusion: violation (unanimously).

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

ARTICLE 10

Freedom of expression/Liberté d'expression

Award of damages against public servant for comments made to press concerning confidential report on conduct of Court of Cassation judge: *no violation*

Condamnation d'un fonctionnaire à verser des dommages et intérêts pour ses propos dans la presse concernant un rapport confidentiel sur un membre de la Cour de cassation : *non-violation*

Poyraz – Turkey/Turquie – 15966/06
Judgment/Arrêt 7.12.2010 [Section II]

En fait – Inspecteur en chef du ministère de la Justice, le requérant fut chargé de procéder à une instruction au sujet d'un magistrat visé par des allégations d'inconduite professionnelle. Dans le rapport qu'il corédigea, le comportement professionnel du juge – entre-temps élu membre de la Cour de cassation – était sérieusement remis en cause par des témoignages l'accusant notamment de harcèlement sexuel. Le rapport filtra dans la presse et de nombreuses émissions télévisées donnèrent la parole au requérant, au juge et à des

témoins. Visé par des accusations de complot politique à l'encontre du juge, le requérant soumit à la presse une déclaration écrite dans laquelle il affirmait que le juge faisait l'objet de quinze instructions et que c'était pour ne pas faire de morts qu'il ne révélait pas le nom de ses victimes de harcèlement. Le magistrat engagea contre lui une procédure civile pour faute personnelle. Le requérant fut condamné à verser des dommages et intérêts. Il forma en vain des pourvois en cassation.

En droit – Article 10 : l'ingérence des autorités dans la liberté d'expression du requérant, constituée par sa condamnation au civil pour le rapport susmentionné et les propos tenus à la presse, était prévue par le droit interne et poursuivait le but légitime consistant à protéger la réputation ou les droits d'autrui. Le requérant a été condamné à titre personnel et non professionnel, mais les deux protagonistes de l'affaire avaient néanmoins un devoir de loyauté envers l'Etat et une réputation à préserver en tant que représentants de haut niveau du pouvoir judiciaire. Les déclarations litigieuses à la presse, malgré leur ton globalement neutre, ont constitué un acquiescement du contenu des informations divulguées. De plus, le requérant a surchargé ce contenu en y apportant un commentaire subjectif, à savoir que s'il dévoilait les noms des victimes du harcèlement cela pourrait faire des morts. Il a en outre « défendu » le contenu du rapport devant les médias audiovisuels. On peut donc, à l'instar des juridictions internes, considérer que le requérant s'est approprié au moins en partie le contenu du rapport tel que publié par la presse. De la sorte, il n'a pas fait preuve de la discrétion requise de la part d'une autorité judiciaire. Par ailleurs, le rapport relatait des infractions graves prétendument commises par un magistrat membre de la Cour de cassation. Or celui-ci devait bénéficier de la confiance du public pour pouvoir s'acquitter de ses fonctions. Les personnes investies de responsabilités publiques doivent faire preuve de retenue pour ne pas créer une situation de déséquilibre lorsqu'elles se prononcent publiquement au sujet de citoyens ordinaires qui, eux, ont un accès plus limité aux médias. Elles doivent également observer une vigilance accrue quand elles sont chargées de conduire des enquêtes contenant des informations couvertes par une clause officielle de secret dans l'intérêt d'une bonne administration de la justice. Partant, l'ingérence des autorités dans la liberté d'expression du requérant était nécessaire dans une société démocratique et les moyens employés étaient proportionnés au but visé, à savoir la protection de la réputation ou des droits d'autrui.

Conclusion : non-violation (unanimité).

La Cour a également conclu, à l'unanimité, à la violation de l'article 6 § 1, en raison de la durée excessive (sept ans et sept mois) de la procédure civile menée en l'espèce.

ARTICLE 12

Right to marry/Droit au mariage

Requirement of certificate of approval for immigrants wishing to marry other than in the Church of England: *violation*

Nécessité d'obtenir une autorisation pour les immigrants souhaitant se marier en dehors de l'Eglise anglicane : *violation*

O'Donaghue and Others/et autres –
United Kingdom/Royaume-Uni - 34848/07
Judgment/Arrêt 14.12.2010 [Section IV]

Facts – Under section 19 of the Asylum and Immigration Act 2004, persons subject to immigration control who wish to get married but are not willing or able to do so in the Church of England must apply to the Secretary of State for permission in the form of a certificate of approval, for which they must pay a fee. There is no exemption or possibility of waiver or reduction of this fee, which at the material time was GBP 295 (about EUR 330). Under the first version of the scheme – introduced in 2005 – in order to qualify for a certificate of approval applicants had to have been granted leave to enter or remain in the United Kingdom for a period of more than six months and have at least three months of that leave remaining at the time of making the application. The scheme was subsequently amended twice with eligibility for a certificate of approval being extended firstly to applicants who had insufficient leave to enter or remain and then to those who had no leave to enter or remain. Under these new second and third versions of the scheme, applicants could be asked to submit information to show that the proposed marriage was genuine.

The second applicant, a Nigerian national, arrived in Northern Ireland in 2004 where he met the second applicant, to whom he proposed in May 2006. The couple did not seek to marry in the Church of England as they were practising Roman Catholics and, in any event, there is no Church of England in Northern Ireland. They therefore required a certificate of approval. However, as an asylum-seeker the second applicant did not become eligible to apply for a certificate until the third

version of the scheme came into effect in June 2007. In July 2007 the first and second applicants applied for a certificate and requested exemption from the fee on the grounds that the first applicant was dependent on State benefits and the second applicant was not permitted to work under the terms of his temporary admission to the United Kingdom, but their application was rejected for failure to pay the fee. Ultimately, a certificate of approval was granted in July 2008 after they succeeded in raising the sum payable with help from friends.

Law – Article 12: Though not inherently objectionable, the requirement for persons subject to immigration control to submit an application for a certificate of approval before being permitted to marry in the United Kingdom gave rise to a number of grave concerns.

First, the decision whether or not to grant a certificate of approval was not based solely on the genuineness of the proposed marriage. The first version of the scheme did not provide for or envisage any investigation of that issue as the decision whether or not to grant a certificate was based solely on whether the applicant had sufficient leave; the second and third versions provided that persons with insufficient or no valid leave to remain could be required to submit information concerning the genuineness of their relationship. In contrast, under all three versions of the scheme applicants with "sufficient" leave to remain qualified for certificates of approval without any apparent requirement that they submit information concerning the genuineness of the proposed marriages.

Secondly, the first and second versions of the scheme had imposed a blanket prohibition on the exercise of the right to marry on all persons in a specified category – foreign nationals with either insufficient or no leave to remain – regardless of whether the proposed marriage was one of convenience or not. There was no justification whatsoever for imposing a blanket prohibition on the right of persons falling within these categories to exercise their right to marry. Even had there been evidence (none was submitted) to suggest that such persons were more likely to enter into marriages of convenience, a blanket prohibition, without any attempt being made to investigate the genuineness of the proposed marriages, restricted the right to marry to such an extent that its very essence was impaired. The existence of an exception on compassionate grounds did not alter the position as it was entirely at the discretion of the Secretary of State.

Thirdly, a fee fixed at a level which a needy applicant could not afford could impair the essence of the right to marry. In view of the fact that many persons subject to immigration control would be unable to work or would fall into the lower income bracket, the fee of GBP 295 was sufficiently high to impair the right to marry. That had remained the case even after the introduction of a system of refunds for needy applicants was introduced in July 2010, as the requirement to pay a fee could still act as a powerful disincentive to marriage.

In conclusion, from May 2006, when the applicants first formed the intention to marry, until they were issued with a certificate of approval on 8 July 2008, the very essence of the first and second applicants' right to marry was impaired, initially because under the second version of the scheme the second applicant was not eligible for a certificate of approval and subsequently because of the level of the fee charged.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 12: The first version of the scheme was discriminatory on the ground of religion. The second applicant had been in a relatively similar position to a person with no leave to remain who was willing and able to marry in the Church of England. While such a person was free to marry unhindered, the second applicant had been both unwilling (on account of his religious beliefs) and unable (on account of his residence in Northern Ireland) to enter into such a marriage. Consequently, he had initially been prohibited from marrying at all in the United Kingdom before, following the amendments to the scheme, being permitted to marry only after submitting an application for a certificate of approval and paying a sizeable fee. There had therefore been a clear difference in treatment for which no objective and reasonable justification had been provided.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 9: The Government conceded that, through being subject to a regime to which those wishing to marry in the Church of England would not have been subject, the first and second applicants' rights under Article 14, taken together with Article 9, had been breached.

Conclusion: violation (unanimously).

Article 41: EUR 8,500, jointly, in respect of non pecuniary damage, and GBP 295, jointly, in respect of pecuniary damage.

ARTICLE 14

Discrimination (Article 3)

Religiously motivated attacks by private individuals on a Hare Krishna member: *violation*

Agressions fondées sur des motifs religieux et perpétrées par des particuliers contre un membre de la communauté Hare Krishna : *violation*

Milanović – Serbia/Serbie - 44614/07
Judgment/Arrêt 14.12.2010 [Section II]

Facts – The applicant, a leading member of the Hare Krishna religious community in Serbia, started receiving anonymous telephone threats and was attacked on two occasions in 2001. He reported the attacks to the police, who were unable to obtain any useful information concerning the attackers. In July 2005, June 2006 and June 2007, respectively, the applicant was attacked in the vicinity of his flat and each time stabbed in the abdomen or chest by unidentified individuals. In one of the attacks the assailants scratched a crucifix on the applicant's head. The attacks were reported to the police and the applicant submitted that they might have been committed by members of a far-right extremist group. The police questioned witnesses and several potential suspects, but was never able to identify any of the attackers or obtain more information on the extremist group they allegedly belonged to. In a report dated 2005 the police referred to the applicant's well-known religious affiliation and his "rather strange appearance". In a further report dated 2010 they observed that the attacks on the applicant always occurred around a major orthodox religious holiday and that the applicant had publicised the incidents while "emphasising" his own religious affiliation. Moreover, they noted that self-infliction of the applicant's injuries could not be excluded. Criminal proceedings in respect of the attacks were still pending when the European Court adopted its judgment.

Law – Article 3: Many years after the incidents, the applicant's attackers had still not been brought to justice. The police had not kept the applicant properly informed of the course of the investigation or afforded him the opportunity to personally see and possibly identify his attackers from among a number of witnesses and suspects who had been questioned by the police. On the contrary, the police considered that the applicant's injuries might have been self-inflicted, although there was no medical or other evidence to that effect. By July 2005 at the latest it should have been obvious to the police that the applicant, who belonged to a vulnerable religious minority, was being systematically targeted around the same time every year and that future attacks were likely to follow, but they had done nothing to prevent them. No video or other surveillance was ever put in place in the vicinity of the flat where the incidents had occurred, no police stakeout was ever contemplated and the applicant was never offered police protection. Despite the numerous steps taken by the domestic authorities and the significant difficulties encountered during the investigation, the Court considered that they had not taken all reasonable measures to conduct an adequate investigation and to prevent the applicant's repeated ill-treatment by unknown perpetrators.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 3: As in cases of racially motivated ill-treatment, when investigating violent attacks State authorities had the additional duty to take all reasonable steps to unmask any religious motives and to establish whether or not religious hatred or prejudice might have played a role in the events, even when the ill-treatment was inflicted by private individuals. In the applicant's case, where it was suspected that the attackers had belonged to one or several far-right organisations governed by extremist ideology, it was unacceptable that the State authorities had allowed the investigation to drag on for many years without taking adequate action with a view to identifying and prosecuting the perpetrators. Moreover, it was obvious from the police conduct and reports that they had serious doubts related to the applicant's religion and the veracity of his accusations. Consequently, even though the authorities had explored several leads suggested by the applicant concerning the underlying religious motivation of his attackers, those steps had amounted to a little more than a *pro forma* investigation.

Conclusion: violation (six votes to one).

Article 41: EUR 10,000 in respect of non-pecuniary damage.

Discrimination (Article 9)

Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *violation*

Impossibilité pour des Eglises réformistes d'assurer un enseignement religieux dans les écoles et de célébrer des mariages religieux officiellement reconnus: *violation*

Savez crkava "Riječ života" and Others/et autres – Croatia/Croatie - 7798/08
Judgment/Arrêt 9.12.2010 [Section I]

Facts – The applicants were churches of a Reformist denomination registered as religious communities under Croatian law. They sought to conclude an agreement with the Government regulating their relations with the State, claiming that without such an agreement they were unable, *inter alia*, to provide religious education in public schools and nurseries, to have religious marriages celebrated by them recognised by the State, or to provide pastoral care in health and social-welfare institutions and prisons. The authorities informed the applicants that they did not fulfil the cumulatively prescribed criteria for the conclusion of such an agreement as set out in a Government instruction, in particular that they had not been present on Croatian territory since 1941 and did not have the required 6,000 adherents.

Law – Article 14 in conjunction with Article 9: Even though the Convention did not impose on States an obligation to have the effects of religious marriages recognised as equal to those of civil marriages, or to allow religious education in public schools and nurseries, Croatia allowed certain religious communities to provide religious education in public schools and recognised religious marriages performed by such communities. Once the State had gone beyond its obligations and created additional rights falling within the wider ambit of any Convention right, it could not, in the application of such rights, take discriminatory measures within the meaning of Article 14. In the applicants' case, the authorities had refused to conclude an agreement because the applicant churches failed to satisfy the cumulative historical and numerical criteria set forth in the Government's instruction. However, the Government had entered into such an agreement with other religious communities which did not fulfil the numerical criterion either. This was because the competent commission had established that those churches satisfied the alternative criterion of being "historical religious communities of the European cultural circle". The Government had provided no explanation as to why the applicant churches did not qualify under that criterion. Consequently, the Court concluded that the criteria set forth in the Government's instruction had not been applied on an equal basis for all religious communities.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 12: Under domestic law the State enjoyed discretion in deciding whether or not to conclude an agreement with a religious community enabling it to provide religious education and to have religious marriages celebrated before it officially recognised. The applicant churches' complaint in this respect therefore did not concern "rights specifically granted to them under national law". Nevertheless, the Court considered that this complaint fell within the third category specified by the Explanatory Report on Protocol No. 12 as they concerned alleged discrimination "by a public authority in the exercise of discretionary power". Given the finding of a violation of Article 14 taken in conjunction with Article 9, it found it unnecessary to examine separately the complaint under Protocol No. 12.

Conclusion: Protocol No. 12 applicable, but no separate examination necessary (unanimously).

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

Discrimination (Article 12)

Requirement of certificate of approval for immigrants wishing to marry other than in the Church of England: *violation*

Nécessité d'obtenir une autorisation pour les immigrants souhaitant se marier en dehors de l'Eglise anglicane: *violation*

O'Donaghue and Others/et autres – United Kingdom/Royaume-Uni - 34848/07
Judgment/Arrêt 14.12.2010 [Section IV]

(See Article 12 above/Voir l'article 12 ci-dessus – page 21)

ARTICLE 35

Article 35 § 3 (b)

No significant disadvantage/Absence de préjudice important

Complaints concerning substantial delays in recovering judgment debts exceeding 200 euros: *preliminary objection dismissed*

Griefs relatifs aux délais significatifs de recouvrement de créances reconnues par la justice portant sur des montants supérieurs à 200 euros : *exception préliminaire rejetée*

Gaglione and Others/et autres – Italy/Italie - 45867/07 et al.
Judgment/Arrêt 21.12.2010 [Section II]

(See Article 46 below/Voir l'article 46 ci-dessous)

ARTICLE 46

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

Respondent State required to take all necessary measures to ensure that requests relating to execution of sentence can be examined by a court satisfying Article 6 § 1 requirements

Etat défendeur tenu de prendre toutes les mesures nécessaires pour qu'une demande en matière d'exécution des peines puisse être examinée par un tribunal remplissant les conditions de l'article 6 § 1

Boulois – Luxembourg - 37575/04
Judgment/Arrêt 14.12.2010 [Section II]

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

Respondent State required to take measures to restore effectiveness of Pinto remedy

Etat défendeur tenu de prendre des mesures pour rétablir l'efficacité du recours « Pinto »

Gaglione and Others/et autres – Italy/Italie - 45867/07 et al.
Judgment/Arrêt 21.12.2010 [Section II]

En fait – Cette requête concerne 475 affaires dans lesquelles les requérants, parties à des procédures judiciaires, ont saisi les juridictions compétentes en vertu de la loi « Pinto » (loi ayant instauré un recours qui permet de se plaindre de la durée d'une procédure civile). De 2003 à 2007, les tribunaux constatèrent le dépassement d'une durée raisonnable et accordèrent aux intéressés des sommes en réparation du préjudice moral subi. En 2006-2007, les requérants entamèrent des procédures d'exécution. Les sommes allouées furent versées à certains d'entre eux en 2007-2008, tandis que pour d'autres les versements n'avaient toujours pas eu lieu à la date des dernières informations fournies à la Cour.

En droit – a) *Exceptions préliminaires*

i. *Absence de préjudice important* : il n'y a pas lieu de déclarer les requêtes irrecevables pour absence de préjudice important, au sens du nouveau critère prévu par l'article 35 § 3 b) de la Convention telle qu'amendée par le Protocole nº 14, comme l'avance le gouvernement défendeur. On ne peut en effet affirmer que les requérants n'ont subi aucun préjudice important, eu égard aux sommes qui leur sont dues (de 200 à plus de 13 700 euros) au titre du recours « Pinto » et au retard litigieux (compris entre 9 et 49 mois, et égal ou supérieur à 19 mois dans 65 % des requêtes).

Conclusion : exception préliminaire rejetée (unanimité).

ii. *Non-épuisement des voies de recours internes* : exiger des requérants l'introduction d'une nouvelle procédure « Pinto » – ce que préconise le gouvernement défendeur – reviendrait à enfermer les intéressés dans un cercle vicieux où le dysfonctionnement d'un remède les obligerait à en entamer un autre.

Conclusion : exception préliminaire rejetée (unanimité).

b) *Fond*

Article 6 § 1 : si une administration peut avoir besoin de temps pour procéder à un paiement, ce délai, dans le cas d'un recours indemnitaire visant à redresser les conséquences d'une durée de procédure excessive, ne devrait généralement pas dépasser six mois à compter du moment où la décision d'indemnisation devient exécutoire. En l'espèce, vu le retard à exécuter les décisions « Pinto », les autorités ont largement dépassé ce délai, privant ainsi l'article 6 § 1 de tout effet utile. Ni le remboursement par les autorités des frais et dépens engagés par les requérants dans la procédure d'exécution ni le versement d'intérêts moratoires ne peuvent être considérés comme une indemnisation du préjudice moral subi. Aussi les requérants ont-ils toujours la qualité de victime.

Conclusion : violation (unanimité).

Article 1 du Protocole nº 1 : le retard litigieux s'analyse en une ingérence dans le droit au respect des biens des requérants, ingérence que le Gouvernement n'a pas justifiée. Ni un éventuel manque de ressources ni l'octroi d'intérêts moratoires ne sauraient légitimer une telle omission. Par

ailleurs, il y a lieu de fixer le seuil susceptible d'entraîner une violation de l'article 1 du Protocole n° 1 à six mois à partir du moment où la décision litigieuse devient exécutoire, délai largement dépassé en l'espèce.

Conclusion : violation (unanimité).

Article 46 : les conclusions formulées plus haut et le nombre d'affaires similaires, traitées ou pendantes devant la Cour, confirment l'existence d'un problème à grande échelle, à savoir la difficulté pour les autorités nationales de garantir dans un nombre important de cas le versement des indemnités dans un délai raisonnable. Eu égard au caractère structurel de cette situation, des mesures générales s'imposent. L'Etat défendeur devrait rétablir l'efficacité du recours « Pinto » en mettant fin aux retards dans le paiement des indemnités allouées dans ce cadre ; ces retards découlant probablement d'une couverture budgétaire insuffisante, il devrait prévoir une affectation de fonds plus importante afin de garantir l'exécution des décisions « Pinto » dans le délai de six mois à partir du moment où elles deviennent exécutoires.

Article 41 : 200 EUR à chacun des requérants pour préjudice moral.

Respondent State required to provide within one year domestic remedy for length of proceedings before the administrative courts

Etat défendeur tenu d'instituer, dans un délai d'un an, un recours interne en matière de durée de procédure devant les juridictions administratives

Vassilios Athanasiou and Others/et autres – Greece/Grèce - 50973/08
Judgment/Arrêt 21.12.2010 [Section I]

En fait – Les requérants initièrent en 1994 une procédure tendant à l'obtention d'un complément de prime de retraite par le Fonds de solidarité de l'armée, qui rejeta leur demande. Tous les recours contre cette décision échouèrent jusqu'à l'arrêt du 1er octobre 2007 par lequel le Conseil d'Etat rejeta leur dernier recours qui fut certifié conforme le 4 avril 2008.

En droit – Article 6 § 1 : la procédure a duré environ treize ans et huit mois pour trois degrés de juridiction. La durée de la procédure litigieuse a été excessive et ne répond pas à l'exigence du « délai raisonnable ».

Conclusion : violation (unanimité).

Article 13 : la Cour ne distingue aucune raison de s'écarter de sa jurisprudence, qui a constaté que l'ordre juridique hellénique n'offre pas aux intéressés un recours effectif leur permettant de se plaindre de la durée d'une procédure.

Conclusion : violation (unanimité).

Article 46

a) *Quant à l'application de la procédure d'arrêt pilote* – Il y a lieu d'appliquer en l'espèce la procédure d'arrêt pilote, compte tenu du caractère chronique et persistant du problème en question, du nombre important de personnes qu'il touche en Grèce et du besoin urgent d'offrir à ces dernières un redressement rapide et approprié à l'échelon national. En juin 2007, dans sa Résolution intérimaire CM/ResDH(2007)74, le Comité des Ministres a reconnu le grand nombre d'arrêts de la Cour constatant de la part de la Grèce une violation des articles 6 § 1 et 13 relative à la durée de procédure devant les juridictions administratives. Il a ainsi exhorté les autorités à endiguer le problème. Cependant, depuis l'adoption de la résolution, la Cour a prononcé environ cinquante arrêts concluant à des violations de l'article 6 § 1 et quinze arrêts concluant à des violations de l'article 13, dont certaines procédures avaient dépassé dix ans pour trois degrés de juridiction. Enfin, les quelque deux cents affaires pendantes contre la Grèce concernant la durée excessive de procédures judiciaires, dont cent environ devant les juridictions administratives, confirment le caractère structurel du problème identifié.

b) *Quant aux mesures générales à adopter* – La Cour, tout en reconnaissant certains développements récents de l'ordre juridique grec, considère que les autorités nationales doivent mettre en place au niveau national un recours ou une combinaison de recours garantissant réellement une réparation effective des violations de la Convention résultant de la durée excessive des procédures devant les juridictions administratives. Les critères essentiels permettant de vérifier l'effectivité des recours indemnitaires en matière de durée de procédure sont les suivants : l'action en indemnisation doit être tranchée dans un délai raisonnable ; l'indemnité doit être promptement versée, en principe au plus tard six mois après que la décision soit devenue exécutoire ; les règles procédurales régissant l'action en indemnisation doivent être conformes aux principes d'équité ; les règles en matière de frais de justice ne doivent pas faire peser un fardeau excessif sur les plaideurs dont l'action est fondée ; et le montant des indemnités ne doit pas être insuffisant par rapport aux sommes octroyées par la Cour

dans des affaires similaires. A propos de ce dernier critère, le juge national est manifestement mieux placé pour statuer sur l'existence et l'ampleur du dommage matériel allégué. Concernant le dommage moral, il existe une présomption solide, quoique réfragable, selon laquelle la durée excessive d'une procédure cause un préjudice. Le juge national devra justifier sa décision en la motivant suffisamment s'il estime qu'il y a absence de préjudice moral ou bien préjudice moral minime.

c) *Quant à la procédure à suivre dans des affaires similaires* – La Cour considère qu'il n'est pas nécessaire d'ajourner l'examen de toutes les affaires relatives à la durée de procédure devant les juridictions administratives ou autres jusqu'à la mise en place du ou des recours nécessaires par les autorités internes. En effet, le temps nécessaire au gouvernement grec pour la mise en œuvre de mesures générales ne doit pas être pris aux dépens de l'examen en temps utile des requêtes pendantes ayant le même objet. De plus, la poursuite de l'examen d'affaires similaires par la voie de la procédure normale rappellera aux autorités grecques, sur une base régulière, leurs obligations découlant de la Convention, et en particulier du présent arrêt.

Article 41 : 14 000 EUR à chacun des requérants pour préjudice moral.

Execution of a judgment – Individual measures/Exécution des arrêts – Mesures individuelles

Respondent State required to hold new, independent investigation into proportionality of use of lethal force

Etat défendeur tenu de procéder à une nouvelle enquête, cette fois indépendante, sur la proportionnalité du recours à la force meurtrière

Abuyeva and Others/et autres – Russia/Russie - 27065/05
Judgment/Arrêt 2.12.2010 [Section I]

Facts – The applicants and their relatives lived in a Chechen village, which was bombed by the Russian military forces in February 2000. As a result, twenty-four of the applicants' relatives died and some of the applicants and their relatives suffered grave bodily injuries. A criminal investigation was opened and the applicants were interviewed. The investigation was closed in March 2002 since the military action was found to have been legitimate in the circumstances. Following the Court's judgment in the *Isayeva v. Russia* case (no. 57950/00, 24 February 2005, Information Note no. 72), the investigation was reopened in late 2005 and the authorities conducted further interviews with ten more applicants granting them victim status. In June 2007 the investigation was once again closed with the same conclusion as in March 2002. That conclusion was further upheld by an additional military expert report – never submitted to the Court – which stated that the civilian evacuation had been properly organised but obstructed by Chechen rebels and that localised fire had been correctly chosen.

Law – Article 2 (substantive aspect): The Court had accepted in the *Isayeva* case that the military operation at issue had pursued a legitimate aim, but found that it had not been planned and executed with the requisite care for the lives of the civilian population. There was no reason to depart from such a conclusion in the applicants' case, in particular given that the Government had never submitted the additional military report allegedly confirming the proper organisation of the civilian evacuation and the correct choice of weapons. The respondent State had therefore failed to protect the right to life of the applicants and their relatives who had died or been wounded in the military operation.

Conclusion: violation (unanimously).

Article 2 (procedural aspect): In the *Isayeva* judgment the Court had concluded that the domestic investigation had been inefficient. It criticised the substantial delay before the opening of the investigation, the lack of crucial information about the civilian evacuation and the failure to comprehensively assess human losses. Those who had been granted victim status had never been notified of the most important procedural decision taken in the criminal proceedings. Lastly, the Court found that the expert report of February 2002 – on the basis of which the investigation had been closed – did not appear to tally with the documents contained in the case file. A new investigation had taken place between November 2005 and June 2007. During this time, a number of additional witnesses were interviewed, including ten of the applicants and some of their relatives, and several people were granted victim status in the proceedings. However, all the major flaws of the investigation had persisted throughout that second set of proceedings, in particular concerning the crucial issues of responsibility for the safety of the civilian evacuation. No additional questions about these aspects were posed to persons involved at ground level and no one was charged with any

crime. Furthermore, the decisions of the military prosecutor's office to terminate the proceedings, on the basis of the expert reports prepared by army officers, raised serious doubts about the independence of the investigation. The Court noted again the surprising failure, even after seven years, to compile an exhaustive list of casualties in the attack and to communicate information to the applicants during the proceedings. In sum, the investigation carried out after the adoption of the *Isayeva* judgment had suffered from exactly the same defects as those identified in respect of the first set of proceedings and had not been effective within the meaning of Article 2.

Conclusion: violation (unanimously).

The Court also found a violation of Article 13 in conjunction with Article 2.

Article 46: In carrying out the investigation in the applicants' case, the respondent State had manifestly disregarded the specific findings of the Court's judgment in the *Isayeva* case. To date, there had been no independent study of the proportionality and necessity of lethal force. Nor has there been any attribution of individual responsibility for the aspects of the operation which had caused loss of life and the evaluation of such aspects by an independent body, preferably of a judicial nature. It fell to the Committee of Ministers, acting under Article 46 of the Convention, to address the issue of what – in practical terms – might be required of the respondent State by way of compliance. However, the Court considered that a new, independent investigation should take place, which would bear due regard to the above conclusions in respect of the failures of the investigation carried out to date.

Article 41: Awards to each applicant ranging between EUR 30,000 and EUR 120,000 in respect of non-pecuniary damage.

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

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

Statutory ban on landlord terminating a long lease: *no violation*

Interdiction légale pour un propriétaire de résilier un bail locatif de longue durée : *non-violation*

Almeida Ferreira and/et Melo Ferreira – Portugal - 41696/07
Judgment/Arrêt 21.12.2010 [Section II]

En fait – En 1980, les requérants donnèrent en location un logement. En 2002, ayant besoin de ces lieux afin d'y installer leur fils, ils sollicitèrent en justice la résiliation du contrat de location. Le tribunal rejeta leur demande en appliquant automatiquement une loi de 1979 interdisant, sans exception, au propriétaire de résilier un bail dans le cas où le locataire demeure depuis vingt ans ou plus dans l'immeuble loué. Les recours des requérants n'aboutirent pas.

En droit – Article 1 du Protocole nº 1 : les requérants ont subi une ingérence dans le respect de leurs biens compte tenu des décisions judiciaires ayant refusé de faire droit à leur demande de résiliation du contrat de location. Cette ingérence était basée sur la loi qui interdit au propriétaire de donner congé au locataire lorsque ce dernier se trouve depuis vingt ans ou plus dans les lieux. Le législateur, disposant en la matière d'une large marge d'appréciation, ne fait dans ce cas qu'adopter les mesures qu'il estime adéquates à la régulation du marché du logement, qui occupe une place centrale dans les politiques sociales et économiques des sociétés modernes, dans le but de fournir une protection accrue à certaines catégories de locataires. La Cour ne saurait mettre en cause un tel choix politique du législateur, dès lors qu'il s'agit d'une mesure d'intérêt général qui ne semble pas manifestement dépourvue de base raisonnable. Ce raisonnement justifie aussi le fait que la limitation en cause est appliquée de manière automatique, les juridictions saisies ne pouvant pas peser les intérêts respectifs du propriétaire et du locataire. De plus, le caractère absolu d'une loi n'est pas, en soi, incompatible avec la Convention. La Cour attache par ailleurs une importance décisive au fait que la limitation en question était déjà en vigueur au moment où les requérants ont conclu le contrat de bail et que ces derniers en étaient donc informés. La Cour tient à préciser enfin que le cas d'espèce est à distinguer d'une situation dans laquelle la limitation incriminée des droits du propriétaire viendrait modifier la position contractuelle originale de ce dernier. Ainsi la limitation en cause ne saurait passer, eu égard au but légitime recherché, pour disproportionnée ou dépourvue de justification, et elle ménage un juste équilibre entre les intérêts de la communauté et le droit des propriétaires et des requérants en particulier.

Conclusion : non-violation (cinq voix contre deux).

ARTICLE 2 OF PROTOCOL No. 1 / ARTICLE 2 DU PROTOCOLE Nº 1

Right to education/Droit à l'instruction

Measures taken by authorities of "Moldavian Republic of Transdniestra" against schools refusing to use Cyrillic script: *relinquishment in favour of the Grand Chamber*

Mesures prises par les autorités de la « République moldave de Transnistrie » contre les écoles refusant d'employer l'alphabet cyrillique : *dessaisissement au profit de la Grande Chambre*

Catan and Others/et autres – Moldova and Russia/Moldova et Russie - 43370/04, 8252/05 and/et 18454/06 [Section IV]

Following Moldovan independence in August 1991, separatists in Transdniestra sought to break away from the newly formed republic by adopting a "declaration of independence" in respect of the "Moldavian Republic of Transdniestra" (the "MRT"). The "MRT" has not been recognised by the international community. In 1992 the "MRT" authorities introduced legislation requiring "Moldavian" to be written with the Cyrillic alphabet. The use of the Latin script in schools in the "MRT" has been forbidden since 1994 and since 2004 steps have been taken to close down all schools using it. The applicants were pupils (or their parents or teachers) attending three schools in the "MRT" that were forced to transfer to new, and allegedly unsatisfactory, premises following stand-offs with the "MRT" authorities involving the intervention of the police to evict pupils, parents and teachers inside the buildings.

In their application to the European Court, the applicants complain, *inter alia*, of the restrictions on their right to use the Moldovan language and Latin script and of the impact of these restrictions on the cultural identity and integrity of the Moldovan community in the "MRT" (Article 8 of the Convention), of the difficulties encountered by pupils wishing to be educated in the Moldovan official language and in accordance with the curriculum of the Moldovan Ministry of Education (Article 2 of Protocol No. 1) and of discriminatory treatment (Article 14 of the Convention). Their applications were declared admissible by a Chamber of the Court in a decision of 15 June 2010 (see Information Note no. 131). The issue of whether the applicants came within the jurisdiction of either or both of the respondent States was joined to the merits.

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

General prohibition of discrimination/ Interdiction générale de la discrimination

Inability of Reformist churches to provide religious education in schools and to conclude officially recognised religious marriages: *Article 1 of Protocol No. 12 applicable*

Impossibilité pour des Eglises réformistes d'assurer un enseignement religieux dans les écoles et de célébrer des mariages religieux officiellement reconnus : *article 1 du Protocole nº 12 applicable*

Savez crkava "Riječ života" and Others/et autres – Croatia/Croatie - 7798/08
Judgment/Arrêt 9.12.2010 [Section I]

(See Article 14 above/Voir l'article 14 ci-dessus – page 24)

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

Article 30

Van der Heijden – Netherlands/Pays-Bas - 42857/05 [Section III]

(See Article 8 above/Voir l'article 8 ci-dessus – page 18)

Catan and Others/et autres – Moldova and Russia/ Moldova et Russie - 43370/04, 8252/05 and/et 18454/06 [Section IV]

(See Article 2 of Protocol No. 1 above/Voir l'article 2 du Protocole nº 1 ci-dessus)

RECENT COURT PUBLICATIONS / PUBLICATIONS RÉCENTES DE LA COUR

1. *The Practical Guide on Admissibility Criteria*: This new handbook for practitioners is available

on-line on the Court's Internet site in English and French. Translations into Russian and Turkish and possibly other languages will be provided in due course.

Link to the Guide in English (PDF)

Lien vers le Guide pratique sur la recevabilité (PDF)

2. *Thematic factsheets on the Court's case-law*: A further set of ten new factsheets are now available on the Court's Internet site on the following themes: children's rights, collective expulsions, conscientious objection, protection of journalists' sources, racial discrimination, right to one's own image, social welfare, trade union rights, transsexuals' rights, and violence against women. They include both decided cases and pending applications and will be revised regularly to keep up with case-law developments.

Link to the Factsheets homepage

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