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

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Life/Vie

Responsibility of authorities for death of a man who was tortured while in unrecorded detention: *violation*

Autorités responsables du décès d'un homme torturé au cours d'une détention non reconnue : *violation*

Lykova – Russia/Russie - 68736/11
Judgment/Arrêt 22.12.2015 [Section III]

(See Article 3 below/Voir l'article 3 ci-après)

ARTICLE 3

Torture

Humiliating and intense ill-treatment inflicted to extract a confession during unrecorded detention: *violation*

Mauvais traitements humiliants et de forte intensité infligés pour arracher des aveux au cours d'une détention non reconnue : *violation*

Lykova – Russia/Russie – 68736/11
Judgment/Arrêt 22.12.2015 [Section III]

En fait – Soupçonné de vol, le fils de la requérante (ci-après « la victime ») ainsi qu'un ami furent emmenés dans les locaux de la police criminelle. Quelques heures plus tard, la victime se défenestra d'un bureau situé au cinquième étage du commissariat et décéda à l'hôpital le lendemain matin.

Sans nouvelles, la cousine de la victime trouva finalement son cadavre à la morgue. Constatant des lésions corporelles multiples, elle demanda l'ouverture d'une enquête sans succès. En effet, l'enquêteur du département du district estima que le décès ainsi que les lésions corporelles étaient liés à la défenestration. Un autre enquêteur du même département refusa également d'ouvrir une enquête pénale contre les policiers en cause. La requérante forma en vain un recours contre cette décision.

Entre-temps, une enquête pénale fut dirigée contre l'ami de la victime (ci-après « le témoin »). Celui-ci indiqua lors d'une audience avoir été témoin des mauvais traitements subis par la victime et mit notamment en cause l'un des policiers.

En droit – Article 3 (*volet matériel*) : Prenant appui sur les dires du témoin, la requérante présente un récit cohérent et précis des mauvais traitements qu'aurait subis son fils. En outre, le rapport d'autopsie fait état de multiples lésions que ce dernier n'avait pas à son arrivée au commissariat de police.

Le Gouvernement interprète le rapport du médecin légiste comme attribuant toutes les lésions à la chute du cinquième étage et comme réfutant ainsi les allégations de mauvais traitements. Or il ressort du rapport que les lésions étaient étrangères à la défenestration. En outre, la Cour ne voit pas de raisons de mettre en doute le témoignage du témoin qui concorde avec la nature et la localisation des lésions identifiées sur le corps de la victime. De surcroît, le témoin a donné, avant le dépôt du rapport d'autopsie, aux autorités compétentes nationales plusieurs possibilités de vérifier ses allégations. Or ses plaintes et offres de témoignage ont été à chaque fois ignorées par les autorités compétentes.

Enfin, la version de la requérante est d'autant plus crédible que les autorités n'ont jamais expliqué l'origine des lésions de la victime autres que celles liées à la chute.

Par ailleurs, la décision relative à la clôture de l'enquête se fondait sur des déclarations comportant des contradictions manifestes, notamment quant à la chronologie des faits.

Dans ces circonstances, le Gouvernement n'a pas présenté des explications suffisantes permettant de croire que la partie des lésions constatées non attribuable à la chute ait une autre origine que l'infliction de mauvais traitements dans les locaux de la police. Par conséquent, la Cour juge établi que la victime a été soumise à des traitements contraires à l'article 3 de la Convention.

S'agissant de l'intensité des actes de violence, selon la version du témoin, les policiers ont infligé à la victime plusieurs coups en lui cognant la tête contre des surfaces dures. Ces coups se sont accompagnés de plusieurs séances d'asphyxie, traitement de nature lui aussi à provoquer des douleurs et des souffrances aiguës. La victime a été enfin humiliée, ayant subi ces traitements déshabillée, avec les mains et les pieds liés.

Les traitements dénoncés ont eu lieu au cours d'une détention non reconnue, ce qui n'a fait qu'aggraver la vulnérabilité de la victime, détenue au commissariat de police et privée pendant plusieurs heures des garanties procédurales normalement attachées à son état.

De surcroît, les mauvais traitements susmentionnés ont été infligés avec l'intention d'arracher des aveux.

Eu égard à ces éléments, la Cour est convaincue que les actes de violence commis sur la victime, pris dans leur ensemble, ont provoqué des douleurs et des souffrances « aiguës » et revêtent un caractère particulièrement grave et cruel. De tels agissements doivent être regardés comme des actes de torture au sens de l'article 3 de la Convention.

Conclusion : violation (unanimité).

Article 2 (*volet matériel*) : La présente affaire ne contient aucun élément permettant de juger au-delà de tout doute raisonnable que la mort a été infligée à la victime par les agents de l'État de manière intentionnelle. Il est certain que la victime s'est défenestrée. Il reste dès lors à déterminer si les autorités pourraient être tenues responsables pour la défenestration de la victime.

La Cour considère qu'il n'est pas nécessaire d'établir si les autorités qui ont arrêté la victime avaient ou non des informations sur l'existence de circonstances personnelles de nature à le pousser au suicide, informations qui dans l'affirmative eussent dû les inciter à agir en prévention d'un éventuel passage à l'acte. En effet, la vulnérabilité de la victime au moment précis de la défenestration tenait avant tout et surtout à la torture qu'elle subissait de la part des policiers. La Cour a établi que la victime avait été torturée en présence du témoin. En outre, il n'est pas exclu que la victime ait été torturée après, dans la mesure où le témoin affirme avoir entendu ses cris au cours de l'heure suivante. De surcroît, pendant cette période, la victime est passée aux aveux et s'est défenestrée. La victime est entrée dans le bâtiment étant en vie et a trouvé la mort en raison de sa chute du cinquième étage du commissariat. D'une part, la Cour estime que la version du Gouvernement tenant au suicide pour des raisons personnelles n'est pas satisfaisante. En effet, celle-ci n'a aucunement tenu compte ni de la torture avérée du requérant, ni de sa détention non reconnue. D'autre part, la Cour ne saurait tirer aucune conclusion probante de l'enquête qu'elle vient de juger ineffective. Dès lors, après avoir constaté que ni le Gouvernement, ni l'enquête nationale n'ont donné aucune explication satisfaisante quant au décès de la victime, la Cour considère que les autorités russes sont responsables pour la défenestration de la victime.

Il ne revient pas à la Cour de discuter dans le cas d'espèce de la responsabilité individuelle de tel ou tel des policiers présents pour la négligence qu'aurait constituée leur surveillance insuffisante de la conduite de la victime. Aussi, la Cour est d'avis que les autorités russes doivent être tenues pour responsables, au regard de la Convention, du décès de la victime qui, au cours d'une détention non reconnue où elle se trouvait privée de tous les droits qui auraient normalement dû être attachés à son état, a été torturée.

Conclusion : violation (unanimité).

La Cour conclut aussi à l'unanimité à la violation de l'article 5 § 1 de la Convention en raison de la privation de liberté de la victime, et à la violation des articles 2 et 3 dans leur volet procédural étant donné que l'instruction pénale menée à la suite du décès de la victime et des allégations de mauvais traitements sur sa personne n'avait pas rempli la condition d'« effectivité » requise.

Article 41 : 45 000 EUR pour préjudice moral ; 8 500 EUR pour dommage matériel.

Inhuman or degrading treatment/Traitement inhumain ou dégradant

Prolonged failure to provide adequate medical care to seriously ill detainee: *violation*

Défaut prolongé de fournir des soins médicaux adéquats à un détenu gravement malade : *violation*

Ivko – Russia/Russie - 30575/08
Judgment/Arrêt 15.12.2015 [Section III]

Facts – The applicant, who was suffering from hepatitis C and tuberculosis, was detained from October 2007 to May 2013 in relation to a drug-trafficking offence. After his release, he spent two months in a civilian hospital receiving treatment for his tuberculosis, before being rearrested in July 2013 on further drug-trafficking charges. He died in detention in October 2014. In his application to the European Court, lodged in 2008, he complained in particular of a lack of adequate medical care in detention (Article 3 of the European Convention). Following his death, his partner, Ms Yusupova informed the Court of her wish to pursue the application on his behalf.

Law – Article 34 (*victim status*): The evidence before the Court convincingly showed that the applicant and Ms Yusupova were in a close relationship equating to "family ties". The circumstances of the applicant's case were similar to those in *Koryak v. Russia* (24677/10, 13 November 2012), in which the Court had allowed the next of kin to continue proceedings before it after the death of the direct victim. Both cases concerned the quality of medical assistance provided to a seriously ill detainee coupled with the question of the existence of effective domestic remedies. The Court therefore

considered that Ms Yusupova had a legitimate interest in pursuing the application on the applicant's behalf and that respect for human rights as defined in the Convention and the Protocols required a continuation of the examination of the case.

Conclusion: victim status upheld (unanimously).

Article 3: In the absence of any documents from the Government relating to the applicant's treatment during the period from October 2007 to October 2009, the Court accepted the applicant's allegations that he had been denied regular medical examinations and anti-relapse treatment. This in itself cast serious doubts on the authorities' fulfilment of their obligations under Article 3 towards the applicant, who, in view of his hepatitis C infection and history of tuberculosis, had required special medical attention.

The Court went on to look more closely at the quality of the treatment the applicant received in institution no. LIU-15 following his admission to that facility in October 2012. On arrival, he was subjected to a number of basic clinical tests and examinations and placed on a drug regimen. However, despite the authorities' knowledge of his long-term affliction with tuberculosis and the fact that he had remained tuberculosis-active for an unusually long period, it was not until February 2013, that is to say over five years after his arrest and the authorities' resultant responsibility to address the applicant's health issues, that a drug susceptibility test was performed for the first time. That test is the primary requirement established by the World Health Organization (WHO) for the correct diagnosis and treatment of all previously treated tuberculosis patients, given the particularly high risk they run of suffering from drug-resistant tuberculosis. The test would not only have allowed the efficient finalising of diagnostic procedures and allocation of the applicant's case to a standard treatment category, but would also have guided the choice of appropriate regimen adjustments in line with the results of the test. The delay in conducting the applicant's test was a breach of the WHO's recommendations and risked depriving the treatment the applicant received of its major therapeutic effects.

In addition, although aware the applicant was suffering from hepatitis C, the authorities took no steps to consider whether his treatment regimen was compatible with his liver disease. The first liver function test was not performed until February 2013, more than three months after the initiation of the new chemotherapy regimen and more than five years after the authorities became aware of his medical condition. The applicant was prescribed hepatoprotectors at the end of October 2013. Such reluctance on the part of the authorities ran counter to the WHO recommendation to perform liver function tests at the start of and during tuberculosis treatment, and to give hepatotoxic drugs to patients with serious liver diseases.

The Court further noted that, following his re-arrest in July 2013, the applicant – who by then was suffering from a severe and extremely advanced stage of tuberculosis requiring comprehensive and complex in-patient treatment – had spent a further three months in detention with no access to the requisite medical aid. For the Court, leaving him for that period without vital medical assistance that might have enabled him to fight the illnesses that were threatening his life was unacceptable.

There had thus been serious deficiencies in the applicant's treatment during the major part of his detention. As a result, the applicant had been exposed to prolonged mental and physical suffering that diminished his human dignity. The authorities' failure to provide him with the medical care he needed amounted to inhuman and degrading treatment within the meaning of Article 3.

Conclusion: violation (unanimously).

The Court also found unanimously a violation of Article 13 of the Convention in view of the absence of an effective domestic remedy to deal with the applicant's complaints of inadequate medical care in detention.

Article 41: EUR 20,000 to be paid to Ms Yusupova; claim in respect of pecuniary damage dismissed.

Inhuman or degrading treatment/Traitement inhumain ou dégradant
Inhuman or degrading punishment/Peine inhumaine ou dégradante

Imposition of exclusion order rendering failed asylum-seeker who could not return home liable to prosecution for overstaying: *inadmissible*

Interdiction de séjour prononcée à l'encontre d'un demandeur d'asile, qui ne pouvait pas rentrer chez lui, le rendant passible de poursuites : *irrecevable*

Nzapali – Netherlands/Pays-Bas - 6107/07
Decision/Décision 17.11.2015 [Section III]

Facts – The applicant, a national of the Democratic Republic of the Congo and former high-ranking

member of the military fled what was then still Zaire following the overthrow of the Mobutu regime in 1997. He and members of his family applied for asylum in the Netherlands, but his application was rejected under Article 1F of the 1951 Geneva Convention relating to the Status of Refugees, as amended, on the grounds that he had been guilty of torture in Zaire. However, he was not expelled as the Netherlands authorities accepted that he faced a real risk of ill-treatment in the event of a return. In April 2004 he was convicted of torture by a Netherlands court and in September 2004 the Minister for Immigration and Integration issued an exclusion order on public-order grounds. After serving his sentence the applicant remained in the Netherlands. He was subsequently rearrested and convicted under Article 197 of the Criminal Code of staying in the Netherlands while aware that he was subject to an exclusion order. He was given a two-month suspended prison sentence. In upholding that conviction and sentence after the case was remitted to it by the Supreme Court, the court of appeal noted that the applicant had been at fault for staying in the Netherlands illegally as he had not made proper efforts to leave the country. In 2008 the applicant received a Belgian residence permit.

In the Convention proceedings, the applicant complained, *inter alia*, that subjecting him to an exclusion order which caused him to commit a criminal offence simply by being in the Netherlands in a situation where he was unable to travel to any other country had amounted to inhuman or degrading treatment or punishment, contrary to Article 3 of the Convention.

Law – Article 3: Subjecting a person who could not be returned to his or her country of origin to an exclusion order did not, by itself and without more, constitute treatment or punishment contrary to Article 3, even if the person's continued stay in the country concerned in defiance of the exclusion order rendered him or her liable to criminal prosecution and conviction. However, an issue under Article 3 could arise if several sets of criminal proceedings were brought against a person subject to an exclusion order and/or if, despite making reasonable efforts to find a third country prepared to admit him or her, that person continued to face the risk of an interminable series of prosecutions and criminal convictions and was helpless to prevent such a predicament.

Between his being made subject to an exclusion order in September 2004 and his relocation to Belgium in 2008, criminal proceedings had been instituted against the applicant just once. Although he was convicted of the offence of being in the Netherlands while subject to an exclusion order, the sentence was suspended. The reasoning of the domestic courts strongly suggested that a suspended sentence was imposed in recognition of the difficult situation in which the applicant found himself and that the applicant might not have been found criminally liable had he made certain efforts to comply with his obligation to leave the Netherlands. Accordingly, and while account had thus been taken of the applicant's particular situation, it also appeared that he had been in a position to affect the outcome of the criminal proceedings.

The treatment complained had thus not attained the requisite level of severity to engage Article 3.

Conclusion: inadmissible (manifestly ill-founded).

Degrading treatment/Traitement dégradant

Family of asylum-seekers with children, including a baby and a disabled child, left homeless and with no means of subsistence for three weeks: *case referred to the Grand Chamber*

Famille de demandeurs d'asile avec enfants, dont un nourrisson et une enfant handicapée, laissée trois semaines sans hébergement ni moyen de subsistance : *affaire renvoyée devant la Grande Chambre*

V.M. and Others/et autres – Belgium/Belgique - 60125/11
Judgment/Arrêt 7.7.2015 [Section II]

Les requérants sont un couple d'origine rom et ses cinq enfants, dont la fille aînée, handicapée moteur et cérébrale depuis sa naissance, est décédée postérieurement à l'introduction de la requête. Originaires de Serbie, ils gagnèrent le Kosovo puis la France où ils déposèrent une demande d'asile en raison des discriminations dont ils étaient victimes. Cette demande fit l'objet d'un rejet définitif en juin 2010. Les requérants retournèrent en Serbie puis se rendirent en Belgique où ils déposèrent une nouvelle demande d'asile en avril 2011. En vertu du règlement Dublin II[1], il leur fut notifié un refus de séjour avec ordre de quitter le territoire vers la

1. Règlement (CE) n° 343/2003 du Conseil du 18 février 2003 établissant les critères et mécanismes de détermination de l'État membre responsable de l'examen d'une demande d'asile présentée dans l'un des États membres par un ressortissant d'un pays tiers.

France, pays responsable de l'examen de leur demande d'asile. Les autorités belges indiquaient notamment qu'il n'y avait aucune preuve de ce que les requérants avaient quitté le territoire des États membres de l'Union européenne pendant plus de trois mois. Les ordres de quitter le territoire furent par la suite prolongés de quatre mois en raison de la grossesse et de l'accouchement imminent de la requérante. Les requérants formèrent un recours contre les refus de séjour et les ordres de quitter le territoire. Cette procédure aboutit notamment à la reconnaissance de la responsabilité de la Belgique pour l'examen de leur demande d'asile par le Conseil du contentieux des étrangers (CCE). En parallèle, les requérants entamèrent une procédure de régularisation en raison de l'état médical de leur fille aînée. Ils n'eurent connaissance de la décision d'irrecevabilité de leur demande que lors de la procédure devant la Cour européenne.

Durant la procédure de demande d'asile en Belgique, les requérants furent hébergés dans deux centres d'accueil. Ils en furent sortis le 26 septembre 2011, à l'expiration de la prolongation des ordres de quitter le territoire. Ils se rendirent alors à Bruxelles où des associations les orientèrent vers une place publique où d'autres familles d'origine rom sans abri se trouvaient également. Ils y restèrent du 27 septembre au 5 octobre 2011. Les centres d'hébergement de demandeurs d'asile s'estimaient incompétents pour les accueillir en raison de l'absence d'effet suspensif du recours contre les refus de séjour avec ordre de quitter le territoire. L'intervention du délégué général de la Communauté française aux droits de l'enfant permit leur prise en charge pendant quelques jours. Après un passage, que le Gouvernement conteste, dans un centre d'accueil à 160 kilomètres de là, les requérants se retrouvèrent dans une gare de Bruxelles sans hébergement et sans moyen de subsistance pendant trois semaines avant que leur retour vers la Serbie ne soit organisé par une organisation caritative en octobre 2011. De retour en Serbie, l'état de santé de la fille aînée se dégrada et elle décéda des suites d'une infection pulmonaire en décembre 2011.

Devant la Cour européenne, les requérants se plaignaient notamment de l'impossibilité dans laquelle ils se sont trouvés durant la période qui a suivi leur éviction du centre d'hébergement, le 26 septembre 2011, jusqu'à leur départ pour la Serbie, le 25 octobre 2011, de jouir de l'accueil afin de pourvoir à leurs besoins essentiels.

Par un arrêt du 7 juillet 2015 (voir la Note d'information 187), une chambre de la Cour a conclu, entre autres, à la violation de l'article 3 de la Convention en raison des conditions d'existence de la famille combinées avec l'absence de perspective de voir leur situation s'améliorer, ainsi qu'à la violation de l'article 13 du fait de l'absence de recours effectif relativement à leur procédure de demande d'asile.

Le 14 décembre 2015, l'affaire a été renvoyée devant la Grande Chambre à la demande du Gouvernement.

Insufficient separation of sanitary facilities from remainder of prison cell: *no violation*

Séparation insuffisante, dans une prison, entre les installations sanitaires et le reste de la cellule : *non-violation*

Szafrański – Poland/Pologne - 17249/12
Judgment/Arrêt 15.12.2015 [Section IV]

(See Article 8 below/Voir l'article 8 ci-dessous, page 24)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Applications against Ukraine concerning non-enforcement of domestic decisions: *relinquishment in favour of the Grand Chamber*

Requêtes contre l'Ukraine concernant la non-exécution de décisions internes : *dessaisissement au profit de la Grande Chambre*

Burmych and Others/et autres – Ukraine - 46852/13 et al.
[Section V]

The applicants were unable to obtain the enforcement of domestic decisions rendered in their own or their deceased family members' favour because of the authorities' failure to take specific budgetary or regulatory measures and thus to adopt the measures that had been indicated by the European in the *Yuriy Nikolayevich Ivanov* pilot judgment.

In 2015 the Government submitted to the Court unilateral declarations in 817 cases in which they expressed their readiness to inforce the judgments that remained unenforced and to pay each applicant EUR 1,000 in compensation.

In their applications to the Court the applicants essentially complain about the national authorities' failure to enforce the domestic decisions in their favour or about excessive delays in their enforcement. They also complain about the lack of effective domestic remedies in respect of those complaints. The case was communicated under Articles 6 and 13 of the Convention and Article 1 of Protocol No. 1.

On 8 December 2015 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

(See *Yuriy Nikolayevich Ivanov v. Ukraine*, 40540/04, 15 October 2009, Information Note 123 and Information Note 149)

Supreme Court ruling that civil courts had no jurisdiction to hear pastor's claim for wrongful dismissal by church: *no violation*

Décision de la Cour suprême refusant la juridiction des cours civiles concernant la plainte d'un pasteur pour renvoi injustifié: *non-violation*

Károly Nagy – Hungary/Hongrie - 56665/09
Judgment/Arrêt 1.12.2015 [Section II]

Facts – The applicant was a pastor in a Calvinist parish. In 2005 he was dismissed for a comment he had made in a local newspaper. He brought a compensation claim against his employer, the Hungarian Calvinist Church, in a labour court but the proceedings were discontinued for want of jurisdiction, since the applicant's relationship with his employer was regulated by ecclesiastic law. The applicant subsequently lodged a claim in the civil courts, but this too was ultimately discontinued after the Supreme Court ruled, following an analysis of the contractual relationship, that the civil courts had no jurisdiction either.

Before the European Court the applicant contended that the Supreme Court's ruling that the State courts had no jurisdiction had deprived him of access to a court, in breach of Article 6 § 1.

Law – Article 6 § 1: The applicant had not been prevented from bringing his claim before the domestic courts. Indeed, the case had been litigated up to the Supreme Court, which had examined whether the Calvinist Church owed him any contractual obligation pursuant to the relevant domestic law provisions, before concluding that the pastoral relationship between the applicant and the Calvinist Church was not regulated by civil law, but by ecclesiastical law. The Court could not conclude that the Supreme Court's decision was arbitrary or manifestly unreasonable and it was not its task to decide whether the domestic law provisions should have been extended to the applicant's engagement with the Calvinist Church, since it could not substitute its own views for those of the domestic courts as to the proper interpretation and content of domestic law.

Thus, the inability of the applicant to obtain an adjudication of his claim against the Calvinist Church did not flow from immunity, either *de facto* or in practice, of the Church, or any another procedural obstacle, but from the applicable principles governing the substantive right to fulfilment of contractual obligations and to compensation for breach of contract, as defined by the domestic law.

In conclusion, although the Supreme Court held that the State courts had no jurisdiction to examine the applicant's claim, it had in fact examined the claim in the light of the relevant domestic legal principles of contract law. The applicant could not, therefore, argue that he had been deprived of the right to a determination of the merits of his claim.

Conclusion: no violation (four votes to three).

(See the Factsheet on Work-related rights)

Article 6 § 1 (criminal/pénal)

Impartial tribunal/Tribunal impartial

Presence on jury of juror who knew the victim and commented on her character: *violation*

Présence dans le jury de jurés connaissant la victime et ayant commenté son caractère: *violation*

Kristiansen – Norway/Norvège - 1176/10
Judgment/Arrêt 17.12.2015 [Section V]

Facts – In his application to the European Court, the applicant complained under Article 6 § 1 of the Convention that in criminal proceedings in which he was convicted of attempted rape, one of the members of the jury had lacked impartiality. During the proceedings the juror in question informed the presiding judge that she had prior knowledge of the victim. Despite noting that she "had formed a picture [*bilde*] of the victim from many years ago where she at the time had experienced her as a quiet and calm person", the High

Court considered that it was capable of influencing her assessment of the question of guilt.

Law – Article 6 § 1: The Court endorsed the domestic courts' view that previous sporadic contact between the victim and the juror could not, on their own, disqualify the juror, as they had not involved personal knowledge and had occurred several years previously. Although the exact relevance of the juror's depiction of the victim as "a quiet and calm person" had given rise to different interpretations at the domestic level, the Court did not find it necessary to determine its exact meaning. However, it noted that the statement was clearly not negative and could actually convey a positive portrait of the victim, susceptible of influencing the juror's evaluation and/or that of other members of the jury to the defendant's disadvantage. That possibility was reinforced by the fact that the juror's value judgment had been expressed at a time when it could be perceived as a comment or reaction to the oral evidence just given by the victim and the applicant respectively.

In these circumstances, the applicant had a legitimate reason to fear that the juror might have had preconceived ideas capable of having a bearing on his innocence or guilt. Moreover, the applicant's lawyer had requested that the juror be disqualified on grounds of lack of impartiality, the victim's assistant lawyer had supported the motion, and the public prosecutor had expressed understanding for it, albeit without taking a stance. Whilst none of these objections and comments was by itself decisive, when considered together they did provide a strong indication of the importance of appearances in the present case. However, despite these indications that the juror might lack impartiality, the domestic court had neither discharged her not sought to redirect the jury, for instance by inviting the jurors to rely on evidence presented in court alone and stressing that they must not allow any other factor to influence their decision.

Having regard to the cumulative effect of these circumstances, there were justifiable grounds on which to doubt the trial court's impartiality.

Conclusion: violation (unanimously).

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

(See also *Ekeberg and Others v. Norway*, 11106/04, 31 July 2007, Information Note 99; *Peter Armstrong v. the United Kingdom*, 65282/09, 9 December 2014, Information Note 180; and *Hanif and Khan v. the United Kingdom*, 52999/08 and 61779/08, 20 December 2011, Information Note 147)

Article 6 § 3 (d)

Examination of witnesses/Interrogation des témoins

Inability to examine absent witnesses, whose testimonies carried considerable weight in applicant's conviction: *violation*

Impossibilité d'interroger des témoins absents, dont les déclarations ont joué un rôle important dans la condamnation du requérant : *violation*

Schatschaschwili – Germany/Allemagne - 9154/10
Judgment/Arrêt 15.12.2015 [GC]

Facts – The applicant was convicted of aggravated robbery in conjunction with aggravated extortion and sentenced to nine and a half years' imprisonment. As regards one of the offences, the trial court relied in particular on witness statements made by the two victims of the crime to the police at the pre-trial stage. The statements were read out at the trial as the two witnesses had gone back to Latvia and refused to testify as they continued to be traumatised by the crime.

In a judgment of 17 April 2014 a Chamber of the Court found, by five votes to two, that there had been no violation of the applicant's rights under Article 6 § 1 read in conjunction with Article 6 § 3 (d) of the Convention. On 8 September 2014 the case was referred to the Grand Chamber at the applicant's request (see Information Note 177).

Law – Article 6 § 1 in conjunction with Article 6 § 3 (d): In order to assess whether the overall fairness of the applicant's trial had been impaired by the use of the statements previously made by witnesses who did not attend the trial, the Court applied and further clarified the test laid down in its Grand Chamber judgment in *Al-Khawaja and Tahery v. the United Kingdom* ([GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147). In particular, while it was clear that each of the three steps of the test had to be examined if the questions in steps one (whether there was a good reason for the non-attendance of the witness) and two (whether the evidence of the absent witness was the sole or decisive basis for the defendant's conviction) were answered in the affirmative, it remained uncertain whether all three steps of the test had to be examined in cases in which either the question in step one or that in step two was answered in the negative, as well as in what order the steps were to be examined. The Court considered that:

(i) The absence of good reason for the non-attendance of a witness, while it could not of itself be conclusive of the unfairness of a trial, was nevertheless a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which could tip the balance in favour of finding a breach of Article 6 §§ 1 and 3 (d).

(ii) The existence of sufficient counterbalancing factors had to be reviewed not only in cases in which the evidence given by an absent witness had been the sole or the decisive basis for the conviction, but also in those cases where it had carried significant weight and its admission could have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair would depend on the weight of the evidence of the absent witness.

(iii) It would, as a rule, be pertinent to examine the three steps of the *Al-Khawaja* test in the order defined in that judgment. However, all three steps were interrelated and, taken together, served to establish whether the criminal proceedings at issue had, as a whole, been fair. It could therefore be appropriate, in a given case, to examine the steps in a different order, in particular if one of the steps proved to be particularly conclusive as to either the fairness or the unfairness of the proceedings.

The Court went on to apply the *Al-Khawaja* test to the facts of the applicant's case:

(a) *Whether there was good reason for the non-attendance of the witnesses at the trial* – The Court noted at the outset that the trial court had considered that the witnesses had not sufficiently substantiated their refusal to testify and had not accepted their state of health or fear as justification for their absence at the trial. After contacting the witnesses individually and proposing different solutions, the trial court had also repeatedly asked the Latvian courts to either have the witnesses' state of health and ability to testify examined by a public medical officer or to compel them to attend the hearing in Latvia. Since these efforts proved futile the trial court had admitted the records of the witnesses' examination at the investigation stage as evidence in the proceedings. Thus, the witnesses' absence was not imputable to the trial court. Accordingly, there had been good reason, from the trial court's perspective, for the non-attendance of the witnesses at the trial and for admitting the statements they had made at the pre-trial stage in evidence.

(b) *Whether the evidence of the absent witnesses was the sole or decisive basis for the applicant's conviction* – The domestic courts did not clearly indicate whether they considered the witness statements in question as "decisive" evidence, that is, as being of such significance as to be likely to be determinative of the outcome of the case. After assessing all the evidence that had been before the domestic courts, the Court noted that the two victims of the crime were the only eyewitnesses to the offence in question. The only other available evidence was either hearsay or merely circumstantial technical and other evidence that was not conclusive. In these circumstances, the evidence of the absent witnesses had been "decisive", that is, determinative of the applicant's conviction.

(c) *Whether there were sufficient counterbalancing factors to compensate for the handicaps under which the defence laboured* – In its reasoning, the trial court had made it clear that it was aware of the reduced evidentiary value of the untested witness statements. It had compared the content of the statements made by the victims at the investigation stage and found that they had given detailed and coherent descriptions of the circumstances of the offence. It had further observed that the witnesses' inability to identify the applicant showed that they had not testified with a view to incriminating him. Moreover, in assessing the witnesses' credibility the trial court had also addressed different aspects of their conduct in relation to their statements. The trial court had therefore examined the credibility of the absent witnesses and the reliability of their statements in a careful manner.

Furthermore, it had had before it additional incriminating hearsay and circumstantial evidence supporting the witness statements. In addition, during the trial the applicant had had the opportunity to give his own version of the events and to cast doubt on the credibility of the witnesses also by cross-examining the witnesses who had given hearsay evidence. However, he had not had the possibility to question the two victims indirectly or at the investigation stage.

In fact, even though the prosecution authorities could have appointed a lawyer to attend the witness hearing before the investigating judge, these procedural safeguards were not used in the applicant's case. In this connection, the Court agreed with the applicant that the witnesses were heard by the investigating judge because, in view of their imminent return to Latvia, the prosecution authorities considered that there was a danger of their evidence being lost. In this context, and bearing in mind that under domestic law the written records of a witness's previous examination by an investigating

judge could be read out at the trial under less strict conditions than the records of a witness examination by the police, the authorities had taken the foreseeable risk, which subsequently materialised, that neither the accused nor his counsel would be able to question them at any stage of the proceedings.

In view of the importance of the statements of the only eyewitnesses to the offence of which the applicant was convicted, the counterbalancing measures taken by the domestic court had been insufficient to permit a fair and proper assessment of the reliability of the untested evidence. Therefore, the absence of an opportunity for the applicant to examine or have examined the two witnesses at any stage of the proceedings had rendered the trial as a whole unfair.

Conclusion: violation (nine votes to eight).

Article 41: no award.

ARTICLE 8

Respect for private life/Respect de la vie privée

Shortcomings in legal framework governing secret surveillance of mobile telephone communications: *violation*

Défauts dans le cadre juridique gouvernant la surveillance secrète des communications des téléphones portables : *violation*

Roman Zakharov – Russia/Russie - 47143/06
Judgment/Arrêt 4.12.2015 [GC]

Facts – The applicant, who was the editor-in-chief of a publishing company, brought judicial proceedings against three mobile network operators, complaining of interference with his right to privacy of his telephone communications. He claimed that pursuant to the relevant domestic law, the mobile network operators had installed equipment which permitted the Federal Security Service (FSB) to intercept all telephone communications without prior judicial authorisation. He sought an injunction ordering the removal of the equipment and ensuring that access to telecommunications was given to authorised persons only.

The domestic courts rejected the applicant's claim, finding that he had failed to prove that his telephone conversations had been intercepted or that the mobile operators had transmitted protected information to unauthorised persons. Installation of the equipment to which he referred did not in itself infringe the privacy of his communications.

In the Convention proceedings the applicant complained that the system of covert interception of mobile telephone communications in Russia did not comply with the requirements of Article 8 of the Convention. On 11 March 2014 a Chamber of the Court relinquished jurisdiction to the Grand Chamber.

Law – Article 8

(a) *Victim status* – The Court's approach in *Kennedy v. the United Kingdom*[1] was best tailored to the need to ensure that the secrecy of surveillance measures does not result in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities and the Court. Accordingly, an applicant can claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures or of legislation permitting such measures, if the following conditions are satisfied:

(i) *Scope of the legislation* – The Court will take into account the scope of the legislation permitting secret surveillance measures by examining whether the applicant can possibly be affected by it, either because he or she belongs to a group of persons targeted by the contested legislation or because the legislation directly affects all users of communication services by instituting a system where any person can have his or her communications intercepted.

(ii) *Availability of remedies at national level* – The Court will take into account the availability of remedies at the national level and will adjust the degree of scrutiny depending on the effectiveness of such remedies. Where the domestic system does not afford an effective remedy, widespread suspicion and concern among the general public that secret surveillance powers are being abused cannot be said to be unjustified. In such circumstances the menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8. There is therefore a greater need for scrutiny by the Court and an exception to the rule which denies individuals the right to challenge a law *in abstracto* is justified. In such cases the individual does not need to demonstrate the existence of any risk that secret surveillance measures were applied to him. By con

1. *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130.

trast, if the national system provides for effective remedies, a widespread suspicion of abuse is more difficult to justify. In such cases, the individual may claim to be a victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures only if he is able to show that, due to his personal situation, he is potentially at risk of being subjected to such measures.

In the instant case, the contested legislation directly affected all users of the mobile telephone services, since it instituted a system of secret surveillance under which any person using the mobile telephone services of national providers could have their mobile telephone communications intercepted, without ever being notified of the surveillance. Furthermore, the domestic law did not provide for effective remedies for persons suspecting they had been subjected to secret surveillance. An examination of the relevant legislation *in abstracto* was therefore justified. The applicant did not need to demonstrate that due to his personal situation he had been at risk of being subjected to secret surveillance. He was thus entitled to claim to be the victim of a violation of the Convention.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The mere existence of the contested legislation amounted in itself to an interference with the exercise of the applicant's rights under Article 8. The interception of mobile telephone communications had a basis in the domestic law and pursued the legitimate aims of the protection of national security and public safety, the prevention of crime and the protection of the economic well-being of the country. It remained to be ascertained whether the domestic law was accessible and contained adequate and effective safeguards and guarantees to meet the requirements of "foreseeability" and "necessity in a democratic society".

(i) *Accessibility* – It was common ground that almost all the domestic legal provisions governing secret surveillance had been officially published and were accessible to the public. Although there was some dispute over the accessibility of further provisions, the Court noted that they had been published in an official ministerial magazine and could be accessed through an internet legal database, and so did not find it necessary to pursue the issue further.

(ii) *Scope of application of secret surveillance measures* – The nature of the offences which could give rise to an interception order was sufficiently clear. However, it was a matter of concern that the domestic law allowed secret interception of communications in respect of a very wide range of offences. Furthermore, interception could be ordered not only in respect of a suspect or an accused, but also in respect of persons who might have information about an offence. While the Court had found in a previous case[1] that interception measures in respect of a person possessing information about an offence might be justified under Article 8, it noted in the instant case that the domestic law did not clarify who might fall into that category in practice. Nor did the law give any indication of the circumstances under which communications could be intercepted on account of events or activities endangering Russia's national, military, economic or ecological security. Instead, it left the authorities an almost unlimited discretion in determining which events or acts constituted such a threat and whether the threat was serious enough to justify secret surveillance. This created possibilities for abuse.

(iii) *Duration of secret surveillance measures* – While the domestic law contained clear rules on the duration and renewal of interceptions providing adequate safeguards against abuse, the relevant provisions on discontinuation of the surveillance measures did not provide sufficient guarantees against arbitrary interference.

(iv) *Procedures for,* inter alia*, storing and destroying intercepted data* – Domestic law contained clear rules governing the storage, use and communication of intercepted data, making it possible to minimise the risk of unauthorised access or disclosure. However, although the Court considered reasonable the six-month time-limit applicable to the storage of intercept material if the person concerned was not charged with a criminal offence, it deplored the lack of a requirement to destroy immediately any data that were not relevant to the purpose for which they were obtained. The automatic storage for six months of clearly irrelevant data could not be considered justified under Article 8.

Further, in cases where the person under surveillance was charged with a criminal offence the trial judge had unlimited discretion under the domestic law to decide whether to order the further storage or destruction of intercept material used in evidence. Ordinary citizens thus had no indication as to the circumstances in which intercept material could be stored. The domestic law was, therefore, not sufficiently clear on this point.

1. *Iordachi and Others v. Moldova*, 25198/02, 10 February 2009, Information Note 116.

(v) *Authorisation of interceptions* – As regards the authorisation procedures, any interception of telephone or other communications had to be authorised by a court. However, judicial scrutiny was limited in scope. In particular, materials containing information about undercover agents or police informers or about the organisation and tactics of operational-search measures could not be submitted to the judge and were therefore excluded from the court's scope of review. Thus the failure to disclose the relevant information to the courts deprived them of the power to assess whether there was a sufficient factual basis for suspecting persons in respect of whom operational-search measures were requested of a criminal offence or of activities endangering national, military, economic or ecological security. Indeed, Russian judges were not instructed to verify the existence of "reasonable suspicion" against the person concerned or to apply the "necessity" and "proportionality" tests.

In addition, the relevant domestic law did not contain any requirements with regard to the content of interception requests or authorisations. As a result, courts sometimes authorised the interception of all telephone communications in an area where a criminal offence had been committed, without mentioning a specific person or telephone number. Some authorisations did not mention the duration for which interception was authorised. Such authorisations granted a very wide discretion to the law-enforcement authorities as to which communications to intercept and for how long.

Furthermore, in cases of urgency it was possible to intercept communications without prior judicial authorisation for up to 48 hours. However, the urgent procedure did not provide sufficient safeguards to ensure that it was used sparingly and only in duly justified cases. The domestic law did not limit the use of the urgent procedure to cases involving immediate serious danger and so gave the authorities unlimited discretion to determine the situations in which it was used, thus creating possibilities for abuse. Furthermore, although under domestic law a judge had to be immediately informed of each instance of urgent interception, the judge's power was limited to authorising the extension of the interception measure beyond 48 hours. Russian law thus did not provide for an effective judicial review of the urgent procedure.

In sum, the authorisation procedures provided for by Russian law were not capable of ensuring that secret surveillance measures were not ordered haphazardly, irregularly or without due and proper consideration.

An added difficulty was that law-enforcement authorities generally had no obligation under the domestic law to show judicial authorisation to the communications service provider before obtaining access to communications, while for their part the service providers were required to install equipment giving the authorities direct access to all users' mobile telephone communications. The system was therefore particularly prone to abuse.

(vi) *Supervision* – The prohibition set out in domestic law on logging or recording interceptions made it impossible for the supervising authority to discover interceptions carried out without proper judicial authorisation. Combined with the authorities' technical ability to intercept communications directly, this provision rendered any supervisory arrangements incapable of detecting unlawful interceptions and was therefore ineffective.

Where interceptions were carried out on the basis of proper judicial authorisation, judicial supervision was limited to the initial authorisation stage. Subsequent supervision was entrusted to the President, Parliament, the Government, the Prosecutor General and competent lower-level prosecutors. The domestic law did not set out the manner in which the President, Parliament and the Government were to supervise interceptions. There were no publicly available regulations or instructions describing the scope of their review, the conditions under which it could be carried out, or the procedures for reviewing the surveillance measures or remedying breaches.

While a legal framework provided, at least in theory, for some supervision by prosecutors, it was not capable in practice of providing adequate and effective guarantees against abuse. In particular:

– there were doubts about the prosecutors' independence as they were appointed and dismissed by the Prosecutor General after consultation with the regional executive authorities and had overlapping functions as they both approved requests for interception and then supervised their implementation;

– there were limits on the scope of their supervision (prosecutors had no information about the work of undercover agents and surveillance measures related to counter-intelligence escaped their supervision as the persons concerned would be unaware they were subject to surveillance and were thus unable to lodge a complaint);

– there were limits on their powers, for example, even though they could take measures to stop or remedy breaches and to bring those responsible to

account, there was no specific provision requiring destruction of unlawfully obtained intercept material;

– their supervision was not open to public scrutiny and knowledge as their reports were not published or otherwise accessible to the public;

– the Government had not submitted any inspection reports or decisions by prosecutors ordering the taking of measures to stop or remedy a detected breach of law.

(vii) *Notification of interception and available remedies* – Persons whose communications were intercepted were not notified. Unless criminal proceedings were opened against the interception subject and the intercepted data was used in evidence, the person concerned was unlikely ever to find out if his or her communications had been intercepted.

Persons who did somehow find out could request information about the data concerned. However, in order to lodge such a request they had to have been in possession of the facts of the operational-search measures to which they had been subjected. Access to information was thus conditional on a person's ability to prove that his or her communications had been intercepted. Furthermore, interception subjects were not entitled to obtain access to documents relating to the interception of their communications: they were at best entitled to receive "information" about the collected data. Such information was provided only in very limited circumstances, namely if the person's guilt had not been proved in accordance with law and the information did not contain State secrets. Since, under Russian law, information about the facilities used in operational-search activities, the methods employed, the officials involved and the data collected constituted a State secret, the possibility of obtaining information about interceptions appeared ineffective.

The judicial remedies referred to by the Government were available only to persons in possession of information about the interception of their communications. Their effectiveness was therefore undermined by the absence of a requirement to notify the interception subject or of an adequate possibility to request and obtain information about interceptions from the authorities. Accordingly, Russian law did not provide an effective judicial remedy against secret surveillance measures in cases where no criminal proceedings were brought against the interception subject.

In sum, the domestic legal provisions governing the interception of communications did not provide adequate and effective guarantees against arbitrariness and the risk of abuse. The domestic law did not meet the "quality of law" requirement and was incapable of keeping the "interference" to what was "necessary in a democratic society".

Conclusion: violation (unanimously).

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

(See *Weber and Saravia v. Germany* (dec.), 54934/00, 29 June 2006, Information Note 88; *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130; see, more generally, the Handbook on European data protection law)

Absence of procedural safeguards or effective judicial review of decision to override lawyer's privilege against disclosure of her bank statements in criminal proceedings: *violation*

Consultation des extraits du compte bancaire personnel d'une avocate soumise au secret professionnel lors d'une procédure pénale sans garanties procédurales et contrôle juridictionnel effectif : *violation*

Brito Ferrinho Bexiga Villa-Nova – Portugal - 69436/10
Judgment/Arrêt 1.12.2015 [Section IV]

En fait – Ne s'étant pas acquittée de la taxe sur la valeur ajoutée concernant des honoraires perçus, la requérante, qui est avocate, reçut de l'administration fiscale une demande de présenter les extraits de son compte bancaire personnel. Elle s'y opposa en invoquant les secrets professionnel et bancaire.

Le parquet ouvrit une enquête à l'encontre de la requérante du chef de fraude fiscale. Mise en examen et entendue, cette dernière reconnut que les paiements de ses honoraires étaient faits sur son compte bancaire personnel. Elle refusa toutefois de produire les extraits de celui-ci. Le ministère public demanda au juge d'instruction criminelle d'ouvrir un incident de procédure visant la levée du secret professionnel. La cour d'appel fit droit à cette demande. La requérante attaqua l'arrêt de la cour d'appel devant la Cour suprême, qui déclara le pourvoi irrecevable.

En droit – Article 8 : La consultation des extraits du compte bancaire de la requérante a constitué une ingérence, prévue par la loi, dans son droit au respect du secret professionnel, lequel est inclus dans la notion de vie privée de l'article 8 de la Convention.

Cette ingérence poursuivait un but légitime, à savoir la « prévention des infractions pénales », car elle tendait à la recherche d'indices et de preuves dans le cadre d'une enquête ouverte contre la requérante pour fraude fiscale.

Dans le cadre de la procédure pénale qui fit suite, la levée du secret professionnel a été soulevée par le ministère public à la suite du refus de la requérante de produire les extraits réclamés. Cette procédure pénale s'est déroulée devant un organe judiciaire mais sans que la requérante n'y participe. Elle n'est donc intervenue à aucun moment et n'a par conséquent pas pu présenter ses arguments. De surcroît, elle n'a pu répondre, ni à la requête du ministère public adressée au juge d'instruction criminelle, ni à l'avis de la procureure adjointe près la cour d'appel.

La législation pertinente prévoyait la consultation de l'ordre des avocats dans le cadre de la procédure visant la levée du secret professionnel. Or, en l'espèce, l'ordre des avocats n'a pas été sollicité. Même si, eu égard à la jurisprudence interne, un avis de l'ordre des avocats n'aurait pas eu d'effet contraignant, la Cour estime que l'intervention d'un organisme indépendant était en l'espèce nécessaire étant donné que les informations réclamées étaient couvertes par le secret professionnel.

En ce qui concerne le « contrôle efficace » pour contester la mesure litigieuse, le pourvoi que la requérante a formé devant la Cour suprême pour contester la décision de la cour d'appel n'a pas fait l'objet d'un examen quant au fond, la haute juridiction ayant considéré que la requérante ne disposait pas de la possibilité de faire appel de l'arrêt de la cour d'appel. Sans se substituer aux juridictions internes, la Cour considère que le simple fait que le recours de la requérante ait été déclaré irrecevable par la Cour suprême ne satisfait pas l'exigence d'un « contrôle efficace » posée par l'article 8 de la Convention ; la requérante n'a donc disposé d'aucun recours pour contester la mesure litigieuse.

Eu égard à l'absence de garanties procédurales et d'un contrôle juridictionnel effectif de la mesure litigieuse, les autorités portugaises n'ont pas ménagé, dans la présente espèce, un juste équilibre entre les impératifs de l'intérêt général et les exigences de protection du droit de la requérante au respect de sa vie privée.

Conclusion : violation (unanimité).

Article 41 : 3 250 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir aussi *Michaud c. France*, 12323/11, 6 décembre 2012, Note d'information 158, et *Sérvulo & Associados - Sociedade de Advogados, RL, et autres c. Portugal*, 27013/10, 3 septembre 2015, Note d'information 188)

Disclosure of banking information to tax authorities of another State pursuant to bilateral agreement: *no violation*

Transmission de données bancaires aux autorités fiscales d'un autre État en application d'un accord bilatéral : *non-violation*

G.S.B. – Switzerland/Suisse - 28601/11
Judgment/Arrêt 22.12.2015 [Section III]

En fait – Au cours de l'année 2008, l'administration fiscale américaine (IRS) découvrit que des milliers de contribuables de nationalité américaine étaient titulaires, auprès de la banque suisse UBS SA (UBS), à Genève, de comptes bancaires non déclarés à leurs autorités nationales ou ayants droit économiques *vis-à-vis* de tels comptes. En 2009, l'IRS introduisit une procédure civile tendant à ce qu'il soit enjoint à UBS de livrer l'identité de ses 52 000 clients américains et un certain nombre de données sur les comptes dont ils étaient titulaires auprès d'elle. La Suisse ayant émis la crainte que le différend entre les autorités américaines et UBS n'engendre un conflit entre le droit suisse et le droit américain si l'IRS obtenait ces informations, la procédure civile fut suspendue dans la perspective d'une conciliation extrajudiciaire. Afin de permettre l'identification des contribuables concernés, le gouvernement suisse et les États-Unis conclurent un accord concernant la demande de renseignements de l'IRS relative à UBS (dit « Accord 09 »). La Suisse s'y engageait à traiter la demande d'entraide administrative des États-Unis concernant les clients américains d'UBS selon les critères établis dans l'accord. En réponse à une demande de l'IRS, l'administration fiscale suisse des contributions (AFC) ouvrit une procédure d'entraide administrative et demanda à UBS de lui fournir les dossiers complets des clients visés par l'annexe de l'Accord 09.

C'est dans ce contexte que le dossier du requérant fut transmis par UBS à l'AFC en 2010. Une première décision de cette dernière fut annulée par le Tribunal administratif fédéral suisse pour des raisons procédurales. Après avoir reçu les observations du requérant, l'AFC considéra que toutes les conditions étaient réunies pour accorder l'entraide administrative à l'IRS et enjoindre à UBS de lui communiquer les documents demandés. Les recours du requérant devant le Tribunal administratif fédéral furent rejetés. En décembre 2012, les don-

nées bancaires le concernant furent transmises aux autorités fiscales américaines. Lors de l'examen de la présente affaire, le contrôle fiscal des autorités américaines était toujours en cours et le requérant n'avait jusqu'alors pas été inculpé sur le plan pénal.

En droit – Article 8 : Le requérant a été victime d'une ingérence dans son droit au respect de sa vie privée lorsque ses données bancaires ont été transmises aux autorités fiscales américaines. Il ne fait pas de doute que des informations relevant des comptes bancaires sont des données personnelles protégées par l'article 8 de la Convention.

Concernant le défaut allégué de prévisibilité tenant à l'application rétroactive des traités litigieux, il existait une jurisprudence constante du Tribunal administratif fédéral suisse selon laquelle les dispositions sur l'entraide administrative et pénale obligeant des tiers à donner certains renseignements sont de nature procédurale et, partant, s'appliquent en principe à toutes les procédures en cours ou à venir, même portant sur des exercices fiscaux antérieurs à leur adoption. De surcroît, on ne saurait prétendre que la pratique auparavant restrictive des autorités suisses en matière d'entraide administrative fiscale avait pu créer dans le chef du requérant l'attente de pouvoir continuer à placer ses avoirs en Suisse en restant à l'abri de tout contrôle de la part des autorités américaines compétentes, ou même seulement de l'éventualité de contrôles rétroactifs.

Le secteur bancaire représentant une branche économique importante pour la Suisse, la mesure incriminée, qui participait d'une tentative globale du gouvernement suisse de régler le conflit entre UBS et les autorités fiscales américaines, pouvait valablement être considérée comme de nature à contribuer à la protection du bien-être économique du pays. À cet égard, les prétentions des autorités fiscales américaines contre les banques suisses pouvaient mettre en danger la survie même d'UBS, acteur important de l'économie suisse et employeur d'un nombre considérable de personnes ; d'où l'intérêt, pour la Suisse, de trouver un règlement juridique efficace avec les États-Unis. Par la conclusion d'un accord bilatéral, elle a pu éviter un conflit majeur avec cet État. La mesure poursuivait donc un but légitime.

Quant à sa nécessité, il faut noter que seules sont en question les données bancaires du requérant, soit des informations purement financières ; il ne s'agissait donc nullement de données intimes ou liées étroitement à son identité qui auraient mérité une protection accrue. Il s'ensuit que la marge d'appréciation de la Suisse était ample. Concernant l'effet pour le requérant de la mesure litigieuse, les données bancaires ont été transmises aux autorités américaines compétentes en vue de permettre à ces dernières de vérifier qu'il s'était bien acquitté de ses obligations fiscales et, dans l'hypothèse où tel ne serait pas le cas, d'en tirer les conséquences juridiques, l'ouverture d'une procédure pénale restant purement spéculative. Par ailleurs, le requérant a bénéficié de certaines garanties procédurales contre le transfert de ses données aux autorités fiscales américaines. D'abord, il a pu introduire un recours en Suisse auprès du Tribunal administratif fédéral contre la décision de l'AFC. Ce tribunal a par la suite annulé ladite décision à cause d'une violation du droit du requérant d'être entendu. L'AFC a par conséquent invité le requérant à transmettre ses éventuelles observations dans le délai imparti. Le requérant a fait usage de ce droit. Elle a ensuite rendu une nouvelle décision, dûment motivée, dans laquelle elle est parvenue à la conclusion que toutes les conditions étaient réunies pour accorder l'entraide administrative. Par la suite, le requérant a une deuxième fois saisi le Tribunal administratif fédéral qui l'a débouté. Il s'ensuit que le requérant avait à sa disposition plusieurs garanties effectives et réelles d'ordre procédural pour contester la remise de ses données bancaires et, dès lors, de le protéger contre une mise en œuvre arbitraire des accords conclus entre la Suisse et les États-Unis.

Compte tenu de l'ensemble des circonstances de l'espèce, et notamment au vu de la nature peu personnelle des données révélées, il n'était pas déraisonnable pour la Suisse de faire primer l'intérêt général d'un règlement efficace et satisfaisant avec les États-Unis sur l'intérêt privé du requérant. Dès lors, la Suisse n'a pas outrepassé sa marge d'appréciation.

Conclusion : non-violation (unanimité).

La Cour conclut également à l'unanimité à la non-violation de l'article 14 combiné avec l'article 8 de la Convention.

Respect for private life/Respect de la vie privée Respect for correspondence/Respect de la correspondance

Alleged mass surveillance of human-rights organisations: *communicated*

Prétendue surveillance de masse d'organisations de défense des droits de l'homme: *affaire communiquée*

10 human-rights organisations – United Kingdom/Royaume-Uni - 24960/15 et al.
[Section I]

The applicants are ten human-rights organisations. They communicate on a regular basis with a range of groups and individuals, both nationally and internationally, as part of their human-rights activities. The information contained in their communications frequently includes material which is sensitive, confidential and, in some cases, legally privileged.

Because of the nature of their activities, the applicants believe that it is very likely that the content of their private communications and their communications data have been obtained by the United Kingdom intelligence services via interception powers exercised pursuant to the Regulation of Investigatory Powers Act 2000 (RIPA), under the domestic interception and collection programme, Tempora, or by way of the Prism or Upstream programmes operated by the United States National Security Agency (NSA).

Between June and December 2013, the applicants lodged complaints with the Investigatory Powers Tribunal (IPT) alleging that the intelligence services and the UK Home and Foreign Secretaries had acted in violation of Articles 8, 10, and 14 of the Convention. In the absence of any confirmation or denial by the Government that the applicants' communications had actually been intercepted, the IPT determined the legal issues on the basis that they had, the question being whether, on that assumption, the interception, retention, storage and sharing of the applicants' data were in accordance with the law under Articles 8 and 10, taken alone and together with Article 14. The internal arrangements regulating the conduct and practice of the intelligence services were examined in a closed hearing at which the applicants were neither present nor represented. Following that hearing the Government disclosed information about the arrangements to the applicants in a note of 9 October 2014.

The IPT considered the applicants' complaints in three judgments of 5 December 2014, and 6 February and 22 June 2015. It found in relation to the receipt of intercept material from Prism and Upstream that the internal arrangements had since the 9 October 2014 disclosure by the Government been sufficiently signposted and that they were also subject to appropriate oversight. The arrangements had thus contravened Articles 8 or 10 of the Convention prior to the disclosure, but no longer did so.

As regards interceptions of external communications pursuant to a warrant issued under section 8(4) RIPA, the IPT found that the regime and safeguards were sufficiently compliant with the requirements the European Court had laid down in *Weber and Saravia* for the interference to be "in accordance with the law" for the purposes of Article 8 of the Convention. It did, however, find two "technical" breaches of Article 8 concerning in one instance the retention for longer than permitted of lawfully intercepted material and in the other a failure to follow the proper selection-for-examination procedure. It made no award of compensation.

In their applications to the European Court the applicants argue that the legal framework governing the interception of communications content and data is incompatible with Articles 8 and 10 of the Convention and that the interference resulting from the Tempora programme is not "necessary in a democratic society" as communications are intercepted and retained without any reasonable suspicion and there is no judicial oversight or authorisation for interception. The applicants also complain under Article 6 that the proceedings before the IPT violated their right to a fair hearing, in particular in that the IPT had wrongly held closed hearings, failed to ensure they were effectively represented in those hearings and failed to order the disclosure of documents. Finally, the applicants complain under Article 14 in conjunction with Articles 8 and 10 that the RIPA framework is indirectly discriminatory on grounds of nationality and national origin since it grants additional safeguards to people known to be in the British Islands but denies them to those abroad.

Communicated under Articles 6, 8 and 10 and under Article 14 in conjunction with Articles 8 and 10.

(See also *Roman Zhakarov v. Russia* [GC], 47143/06, 4 December 2015, Information Note 191; *Weber and Saravia v. Germany* (dec.), 54934/00, 29 June 2006, Information Note 88; and *Kennedy v. the United Kingdom*, 26839/05, 18 May 2010, Information Note 130; see, more generally, the Handbook on European data protection law)

Respect for family life/Respect de la vie familiale

Removal of husband under Dublin Convention following refusal to recognise his alleged marriage to 14-year-old bride: *no violation*

Déplacement d'un époux conformément à la Convention de Dublin suite au refus de reconnaître son prétendu mariage avec une jeune fille de 14 ans: *non-violation*

Z.H. and/et R.H. – Switzerland/Suisse - 60119/12
Judgment/Arrêt 8.12.2015 [Section III]

Facts – The applicants, who were Afghan nationals, requested asylum in Switzerland after previously registering as asylum-seekers in Italy. They presented themselves to the Swiss asylum authorities as a married couple, saying they had been married at a religious ceremony in Iran when the first applicant was 14 and her husband, the second applicant, 18. They did not produce a marriage certificate. Their request for asylum was rejected. The second applicant was removed to Italy, but managed to return illegally three days later and was allowed to remain. In the appeal proceedings against the refusal, the domestic courts found, among other things, that the applicants' marriage was incompatible on grounds of public policy given that sexual intercourse with a child under the age of 16 was a criminal offence under Swiss law. The applicants could not therefore claim any right to family life under Article 8 of the Convention.

In the Convention proceedings, the applicants alleged that the second applicant's expulsion to Italy in 2012 had violated Article 8 of the Convention and that there would be a further violation if he was expelled again.

Law – Article 8: The Court saw no reason to depart from the Swiss Federal Administrative Court's findings that the applicants' religious marriage was invalid under Afghan law and was in any case incompatible with Swiss *ordre public* owing to the first applicant's young age. Article 8 of the Convention could not be interpreted as imposing on any State party to the Convention an obligation to recognise a marriage, religious or otherwise, contracted by a 14-year-old child. Nor could such obligation be derived from Article 12 of the Convention. Article 12 expressly provided for regulation of marriage by national law and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, the Court should not rush to substitute its own judgment for that of the national authorities.

The national authorities had therefore been justified in considering that the applicants, who had taken no steps to seek recognition of their religious marriage in Switzerland, were not married.

In any event, even if their relationship had qualified as "family life" under Article 8, the second applicant had returned to Switzerland just three days later and had been allowed to remain in Switzerland and to request a re-examination of his asylum application, which had eventually succeeded. Nor was the first applicant ever prevented from joining the second applicant after his expulsion to Italy.

Bearing in mind the margin of appreciation afforded to States in immigration matters, a fair balance had been struck between, on the one hand, the personal interests of the applicants in remaining together in Switzerland while awaiting the outcome of the first applicant's asylum application, and, on the other, the Swiss Government's interests in controlling immigration.

Conclusion: no violation (unanimously).

Positive obligations/Obligations positives

Insufficient separation of sanitary facilities from remainder of prison cell: *violation*

Séparation insuffisante entre les installations sanitaires et le reste de la cellule: *violation*

Szafrański – Poland/Pologne - 17249/12
Judgment/Arrêt 15.12.2015 [Section IV]

Facts – In his application to the European Court the applicant complained that his condition of detention in Wronki Prison were inadequate. In particular, he complained that in seven of the ten cells where he was detained the sanitary facilities were separated from the rest of the cell only by a 1.20 metre-high fibreboard partition and had no doors.

Law

Article 3 (*substantive aspect*): In previous cases where insufficient partitioning between sanitary facilities and the rest of the cell had been at issue, the Court had found a violation of Article 3 only where other aggravating factors were present and as a result of their cumulative effect. However, in the present case the only hardship the applicant had had to bear was the insufficient separation of the sanitary

facilities from the rest of the cell. Apart from that, the cells were properly lit, heated and ventilated and he had access to various activities outside the cells. Therefore, the overall circumstances of his detention could not be found to have caused distress and hardship which exceeded the unavoidable level of suffering inherent in detention or went beyond the threshold of severity under Article 3.

Conclusion: no violation (unanimously).

Article 8: Under the Court's case-law the domestic authorities had a positive obligation to provide access to sanitary facilities separated from the rest of the prison cell in such a way as to ensure a minimum of privacy. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a sanitary annex which was only partially separated off was not acceptable in a cell occupied by more than one detainee. In addition, the CPT had recommended that a full partition in all the in-cell sanitary annexes be installed. Despite this, the applicant had been placed in cells in which the sanitary facilities were not fully separated off, and had had to use the toilet in the presence of other inmates. The domestic authorities had thus failed to discharge their positive obligation of ensuring a minimum level of privacy for the applicant.

Conclusion: violation (unanimously).

Article 41: EUR 1,800 in respect of non-pecuniary damage.

(See also the Factsheet on Detention conditions and treatment of prisoners)

ARTICLE 10

Freedom of expression/Liberté d'expression

Penalty imposed on defence counsel for accusing investigating judges of complicity in torture: *violation*

Sanction infligée à un avocat pour des accusations de complicité de torture faites à l'encontre de magistrats instructeurs : *violation*

Bono – France - 29024/11
Judgment/Arrêt 17.12.2015 [Section V]

En fait – Le requérant, avocat, était le défenseur d'un suspect poursuivi pour des actes liés au terrorisme. Celui-ci fut arrêté en Syrie. Une commission rogatoire, exécutée par un juge d'instruction qui se rendit sur place, permit d'obtenir des pièces de procédure, dont le contenu d'interrogatoires prétendument effectués sous la torture. Le client du requérant fut ensuite extradé vers la France.

Le requérant demanda que soient retirées du dossier les pièces obtenues, selon lui, sous la torture des services secrets syriens et fit valoir à cette occasion la complicité des magistrats instructeurs français dans l'utilisation de la torture pratiquée à l'encontre de son client en Syrie. Le tribunal écarta les pièces d'exécution de la commission rogatoire internationale mais condamna le client du requérant. Lors de l'appel, le requérant demanda de nouveau l'exclusion de certaines pièces et réitéra ses propos relatifs aux magistrats instructeurs. La cour d'appel fit droit à la demande d'exclusion mais rejeta les conclusions relatives aux juges d'instruction et invita le requérant à mesurer ses propos. Le bâtonnier de l'ordre des avocats fit connaître au procureur général, qui lui avait adressé une copie des conclusions d'appel, qu'il n'entendait pas donner suite à cette affaire. Par acte de saisine et d'ouverture de l'instance disciplinaire, le procureur général demanda aux autorités ordinales d'engager une poursuite disciplinaire contre le requérant. Le conseil de discipline de l'ordre des avocats renvoya le requérant de toutes les fins de la poursuite. Le procureur général forma un recours contre cette décision. La cour d'appel infirma la décision de l'ordre et prononça à l'encontre du requérant un blâme assorti d'une inéligibilité aux instances professionnelles pendant une durée de cinq ans. Le requérant et le bâtonnier de l'ordre des avocats se pourvurent en cassation. Ils furent déboutés.

En droit – Article 10 : La sanction litigieuse a constitué une ingérence dans la liberté d'expression du requérant. Elle était prévue par la loi et poursuivait les buts légitimes que sont la protection de la réputation ou des droits d'autrui et la protection de l'autorité du pouvoir judiciaire, dont les magistrats instructeurs faisaient partie.

Les propos litigieux, de par leur virulence, avaient, à l'évidence, un caractère outrageant pour les magistrats en charge de l'instruction. Or le bon fonctionnement des tribunaux ne saurait être possible sans des relations fondées sur la considération et le respect mutuel entre les différents acteurs de la justice, au premier rang desquels les magistrats et les avocats. Les conclusions du requérant accusant les juges d'instruction d'être complices de torture n'étaient pas nécessaires au but poursuivi, à savoir faire écarter les déclarations obtenues sous la torture, et ce d'autant moins que les juges de première instance avaient déjà accepté une telle demande. Pour autant, la question se pose de savoir si le

prononcé d'une sanction disciplinaire a ménagé un juste équilibre dans le cadre d'une bonne administration de la justice.

Les propos litigieux ont été formulés dans un contexte judiciaire, puisqu'ils ont été communiqués sous forme écrite à l'occasion du dépôt de conclusions en défense devant la cour d'appel. Ils s'inscrivaient dans une démarche tendant à obtenir, avant toute défense au fond, l'annulation par cette juridiction des dépositions de son client obtenues sous la torture en Syrie. Les passages retenus par le procureur ne visaient pas nommément les magistrats concernés mais portaient sur la manière dont ils avaient mené l'instruction. En particulier, le requérant dénonçait leur choix de délivrer une commission rogatoire internationale alors qu'ils devaient savoir que les interrogatoires menés par les services secrets syriens se déroulaient en violation du respect des droits de l'homme, et en particulier de l'article 3 de la Convention. Dès lors, cette accusation porte sur le choix procédural des magistrats. D'ailleurs, les juridictions nationales ont fait droit à la demande de retrait des actes de la procédure établis en violation de l'article 3 de la Convention alors que cette cause de nullité n'avait pas été soulevée pendant l'instruction ni par les juges d'instruction eux-mêmes ni par le procureur. Dans ce contexte procédural, les écrits litigieux participaient directement de la mission de défense du client du requérant. Les propos relevaient davantage de jugements de valeur, dès lors qu'ils renvoyaient essentiellement à une évaluation globale du comportement des juges d'instruction durant l'information. En revanche, ils reposaient sur une base factuelle. À cet égard, si le juge d'instruction n'a pas pu participer aux interrogatoires, il les a suivis en temps réel, à Damas, sur la base du questionnaire figurant sur la commission rogatoire internationale et des questions complémentaires auxquelles il souhaitait avoir des réponses, en plus de celles qui avaient déjà été enregistrées. De plus, les méthodes des services de police syriens étaient notoirement connus, ainsi qu'en attestent les témoignages produits devant le tribunal et, du reste, l'ensemble des rapports internationaux à ce sujet. En outre, les critiques du requérant ne sont pas sorties de la « salle d'audience » puisqu'elles étaient formulées dans des conclusions écrites. Elles n'ont donc pas pu porter atteinte ou menacer le fonctionnement du pouvoir judiciaire et la réputation des autorités judiciaires auprès du grand public. Or la cour d'appel et la Cour de cassation n'ont pas pris en compte cet élément contextuel et n'ont pas tenu compte de l'auditoire restreint à qui les propos avaient été adressés.

Compte tenu de ces éléments, la sanction disciplinaire infligée au requérant n'était pas proportionnée. Outre les répercussions négatives d'une telle sanction sur la carrière professionnelle d'un avocat, le contrôle *ex post facto* des paroles ou des écrits litigieux d'un avocat doit être mis en œuvre avec une prudence et une mesure particulières. Ainsi, en l'espèce, le président de la chambre de la cour d'appel devant laquelle était jugé le client du requérant avait déjà invité ce dernier au cours de l'audience à mesurer ses propos puis, considérant qu'ils étaient excessifs, cette chambre a fait alors figurer dans le dispositif de l'arrêt le rejet des conclusions sur ce point au motif qu'elles étaient infamantes. Estimant suffisant ce rappel à l'ordre, ces juges n'avaient pas estimé opportun de demander au procureur général de saisir les instances disciplinaires. Ce n'est que plusieurs mois après le dépôt des conclusions litigieuses, et le rendu de l'arrêt, que le procureur général initia une procédure disciplinaire. Au regard de l'ensemble des circonstances, en allant au-delà de la position ferme et mesurée de la cour d'appel pour infliger une sanction disciplinaire au requérant, les autorités ont porté une atteinte excessive à l'exercice de la mission de défense de l'avocat.

Conclusion : violation (unanimité).

Article 41 : 5 000 EUR pour préjudice moral.

(Voir aussi *Morice c. France* [GC], 9369/10, 11 juillet 2013, Note d'information 184, et *Nikula c. Finlande*, 31611/96, 21 mars 2002, Note d'information 40)

Freedom to impart information/Liberté de communiquer des informations

Order restraining mass publication of tax information: *case referred to the Grand Chamber*

Ordonnance interdisant la publication massive d'informations fiscales : *affaire renvoyée devant la Grande Chambre*

Satakunnan Markkinapörssi Oy and/et Satamedia Oy – Finland/Finlande - 931/13
Judgment/Arrêt 21.7.2015 [Section IV]

The first applicant company (*Satakunnan*) published a magazine providing information on the taxable income and assets of Finnish taxpayers. The information was, by law, public.[1] The second

1. See section 5 of the Act on the Public Disclosure and Confidentiality of Tax Information.

applicant company (*Satamedia*) offered a service supplying taxation information by SMS text message. In April 2003 the Data Protection Ombudsman requested the Data Protection Board to restrain the applicant companies from processing taxation data in the manner and to the extent they had in 2002 and from passing such data to an SMS-service. The Data Protection Board dismissed the Ombudsman's request on the grounds that the applicant companies were engaged in journalism and so were entitled to a derogation from the provisions of the Personal Data Act. The case subsequently came before the Supreme Administrative Court, which in February 2007 sought a preliminary ruling from the Court of Justice of the European Union (CJEU) on the interpretation of the EU Data Protection Directive.[1] In its judgment of 16 December 2008[2] the CJEU ruled that activities relating to data from documents which were in the public domain under national legislation could be classified as "journalistic activities" if their object was to disclose to the public information, opinions or ideas, irrespective of the medium used to transmit them. In September 2009 the Supreme Administrative Court directed the Data Protection Board to forbid the processing of taxation data in the manner and to the extent carried out by the applicant companies in 2002. Noting that the CJEU had found that the decisive factor was to assess whether a publication contributed to a public debate or was solely intended to satisfy the curiosity of readers, the Supreme Administrative Court concluded that the publication of the whole database collected for journalistic purposes and the transmission of the information to the SMS service could not be regarded as journalistic activity.

In the Convention proceedings the applicant companies complained, among other matters, of a violation of Article 10 of the Convention.

In a judgment of 21 July 2015 a Chamber of the European Court held, by six votes to one, that there had been no violation of Article 10 of the Convention. It found that the domestic authorities had relied on relevant and sufficient reasons in their decisions and had struck a fair balance between the competing interests at stake. It noted, in particular, the Supreme Administrative Court's finding that the publication of the whole database could not be regarded as journalistic activity and that the public interest had not required such extensive publication of personal data. In the Chamber's view, the Supreme Administrative Court had balanced the applicant companies' right to freedom of expression against the right to privacy, interpreting the applicant companies' freedom of expression strictly in order to protect the right to privacy. That reasoning was acceptable.

The Chamber also held unanimously that there been a violation of Article 6 § 1 of the Convention in respect of the length of the proceedings before the domestic courts.

On 14 December 2015 the case was referred to the Grand Chamber at the applicants' request.

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

Wholesale blocking of access to YouTube without legal basis: *violation*

Blocage de l'accès à l'intégralité de YouTube sans base légale : *violation*

Cengiz and Others/et autres – Turkey/Turquie - 48226/10 and/et 14027/11
Judgment/Arrêt 1.12.2015 [Section II]

En fait – En mai 2008, un tribunal d'Ankara, considérant notamment que le contenu de dix pages présentes sur le site YouTube violait l'interdiction d'outrage à la mémoire d'Atatürk, ordonna le blocage de l'accès à l'intégralité de ce site. Les requérants, des usagers actifs de celui-ci, formèrent des recours contre cette décision. Ils furent déboutés au motif qu'ils n'étaient pas parties à la procédure d'enquête et n'avaient donc pas la qualité à agir.

La loi sur laquelle reposait la décision du tribunal a été amendée postérieurement aux faits de l'espèce, de manière à rendre possible le blocage de l'accès à l'intégralité d'un site internet et non plus seulement au contenu litigieux.

En droit – Article 10 : Les requérants ont déposé leurs requêtes devant la Cour en qualité d'usagers actifs de YouTube, soulignant notamment les répercussions du blocage litigieux sur leur travail académique, ainsi que les caractéristiques importantes du site en question. En particulier, ils affirment que, en se servant de leurs comptes YouTube, ils

1. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
2. *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, C73/07, judgment of 16 December 2008.

utilisent cette plateforme non seulement pour accéder à des vidéos relatives à leur domaine professionnel mais aussi, de manière active, en téléchargeant et partageant de tels fichiers. Par ailleurs, certains d'entre eux ont précisé y publier des enregistrements sur leurs activités académiques. En outre, YouTube diffuse non seulement des œuvres artistiques et musicales, mais constitue également une plateforme très populaire pour le discours politique et les activités politiques et sociales. Les fichiers diffusés par YouTube comportent entre autres des informations qui peuvent présenter un intérêt particulier pour chacun. En effet, la mesure litigieuse rendait inaccessible un site comprenant des informations spécifiques pour les requérants qui ne sont pas facilement accessibles par d'autres moyens. Ce site constitue également une source importante de communication pour les intéressés. En outre, YouTube est un site web d'hébergement de vidéos sur lequel les utilisateurs peuvent envoyer, regarder et partager des vidéos et il constitue à n'en pas douter un moyen important d'exercer la liberté de recevoir ou de communiquer des informations et des idées. En particulier, les informations politiques ignorées par les médias traditionnels ont souvent été divulguées par le biais de YouTube, ce qui a permis l'émergence d'un journalisme citoyen. Dans cette optique, cette plateforme est unique compte tenu de ses caractéristiques, de son niveau d'accessibilité et surtout de son impact potentiel, et il n'existait au moment des faits aucun équivalent.

Par conséquent, les requérants, bien que n'étant pas directement visés par la décision de blocage de l'accès à YouTube, peuvent légitimement prétendre que la mesure en question a affecté leur droit de recevoir et de communiquer des informations ou des idées. Quelle qu'en ait été la base légale, pareille mesure avait vocation à influer sur l'accessibilité à internet. Dès lors, elle engageait la responsabilité de l'État défendeur au titre de l'article 10.

Quant à la légalité de cette ingérence, il faut noter que la loi en cause n'autorisait pas le blocage de l'accès à l'intégralité d'un site internet à cause du contenu de l'une des pages web qu'il hébergeait. En effet, seul le blocage de l'accès à une publication précise peut être ordonné, s'il existe des motifs suffisants de soupçonner que, par son contenu, une telle publication est constitutive des infractions mentionnées dans la loi. Par conséquent, lorsque le tribunal a décidé de bloquer totalement l'accès à YouTube, aucune disposition législative ne lui conférait un tel pouvoir. En effet, la technologie de filtrage d'URL pour les sites basés à l'étranger n'est pas disponible en Turquie. Dès lors, dans la pratique, un organe administratif décide de bloquer tout accès à l'intégralité du site en question afin d'exécuter les décisions judiciaires concernant un contenu en particulier. Or les autorités auraient dû notamment tenir compte du fait que pareille mesure, qui rendait inaccessible une grande quantité d'informations, ne pouvait qu'affecter considérablement les droits des internautes et avoir un effet collatéral important. Partant, la mesure litigieuse ne répondait pas à la condition de légalité.

Conclusion: violation (unanimité).

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

Article 46: Après l'introduction de la présente affaire, la loi en cause a été modifiée. Le blocage de l'accès à l'intégralité d'un site internet peut désormais être ordonné si les conditions énumérées par la loi sont réunies. Ces amendements ont été introduits après les faits de l'espèce. Or la Cour n'a point pour tâche de se prononcer *in abstracto* sur la compatibilité avec la Convention du régime juridique du blocage de l'accès à des sites internet tel qu'il a existé en Turquie au moment des faits ou tel qu'il existe actuellement mais doit apprécier *in concreto* l'incidence de l'application des dispositions en question sur le droit des requérants à la liberté d'expression. Il n'est donc pas nécessaire, dans les circonstances de l'espèce, de se prononcer sur la demande des requérants tendant au prononcé d'une injonction au titre de l'article 46 de la Convention.

(Voir aussi *Ahmet Yıldırım c. Turquie*, 3111/10, 18 décembre 2012, Note d'information 158, et la fiche thématique Nouvelles technologies)

Alleged mass surveillance of human-rights organisations: *communicated*

Prétendue surveillance de masse d'organisations de défense des droits de l'homme: *affaire communiquée*

10 human-rights organisations – United Kingdom/Royaume-Uni - 24960/15 et al.
[Section I]

(See Article 8 above/Voir l'article 8 ci-dessus, page 23)

ARTICLE 11

Freedom of association/Liberté d'association

Refusal to grant wine growers licence to produce wine owing to exclusive rights of union of wine producing cooperatives:
violation

Refus d'octroyer un permis de vinification à des viticulteurs au motif de l'exclusivité assurée à une union de coopératives vinicoles:
violation

Mytilinaios and/et Kostakis – Greece/Grèce - 29389/11
Judgment/Arrêt 3.12.2015 [Section I]

En fait – Les requérants sont viticulteurs et membres de l'Union des coopératives vinicoles de Samos («l'Union»), créée en 1934, qui assure exclusivement la vinification et la commercialisation du muscat de Samos. Toutes les coopératives vinicoles locales y sont obligatoirement affiliées.

Les requérants ne pouvant pas disposer et vendre librement leur production de vin muscat ont déposé en vain auprès de l'Union plusieurs demandes tendant à se délier de celle-ci.

En novembre 2005, les requérants saisirent le Conseil d'État d'un recours en annulation du refus tacite de l'administration de leur accorder un permis de vinification. Ce refus se fondait sur les dispositions de la «loi obligatoire» nº 6085/1934 qui excluait l'octroi d'un permis de vinification à des individus isolés. L'Union intervint dans la procédure et demanda le rejet du recours. En novembre 2010, le Conseil d'État rejeta celui-ci.

En droit – Article 11

a) *Applicabilité* – Deux des critères établis dans la jurisprudence de la Cour pour déterminer si une association doit être considérée comme privée ou publique ne sont pas réunis en l'espèce, à savoir l'intégration aux structures de l'État et l'existence de prérogatives administratives, normatives et disciplinaires. Par conséquent, l'Union ne saurait être considérée comme une association à caractère public au sens de la Convention et l'article 11 trouve à s'appliquer en l'espèce.

b) *Fond* – Le refus tacite des autorités nationales, validé par le Conseil d'État, d'octroyer aux requérants un permis de vinification au motif que l'Union assure exclusivement la vinification et la commercialisation du muscat de Samos est une «ingérence» dans leur liberté d'association «négative».

Cette ingérence était prévue par la loi nº 6085/1934 et poursuivait comme «but légitime» celui d'assurer, dans l'intérêt général de l'île de Samos, la protection de la qualité d'un vin unique en Grèce et du revenu des viticulteurs de l'île et donc la protection des droits et libertés d'autrui.

La Cour estime que la distinction faite par le Conseil d'État dans son arrêt de novembre 2010 entre la culture de la vigne, qui n'est pas soumise à restriction, et la vinification et la commercialisation, pour lesquels il faut obligatoirement être membre d'une coopérative, est artificielle et exclut en réalité toute sorte d'autonomie ou d'indépendance aux viticulteurs concernés.

En 1934, les viticulteurs de l'île de Samos avait été motivés à se regrouper dans des coopératives à participation obligatoire pour protéger la qualité du cépage et développer la culture de cette vigne. Mais ces motifs apparaissent peu pertinents dans le contexte actuel. Aujourd'hui, le nombre total des viticulteurs est de 2 847, le muscat de Samos bénéficie de l'appellation d'origine contrôlée ainsi que du label de vin de qualité produit dans une région déterminée et le marché de l'exportation est très important, couvrant 80 % de la production annuelle qui se monte approximativement à 7 000 tonnes.

La minorité du Conseil d'État a souligné dans l'arrêt de novembre 2010 que les buts poursuivis par la loi nº 6085/1934 pourraient être atteints par d'autres moyens comme, par exemple, par des contrôles de qualité effectués par des organes de certification étatiques ou autres.

En outre, en 1993, la loi nº 2169/1993 a prévu la possibilité pour les coopératives à participation obligatoire de se transformer, à leur initiative, en coopératives libres. Ainsi, les autorités nationales ont considéré que la qualité du vin produit sur l'île de Samos et le souci de garantir aux viticulteurs des prix équitables et dignes du raisin fourni ne risquerait pas de pâtir en cas de transformation de la nature de cette participation. Aussi, le rapport introductif de la loi nº 4015/2011 indique que l'agriculteur indépendant et autonome, qui en tant que propriétaire et producteur revendique son droit à la prospérité, n'est pas incompatible avec l'idée de l'association coopérative.

Par conséquent, en obligeant les viticulteurs à transmettre la totalité de leur production aux coopératives, la loi nº 6085/1934 a fait le choix le plus restrictif en ce qui concerne la liberté négative d'association.

Compte tenu des circonstances particulières de la cause, le refus des autorités nationales d'octroyer

aux requérants un permis de vinification va au-delà de ce qui est nécessaire pour assurer un juste équilibre entre des intérêts contradictoires et ne saurait être considéré comme proportionné au but poursuivi.

Conclusion: violation (unanimité).

Article 41: 6 000 EUR à chaque requérant pour préjudice moral; demande pour dommage matériel rejetée.

(Voir aussi *Chassagnou et autres c. France* [GC], 25088/94, 28331/95 et 28443/95, 29 avril 1999, Note d'information 5)

ARTICLE 13

Effective remedy/Recours effectif

Alleged lack of domestic remedy in respect of non-enforcement of domestic decisions: *relinquishment in favour of the Grand Chamber*

Prétendue absence de recours effectif pour la non-exécution de décisions internes: *dessaisissement au profit de la Grande Chambre*

Burmych and Others/et autres – Ukraine - 46852/13 et al.
[Section V]

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

Lack of effective remedy in asylum proceedings: *case referred to the Grand Chamber*

Absence de recours effectif dans une procédure de demande d'asile: *affaire renvoyée devant la Grande Chambre*

V.M. and Others/et autres – Belgium/Belgique - 60125/11
Judgment/Arrêt 7.7.2015 [Section II]

(See Article 3 above/Voir l'article 3 ci-dessus, page 12)

ARTICLE 14

Discrimination (Article 5)

Alleged discrimination in provisions governing liability to life imprisonment: *relinquishment in favour of the Grand Chamber*

Caractère prétendument discriminatoire de dispositions régissant l'imposition de la réclusion à perpétuité: *dessaisissement au profit de la Grande Chambre*

Khamtokhu and/et Aksenchik – Russia/Russie - 60367/08 and/et 961/11
[Section I]

Article 57 of the Russian Criminal Code provides that a sentence of life imprisonment may be imposed for certain particularly serious offences. However, such a sentence cannot be imposed on women, persons under eighteen when the offence was committed or over sixty-five when the verdict case was delivered. The Russian Constitutional Court has repeatedly declared inadmissible complaints of alleged incompatibility of that provision with the constitutional protection against discrimination, *inter alia*, on the grounds that any difference in treatment is based on principles of justice and humanitarian considerations and allows age, social and physiological characteristics to be taken into account when sentencing.

In their applications to the European Court, the applicants, who are both adult males serving life sentences for criminal offences, complain under Article 14 of the Convention read in conjunction with Article 5 of discriminatory treatment *vis-à-vis* other categories of convicts who are exempt from life imprisonment as a matter of law.

On 1 December 2015 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber.

Discrimination (Article 1 of Protocol No. 1)

Difference in treatment between publicly and privately employed retirees and between various categories of civil servants as regards payment of old-age pension: *violation*

Différence de traitement entre employés des secteurs public et privé, et entre différentes catégories de fonctionnaires, concernant le paiement de leur pension de retraite: *violation*

Fábián – Hungary/Hongrie - 78117/13
Judgment/Arrêt 15.12.2015 [Section IV]

Facts – In 2012 the applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. In 2013 an amendment to the Pension Act 1997 entered into force suspending

the payment of old-age pensions to persons simultaneously employed in certain categories of the public sector. As a consequence, the payment of the applicant's pension was suspended. His administrative appeal against that decision was unsuccessful. The restriction did not apply to pensioners working in the private sector. In the Convention proceedings, the applicant complained of an unjustified and discriminatory interference with his property rights, in breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The applicant's pension right was a pecuniary right within the ambit of Article 1 of Protocol No. 1 and his status as a pensioner simultaneously employed in the public sphere could be considered "other status" for the purposes of Article 14 of the Convention. Article 14 was therefore applicable.

The difference in treatment pursued the legitimate aim of reducing public expenditure. There were in fact two forms of difference in treatment: one between different categories of employees in the public sphere, and the other between persons employed in the private and public spheres. As regards the former, the Court could see no justification from the perspective of reducing public expenditure for the difference in treatment between different categories of employees in the public sector and accepted that the exempted State employees were in a situation analogous to that of the applicant. As to the difference in treatment between the public and private spheres, while it was true that only public employees received two sets of income from public sources, the Government's core argument – that no State pension should be paid to those who did not need a substitute for salary as they were already employed – applied equally to retired persons employed in the private sphere because, from that perspective, pensions paid to them could also be regarded as redundant public expenditure. These two groups were thus also in an analogous situation.

The Government's arguments to justify the difference in treatment between publicly and privately employed retirees on the one hand, and between various categories of civil servants on the other, were unpersuasive and thus not based on any "objective and reasonable justification".

Conclusion: violation (unanimously).

Article 41: EUR 15,000 in respect of pecuniary and non-pecuniary damage.

(See also *Gaygusuz v. Austria*, 17371/90, 16 September 1996; and *Carson and Others v. the United Kingdom* [GC], 42184/05, 16 March 2010, Information Note 128)

ARTICLE 34

Victim/Victime

User of mobile phone complaining of system of secret surveillance without effective domestic remedies: *victim status upheld*

Utilisateur de téléphone mobile se plaignant d'un système de surveillance secret sans recours effectif : *qualité de victime reconnue*

Roman Zakharov – Russia/Russie - 47143/06
Judgment/Arrêt 4.12.2015 [GC]

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

Wholesale blocking of access to YouTube of which applicants were active users: *victim status upheld*

Blocage de l'accès à l'intégralité de YouTube dont les requérants sont des usagers actifs : *qualité de victime reconnue*

Cengiz and Others/et autres – Turkey/Turquie - 48226/10 and/et 14027/11
Judgment/Arrêt 1.12.2015 [Section II]

(See Article 10 above/Voir l'article 10 ci-dessus, page 27)

Detainees awarded insufficient sums by domestic courts in respect of inadequate conditions of detention: *victim status upheld*

Personnes ayant reçu un dédommagement insuffisant au niveau interne par rapport à leurs conditions de détention : *qualité de victime reconnue*

Mironovas and Others/et autres – Lithuania/Lituanie - 40828/12 et al.
Judgment/Arrêt 8.12.05 [Section IV]

Facts – The applicants, who were serving their sentences at correctional homes, complained about the conditions of their detention before the domestic courts, which found in all seven cases that

domestic norms had been violated. The domestic courts awarded five of the applicants sums between the equivalent of EUR 60 and EUR 2,300 in compensation and made no award to the other two, considering that pecuniary compensation was not indispensable in order to protect their rights.

In the Convention proceedings, all seven applicants complained that the conditions of their detention in the various correctional facilities in which they had been held had fallen short of standards compatible with Article 3 of the Convention. The Government argued that they could no longer be considered victims of the alleged violations as their cases had been reviewed by the domestic courts and decisions in the applicants' favour had been adopted.

Law – Article 34

(a) *Acknowledgement of a violation* – In all seven cases the domestic courts had admitted a violation of the domestic legal norms setting out specific aspects pertinent to the conditions of detention. In most of the cases they had taken into account the principles laid down in the Court's case-law under Article 3.

Nonetheless, their decisions raised problems concerning the manner in which claims about conditions of detention were being dealt with. Thus in at least one case, the administrative court had ignored the essence of the applicant's complaint by splitting his claims into the particular aspects of detention affecting him, instead of adopting a cumulative approach. Considering each element of the conditions of detention as a separate issue could easily lead to the conclusion that none of the complaints was, in itself, serious enough to call for compensation, even in cases where the general impact on the particular prisoner had reached the threshold of Article 3. Furthermore, in two of the cases the domestic courts had considered that a person's suffering decreased with time. The Court was neither convinced by this line of argument, nor shared the view that the lack of intent to debase a prisoner alleviated the State's responsibility for improper conditions of detention.

In the light of these considerations, in spite of certain limited shortcomings, under the domestic law as interpreted and applied by the domestic courts, a claim for damages could in principle have secured a remedy in respect of the plaintiff's allegations of poor conditions of past detention, in that it offered a reasonable prospect of success.

(b) *Compensation awards* – In the case of one of the applicants, the domestic court had awarded EUR 2,300 for improper conditions of detention. While still lower than the amount the Court had awarded in similar cases the administrative court had analysed the applicant's complaints constructively in accordance with the standards flowing from the Court's case-law under Article 3. The award had thus been sufficient. Moreover, the applicant's complaints to both the domestic courts and the Court were confined to the conditions of an earlier period of detention and did not concern conditions at the correctional home. Thus the applicant could no longer be considered to be a victim of a violation of Article 3.

In the case of two of the applicants, the domestic courts had made no award and had not allowed them to recover damages on proof of their allegations of inhuman or degrading conditions of detention for non-pecuniary damage. In the case of the other four applicants the sums awarded by the domestic courts were incommensurably small and not even approaching the awards usually made by the Court in comparable circumstances.

In sum, the compensatory remedy for the conditions in which the six applicants concerned had been held was plainly insufficient. They therefore retained their victim status under Article 34.

(c) *Preventive remedies* – As regards to the Government's argument that the applicants' removal from inadequate prison conditions could be considered an effective remedy, the prison authorities' decisions on the transfer of inmates between prisons had been to a great extent discretionary, based either on the inmate's state of health, or on other "exceptional circumstances". It was unlikely that either of those criteria had been triggered by issues such as cramped or insalubrious prison conditions. Furthermore inmates did not have a right to be transferred if they so requested.

Given the financial difficulties of the prison administration, any attempt to seek an improvement of the conditions of detention from within the penal system would not have sufficient prospects of success. Even in the event of a judicial or administrative decision requiring the prison authorities to redress a violation of the applicants' right to adequate living space and sanitary conditions, their personal situation in an already overcrowded facility could have been improved only at the expense and to the detriment of other detainees. Moreover, the prison authorities would not have been in a position to grant a large number of simultaneous requests, given the structural nature of the prison overcrowding problem and the absence of reforms to tackle it.

Moreover, the new legislative measures in force since 1 July 2012 could not have benefited the applicants, as their complaints to the Court about the conditions of their detention mostly precede the date of the new legislation.

As to the Parliamentary Ombudsman, his powers were restricted solely to making proposals and recommendations, without the possibility of issuing binding orders to the prison authorities to improve a prisoner's situation. Furthermore, it had not been shown that the Ombudsman's recommendations and proposals are capable of providing relief within reasonably short time-limits, which was another condition for a preventive remedy to be effective. Thus a complaint to the Parliamentary Ombudsman fell short of the requirements of an effective remedy because its capacity to have a preventive effect in practice had not been convincingly demonstrated.

Thus the six applicants' complaints about their conditions of detention were not manifestly ill-founded and were not inadmissible on any grounds.

Conclusion: preliminary objection dismissed in respect of six applicants (unanimously).

As regards the applications which were declared admissible the Court went on to find violations of Article 3 of the Convention in respect of four applicants and no violation of that provision in respect of the remaining two.

Article 41: awards ranging from EUR 6,500 to EUR 10,000 in respect of non-pecuniary damage.

(See also *Scordino v. Italy (no. 1)* [GC], 36813/97, 29 March 2006, Information Note 85)

Partner of deceased detainee who had allegedly been denied adequate medical care: *victim status upheld*

Conjointe d'un détenu décédé à qui on n'aurait pas fourni de soins médicaux adéquats : *qualité de victime reconnue*

Ivko – Russia/Russie - 30575/08
Judgment/Arrêt 15.12.2015 [Section III]

(See Article 3 above/Voir l'article 3 ci-dessus, page 10)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/Épuisement des voies de recours internes
Effective domestic remedy/Recours interne effectif – Turkey/Turquie

Domestic remedies made accessible only as a result of unforeseeable change in the case-law after the application was lodged: *preliminary objection dismissed*

Recours internes devenus accessibles à la suite de revirements de jurisprudence imprévisibles au moment du dépôt de la requête ou postérieur à celui-ci : *exception préliminaire rejetée*

Yavuz Selim Güler – Turkey/Turquie - 76476/12
Judgment/Arrêt 15.12.2015 [Section II]

En fait – En 2011, le requérant, sous-officier, fut frappé d'une sanction disciplinaire privative de liberté de deux jours prise par son supérieur hiérarchique militaire. Devant la Cour européenne, il se plaint de ce que sa privation de liberté n'avait pas été prononcée par un tribunal indépendant et impartial.

Postérieurement à ces faits, la Haute Cour administrative militaire se prononça, pour la première fois, sur de telles privations de liberté dans le cadre de recours en annulation (le 24 mai 2012) et en indemnisation (le 22 février 2013). Elle considéra que, bien que conformes au droit interne, ces sanctions étaient contraires à l'article 5 § 1 de la Convention européenne. Le requérant n'a pas fait usage de ces voies de recours.

En droit – Article 35 § 1 : S'agissant d'abord d'un possible recours en annulation, le requérant ne pouvait pas raisonnablement prévoir que cette voie de recours était disponible et adéquate. À l'époque des faits, le droit en vigueur interdisait expressément l'exercice de tout contrôle juridictionnel sur les sanctions disciplinaires infligées par les supérieurs hiérarchiques pour infraction à la discipline militaire. À cet égard, selon la jurisprudence bien établie en la matière de la Haute Cour administrative militaire, de telles actions étaient systématiquement rejetées. L'arrêt du 24 mai 2012 de la Haute Cour administrative militaire constituait donc un revirement jurisprudentiel. Or ce revirement n'était pas juridiquement prévisible pour le requérant. En

effet, il faut normalement un délai de six mois pour qu'un développement jurisprudentiel puisse acquérir une publicité et un degré suffisant de certitude juridique au niveau interne. C'est donc à partir du 24 novembre 2012 qu'il doit être exigé des requérants qu'ils fassent usage de ce recours aux fins de l'article 35 § 1 de la Convention. La présente requête a été introduite le 22 octobre 2012. Par conséquent, le requérant n'avait pas à faire usage d'une voie de recours qui était théoriquement inaccessible.

En ce qui concerne ensuite le recours en indemnisation, il convient de noter que la détention du requérant était parfaitement légale au regard du droit interne, mais qu'elle était cependant contraire à l'article 5 § 1 a) de la Convention. Il ressort de l'arrêt de la Haute Cour administrative militaire que l'interprétation qu'elle y fait (relative à la hiérarchie des normes et à la primauté de la Convention sur la loi) ouvre le droit à une réparation pécuniaire aux militaires privés de liberté à la suite d'une sanction d'arrêt de rigueur prise par leur supérieur hiérarchique. Cette situation correspond précisément à celle du requérant. Le recours en indemnisation est donc adéquat en ce qu'il permet de faire reconnaître une atteinte au droit à la liberté et à la sûreté et d'obtenir une indemnité. Toutefois, ce recours n'a été que récemment admis. En effet, l'arrêt pertinent de la haute juridiction date du 22 février 2013 et est donc postérieur à l'introduction de la présente requête. À l'époque des faits, ni la lettre de la loi ni l'interprétation qui en était faite par la Haute Cour administrative militaire ne permettaient aux militaires qui avaient été frappés d'une sanction disciplinaire par leur supérieur hiérarchique d'obtenir réparation au motif que cette sanction était contraire aux prescriptions de l'article 5 de la Convention. Si le recours fondé sur la disposition en question est devenu effectif, rien ne permet d'affirmer qu'il l'était lors de l'introduction de la requête. On ne peut par conséquent reprocher au requérant de ne pas l'avoir préalablement exercé.

Conclusion : exception préliminaire rejetée (unanimité).

La Cour conclut en outre, à l'unanimité, à la violation de l'article 5 § 1 de la Convention.

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

Possessions/Biens

Applications against Ukraine concerning non-enforcement of domestic decisions:
relinquishment in favour of the Grand Chamber

Requêtes contre l'Ukraine concernant la non-exécution de décisions internes :
dessaisissement au profit de la Grande Chambre

Burmych and Others/et autres – Ukraine - 46852/13 et al.
[Section V]

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

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

Article 30

Burmych and Others/et autres – Ukraine - 46852/13 et al.
[Section V]

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

Khamtokhu and/et Aksenchik – Russia/Russie - 60367/08 and/et 961/11
[Section I]

(See Article 14 above/Voir l'article 14 ci-dessus, page 30)

REFERRAL TO THE GRAND CHAMBER / RENVOI DEVANT LA GRANDE CHAMBRE

Article 43 § 2

V.M. and Others/et autres – Belgium/Belgique - 60125/11
Judgment/Arrêt 7.7.2015 [Section II]

(See Article 3 above/Voir l'article 3 ci-dessus, page 12)

Satakunnan Markkinapörssi Oy and/et Satamedia Oy – Finland/Finlande - 931/13
Judgment/Arrêt 21.7.2015 [Section IV]

(See Article 10 above/Voir l'article 10 ci-dessus, page 26)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS / DÉCISIONS RENDUES PAR D'AUTRES JURIDICTIONS INTERNATIONALES

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

Obligations of the States Parties to the American Convention in the context of extradition proceedings

Obligations pesant sur les États parties à la Convention américaine dans le cadre des procédures d'extradition

Case of Wong Ho Wing v. Peru - Series C No. 297 / *Affaire Wong Ho Wing c. Pérou* – Série C n° 297
Judgment/Arrêt 30.6.2015[1]

Facts – The applicant was a national of the People's Republic of China who was wanted by the authorities of Hong Kong (China) for smuggling ordinary merchandise, money-laundering and bribery. On 27 October 2008 the Peruvian authorities arrested him at Lima airport in compliance with an Interpol Red Notice. He was held on "provisional or pre-extradition arrest" before being put on house arrest on 10 March 2014.

On 14 November 2008 Peru received an extradition request from China. On 10 December 2008 a public hearing was held during which the applicant and his representative mentioned that the smuggling offence was punishable by the death penalty. On 20 January 2009 the Second Transitory Chamber of the Peruvian Supreme Court of Justice issued the first advisory decision in the extradition proceedings, declaring the extradition request admissible for the offences of evasion of customs duty or smuggling and bribery. Following that decision, on 26 January 2009, the applicant's brother filed an application for habeas corpus. On 24 April 2009 the 56th Criminal Court of Lima considered well-founded the application for habeas corpus and declared invalid the advisory decision of 20 January 2009, because it was insufficiently substantiated.

On 11 December 2009 China informed Peru that its Supreme Court had decided not to impose the death penalty if the applicant was extradited and convicted. On 27 January 2010 the Peruvian Supreme Court issued another advisory decision in which it ruled in favour of extradition in view of the Chinese Supreme Court's decision. Following that decision, on 9 February 2010 the applicant´s representative filed an application for habeas corpus which was declared inadmissible. The representative filed an appeal based on constitutional injury.

On 1 May 2011 the Eighth Amendment to the Chinese Criminal Code entered into force annulling the death penalty for the smuggling offence in respect of the applicant's extradition had been requested. On 24 May 2011 the Peruvian Constitutional Court decided the constitutional appeal and ordered the Executive Branch to refrain from extraditing the applicant considering that the diplomatic assurances offered by China were insufficient to ensure that the death penalty would not be imposed. On 9 June 2011 it issued a further decision clarifying that the diplomatic assurances offered by China were not included in the case file. The Executive Branch has since filed various judicial remedies to clarify the way in which the decision should be executed, all of which have been unsuccessful. A final decision by the Executive Branch regarding the extradition request was still pending at the date of the Inter-American Court's judgment.

Law

(a) *Preliminary objection* – The State raised the objection of non-exhaustion of domestic remedies, on the grounds that: (i) when the initial petition was lodged, domestic remedies had not been exhausted, and (ii) when adopting its decision on admissibility, the Commission did not take into account that other applications for habeas corpus were pending.

The Inter-American Court rejected the first point, considering that according to Article 46 of the American Convention on Human Rights (ACHR) exhaustion of remedies is required when deciding on the admissibility of the petition and not when

1. This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. A more detailed, official abstract (in Spanish only) is available on that Court's Internet site (<www.corteidh.or.cr>).

it is lodged. On the second point, the Court noted that the application for habeas corpus was not part of the regular extradition proceedings in Peru, and thus need not be exhausted.

(b) *Article 4(1) (right to life) in relation to Article 1(1) (obligation to respect and ensure rights) of the ACHR and Article 14(4) of the Inter-American Convention to Prevent and Punish Torture (ICPPT) (Non-refoulement)* – The Court established that States have the obligation not to expel, by extradition, any individual under their jurisdiction when there are substantial grounds for believing that he will face a real, foreseeable and personal risk of suffering treatment contrary to his right to life and the prohibition of torture or cruel, inhuman or degrading treatment. Consequently, when an individual alleges before a State a risk in the event of a return, the competent authorities of that State must, at least, interview him and make a preliminary assessment in order to determine whether or not that risk exists in the event of his being expelled. This implies that certain basic judicial guarantees should be respected as part of the opportunity afforded to the individual to explain the reasons why he should not be expelled and, if the risk is verified, the individual should not be returned to the country where the risk exists.

The Court acknowledged that the death penalty had been abolished for one of the crimes for which the applicant was being requested. Thus, there was no real risk for his right to life.

It established that to determine whether there is a risk of torture or other forms of cruel, inhuman or degrading treatment, the following must be examined: (i) the alleged situation of risk in the requesting State, including the relevant conditions in the requesting State as well as the specific circumstances of the applicant, and (ii) any diplomatic assurances provided. Following the case-law of the European Court of Human Rights, the Court considered that the quality and reliability of diplomatic assurances should be assessed. The Court determined that the information on which both the Commission and the representative relied in the instant case referred to the general situation of human rights in China. This was deemed to be insufficient by the Court in order to conclude that the applicant's extradition would expose him to a real, foreseeable and personal risk of being subject to treatment contrary to the prohibition of torture or other cruel, inhuman or degrading treatment.

Conclusion: extradition would not constitute a violation of Peru's obligation to ensure his rights to life and to personal integrity (Articles 4 and 5, in relation to Article 1(1) of the ACHR), or the obligation of non-refoulement (Article 13(4) of the ICPPT) (five votes to one).

(c) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial guarantees and judicial protection) in relation to Article 1(1) of the ACHR* – In relation to the alleged failure to comply with the Constitutional Court's decision, the Inter-American Court considered that Peru had to decide how to proceed with the request to extradite the applicant, bearing in mind that, for the time being, there would be no risk to his rights to life and personal integrity if he was extradited, but that there was a Constitutional Court decision that prima facie could not be amended and was, in principle, binding on the Executive Branch. In addition, the Court took into account the fact that the Executive Branch's discretionary acts may be subject to subsequent constitutional control.

Regarding the duration of the extradition proceedings, the Court analysed four elements to determine whether the duration had been reasonable: (i) the complexity of the matter; (ii) the procedural activity of the interested party; (iii) the conduct of the judicial authorities, and (iv) the effects on the legal situation of the person involved in the proceedings. It concluded that the State authorities had not acted with due diligence and in respect of the obligation of promptness required by the applicant's detention. Thus, the extradition proceedings had exceeded a reasonable time. Concerning the other guarantees of due process, the Court considered that insofar as the applicant had taken part in the judicial stage of the proceedings and retained the possibility of obtaining judicial control of the final decision on extradition, the State had not failed to comply with its obligation to guarantee the applicant's right to be heard.

Conclusion: violation of the guarantee of a reasonable time (Article 8(1) in relation to Article 1(1) of the ACHR – three votes in favour, three against, with deciding vote of the President); no violation of the right to be heard and of the right of defence (Article 8(1) in relation to Article 1(1) – five votes to one); not necessary to issue a ruling on the alleged failure to comply with the right to judicial protection recognised in Article 25 (five votes to one).

(d) *Articles 5 (right to personal integrity) and 7 (right to personal liberty), in relation to Article 1(1) of the ACHR* – In this case, the holder of the rights whose situation was examined was an alien detained owing to the existence of an international warrant for his arrest and a subsequent extradition request.

However, regardless of the reason for his detention, insofar as it relates to a deprivation of liberty executed by a State Party to the Convention, it must be strictly in keeping with the relevant provisions of the ACHR and domestic law.

With regard to the right to personal liberty, the Court concluded that: (i) the applicant had been subjected to an arbitrary deprivation of liberty, which had extended excessively; (ii) certain habeas corpus remedies were not effective; and (iii) the State had failed to decide those remedies within a reasonable time.

Finally, in relation to the alleged violation of the applicant's right to personal integrity as a consequence of his deprivation of liberty, the Court concluded that the arguments referred to a "collateral effect of the detention".

Conclusion: violation of Articles 7(1), 7(3), 7(5) and 7(6) in relation to Article 1(1) of the ACHR (five votes to one); no violation of Article 7(2), in relation to Article 1(1) of the ACHR (four votes to two); no violation of Article 7(2) in relation to Article 1(1) of the ACHR (four votes to two); and no violation of Article 5, in relation to Article 1(1) of the ACHR (five votes to one).

(e) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State to: (i) adopt as soon as possible the final decision in the extradition proceedings concerning the applicant; (ii) immediately review the applicant's deprivation of liberty; (iii) publish the judgment and its official summary; and (iv) pay the amount stipulated in the judgment as compensation for pecuniary and non-pecuniary damage and the reimbursement of costs and expenses.

RECENT PUBLICATIONS / PUBLICATIONS RÉCENTES

Translation of the Case-Law Information Note into Turkish / Traduction de la Note d'information en turc

The first three issues for 2015 of the Court's Case-Law Information Note have just been translated into Turkish, thanks to the Turkish Ministry of Justice. Further issues will be added progressively. The Notes in Turkish can be downloaded from the Court's Internet site (<www.echr.coe.int> – Publications).

-ooOoo-

Les trois premiers numéros de l'année 2015 de la Note d'information sur la jurisprudence de la Cour viennent d'être traduits en turc, grâce à l'initiative du ministère turc de la Justice. Les prochains numéros seront ajoutés au fur et à mesure. Les Notes d'information en turc peuvent être téléchargées à partir du site internet de la Cour (<www.echr.coe.int> – Publications).

Factsheets / Fiches thématiques

The Court has launched five new factsheets on its case-law concerning the following themes: derogation in time of emergency, life imprisonment, extradition and life imprisonment, protection of reputation, and sport.

All factsheets can be downloaded from the Court's Internet site (<www.echr.coe.int>– Press).

-ooOoo-

La Cour a lancé cinq nouvelles fiches thématiques sur sa jurisprudence, portant sur les thèmes suivants : les dérogations en cas d'état d'urgence, la détention à perpétuité, l'extradition et la détention à perpétuité, la protection de la réputation, et le sport.

Toutes les fiches thématiques sont disponibles sur le site internet de la Cour (<www.echr.coe.int> – Presse).

Case-Law Overview: translation into Russian / Aperçu de la jurisprudence: traduction en russe

The Court's case-law overview for the first six months (January-June) of 2015 has just been translated into Russian, thanks to the Ukrainian Helsinki Human Rights Union.

It can be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Обзор прецедентного права Суда (январь-июнь 2015 года) (rus)

L'aperçu de la jurisprudence de la Cour pour le premier semestre 2015 (janvier-juin) vient d'être traduit en russe, grâce à l'initiative de l'Ukrainian Helsinki Human Rights Union. Il peut être téléchargé à partir du site internet de la Cour (<www.echr.coe.int> – Jurisprudence).