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COUR EUROPÉENNE DES DROITS DE L'HOMME

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European Court of Human Rights
(Council of Europe)
67075 Strasbourg Cedex
France
Tel: +33 (0)3 88 41 20 18
Fax: +33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int

Cour européenne des droits de l'homme
(Conseil de l'Europe)
67075 Strasbourg Cedex
France
Tél. : +33 (0)3 88 41 20 18
Fax : +33 (0)3 88 41 27 30
publishing@echr.coe.int
www.echr.coe.int

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ARTICLE 1

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Juridiction de la Suède concernant une procédure en diffamation suivant la diffusion d'un programme télévisé depuis l'étranger

Arlewin – Sweden/Suède - 22302/10
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(See Article 6 § 1 (criminal) below/Voir l'article 6 § 1 (pénal) ci-dessous, page 23)

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Nagmetov – Russia/Russie - 35589/08
Judgment/Arrêt 5.11.2015 [Section I]

In 2006 the applicant's son participated in a public gathering alleging corruption by local public officials. The gathering was dispersed by the authorities with the use of firearms and he died of injuries sustained by a tear gas grenade. On the same day a criminal investigation was opened. The investigation was then suspended and reopened several times, until it was ultimately abandoned in 2011.

In the Convention proceedings the applicant complained under Article 2 of the Convention that his son had died as a result of excessive use of force by the state and that the investigation into his son's death was ineffective.

In a judgment of 5 November 2015 a Chamber of the Court held, unanimously, that there had been a violation of Article 2 both in its substantive and in its procedural aspects. The Chamber noted that the Russian Government had acknowledged that the applicant's son had been unlawfully deprived of his life, as it was against Russian law to fire the tear gas grenade directly at a person. The Chamber of the Court found no reasons to disagree with that submission. Furthermore, the Chamber concluded that the authorities had not exhausted all reasonable and practicable measures which could have helped in identifying the shooter and in establishing the other relevant circumstances of the case.

On 14 March 2016 the case was referred to the Grand Chamber at the Government's request.

Effective investigation/Enquête effective

Alleged failure to conduct effective investigation into fatal shooting of person mistakenly identified as suspected terrorist: *no violation*

Absence alléguée d'enquête effective sur la mort par balle d'une personne prise à tort pour un terroriste présumé : *non-violation*

Armani Da Silva – United Kingdom/Royaume-Uni - 5878/08
Judgment/Arrêt 30.3.2016 [GC]

Facts – The applicant was a relative of Mr Jean Charles de Menezes, who was mistakenly identified as a terrorist suspect and shot dead on 22 July 2005 by two special firearms officers in London. The shooting occurred the day after a police manhunt was launched to find those responsible for four unexploded bombs that had been found on three underground trains and a bus in London. It was feared that a further bomb attack was imminent. Two weeks earlier, the security forces had been put on maximum alert after more than 50 people had died when suicide bombers detonated explosions on the London transport network. Mr de Menezes lived in a block of flats that shared a communal entrance with another block where two men suspected of involvement in the failed bombings lived. As he left for work on the morning of 22 July, he was followed by surveillance officers, who thought he might be one of the suspects. Special firearms officers were dispatched to the scene with orders to stop him boarding any underground trains. However, by the time they arrived, he had already entered Stockwell tube station. There he was followed onto a train, pinned down and shot several times in the head.

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

In her application to the European Court, the applicant complained about the decision not to prosecute any individuals in relation to Mr de Menezes' death.

On 9 December 2014 a Chamber of the Court decided to relinquish jurisdiction in the case in favour of the Grand Chamber.

Law – Article 2 (*procedural aspect*): The Court's case-law had established a number of requirements for an investigation into the use of lethal force by State agents to be "effective": those responsible for carrying out the investigation had to be independent from those implicated in the events; the investigation had to be "adequate"; its conclusions had to be based on thorough, objective and impartial analysis of all relevant elements; it had to be sufficiently accessible to the victim's family and open to public scrutiny; and it had to be carried out promptly and with reasonable expedition.

The investigation in the instant case was conducted by an independent body (the IPCC) which had secured the relevant physical and forensic evidence (more than 800 exhibits were retained), sought out the relevant witnesses (nearly 890 witness statements were taken), followed all obvious lines of enquiry and objectively analysed all the relevant evidence. The deceased's family had been given regular detailed briefings on the progress and conclusions of the investigation, had been able to judicially review the decision not to prosecute, and were represented at the inquest at the State's expense, where they had been able to cross-examine the witnesses and make representations. There was nothing to suggest that a delay that had occurred in handing the scene of the incident to the IPCC had compromised the integrity of the investigation in any way.

Although the applicant had not complained generally about the investigation, these considerations were important to bear in mind when considering the proceedings as a whole, in view of the applicant's specific complaints which solely concerned two aspects of the adequacy of the investigation: (a) whether the investigating authorities were able properly to assess whether the use of force was justified and (b) whether the investigation was capable of identifying and – if appropriate – punishing those responsible.

(a) *Whether the investigating authorities were able properly to assess whether the use of force was justified* – The applicant had argued that the investigation had fallen short of the standard required by Article 2 because the authorities were precluded by domestic law from considering the objective reasonableness of the special firearms officers' belief that the use of force was necessary.

The Court observed that the principal question to be addressed in determining whether the use of lethal force was justified under the Convention was whether the person purporting to act in self-defence had an honest and genuine belief that the use of force was necessary. In addressing that question, the Court would have to consider whether the belief was subjectively (as opposed to objectively) reasonable, having full regard to the circumstances that pertained at the relevant time. If the belief was not subjectively reasonable (that is, was not based on subjective good reasons), it was likely that the Court would have difficulty accepting that it was honestly and genuinely held.

The test for self-defence in England and Wales was not significantly different and did not fall short of that standard. In any event, all the independent authorities who had considered the actions of the two officers responsible for the shooting had carefully examined the reasonableness of their belief that Mr de Menezes was a suicide bomber who could detonate a bomb at any second. Consequently, it could not be said that the domestic authorities had failed to consider, in a manner compatible with the requirements of Article 2, whether the use of force had been justified in the circumstances.

(b) *Whether the investigation was capable of identifying and – if appropriate – punishing those responsible* – The Court would normally be reluctant to interfere with a prosecutorial decision taken in good faith following an otherwise effective investigation. It had, however, on occasion, accepted that "institutional deficiencies" in a criminal justice or prosecutorial system could breach Article 2.

In the instant case, the Court found, having regard to the criminal proceedings as a whole, that the applicant had not demonstrated the existence of any "institutional deficiencies" in the criminal justice or prosecutorial system giving or capable of giving rise to a procedural breach of Article 2 on the facts. In particular:

– The Court had never stated that the prosecutorial decision must be taken by a court and the fact that the decision not to prosecute was taken by a public official (the Crown Prosecution Service – CPS) was not problematic in and of itself, provided there were sufficient guarantees of independence and objectivity. Nor was there anything in the Court's case-law to suggest that an independent prosecutor had to hear oral testimony before deciding whether or not to prosecute.

– The threshold evidential test[1] applied by the CPS in deciding whether to prosecute had been within the State's margin of appreciation. In setting the threshold evidential test the domestic authorities were required to balance a number of competing interests, including those of the victims, the potential defendants and the public at large and those authorities were evidently better placed than the Court to make such an assessment. The threshold applied in England and Wales was not arbitrary, having been the subject of frequent reviews, public consultations and political scrutiny. There was no uniform approach among Contracting States and while the threshold adopted in England and Wales might be higher than that in certain other countries, this simply reflected the jury system that operated there. Nor did Article 2 require the evidential test to be lowered in cases where deaths had occurred at the hands of State agents. The authorities of the respondent State had been entitled to take the view that public confidence in the prosecutorial system was best maintained by prosecuting where the evidence justified it and not prosecuting where it did not. In any event, a number of safeguards had been built into the system in cases of police shootings and deaths in custody.

– The Court was not persuaded that the scope of judicial review of decisions not to prosecute (the domestic courts could only interfere with a prosecutorial decision if it was wrong in law) was too narrow. There was no uniform approach among member States with regard either to the availability of review or, if available, the scope of that review.

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In conclusion, while the facts of the case were undoubtedly tragic and the frustration of the family at the absence of any individual prosecutions was understandable, it could not be said that "any question of the authorities' responsibility for the death ... was left in abeyance".

As soon as it was confirmed that Mr de Menezes had not been involved in the attempted attack on 21 July 2005, the Metropolitan Police Service (MPS) had publicly accepted that he had been killed in error by special firearms officers. A representative of the MPS had flown to Brazil to apologise to his family face to face and to make an *ex gratia* payment to cover their financial needs. They were further advised to seek independent legal advice and assured that any legal costs would be met by the MPS. The individual responsibility of the police officers involved and the institutional responsibility of the police authority were considered in depth by the IPCC, the CPS, the criminal court, and the coroner and jury during the Inquest. Later, when the family brought a civil claim for damages, the MPS agreed to a settlement with an undisclosed sum being paid in compensation.

The decision to prosecute the police authority did not have the consequence, either in law or in practice, of excluding the prosecution of individual police officers as well. Neither was the decision not to prosecute any individual officer due to any failings in the investigation or the State's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor had considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to meet the threshold evidential test.

The institutional and operational failings identified had resulted in the conviction of the police authority for offences under the Health and Safety at Work Act 1974. There was no evidence to indicate that the "punishment" (a fine of GBP 175,000 and costs of GBP 385,000) was excessively light for offences of that nature. This was not a case of "manifest disproportion" between the offence committed and the sanction imposed.

Accordingly, having regard to the proceedings as a whole, it could not be said that the domestic authorities had failed to discharge the procedural obligations under Article 2 to conduct an effective investigation into the shooting of Mr de Menezes which was capable of leading to the establishment of the facts, a determination of whether the force used was or was not justified in the circumstances

1. Under sections 5.2 and 5.3 of the Crown Prosecutors' Code, Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction", in other words, that a properly directed jury is more likely than not to convict the defendant of the charge alleged.

and of identifying and – if appropriate – punishing those responsible.

Conclusion: no violation (thirteen votes to four).

(See also *McCann and Others v. the United Kingdom*, 18984/91, 27 September 1995; Öneryıldız *v. Turkey* [GC], 48939/99, 30 November 2004, Information Note 69; and *Giuliani and Gaggio v. Italy* [GC], 23458/02, 24 March 2011, Information Note 139)

Expulsion

Proposed expulsion to Iran of low-profile political activist: *deportation would not constitute a violation*

Projet d'expulsion vers l'Iran d'un militant politique discret : *l'expulsion n'emporterait pas violation*

Proposed expulsion to Iran without adequate investigation of reality and implications of conversion to Christianity after arrival in Europe: *deportation would constitute a violation*

Projet d'expulsion vers l'Iran, sans examen adéquat de la réalité et des implications d'une conversion au christianisme postérieure à l'arrivée en Europe : *l'expulsion emporterait violation*

F.G. – Sweden/Suède - 43611/11
Judgment/Arrêt 23.3.2016 [GC]

(See Article 3 below/Voir l'article 3 ci-dessous, page 16)

ARTICLE 3

Inhuman or degrading treatment/Traitement inhumain ou dégradant

Failure to provide adequate medical care for minor during detention to "correct his behaviour": *violation*

Absence de suivi médical adéquat d'un enfant détenu en vue d'une « rééducation comportementale » : *violation*

Blokhin – Russia/Russie - 47152/06
Judgment/Arrêt 23.3.2016 [GC]

(See Article 5 § 1 (d) below/Voir l'article 5 § 1 d) ci-dessous, page 19)

Failure to perform *Helicobacter pylori* test and other shortcomings in treatment of detainee's ulcer: *violation*

Absence de test de dépistage d'*Helicobacter pylori* et autres carences dans le traitement d'un détenu souffrant d'un ulcère : *violation*

Kolesnikovich – Russia/Russie - 44694/13
Judgment/Arrêt 22.3.2016 [Section III]

Facts – During his pre-trial detention and while serving a prison sentence, the applicant suffered from frequent ulcer recurrence and other serious health conditions. He unsuccessfully sued the prison administration for inadequate medical treatment.

Law – Article 3: Even though the authorities had become promptly aware of the applicant's health problems, he had been left without any medical supervision during the first two years of his detention, until his health had worsened to the extent that he could no longer take part in court hearings. His delayed admission to the prison hospital, combined with the failure to provide him with some of the required medication in order to, at least, relieve his severe stomach pain, was a serious shortcoming. The Court was not convinced that the authorities had properly assessed the complications of the applicant's condition. His treatment had lacked a strategy aimed at reducing the frequency of ulcer recurrence and was therefore patently ineffective. A major flaw in that respect was the failure to perform the *Helicobacter pylori* test.[1] Moreover, the authorities did not seem to have assessed the compatibility of the applicant's treatment with nonsteroidal anti-inflammatory drugs for his spinal problems with his ulcer disease, even though such medication could induce gastrointestinal bleeding and deterioration of the patient's condition. All those shortcomings, taken cumulatively, amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

The Court also found unanimously a violation of Article 13 of the Convention.

Article 41: EUR 15,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

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1. The Court relied, *inter alia*, on the Maastricht IV/Florence Consensus report of 22 February 2012 on Management of *H.pylori* infection, according to which *H.pylori* was the key factor in peptic ulcer development and *H.pylori* eradication effectively achieved ulcer healing rates exceeding 90%.

Shackling of pregnant woman before and after delivery; poor conditions of detention of mother and newborn; insufficient medical care to newborn in detention facility; placement of pregnant woman in metal cage during court hearings: *violations*

Femme enceinte entravée avant et après son accouchement; mauvaises conditions de détention d'une mère et de son bébé; caractère inadéquat des soins médicaux dispensés à un bébé en prison; placement d'une femme enceinte dans une cage de métal pendant les audiences tenues lors de son procès: *violations*

Korneykova and/et Korneykov – Ukraine - 56660/12
Judgment/Arrêt 24.3.2016 [Section V]

Facts – In 2012 the first applicant, who was in her fifth month of pregnancy, was taken into police custody on suspicion of robbery and subsequently detained pending trial. She gave birth to her son, the second applicant, while in detention.

In her application to the European Court she complained under Article 3 of the Convention that she had been shackled to her bed during her stay in the maternity hospital and placed in a metal cage during court hearings before and after she gave birth, and that the material conditions of her and her child's detention and the medical care provided to the second applicant in pre-trial detention had been inadequate.

Law – Article 3

(a) *Alleged shackling in the maternity hospital* – The Court considered it sufficiently established that the first applicant had been subjected to continuous shackling in the maternity hospital. It recalled that the handcuffing or shackling of an ill or otherwise weak person was disproportionate to the requirements of security and implied an unjustifiable humiliation, whether or not intentional. In the present case, the first applicant had been shackled to a gynaecological examination chair in the hospital she had been taken to on the day she gave birth. Any risk of her behaving violently or attempting to escape would have been hardly imaginable given her condition. In fact, it was never alleged that she had behaved aggressively towards the hospital staff or the police, or that she had attempted to escape or posed a threat to her own safety. Moreover, her unjustified shackling had continued after the birth, when she was particularly sensitive. The Court also attached weight to the fact that she was guarded by three guards at all times, which was sufficient to respond to any potential risks. Accordingly, the impugned measure had amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

(b) *Physical conditions of the applicants' detention* – The cumulative effect of malnutrition of the first applicant, inadequate sanitary and hygiene arrangements for her and her newborn son, as well as insufficient outdoor walks, had amounted to inhuman and degrading treatment.

Conclusion: violation (unanimously).

(c) *Medical care provided to the second applicant in the detention facility* – The authorities were under an obligation to provide adequate medical supervision and care for the second applicant as a newborn staying with his mother in a detention facility. He was particularly vulnerable and required close medical monitoring by a specialist. The material in the case file provided a sufficient basis for the Court to establish that the second applicant had remained without any monitoring by a paediatrician for almost three months. Having particular regard to his young age, this circumstance alone was sufficient to conclude that adequate health-care standards had not been met in the present case.

Conclusion: violation (unanimously).

(d) *The first applicant's placement in a metal cage during court hearings* – According to the Court's case-law, holding a person in a metal cage during a trial constituted in itself an affront to human dignity in breach of Article 3 (*Svinarenko and Slyadnev v. Russia* [GC], 32541/08 and 43441/08, 17 July 2014, Information Note 176). In the present case, the first applicant had been held in a metal cage during all six hearings in her case. During the first two hearings she had been at a very advanced stage of pregnancy, whereas during the remaining four hearings she had been a nursing mother separated from her baby in the courtroom by metal bars. No justification for such a restraint measure was even considered given the domestic judge's position that the mere placement of the first applicant outside the cage would have been equal to her release, contrary to the custodial preventive measure applied.

Conclusion: violation (unanimously).

Article 41: EUR 12,000 to the first applicant and EUR 7,000 to the second applicant in respect of non-pecuniary damage.

(See the Factsheets on Detention conditions and treatment of prisoners, Protection of minors and Prisoners' health-related rights)

Positive obligations (substantive aspect)/ Obligations positives (volet matériel)

Lack of access to protection measures against domestic violence for divorced or unmarried women: *violation*

Inaccessibilité des mesures de protection contre la violence domestique aux femmes non mariées ou divorcées : *violation*

M.G. – Turkey/Turquie - 646/10
Judgment/Arrêt 22.3.2016 [Section II]

En fait – Victime de violences conjugales chroniques lui ayant causé des blessures multiples, la requérante déposa en 2006 une plainte pénale contre son mari, après avoir quitté le domicile conjugal pour un refuge associatif. Elle engagea une action en divorce. Son état physique et psychique ayant été rapidement constaté, elle demanda et obtint le bénéfice des mesures de protection offertes aux victimes de violence domestique par la loi, qui lui fut renouvelé à plusieurs reprises tant que le mariage ne fut pas dissous. Les injonctions adressées au mari comprenaient, par exemple, son éloignement du domicile commun, avec interdiction de s'en approcher ou de déranger la requérante ou ses enfants par le biais de communications, sous peine de sanctions privatives de liberté. En 2007, le divorce fut prononcé. Après l'entrée en vigueur, en 2012, d'une nouvelle loi mettant fin à toute distinction entre personnes mariées et non mariées à cet égard, des mesures de protection lui furent de nouveau accordées à sa demande. En 2012, le procureur ouvrit contre l'ex-mari de la requérante des poursuites pénales, qui demeurent pendantes.

En droit – Article 3 : Les allégations de la requérante étant crédibles et d'une gravité certaine, l'article 3 de la Convention est applicable. L'État se devait donc d'avoir mis en place un cadre législatif adéquat et de réagir promptement.

a) *Défaut de prompte réaction pénale* – Dans le traitement judiciaire du contentieux des violences contre les femmes, il incombe aux instances nationales de tenir compte de la situation de précarité et de vulnérabilité particulière, morale, physique et/ou matérielle de la victime, et d'apprécier la situation dans les plus brefs délais – exigences d'attention et de célérité expressément énoncées par ailleurs par la Convention d'Istanbul[1].

Si le code pénal ne contenait pas de dispositions spécifiques aux violences domestiques, une incrimination générale existait pour les atteintes à l'intégrité physique. Dès le lendemain du dépôt de sa plainte, des rapports médicaux avaient permis d'établir que la requérante présentait des blessures physiques ainsi qu'un trouble dépressif majeur et un stress post-traumatique chronique, liés aux violences subies. Malgré cela, le procureur de la République attendit cinq mois avant de délivrer un mandat d'amener aux fins d'auditionner l'ex-mari de la requérante. De même, dès 2007, lors du prononcé du divorce, au vu des preuves rassemblées, le tribunal de la famille avait estimé établies les violences dénoncées. Rien ne peut donc expliquer la passivité du procureur de la République pendant une période aussi longue – plus de cinq ans et six mois après la plainte – avant le déclenchement des poursuites pénales, lesquelles restent par ailleurs toujours pendantes.

Pour la Cour, la manière dont les autorités internes ont mené les poursuites pénales participe également de cette passivité judiciaire généralisée et discriminatoire déjà constatée dans les affaires contre la Turquie en matière de violence domestique et qui engendre un climat propice à ladite violence.

b) i*naccessibilité des mesures de protection contre la violence domestique après le divorce* – En l'espèce, il existait bien un dispositif civil prévoyant la possibilité de saisir le juge aux affaires familiales pour demander à bénéficier de mesures de protection, dont la requérante avait d'ailleurs bénéficié lorsqu'elle était mariée. Toutefois, entre la date de prononcé de son divorce et la date d'entrée en vigueur de la nouvelle loi, le cadre législatif en place ne garantissait pas à la requérante, divorcée, le bénéfice des mesures de protection en cause, dont l'application était laissée à l'interprétation et à la discrétion du juge aux affaires familiales saisi.

Certes, durant la période en cause, la requérante ne fut pas victime de nouvelles violences physiques de la part de son ex-mari. Cela étant, l'impact psychologique, aspect important de la violence domestique, doit être pris en compte. On ne saurait ignorer le sentiment de peur dans lequel la requérante a vécu – cachée dans un foyer pendant deux ans et demi – ni le retentissement sur sa vie personnelle, sociale et familiale des violences qu'elle a subies, qui perdure encore aujourd'hui. La circonstance que, depuis l'entrée en vigueur de la nouvelle loi, la requérante a bénéficié de mesures de protection contre son ex-mari, accrédite encore que son intégrité physique restait menacée, situation propre à lui inspirer des sentiments de peur, de vulnérabilité et d'insécurité.

1. Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, ratifiée par la Turquie en 2012 et entrée en vigueur en 2014.

c) *Conclusion* – Il convient d'avoir à l'esprit que la violence à l'égard des femmes est, comme l'énonce le Préambule de la Convention d'Istanbul, un des mécanismes sociaux cruciaux par lesquels celles-ci sont maintenues dans une position de subordination par rapport aux hommes. Il est inacceptable que la requérante ait dû, de nombreuses années après avoir saisi les instances nationales des violences dont elle fut victime, vivre dans la crainte des agissements de son ex-mari.

Au vu de tout ce qui précède, l'État a failli à ses obligations positives au regard de l'article 3.

Conclusion : violation (unanimité).

La Cour conclut également, à l'unanimité, à la violation de l'article 14 combiné avec l'article 3 de la Convention.

Article 41 : 19 500 EUR pour préjudice moral ; demande pour dommage matériel rejetée.

(Voir aussi *Opuz c. Turquie*, 33401/02, 9 juin 2009, Note d'information 120, et *Durmaz c. Turquie*, 3621/07, 13 novembre 2014, ainsi que la fiche thématique Violence domestique)

Effective investigation/Enquête effective

Authorities' failure to take into account local background of racist violence when investigating assault on migrant: *violation*

Défaut de prise en compte d'un contexte local de violences racistes dans l'enquête sur l'agression d'un migrant : *violation*

Sakir – Greece/Grèce - 48475/09
Judgment/Arrêt 24.3.2016 [Section I]

En fait – De nationalité afghane, le requérant fut hospitalisé en 2009 avec des blessures au thorax après avoir été agressé par un groupe d'individus armés, dans un quartier du centre d'Athènes connu pour être de manière répétitive le théâtre de violences xénophobes. À sa sortie de l'hôpital, n'ayant pas de titre de séjour, il fut détenu une dizaine de jours au commissariat de police en vue de son expulsion, avant d'être finalement remis en liberté avec l'ordre de quitter le territoire grec.

Un témoin mit en cause deux personnes nommément, avant de se rétracter ; poursuivi ensuite à cet égard pour fausse déclaration, il réaffirma alors la véracité de ses dires et fut finalement acquitté de cette accusation.

Après la clôture de l'enquête préliminaire par la police et l'envoi du dossier au procureur, celui-ci le mit en 2012 aux archives des infractions à auteurs non identifiés.

En droit – Article 3

a) *Volet matériel* – Le surpeuplement et les mauvaises conditions de détention régnant dans le commissariat en question, qui semblait servir de lieu de détention pour les immigrés clandestins pour des durées de plusieurs mois, ont été constatés aussi bien par le médiateur de la République, à l'époque où le requérant s'y trouvait, que par le Rapporteur spécial des Nations unies sur la torture[1].

En ce qui concerne spécifiquement le requérant, diverses carences peuvent être constatées quant à la prise suffisante en compte par les autorités policières de sa situation médicale et de son état de vulnérabilité pendant sa détention.

Premièrement, celui-ci a été directement mis en détention dans les locaux du commissariat dès sa sortie de l'hôpital, sans que les autorités policières n'aient au préalable cherché à savoir auprès des autorités dudit hôpital si son état de santé permettait sa mise en détention immédiate.

Deuxièmement, le requérant portait alors toujours les mêmes vêtements tachés de sang, et les autorités policières ne lui ont par la suite à aucun moment offert des habits propres, ni donné la possibilité de prendre une douche et de soigner ses blessures.

Troisièmement, les délais indiqués dans le certificat médical délivré par l'hôpital pour y ramener le requérant aux fins d'y subir de nouveaux examens ne furent pas respectés.

Au vu de ce qui précède, les autorités compétentes n'ont pas garanti au requérant des conditions de détention conformes à l'article 3 ni assuré sa santé et son bien-être de manière adéquate.

Conclusion : violation (unanimité).

b) *Volet procédural* – Les autorités compétentes n'ont pas enquêté sur l'agression du requérant avec le niveau de diligence et d'efficacité requis.

i. *La recherche des preuves*

– *Avec le requérant* – Aucune déposition n'a été recueillie du requérant lui-même, alors que les autorités compétentes disposaient de tout le temps nécessaire pour l'entendre puisqu'il est resté en détention au commissariat de police près de dix jours. Les autorités policières ne l'ont pas même invité à reconnaître les deux individus initialement dénoncés par le principal témoin comme faisant partie du groupe d'agresseurs. Aucune procédure d'identification d'autres personnes ayant un histo-

1. Voir *Ahmade c. Grèce*, 50520/09, 25 septembre 2012, où la Cour avait déjà conclu à la violation de l'article 3 de ce chef.

rique d'appartenance à des groupes d'extrémistes s'étant déjà livrés à des violences racistes au centre d'Athènes n'a non plus eu lieu.

– *Avec les médecins* – Ni les autorités policières ni le procureur n'ont cherché à établir en détail la nature et la cause des lésions infligées au requérant en commandant, par exemple, une expertise médico-légale dont les conclusions auraient pu élucider des aspects techniques de l'agression et contribuer à l'identification des auteurs.

– *Avec les témoins* – La police n'a entendu que deux témoins : un policier présent lors de incident en cause ; et un compatriote du requérant, qui avait averti la police de l'agression. Or, d'après le témoignage du premier, il y avait au moins un troisième témoin oculaire, qui n'a jamais été convoqué.

Quant au second témoin, étranger se trouvant aux mains de la police pour défaut de titre de séjour lorsqu'il a déposé en tant que témoin oculaire sur l'incident en cause, il était sans doute dans un état de vulnérabilité. La police devait donc lui réserver des conditions d'audition pouvant garantir la fiabilité et l'exactitude des informations fournies sur l'agression du requérant. Or celui-ci est revenu sur sa déposition initiale, qui désignait deux individus – connus – comme auteurs principaux de l'agression, sans qu'on l'interroge à aucun moment sur les raisons de cette volte-face à quelques heures d'intervalle. Au contraire, il fit l'objet de poursuites à ce titre. Bien que celles-ci se soient avérées infondées, aucune initiative – telle qu'une convocation des deux personnes désignées afin d'examiner à nouveau leur rôle dans l'incident litigieux, éventuellement en les confrontant avec le témoin – n'a été ensuite prise par les autorités judiciaires compétentes afin d'élucider la question de la véracité du témoignage initial.

ii. *L'absence de prise en compte du contexte général de violences racistes à Athènes* – Des rapports provenant de plusieurs instances nationales ou organisations non gouvernementales internationales soulignent de façon convergente la nette augmentation d'incidents violents à caractère raciste au centre d'Athènes depuis 2009, à savoir l'année durant laquelle les faits litigieux se sont produits.

Ils relèvent l'existence d'un schéma récurrent d'agressions contre des étrangers, perpétués par des groupes d'extrémistes, la plupart des incidents recensés ayant eu lieu dans deux quartiers spécifiques, dont celui de la présente affaire.

D'autre part, ces rapports font état d'omissions sérieuses de la part de la police en ce qui concerne tant ses interventions au moment des agressions au centre d'Athènes que l'effectivité des enquêtes policières subséquentes.

Bien que l'incident dans le cas présent ait eu lieu dans l'un des deux quartiers en question et que la nature de l'agression présentât les caractéristiques d'une attaque à caractère raciste, la police a complètement omis de placer l'affaire dans le contexte décrit par les rapports précités et l'a traitée comme un cas isolé. Ainsi, ni la police ni les instances judiciaires compétentes n'ont pris d'initiatives pour repérer des liens éventuels entre les incidents y relatés et l'agression du requérant.

Or, lorsqu'il s'agit d'enquêter sur des allégations de mauvais traitement avec motif éventuellement raciste, une réponse adéquate est essentielle pour éviter toute apparence de complicité ou de tolérance relativement à des actes illégaux et préserver la confiance du public dans le principe de la légalité et son adhésion à l'État de droit.

Conclusion : violation (unanimité).

La Cour conclut également, à l'unanimité, à la violation de l'article 13 combiné avec l'article 3, eu égard à l'absence de recours effectif quant aux conditions de détention du requérant dans les locaux du commissariat de police.

Article 41 : aucune demande formulée pour dommage.

(Voir aussi la fiche thématique La discrimination raciale)

Expulsion

Proposed expulsion to Iran of low-profile political activist: *deportation would not constitute a violation*

Projet d'expulsion vers l'Iran d'un militant politique discret : *l'expulsion n'emporterait pas violation*

Proposed expulsion to Iran without adequate investigation of reality and implications of conversion to Christianity after arrival in Europe: *deportation would constitute a violation*

Projet d'expulsion vers l'Iran, sans examen adéquat de la réalité et des implications d'une conversion au christianisme postérieure à l'arrivée en Europe : *l'expulsion emporterait violation*

F.G. – Sweden/Suède – 43611/11
Judgment/Arrêt 23.3.2016 [GC]

Facts – The applicant, an Iranian national, applied for asylum in Sweden on the grounds that he had worked with known opponents of the Iranian regime and had been arrested and held by the authorities on at least three occasions between 2007 and 2009, notably in connection with his web publishing activities. He said that he had been forced to flee after discovering that his business premises, where he kept politically sensitive material, had been searched and documents were missing. After arriving in Sweden, he had converted to Christianity, which he claimed put him at risk of capital punishment for apostasy on a return to Iran. His request for asylum was rejected by the Swedish authorities, who made an order for his expulsion.

In a judgment of 16 January 2014, a Chamber of the Court held by five votes to two that the implementation of the expulsion order against the applicant would not give rise to a violation of Article 2 or 3 of the Convention. It found that no information had emerged to indicate that the applicant's political activities and engagement had been anything more than peripheral. As regards his conversion to Christianity, he had expressly stated before the domestic authorities that he did not wish to invoke his religious affiliation as a ground for asylum, since he felt this to be a private matter and there was nothing to indicate that the Iranian authorities were aware of his conversion. In conclusion, the applicant had failed to substantiate a real and concrete risk of proscribed treatment if he was returned to Iran.

Law – Article 37 § 1: The Government requested the Grand Chamber to strike the case out of its list as the deportation order against the applicant had become statute-barred in June 2015 and was no longer enforceable. The Grand Chamber noted, however, that the case involved important issues – notably concerning the duties to be observed by the parties in asylum proceedings – that went beyond the applicant's particular situation. There were therefore special circumstances regarding respect for human rights as defined in the Convention and its Protocols which required the continued examination of the case.

Conclusion: request to strike out dismissed (sixteen votes to one).

Articles 2 and 3

(a) *General principles* – The Grand Chamber reiterated that where there were substantial grounds to believe that a person, if expelled, would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment in the destination country, both Articles 2 and 3 implied that the Contracting State must not expel that person. It therefore examined the two Articles together.

In relation to asylum claims based on a well-known general risk, when information about such a risk was freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 in expulsion cases entailed that the authorities carry out an assessment of that risk of their own motion.

By contrast, in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk. Accordingly, if an applicant chose not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, the State concerned could not be expected to discover this ground by itself. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum seekers often found themselves in, if a Contracting State was made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entailed that the authorities carry out an assessment of that risk of their own motion. This applied in particular to situations where the national authorities were made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment and there were serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned.

(b) *Application of the principles to the applicant's case*

(i) *The applicant's political activities* – The applicant did not claim that the general circumstances obtaining in Iran would on their own preclude his return to that country. Nor did the Grand Chamber find them to be of such a nature as to show, on their own, that there would be a violation of the Convention if the applicant were returned.

As regards the applicant's personal situation, the Grand Chamber noted that the national authorities had found that the political activities in which the applicant was engaged in Iran could be considered to have taken place at a low level. That finding was supported by the fact that since 2009 the applicant had not received any new summonses from the Revolutionary Court and that none of the applicant's family members remaining in Iran had been subjected to any reprisals by the Iranian authorities. In these circumstances, the Grand Chamber was not convinced by the applicant's claim that the Swedish authorities had failed to duly take into account matters such as his ill-treatment during detention in September 2009, or the risk of his being detained at the airport in the event of deportation. Nor could it conclude that the proceedings before the Swedish authorities were inadequate and insufficiently supported by domestic material or by material originating from other reliable and objective sources. As concerns the risk assessment, there was no evidence to support the allegation that the Swedish authorities had been wrong to conclude that the applicant was not a high-profile activist or political opponent. Lastly, the applicant had been granted anonymity in the proceedings before the Court and, based on the materials before it, there were no strong indications of an identification risk.

Conclusion: deportation would not constitute a violation (unanimously).

(ii) *The applicant's religious conversion* – The Migration Board had rejected the applicant's request for asylum after noting that the applicant had not initially wished to invoke his conversion as a ground for asylum and had stated that his new faith was a private matter. It concluded that to pursue his faith in private was not a plausible reason for believing that the applicant would risk persecution upon return. Subsequently, in its decision dismissing the applicant's appeal against the Migration Board's decision, the Migration Court observed that the applicant no longer relied on his religious views as a ground for persecution and accordingly did not carry out an assessment of the risk the applicant might encounter, as a result of his conversion, upon returning to Iran. The applicant's request for leave to appeal to the Migration Court of Appeal was dismissed. His subsequent applications for a stay of execution of the removal order were refused on the grounds that the applicant's conversion did not constitute a new circumstance justifying a re-examination of the case.

Thus, due to the fact that the applicant had declined to invoke his conversion as an asylum ground and despite being aware that he had converted in Sweden from Islam to Christianity and might therefore belong to a group of persons who, depending on various factors, could be at risk of treatment in breach of Articles 2 and 3 of the Convention upon a return to Iran, the Migration Board and the Migration Court did not carry out a thorough examination of his conversion, the seriousness of his beliefs, the way he manifested his Christian faith in Sweden and how he intended to manifest it in Iran if the removal order were executed. Moreover, the conversion was not considered a "new circumstance" which could justify a re-examination of his case. The Swedish authorities had therefore never made an assessment of the risk that the applicant might encounter, as a result of his conversion, upon a return to Iran. However, in view of the absolute nature of Articles 2 and 3 it was hardly conceivable that the applicant could forego the protection afforded thereunder. It followed therefore that, regardless of his conduct, the competent national authorities had an obligation to assess, of their own motion, all the information brought to their attention before taking a decision on his removal to Iran.

The applicant had submitted various documents to the Grand Chamber which were not presented to the national authorities, including a written statement about his conversion, the way he manifested his Christian faith in Sweden and how he intended to manifest it in Iran if the removal order was executed, and a written statement by the former pastor at his church. In the light of that material and the material previously submitted by the applicant to the national authorities, the Court concluded that the applicant had sufficiently shown that his claim for asylum on the basis of his conversion merited an assessment by the national authorities. It was for the domestic authorities to take this material into account, as well as any further development regarding the general situation in Iran and the particular circumstances of the applicant's situation.

It followed that there would be a violation of Articles 2 and 3 if the applicant were to be returned to Iran without an *ex nunc* assessment by the Swedish authorities of the consequences of his conversion.

Conclusion: deportation would constitute a violation (unanimously).

Article 41: no claim made in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

ARTICLE 5

Article 5 § 1 (d)

Educational supervision/Éducation surveillée_

Thirty-day placement of minor in detention centre for young offenders to "correct his behaviour": *violation*

Détention pendant 30 jours d'un enfant dans un centre de détention pour mineurs en vue d'une « rééducation comportementale » : *violation*

Blokhin – Russia/Russie - 47152/06
Judgment/Arrêt 23.3.2016 [GC]

Facts – The applicant, who at the material time was twelve years old and suffering from attention-deficit hyperactivity disorder (ADHD), was arrested and taken to a police station on suspicion of extorting money from a nine-year old. The authorities found it established that the applicant had committed offences punishable under the Criminal Code but, since he was below the statutory age of criminal responsibility, no criminal proceedings were opened against him. Instead he was brought before a court which ordered his placement in a temporary detention centre for juvenile offenders for a period of thirty days in order to "correct his behaviour" and to prevent his committing further acts of delinquency. The applicant alleged that his health deteriorated while in the centre as he did not receive the medical treatment his doctor had prescribed.

In a judgment of 14 November 2013 (see Information Note 168), a Chamber of the Court held unanimously that there had been violations of Article 3 of the Convention (on account of the lack of adequate medical treatment for the applicant's condition), of Article 5 (on account of the applicant's detention in the temporary detention centre, which was held to have been arbitrary) and of Article 6 § 1 in conjunction with Article 6 § 3 (c) and (d) (on account of the lack of adequate procedural guarantees in the proceedings leading to his placement). The case was referred to the Grand Chamber at the Government's request

Law

Article 3: In line with established international law, the health of juveniles deprived of their liberty shall be safeguarded according to recognised medical standards applicable to juveniles in the wider community. The authorities should always be guided by the child's best interests and the child should be guaranteed proper care and protection. Moreover, if the authorities are considering depriving a child of his or her liberty, a medical assessment should be made of the child's state of health to determine whether or not he or she can be placed in a juvenile detention centre.

In the instant case, there had been sufficient evidence to show that the authorities were aware that the applicant was suffering from ADHD upon his admission to the temporary detention centre and was in need of treatment. Moreover, the fact that he was hospitalised the day after his release, and kept in the psychiatric hospital for almost three weeks, indicated that he was not given the necessary treatment for his condition at the temporary detention centre. The applicant had thus established a prima facie case. For their part, the Government had failed to show that the applicant received the medical care required by his condition during his thirty-day stay at the temporary detention centre where he was entirely under the control and responsibility of the staff. There had thus been a violation of the applicant's rights under Article 3 on account of the lack of necessary medical treatment at the temporary detention centre, having regard to his young age and particularly vulnerable situation as an ADHD sufferer.

Conclusion: violation (unanimously).

Article 5 § 1: The Grand Chamber confirmed the Chamber's finding that the applicant's placement for thirty days in the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5 § 1. The Chamber had noted in particular that the centre was closed and guarded, with twenty-four-hour surveillance to ensure inmates did not leave the premises without authorisation and a disciplinary regime enforced by a duty squad.

The Grand Chamber agreed with the Chamber that the applicant's placement did not come within any of sub-paragraphs (a), (b), (c), (e) or (f) Article 5 § 1 of the Convention. It therefore focused its examination on whether the placement was in accordance with Article 5 § 1 (d) (detention for the purposes of educational supervision).

The Grand Chamber reiterated that the words "educational supervision" must not be equated rigidly with notions of classroom teaching: in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned. Further, detention for educational supervision must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements.

Turning to the facts of the applicant's case, it noted that placement in a temporary detention centre was a short-term, temporary solution and could not be compared to a placement in a closed educational institution, which was a separate and long-term measure intended to try to help minors with serious problems. The Grand Chamber failed to see how any meaningful educational supervision, to change a minor's behaviour and offer appropriate treatment and rehabilitation, could be provided during a maximum period of thirty days.

While the Grand Chamber accepted that some schooling was provided in the centre, it considered that schooling in line with the normal school curriculum should be standard practice for all minors deprived of their liberty and placed under the State's responsibility, even when they were placed in a temporary detention centre for a limited period of time. Such schooling was necessary to avoid gaps in their education. The provision of such schooling did not, however, substantiate the Government's argument that the applicant's placement in the centre was "for the purpose" of educational supervision. On the contrary, the centre was characterised by its disciplinary regime rather than by the schooling provided.

It was also of importance that none of the domestic courts had stated that the applicant's placement was for educational purposes. Instead, they referred to "behaviour correction" and the need to prevent the applicant from committing further delinquent acts, neither of which was a valid ground covered by Article 5 § 1 (d) of the Convention. Since the detention did not fall within the ambit of any of the other sub-paragraphs of Article 5 § 1, there had been a violation of that provision.

Conclusion: violation (unanimously).

Article 6 § 1 in conjunction with Article 6 § 3 (c) and (d): The applicant complained that the proceedings relating to his placement in the temporary detention centre had been unfair in that he had been questioned by the police without his guardian, a defence lawyer or a teacher present and had not had the opportunity to cross-examine witnesses against him during the proceedings.

(a) *Applicability* – The Grand Chamber saw no reason to depart from the Chamber's findings that the proceedings against the applicant constituted criminal proceedings within the meaning of Article 6 of the Convention. Like the Chamber, it stressed the need to look beyond appearances and the language used and to concentrate on the realities of the situation. The placement for thirty days in the temporary detention centre for juvenile offenders had clear elements of both deterrence and punishment (the Chamber had noted that the centre was closed and guarded to prevent inmates leaving without authorisation and that inmates were subject to constant supervision and to a strict disciplinary regime).

The Grand Chamber also rejected the Government's contention that the complaints should be considered under Article 5 § 4 of the Convention. In the Grand Chamber's view, since the proceedings taken against the applicant concerned the determination of a criminal charge, the applicant's complaints should be seen in the context of the more far-reaching procedural guarantees enshrined in Article 6 of the Convention rather than Article 5 § 4.

Article 6 was therefore applicable.

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The applicant was only twelve years old when the police took him to the police station and questioned him and thus well below the age of criminal responsibility (fourteen years) set by the Criminal Code for the offence he was accused of. He had therefore been in need of special treatment and protection by the authorities. It was clear from a variety of international sources[1] that any measures against him should have been based on his best interests and that from the time of his apprehension by the police he should have been guaranteed at least the same legal rights and safeguards as those provided to adults. Moreover, the fact that he suffered from ADHD, a mental and neurobehavioural disorder, made him particularly vulnerable and in need of special protection.[2]

1. See, for instance, Council of Europe Recommendation No. R (87) 20; Council of Europe Recommendation (2003)20; Council of Europe Guidelines on child friendly justice, Guidelines 1, 2, and 28-30; the Article 40 of the Convention on the Rights of the Child, 1989, and General Comment No. 10, point 33; and Rule 7.1 of the Beijing Rules.

2. Council of Europe Guidelines on child friendly justice, Guideline 27; Article 23 of the Convention on the Rights of the Child 1989, and General Comment No. 9 (The rights of children with disabilities), points 73 and 74.

(i) *Right to legal assistance* – The Court considered it established that the police did not assist the applicant in obtaining legal representation. Nor was the applicant informed of his right to have a lawyer and his grandfather or a teacher present. This passive approach adopted by the police was clearly not sufficient to fulfil their positive obligation to furnish the applicant – a child suffering from ADHD – with the necessary information enabling him to obtain legal representation. The fact that the domestic law did not provide for legal assistance to a minor under the age of criminal responsibility when interviewed by the police was not a valid reason for failing to comply with that obligation. Indeed, it was contrary to the basic principles set out in international sources requiring minors to be guaranteed legal, or other appropriate, assistance.[1]

Furthermore, the confession statement, made in the absence of a lawyer, was not only used against the applicant in the proceedings to place him in the temporary detention centre but actually formed the basis, in combination with the witness statements, for the domestic courts' finding that his actions contained elements of the criminal offence of extortion, thus providing grounds for his placement in the centre. The absence of legal assistance during the applicant's questioning by the police had irretrievably affected his defence rights and undermined the fairness of the proceedings as a whole, in breach of Article 6 §§ 1 and 3 (c).

(ii) *Right to obtain the attendance and examination of witnesses* – Neither the child from whom the applicant was alleged to have extorted money nor the child's mother was called to the hearing to give evidence and provide the applicant with an opportunity to cross-examine them, despite the fact that their testimonies were of decisive importance to the pre-investigation inquiry's conclusion that the applicant had committed extortion. There was no good reason for their non-attendance. Moreover, in view of the fact that the applicant had retracted his confession, it was important for the fairness of the proceedings that those witnesses be heard. That safeguard was even more important when, as here, the matter concerned a minor under the age of criminal responsibility in proceedings determining such a fundamental right as his right to liberty. Having regard to the fact that the applicant risked being deprived of his liberty for thirty days – a not negligible length of time for a twelve-year-old boy – it was of utmost importance that the domestic court guarantee the fairness of the proceedings by ensuring that the principle of equality of arms was respected. In the absence of any counterbalancing factors to compensate for the applicant's inability to cross-examine the witnesses at any stage of the proceedings, the applicant's defence rights, in particular the right to challenge and question witnesses, had been restricted to an extent incompatible with the guarantees provided by Article 6 §§ 1 and 3 (d).

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The instant case, in which the minor applicant had enjoyed significantly restricted procedural safeguards under the Minors Act 1999 compared to those afforded criminal defendants by the Code of Criminal Procedure, illustrated how the legislature's intention to protect children and ensure their care and treatment could come into conflict with reality and the principles requiring proper procedural safeguards for juvenile delinquents.

In the Grand Chamber's view, minors, whose cognitive and emotional development in any event required special consideration, and in particular young children under the age of criminal responsibility, deserved support and assistance to protect their rights when coercive measures were applied in their regard albeit in the guise of educational measures. Adequate procedural safeguards had to be in place to protect the best interests and well-being of the child, certainly when his or her liberty was at stake. To find otherwise would be to put children at a clear disadvantage compared with adults in the same situation. In this connection, children with disabilities may require additional safeguards to ensure they are sufficiently protected. This does not mean, however, that children should be exposed to a fully-fledged criminal trial; their rights should be secured in an adapted and age-appropriate setting in line with international standards, in particular the Convention on the Rights of the Child.

In sum, the applicant had not been afforded a fair trial in the proceedings leading to his placement in the temporary detention centre.

Conclusion: violation (eleven votes to six).

Article 41: EUR 7,500 in respect of non-pecuniary damage.

1. See, for example, Convention on the Rights of the Child, Article 40 § 2 (b) (ii), and the comments thereto; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"), Rule 7.1; and Council of Europe Recommendation No. R (87) 20, point 8.

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Waiver of right to appeal against arbitration verdict: *inadmissible*

Renonciation à tout recours contre une sentence arbitrale : *irrecevable*

Tabbane – Switzerland/Suisse - 41069/12
Decision/Décision 1.3.2016 [Section III]

En fait – Homme d'affaires tunisien, le requérant avait conclu avec une société française un contrat placé sous l'empire du droit de l'État de New York. Le contrat comprenait une convention d'arbitrage, assortie d'une clause d'exclusion de tout recours (« *the decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law* »). Un litige survint. Les arbitres choisirent de fixer le siège du tribunal arbitral à Genève.

La sentence rendue lui ayant été défavorable, le requérant tenta vainement de la faire annuler en justice : arguant de la culture juridique familière aux parties, il soutenait que celles-ci avaient entendu le terme anglais « *appeal* » dans un sens étroit, correspondant au français « appel ».

Le Tribunal fédéral suisse refusa d'examiner la sentence, considérant que les parties avaient valablement renoncé à recourir contre toute décision du tribunal arbitral, conformément à l'article 192 de la loi fédérale sur le droit international privé (LDIP). Au terme d'une analyse littérale de la clause (*right « to » appeal,* et non pas « of » *appeal*) et d'une observation de droit comparé, il jugea en effet que la clause n'avait pas pu viser seulement l'appel ordinaire, déjà exclu par les trois législations observées (New York, France, Tunisie) : ainsi, la renonciation couvrait également les recours extraordinaires. Aux yeux du Tribunal fédéral, l'ouverture d'une telle faculté n'était pas en soi contraire à l'article 6 de la Convention, dès lors que l'article 192 exigeait que la renonciation soit expresse et commune à toutes les parties ; que celle-ci pouvait être déclarée invalide en cas de vice du consentement ; et que, de par la nature même d'un arbitrage, on ne voyait guère, *a priori*, à quel intérêt public important une renonciation anticipée au recours serait susceptible de porter atteinte dans le cours ordinaire des choses.

En droit – Article 6

a) *Accès à un tribunal* – La voie de l'arbitrage n'était pas imposée par la loi, mais était le fruit de la liberté contractuelle des parties. Sans aucune contrainte, le requérant avait expressément et librement renoncé à la possibilité de soumettre les litiges potentiels à un tribunal ordinaire qui lui aurait offert l'ensemble des garanties de l'article 6.

Pour la Cour, cette renonciation est intervenue sans équivoque. Par voie d'interprétation de la volonté des parties, le Tribunal fédéral a conclu que celles-ci avaient entendu exclure tout recours. À la lumière du libellé de la clause, et dans la mesure où la Cour est compétente pour trancher cette question, une telle conclusion ne paraît ni arbitraire ni déraisonnable.

Un minimum de garanties, correspondant à son importance, entourait cette renonciation. Le requérant a d'abord pu élire un arbitre de son choix, lequel s'est accordé avec les deux autres arbitres pour fixer à Genève le siège du tribunal arbitral, plaçant ainsi l'arbitrage sous l'empire du droit suisse. Par ailleurs, le Tribunal fédéral a entendu les arguments du requérant et a pris en compte tous les éléments factuels et juridiques objectivement pertinents. Son arrêt est dûment motivé ; aucune apparence d'arbitraire n'en ressort.

La disposition légale litigieuse reflète un choix de politique législative répondant à un double souhait du législateur suisse : d'une part, augmenter l'attractivité et l'efficacité de l'arbitrage international en Suisse, en évitant que la sentence soit soumise au double contrôle de l'autorité de recours et du juge de l'*exequatur* ; d'autre part, décharger le Tribunal fédéral.

Par rapport au but poursuivi, cette disposition n'apparaît pas disproportionnée. D'abord, la renonciation à tout recours n'est pas une obligation : il s'agit simplement d'une faculté laissée au libre choix des parties qui n'ont pas d'attaches en Suisse. Ensuite, lorsque les parties ont opté pour cette exclusion, la loi prévoit l'applicabilité par analogie de la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères, si la sentence doit être exécutée en Suisse ; les tribunaux arbitraux se voient alors exposés au contrôle des tribunaux ordinaires, puisque l'article V de ladite convention énumère un certain nombre de motifs permettant exceptionnellement de refuser la reconnaissance et l'exécution d'une sentence.

En bref, la restriction poursuivait un but légitime, à savoir la mise en valeur de la place arbitrale suisse, par des procédures souples et rapides, tout en respectant la liberté contractuelle du requérant, et ne saurait être considérée comme disproportionnée. Dès lors, le droit d'accès à un tribunal n'a pas été atteint dans sa substance même[1].

Conclusion : irrecevable (défaut manifeste de fondement).

b) *Égalité des armes* – En présence d'un rapport d'expert produit par l'adversaire du requérant et versé au dossier, le tribunal arbitral avait refusé d'ordonner lui-même une expertise, en répondant au requérant qu'il suffisait de permettre à son propre expert privé d'obtenir l'accès aux mêmes documents comptables que ceux utilisés par son adversaire.

Pour la Cour, à supposer que les garanties de l'article 6 soient applicables en l'espèce, pareille motivation n'est ni déraisonnable ni arbitraire. Le requérant ayant eu accès aux documents litigieux, il n'a pas été placé dans une situation de net désavantage par rapport à son adversaire.

Conclusion : irrecevable (défaut manifeste de fondement).

Article 6 § 1 (criminal/pénal)

Criminal charge/Accusation en matière pénale
Fair hearing/Procès équitable

Lack of adequate procedural guarantees in proceedings leading to minor's placement in detention centre for young offenders to "correct his behaviour": *Article 6 applicable*

Procédure ayant abouti au placement d'un enfant dans un centre de détention pour mineurs en vue d'une « rééducation comportementale » : *article 6 applicable*

Blokhin – Russia/Russie - 47152/06
Judgment/Arrêt 23.3.2016 [GC]

(See Article 5 § 1 (d) above/Voir l'article 5 § 1 d) ci-dessus, page 19)

1. Voir aussi *Eiffage S.A. et autres c. Suisse* (déc.), 1742/05, 15 septembre 2009 ; *Osmo Suovaniemi et autres c. Finlande* (déc.), 31737/96, 23 février 1999 ; *Transportes Fluviais do Sado S.A. c. Portugal* (déc.), 35943/02, 16 décembre 2003 ; et *Suda c. République tchèque*, 1643/06, 28 octobre 2010, Note d'information 134.

Access to court/Accès à un tribunal

Swedish courts' refusal to exercise jurisdiction in respect of defamation proceedings concerning a television broadcast from a foreign country: *violation*

Refus de juridiction des cours suédoises concernant une procédure en diffamation suivant la diffusion d'un programme télévisé depuis l'étranger : *violation*

Arlewin – Sweden/Suède - 22302/10
Judgment/Arrêt 1.3.2016 [Section III]

Facts – In 2004, in a programme broadcast on Swedish television, the applicant was accused of being a central figure in organised crime in the media and advertising sector and of fraud and other economic offences. In 2006 he brought a private prosecution for gross defamation against X, the anchorman of the show, before the Swedish courts. His claim was rejected for lack of jurisdiction on the grounds that the broadcast had been transmitted by a company registered in the United Kingdom and was thus considered not to have emanated from Sweden. The applicant was later convicted of various offences, including those he had been accused of in the television programme, and sentenced to five years' imprisonment.

In his application to the European Court, he complained under Article 6 of the Convention that he had been deprived of access to court, in that Sweden had failed to provide him with a remedy to protect his reputation.

Law – Article 6 § 1: The core question was whether Sweden was under an obligation to provide the applicant with a remedy for the alleged infringements of his privacy rights or whether the fact that another State could provide him with such remedies relieved Sweden from that obligation. It was not in dispute that the broadcast of the programme fell within the scope of the applicant's private life, within the meaning of Article 8 of the Convention. Since the defamation proceedings concerned the applicant's civil rights and obligations, Article 6 § 1 of the Convention was applicable.

The Government raised a preliminary objection that the application was inadmissible *ratione personae* as it fell outside Sweden's jurisdiction under Article 1 of the Convention. According to the Swedish courts, it was the United Kingdom, not Sweden, which had jurisdiction to deal with the applicant's defamation proceedings as, under the "country of origin principle" laid down by the EU

Audiovisual Media Services Directive[1] ("AVMSD"), jurisdiction had to be determined primarily with reference to the country where the broadcaster's head office was located and where its editorial decisions were taken.

The Court rejected that interpretation after noting that in a case concerning the similarly worded predecessor to the AVMSD (the Television without Frontiers Directive of 1989 (89/552/EEC)), the European Court of Justice had found that, under certain conditions, a State could take measures against a television broadcast although it was not designated as the broadcasting – and thus jurisdictional – State.[2] The same reasoning could be presumed to apply also to the AVMSD. Under EU law, it was thus not the AVMSD, but rather the Brussels I Regulation that determined the country of jurisdiction when an individual brought a defamation claim against a journalist or a broadcasting company. Under the Regulation both the United Kingdom and Sweden had jurisdiction. In fact, the harmful event could be argued to have occurred in either country as, although the television programme had been broadcast from the United Kingdom where the broadcasting company was registered and domiciled, X was domiciled in Sweden and the alleged injury to his reputation and privacy had manifested itself there. The Court therefore considered that the Swedish Government had not shown that Swedish jurisdiction was barred by a binding provision of EU law.

The Court further noted that the content, production, broadcasting of the television programme as well as its implications had very strong connections to Sweden. There had, therefore, been a *prima facie* obligation on Sweden to secure the applicant's right of access to court. The fact that the applicant may have had access to a court in a different country did not affect Sweden's responsibility under Article 1 of the Convention, but was rather a factor to be taken into consideration when determining whether the lack of access to a Swedish court had been proportionate.

Irrespective of whether the United Kingdom courts had jurisdiction, the Court observed that, except for the technical detail that the broadcast had been routed via the United Kingdom, the programme and its broadcast had been entirely Swedish in nature. In these circumstances, the respondent State had an obligation, under Article 6, to provide the applicant with effective access to court, and instituting defamation proceedings before the British courts was not a reasonable and practicable alternative for him. By failing to provide such access, the domestic courts had impaired the very essence of the applicant's right of access to court as the legal limitations on that access could not be considered proportionate.

Accordingly, the Court rejected the Government's objection that the application should be declared inadmissible for being incompatible *ratione personae* with the Convention and found a violation of Article 6 § 1.

Conclusion: violation (unanimously).

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

(See the Factsheet on Extra-territorial jurisdiction)

Article 6 § 3

Rights of defence/Droits de la défense

Lack of adequate procedural guarantees in proceedings leading to minor's placement in detention centre for young offenders to "correct his behaviour": *violation*

Absence de garanties procédurales adéquates dans une procédure ayant abouti au placement d'un enfant dans un centre de détention pour mineurs en vue d'une « rééducation comportementale » : *violation*

Blokhin – Russia/Russie - 47152/06
Judgment/Arrêt 23.3.2016 [GC]

(See Article 5 § 1 (d) above/Voir l'article 5 § 1 d) ci-dessus, page 19)

1. Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

2. *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, joined cases C 34/95 to C 36/95, judgment of the CJEU of 9 July 1997.

Article 6 § 3 (c)

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

Lack of access to a lawyer during first three days of detention: *case referred to the Grand Chamber*

Absence d'accès du détenu à un avocat pendant les trois premiers jours de sa détention : *affaire renvoyée devant la Grande Chambre*

Simeonovi – Bulgaria/Bulgarie - 21980/04
Judgment/Arrêt 20.10.2015 [Section IV]

Le 3 octobre 1999, le requérant fut arrêté par la police pour des soupçons de participation à un vol à main armée accompagné du meurtre de deux personnes. Il n'a pas été assisté d'un avocat pendant les trois premiers jours de sa détention. Le 6 octobre 1999, en présence d'un avocat commis d'office, il fut inculpé de vol à main armée et du meurtre de deux personnes. Il refusa de répondre aux questions de l'enquêteur. Le 12 octobre 1999, le requérant fut interrogé en présence de deux avocats de son choix ; il garda le silence. Le 21 octobre 1999, assisté par ses deux avocats, il passa aux aveux avant de rétracter sa déposition quelques mois plus tard et de lancer une autre version des faits. Le tribunal régional, en se basant sur l'ensemble des preuves du dossier, reconnut le requérant coupable des charges susmentionnées. Ce jugement fut confirmé par la cour d'appel, qui décida de retenir comme preuve les aveux du requérant du 21 octobre 1999 qui étaient corroborés par les autres pièces du dossier. La Cour suprême de cassation rejeta le pourvoi subséquent du requérant. Il fut incarcéré dans trois différents établissements pénitentiaires.

Dans son arrêt de chambre du 20 octobre 2015, la Cour a conclu, à l'unanimité, à la non-violation de l'article 6 § 3 c) combiné avec l'article 6 § 1 pour ce qui est de l'absence d'accès à un avocat pendant les trois premiers jours de détention. La chambre a pris en compte les circonstances suivantes : la législation interne garantissait au requérant l'accès à un avocat dès son arrestation par la police ; le requérant n'a pas bénéficié d'une telle assistance pendant les trois premiers jours de sa détention ; il n'a pourtant pas été interrogé pendant cette période et aucune autre mesure d'instruction impliquant celui-ci n'a été effectuée pendant ces trois jours ; il est passé aux aveux lorsqu'il était déjà assisté de deux avocats de son choix ; il était au courant que cette déposition pourrait être utilisée en tant que preuve dans le cadre des poursuites pénales ; sa condamnation ne reposait pas uniquement sur ces aveux, mais sur l'ensemble des preuves du dossier. La Cour a donc conclu, en appliquant les critères élaborés dans son arrêt de Grande Chambre *Salduz c. Turquie*[1] que le fait que l'intéressé n'a pas été assisté d'un avocat au cours des trois premiers jours de sa détention n'a pas porté atteinte à son droit de se défendre de manière effective dans le cadre des poursuites pénales.

La chambre a aussi conclu, à l'unanimité, à la violation de l'article 3 de la Convention en raison des mauvaises conditions de détention et du régime pénitentiaire restrictif.

Le 14 mars 2016, l'affaire a été renvoyée devant la Grande Chambre à la demande du requérant.

Article 6 § 3 (d)

Examination of witnesses/Interrogation des témoins

Conviction on basis of statement of overseas witness who could not be cross-examined: *violation*

Condamnation fondée sur les déclarations d'un témoin situé à l'étranger et ne pouvant être contre-interrogé : *violation*

Paić – Croatia/Croatie - 47082/12
Judgment/Arrêt 29.3.2016 [Section II]

Facts – In 2010 the applicant was convicted of stealing a mobile telephone and sentenced to four months' imprisonment suspended for one year.

In his application to the European Court he complained under Article 6 §§ 1 and 3 (d) of the Convention that he had had no opportunity to question the main witness in the criminal proceedings against him (who was also the victim of the alleged theft).

Law – Article 6 §§ 1 and 3 (d): The trial court did not summon the witness to testify at the applicant's trial on the grounds that she had nothing to add to her previous statement, that she resided abroad and that there was a risk the prosecution would become time-barred. However, the Court observed that residence abroad could not be considered a good reason for not summoning a witness while it was incumbent on the judicial authorities to ensure that the prosecution did not become time-barred, without undermining the rights of defence.

1. *Salduz c. Turquie* [GC], 36391/02, 27 novembre 2008, Note d'information 113.

The witness's description of the events constituted the sole, and thus decisive, evidence on which the trial court's findings of the applicant's guilt were based.

As to the existence of sufficient counterbalancing factors to compensate for the handicaps of the defence, the Court noted that in dealing with the witness's statement the trial court did not take any specific caution or attach less weight to it because of her absence. On the contrary, the applicant's conviction was based solely on that statement, which was considered "credible and truthful" without further specification. Although at the trial, the applicant had the opportunity to give his own version of the events and to cast doubt on the witness's credibility, neither he nor his lawyer were allowed to examine her at any stage of the proceedings or investigation. When the witness gave her evidence in her home country the applicant was not invited to attend the hearing, either in person or by video-link, or to question her in writing. No video recording of her questioning was shown at the hearing.

The fact that the applicant had been in a position to challenge or rebut the witness's statement by giving evidence himself or examining a defence witness could not be regarded as a sufficient counterbalancing factor to compensate for the handicap faced by the defence as a result of the admission of the main prosecution witness's statement.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage.

(See *Al-Khawaha and Tahery v. the United Kingdom* [GC], 26766/05 and 22228/06, 15 December 2011, Information Note 147; and *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, Information Note 191)

ARTICLE 8

Respect for private life/Respect de la vie privée

No award of damages against publisher for breaching injunction not to publish photographs: *no violation*

Absence de condamnation d'un éditeur au paiement d'une somme pour avoir enfreint une interdiction de publier : *non-violation*

Kahn – Germany/Allemagne - 16313/10
Judgment/Arrêt 17.3.2016 [Section V]

En fait – Les requérants sont les deux enfants d'un ancien gardien de but de l'équipe nationale de football allemande. À la suite de la parution dans un magazine de plusieurs photos des requérants, ces derniers ont saisi le tribunal régional qui, par ses jugements de janvier 2005, a constaté une violation du droit à leur image et a interdit toute future publication de photos les montrant sous peine d'astreintes. Puis, en 2007, après que l'éditeur du magazine eut publié d'autres photos en dépit de cette interdiction, le tribunal régional a imposé à celui-ci des sanctions pécuniaires sous forme de trois astreintes de 5 000, 7 500 et 15 000 EUR.

En décembre 2007, les requérants demandèrent au tribunal régional de condamner l'éditeur au paiement d'au moins 40 000 EUR à titre de compensation pécuniaire. En juillet 2008, le tribunal régional fit droit à la demande des requérants. Or, en novembre 2008, la cour d'appel annula les jugements et n'autorisa pas le pourvoi en cassation. Elle jugea qu'il n'y avait pas lieu d'allouer une compensation pécuniaire, le tribunal régional ayant en effet prononcé une interdiction de publication générale, en vertu de laquelle les requérants pouvaient demander la fixation d'astreintes à l'encontre de l'éditeur. Le droit à une compensation pécuniaire revêtait un caractère subsidiaire et il ne devait pas être retenu lorsqu'il existait d'autres possibilités de protéger les droits de la personnalité. Par ailleurs, le code de procédure civile prévoyait des astreintes allant jusqu'à 250 000 EUR et une contrainte par corps allant jusqu'à deux ans de détention, si bien que les requérants avaient à leur disposition des moyens de protection effectifs contre de futures violations de leur droit à l'image.

Les recours des requérants devant la Cour fédérale de justice et le Tribunal constitutionnel n'aboutirent pas.

En droit – Article 8 : La question qui se pose n'est pas celle de savoir si les requérants ont bénéficié d'une protection contre les atteintes non contestées à leur droit au respect de la vie privée, mais si, au regard de l'article 8 de la Convention, la protection accordée (la possibilité d'obtenir l'imposition des astreintes contre l'éditeur) était suffisante, ou si seulement l'octroi d'une compensation pécuniaire était de nature à procurer aux requérants la protection nécessaire contre l'atteinte à leur droit au respect de la vie privée.

Le montant de chaque nouvelle astreinte a été augmenté au regard de la précédente.

Aussi, les requérants n'ont pas usé de la possibilité de contester le montant des astreintes fixé par le tribunal régional devant la cour d'appel. Ils n'ont pas expliqué pourquoi un tel recours à la cour d'appel aurait été voué à l'échec ou n'aurait pas été capable de remédier à la fixation d'une astreinte à leurs yeux trop faible.

Le résultat des actions des requérants obligeait l'éditeur à payer des astreintes d'un montant correspondant à environ 68 % de la somme réclamée par les requérants dans la procédure litigieuse. Par ailleurs, la procédure d'astreinte revêtait un caractère rapide et simplifié dans la mesure où le tribunal régional s'était limité à constater que l'éditeur avait enfreint l'interdiction générale de publication tout en ajoutant quelques considérations pour apprécier les montants appropriés – et croissants – des astreintes.

Dans ce contexte, la Cour estime nécessaire de prendre en considération la nature des publications litigieuses déclarées illégales par les tribunaux internes. Pour la cour d'appel, si la publication avait enfreint le droit à l'image des requérants, l'ingérence ne revêtait pas une gravité particulière qui aurait justifié ou rendu nécessaire l'octroi d'une compensation financière. La Cour fédérale de justice a précisé que les requérants (dont les visages n'étaient pas visibles ou étaient pixellisés) ne pouvaient être identifiés sur les photos que par le biais des photos de leurs parents et par les textes accompagnant, et que le sujet déterminant des reportages n'était pas les requérants, mais la relation de leurs parents à la suite de l'échec de leur mariage. La Cour peut souscrire aux conclusions des tribunaux allemands que la nature des photos publiées ne commandait pas l'octroi d'une compensation supplémentaire. Par ailleurs la possibilité d'obtenir une compensation pécuniaire n'est pas exclue du seul fait que l'intéressé peut demander l'infliction d'astreintes à l'encontre de l'éditeur, mais cette question dépend avant tout de la gravité de l'atteinte et de l'ensemble des circonstances de l'affaire.

Dans ces circonstances, on ne saurait tirer de l'article 8 de la Convention le principe que, pour protéger la vie privée d'une personne de manière effective, la condamnation d'un éditeur au paiement d'une somme pour avoir enfreint une interdiction de publier ne saurait être suffisante que si cette somme revient à la victime, si tant est que l'État, dans l'exercice de sa marge d'appréciation, met à la disposition des personnes lésées d'autres moyens qui peuvent se révéler effectifs et dont on ne saurait dire qu'ils limitent la possibilité d'obtenir le redressement des violations alléguées de manière disproportionnée.

Ainsi, les autorités allemandes n'ont pas manqué à leurs obligations positives à l'égard des requérants et leur ont procuré une protection suffisante au regard de l'article 8 de la Convention.

Conclusion : non-violation (unanimité).

Respect for private life/Respect de la vie privée
Positive obligations/Obligations positives

Refusal to prosecute for joke made during television comedy show about homosexual celebrity referred to as a "female": *no violation*

Refus d'ouvrir des poursuites pénales à propos d'une plaisanterie sur un célèbre homosexuel, qualifié de « femme » durant une émission de divertissement à la télévision : *non-violation*

Sousa Goucha – Portugal - 70434/12
Judgment/Arrêt 22.3.2016 [Section IV]

Facts – During a live television comedy show, a joke was made about the applicant, a well-known homosexual TV host, who was referred to as a "female". His criminal complaint for defamation against the television and production companies, the presenter and the directors of programming and content was dismissed by the domestic courts.

Law

Article 8: As sexual orientation was a profound part of a person's identity, and gender and sexual orientation were two distinctive and intimate characteristics, any confusion between the two would constitute an attack on one's reputation capable of attaining a sufficient level of seriousness for Article 8 to be applicable.

As the alleged violation stemmed from the authorities' refusal to prosecute, the main issue was whether the State, in the context of its positive obligations, had achieved a fair balance between the applicant's right to protection of his reputation and the other parties' right to freedom of expression guaranteed by Article 10.

The instant case was distinguishable from the previous cases concerning a satiric form of artistic expression, as the joke had not been made in the context of a debate of public interest and, as such, no matters of public interest were at stake.

A State's obligation under Article 8 to protect an applicant's reputation might arise where the statements went beyond the limits of what was considered acceptable under Article 10.

When dismissing the applicant's complaint, the domestic courts had convincingly established the need for placing the protection of the defendants' freedom of expression above the applicant's right to protection of his reputation. In particular, they had taken into account the playful and irreverent style of the show and its usual humour, the fact that the applicant was a public figure, as well as the defendants' lack of intent to attack the applicant's reputation or to criticise his sexual orientation. Moreover, they had assessed the way in which a reasonable spectator of the show in question would have perceived the impugned joke – rather than just considering what the applicant felt or thought. According to the domestic courts, a reasonable person would not have perceived the joke as defamation because it referred to the applicant's characteristics, his behaviour and way of expressing himself. A limitation on the television show's freedom of expression for the sake of the applicant's reputation would therefore have been disproportionate under Article 10.

In view of the margin of appreciation afforded to the State in that area, the domestic courts had struck a fair balance between the two conflicting rights in line with the Convention standards.

Conclusion: no violation (unanimously).

Article 14 in conjunction with Article 8: The applicant himself had mentioned his sexual orientation in public and to the domestic courts. In this context, it would therefore have been difficult for the courts to avoid referring to it. In assessing whether the impugned joke reached the defamation threshold, they had framed it in the light of the applicant's external behaviour and the style of the talk show, albeit through debatable comments. In particular, they had noted that the applicant dressed in a "colourful way" and hosted television shows which were generally watched by women.

There was nothing to suggest that the Portuguese authorities would have arrived at different decisions had the applicant not been homosexual. The reason for refusing to prosecute seemed rather to have been the weight given to freedom of expression in the circumstances of the case and the defendants' lack of intention to attack the applicant's honour or his sexual orientation. Consequently, it was not possible to speculate whether his sexual orientation had any bearing on the domestic courts' decisions. Although the relevant passages were debatable and could have been avoided, they did not have discriminatory intent.

Conclusion: no violation (unanimously).

(See also *Nikowitz and Verlagsgruppe News GmbH v. Austria*, 5266/03, 22 February 2007; *Alves da Silva v. Portugal*, 41665/07, 20 October 2009; and *Welsh and Silva Canha v. Portugal*, 16812/11, 17 September 2013)

Respect for family life/Respect de la vie familiale
Positive obligations/Obligations positives

Refusal to order child's return pursuant to Hague Convention in view of abducting mother's unwillingness to return with child: *violation*

Refus d'ordonner le retour d'une enfant dans le cadre de la Convention de La Haye au vu de la réticence de la mère, auteur de l'enlèvement, à revenir avec celle-ci : *violation*

K.J. – Poland/Pologne - 30813/14
Judgment/Arrêt 1.3.2016 [Section IV]

Facts – The applicant and his wife, Polish nationals living in the United Kingdom, had a daughter. When the child was two years old, the applicant's wife took her to Poland on holiday. Subsequently, she informed the applicant that they would not be coming back and initiated divorce proceedings. The applicant's request for the return of his daughter under the Hague Convention on the Civil aspects of International Child Abduction ("the Hague Convention") was dismissed by the Polish courts on the ground that the child's return to the UK with or without her mother would put her in an intolerable situation within the meaning of Article 13 (b) of the Hague Convention. Under that provision, a State is not bound to order the return of a child if it is established that there is a grave risk that the child would be exposed to psychological harm or otherwise placed in an intolerable situation.

Law – Article 8: While Article 13 (b) of the Hague Convention was not restrictive as to the exact nature of the "grave risk", it could not be read, in the light of Article 8 of the Convention, as including all of the inconveniences necessarily linked to the experience of return: the exception provided for concerned only situations which went beyond what a child might reasonably be expected to bear.

It was for the applicant's estranged wife, who opposed the child's return, to substantiate any potential allegation of specific risks under that provision. Although both of her arguments – the break-up of the marriage and her fear that the child would not be allowed to leave the United Kingdom – fell short of the requirements thereof, the domestic courts had nevertheless proceeded with the assessment of the said risks in view of what appeared to be a rather arbitrary refusal of the child's mother to return with the child. Indeed, nothing in the circumstances unveiled before the domestic courts had objectively ruled out the possibility of the mother's return together with the child. It had not been implied that the applicant's wife did not have access to UK territory, or that she would have faced criminal sanctions upon her return. Nothing indicated that the applicant might actively prevent her from seeing her child in the United Kingdom or might deprive her of parental rights or custody.

Secondly, the harm referred to in Article 13 (b) of the Hague Convention could not arise solely from separation from the parent who was responsible for the wrongful removal or retention. That separation, however difficult for the child, would not automatically meet the grave risk test. However, the domestic courts had held that the child's separation from the mother would have negative irreversible consequences, since the latter was her primary caregiver, and the child's contact with her father had been rare.

Thirdly, equally misguided was the Polish courts' holding that the child's return *with* the mother would not have a positive impact on the child's development, because the mother's departure from Poland would be against her will. The domestic courts had clearly gone beyond the elements which ought to have been assessed under Article 13 (b) of the Hague Convention, while ignoring the conclusions of the experts, namely that the child, who was apparently adaptable, was in good physical and psychological health, was emotionally attached to both parents, and perceived both countries as on an equal footing. Furthermore, as the issues of custody and access were not to be intertwined in the Hague Convention proceedings, it was erroneous for the family court to assume that if returned to the United Kingdom the child would be placed in the applicant's custody or care.

Lastly, despite the recognised urgent nature of the Hague Convention proceedings, one year had elapsed between the request for return and the final decision, a period for which no explanation had been provided by the Government.

In sum, notwithstanding its margin of appreciation in the matter, the State had failed to comply with its positive obligations. However, as the child had lived with her mother in Poland for over three and a half years, there was no basis for the instant judgment to be interpreted as obliging the respondent State to take steps to order the child's return to the United Kingdom.

Conclusion: violation (unanimously).

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

(See also the Factsheet on International Child Abductions)

Respect for family life/Respect de la vie familiale

Parental authority of father with mild intellectual disability restricted on insufficiently demonstrated grounds: *violation*

Père affecté d'un handicap intellectuel modéré ayant vu son autorité parentale réduite sur des fondements insuffisants : *violation*

Kocherov and/et Sergeyeva – Russia/Russie - 16899/13
Judgment/Arrêt 29.3.2016 [Section III]

Facts – The first applicant, who had a mild intellectual disability, lived in a care home between 1983 and 2012. In 2007 he and another resident of the care home had a daughter, the second applicant. A week after her birth the child was placed in public care, where, with the first applicant's consent, she remained for several years. In 2012 the first applicant was discharged from the care home and expressed his intention to take the second applicant into his care. However, the domestic courts restricted his parental authority over the child. The second applicant thus remained in public care although the first applicant was allowed to maintain regular contact with her. In 2013 he managed to have the restriction of his parental authority lifted and the second applicant went to live with him.

In their application to the European Court the applicants complained that, as a result of the restriction of the first applicant's parental authority, their reunification had been postponed for a year, in breach of Article 8 of the Convention.

Law – Article 8: The Court noted at the outset that although the restriction of the first applicant's parental authority over his child had not resulted in the applicants' separation from one another or had any impact on the first applicant's visiting rights and had been of a temporary nature, it had nevertheless interfered with their family life.

The domestic courts' decision was based on a number of reasons: alleged communication difficulties between the child and her parents; the first applicant's prolonged residence in an institution and his alleged lack of skills in child rearing; his mental disability; the fact that the child's mother had no legal capacity; and the first applicant's financial situation. Although these considerations appeared relevant for the purpose of striking a balance between the conflicting interests at stake, the Court doubted that they were based on sufficient evidence.

There had been conflicting evidence before the domestic courts relating to the domestic courts alleged communication difficulties. Faced with such an obviously conflicting body of evidence, the domestic courts could have ordered an independent comprehensive psychological expert examination of the child with a view to establishing her psychological and emotional state and attitude towards her father, but had failed to do so. The Court was thus not persuaded that the domestic courts had convincingly demonstrated that the girl's transfer into her father's care would have been stressful to the extent of making it necessary for her to remain in public care for another year.

As to the first applicant's alleged lack of child rearing skills, this could hardly in itself be regarded as a legitimate ground for restricting parental authority or keeping a child in public care. Furthermore, the psychiatric examination report and certificates from the care home confirmed that the first applicant had demonstrated that he was independent and fully able to care for himself and his child. For their part, the domestic courts did not appear to have tried to analyse the first applicant's emotional and mental maturity and ability to care for his daughter.

As to the first applicant's mental disability, it appeared from a report submitted to the domestic authorities that his state of health allowed him fully to exercise his parental authority. However, the domestic court had disregarded that evidence.

Further, although the question whether the mother posed a danger to the child was directly relevant when it came to striking a balance between the child's interests and those of her father, the domestic courts had based their fears for the second applicant's safety on a mere reference to the fact that the mother had no legal capacity, without demonstrating that her behaviour had or might put the second applicant at risk. Their reference to the mother's legal status was thus not a sufficient ground for restricting the first applicant's parental authority.

Finally, the first applicant's alleged financial difficulties could not in themselves be regarded as sufficient grounds for refusing him custody, in the absence of any other valid reasons.

In the light of the foregoing, the reasons relied on by the domestic courts to restrict the first applicant's parental authority over the second applicant were insufficient to justify that interference, which was therefore disproportionate to the legitimate aim pursued.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 to the first applicant and EUR 2,500 to the second applicant in respect of non-pecuniary damage.

(See the Factsheets on Parental Rights and Persons with disabilities and the ECHR)

ARTICLE 10

Freedom of expression/Liberté d'expression

NGOs liable for defamation of public servant for sending private letter of complaint to a local authority which was then published in the press: *case referred to the Grand Chamber*

ONG condamnées pour diffamation pour avoir envoyé à une autorité locale une lettre privée de plainte, reproduite ensuite par la presse : *affaire renvoyée devant la Grande Chambre*

Medžlis Islamske Zajednice Brčko and Others/ et autres – Bosnia and Herzegovina/Bosnie-Herzégovine - 17224/11
Judgment/Arrêt 13.10.2015 [Section IV]

In 2003 the applicants, four non-governmental organisations (NGOs) of the Brčko District of Bosnia and Herzegovina, wrote a letter to the district authorities complaining about the alleged misconduct of an editor of the public radio station. Shortly afterwards, the letter was published in three newspapers. The editor brought civil defamation proceedings against the applicant NGOs, which were eventually found liable for defamation and ordered to retract their statements and publish the judgment against them at their own expense. They failed to do so and were ultimately required to pay approximately EUR 1,445 in execution of the judgment.

In a judgment of 13 October 2015 a Chamber of the Court held, by four votes to three, that there had been no violation of Article 10 of the Convention. The Chamber found that the national courts had correctly concluded that the applicant NGOs had acted negligently in simply reporting the editor's alleged misconduct without making a reasonable effort to verify its accuracy. The domestic courts had therefore struck a fair balance between the editor's right to reputation and the applicant NGOs' right to report irregularities about the conduct of a public servant to the body competent to deal with such complaints.

On 14 March 2016 the case was referred to the Grand Chamber at the applicant NGOs' request.

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

Conviction of a journalist for the publication of materials covered by the secrecy of a pending investigation: *no violation*

Condamnation d'un journaliste pour la publication d'informations couvertes par le secret de l'instruction : *non-violation*

Bédat – Switzerland/Suisse - 56925/08
Judgment/Arrêt 29.3.2016 [GC]

En fait – Le 15 octobre 2003, le requérant, journaliste, fit paraître dans un hebdomadaire un article qui concernait une procédure pénale dirigée contre un automobiliste placé en détention préventive pour avoir foncé sur des piétons, tué trois personnes et blessé huit autres avant de se jeter du pont de Lausanne. L'article dressait le portrait du prévenu, présentait un résumé des questions des policiers et du juge d'instruction, ainsi que les réponses du prévenu, et était accompagné de plusieurs photographies des lettres qu'il avait adressées au juge d'instruction. Cet article comportait également un bref résumé des déclarations de l'épouse et du médecin traitant du prévenu. Le journaliste fit l'objet de poursuites pénales d'office pour avoir publié des documents secrets. En juin 2004, le juge d'instruction le condamna à un mois de prison avec sursis. Puis le tribunal de police remplaça sa condamnation par une amende de 4 000 francs suisses (CHF – environ 2 667 EUR). Les recours du requérant contre sa condamnation n'aboutirent pas.

Par un arrêt du 1er juillet 2014 (voir la Note d'information 176), une chambre de la Cour a conclu par quatre voix contre trois à la violation de l'article 10 car la condamnation du requérant au paiement d'une amende, en raison de l'utilisation et de la reproduction d'éléments du dossier d'instruction dans son article, ne répondait pas à « un besoin social impérieux ». Si les motifs de la condamnation étaient « pertinents », ils n'étaient pas « suffisants » pour justifier une telle ingérence dans le droit à liberté d'expression du requérant.

Le 17 novembre 2014, l'affaire a été renvoyée devant la Grande Chambre à la demande du Gouvernement.

En droit – Article 10 : La condamnation du requérant a constitué une ingérence, prévue par la loi, dans l'exercice par lui du droit à la liberté d'expression garanti par l'article 10 § 1 de la Convention. La mesure incriminée poursuivait des buts légitimes, à savoir empêcher « la divulgation d'informations confidentielles », garantir « l'autorité et l'impartialité du pouvoir judiciaire » et « la protection de la réputation (et) des droits d'autrui ».

Le droit du requérant d'informer le public et le droit du public de recevoir des informations se heurtent à des intérêts publics et privés de même importance, protégés par l'interdiction de divulguer des informations couvertes par le secret de l'instruction. Ces intérêts sont : l'autorité et l'impartialité du pouvoir judiciaire, l'effectivité de l'enquête pénale et le droit du prévenu à la présomption d'innocence et à la protection de sa vie privée. La Cour estime nécessaire de préciser les critères[1] devant guider les autorités nationales des États parties à la Convention dans la mise en balance de ces intérêts et donc dans l'appréciation du caractère « nécessaire » de l'ingérence s'agissant des affaires de violation du secret de l'instruction par un journaliste.

a) *La manière dont le requérant est entré en possession des informations litigieuses* – S'il n'a pas été allégué que le requérant se serait procuré les informations litigieuses de manière illicite, en tant que journaliste de profession, il ne pouvait pas ignorer le caractère confidentiel des informations qu'il s'apprêtait à publier.

b) *La teneur de l'article litigieux* – Même si l'article litigieux n'exprimait aucune position quant au caractère intentionnel de l'acte dont été accusé le prévenu, il traçait néanmoins de ce dernier un portrait très négatif, sur un ton presque moqueur. Les titres utilisés par le requérant ainsi que la photo en gros plan du prévenu, publiée en grand format, ne laissent aucun doute quant à l'approche sensationnaliste que le requérant avait entendu donner à son article. Par ailleurs, l'article mettait en exergue

1. Voir *Axel Springer AG c. Allemagne* [GC], 39954/08, 7 février 2012, Note d'information 149, et *Stoll c. Suisse* [GC], 69698/01, 25 avril 2006, Note d'information 103.

la vacuité des déclarations du prévenu et ses contradictions, qualifiées parfois explicitement de « mensonges à répétition », pour en conclure, sur le mode interrogatif, que par « ce mélange de naïveté et d'arrogance », le prévenu faisait « tout pour se rendre indéfendable ». Ces questions faisaient précisément partie de celles que les autorités judiciaires étaient appelées à trancher, tant au stade de l'instruction qu'à celui du jugement.

c) *La contribution de l'article litigieux à un débat d'intérêt général* – Le sujet à l'origine de l'article, à savoir l'enquête pénale ouverte sur le drame du Grand-Pont de Lausanne, relevait de l'intérêt général. Cet incident, tout à fait exceptionnel, avait suscité une très grande émotion au sein de la population et les autorités judiciaires elles-mêmes avaient jugé opportun de tenir la presse et le public informés de certains aspects de l'enquête en cours.

Toutefois, la question qui se pose est celle de savoir si le contenu de l'article et, en particulier, les informations qui étaient couvertes par le secret de l'instruction étaient de nature à nourrir le débat public sur le sujet en question ou simplement à satisfaire la curiosité d'un certain public sur les détails de la vie strictement privée du prévenu.

À cet égard, après un examen approfondi du contenu de l'article, de la nature des informations qui y étaient contenues et des circonstances entourant l'affaire, le Tribunal fédéral, dans un arrêt longuement motivé et qui ne révèle aucune trace d'arbitraire, a considéré que ni la divulgation des procès-verbaux d'audition ni celle des lettres adressées par le prévenu au juge d'instruction n'avaient apporté un éclairage pertinent pour le débat public et que l'intérêt du public relevait en l'espèce « tout au plus de la satisfaction d'une curiosité malsaine ».

De son côté, le requérant n'a pas démontré en quoi la publication des procès-verbaux d'audition, des déclarations de la femme et du médecin du prévenu, ainsi que des lettres que le prévenu avait adressées au juge d'instruction et qui portaient sur des questions anodines concernant le quotidien de sa vie en détention était de nature à nourrir un éventuel débat public sur l'enquête en cours.

Dès lors, la Cour n'aperçoit aucune raison sérieuse de substituer son propre avis à celui du Tribunal fédéral, juridiction qui bénéficiait en la matière d'une certaine marge d'appréciation.

d) *L'influence de l'article litigieux sur la conduite de la procédure pénale* – Tout en soulignant que les droits garantis, respectivement, par l'article 10 et par l'article 6 § 1 méritent *a priori* un égal respect, il est légitime de vouloir accorder une protection particulière au secret de l'instruction compte tenu de l'enjeu d'une procédure pénale, tant pour l'administration de la justice que pour le droit au respect de la présomption d'innocence des personnes mises en examen. Le secret de l'instruction sert à protéger, d'une part, les intérêts de l'action pénale, en prévenant les risques de collusion ainsi que le danger de disparition et d'altération des moyens de preuve et, d'autre part, les intérêts du prévenu, notamment sous l'angle de la présomption d'innocence et, plus généralement, de ses relations et intérêts personnels. Il est en outre justifié par la nécessité de protéger le processus de formation de l'opinion et de prise de décision du pouvoir judiciaire.

Bien que l'article litigieux ne privilégiât pas ouvertement la thèse d'un acte intentionnel, il était néanmoins orienté de manière à tracer du prévenu un portrait très négatif, mettant en exergue certains aspects troublants de sa personnalité et concluant que celui-ci « faisait tout pour se rendre indéfendable ».

Force est de constater que la publication d'un article orienté de telle manière, à un moment où l'instruction était encore ouverte, comportait en soi un risque d'influer d'une manière ou d'une autre sur la suite de la procédure, que ce soit le travail du juge d'instruction, les décisions des représentants du prévenu, les positions des parties civiles ou la sérénité de la juridiction appelée à juger la cause, indépendamment de la composition d'une telle juridiction.

On ne saurait attendre d'un gouvernement qu'il apporte la preuve, *a posteriori*, que ce type de publication a eu une influence réelle sur les suites de la procédure. Le risque d'influence sur la procédure justifie en soi que des mesures dissuasives, telles qu'une interdiction de divulgation d'informations secrètes, soient adoptées par les autorités nationales.

La légalité de ces mesures en droit interne ainsi que leur compatibilité avec les exigences de la Convention doivent pouvoir être appréciées au moment où les mesures sont prises et non, comme soutient le requérant, à la lumière de faits ultérieurs révélateurs de l'impact réel de ces publications sur le procès, telle la composition de la formation de jugement.

C'est donc à juste titre que le Tribunal fédéral, dans son arrêt du 29 avril 2008, a considéré que les procès-verbaux d'interrogatoire et la correspondance du prévenu avaient fait « l'objet d'exégèses sur la place publique, hors contexte, au risque d'influencer le processus des décisions du juge d'instruction et, plus tard, de l'autorité de jugement ».

e) *L'atteinte à la vie privée du prévenu* – La procédure pénale diligentée contre le requérant par les autorités cantonales de poursuite s'inscrivait dans le cadre de l'obligation positive de protéger la vie privée du prévenu qui incombait à la Suisse en vertu de l'article 8 de la Convention.

Par ailleurs, les informations divulguées par le requérant étaient de nature très personnelle, et même médicale, et incluaient notamment des déclarations du médecin traitant du prévenu, ainsi que des lettres adressées par ce dernier, depuis son lieu de détention, au juge d'instruction chargé de l'affaire. Ce type d'information appelait le plus haut degré de protection sous l'angle de l'article 8 ; ce constat est d'autant plus important que le prévenu n'était pas connu du public et que le simple fait qu'il se trouvait au centre d'une enquête pénale, certes pour des faits très graves, n'impliquait pas qu'on l'assimile à un personnage public qui se met volontairement sur le devant de la scène.

Au moment de la publication de l'article litigieux, le prévenu se trouvait en détention, et donc dans une situation de vulnérabilité. Par ailleurs, rien dans le dossier n'indique qu'il était informé de la parution de l'article et de la nature des informations qui y figuraient. Au surplus, il souffrait vraisemblablement de troubles psychiques, ce qui accentuait sa vulnérabilité. Dans ces conditions, on ne saurait reprocher aux autorités cantonales d'avoir considéré que, pour remplir leur obligation positive de protéger le droit du prévenu au respect de sa vie privée, elles ne pouvaient se contenter d'attendre que celui-ci eût pris lui-même l'initiative d'intenter une action civile contre le requérant et d'avoir par conséquent opté pour une démarche active, fût-elle de nature pénale.

f) *La proportionnalité de la sanction prononcée* – Le recours à la voie pénale ainsi que la sanction infligée au requérant n'ont pas constitué une ingérence disproportionnée dans l'exercice de son droit à la liberté d'expression. Le requérant fut condamné initialement à un mois de prison avec sursis. Cette peine fut ensuite commuée en une amende de 4 000 CHF, somme qui fut fixée en tenant compte des antécédents judiciaires du requérant et qui ne fut pas déboursée par le requérant lui-même mais avancée par son employeur. Cette sanction punissait la violation du secret d'une instruction pénale et protégeait en l'occurrence le bon fonctionnement de la justice ainsi que les droits du prévenu à un procès équitable et au respect de sa vie privée.

Dans ces conditions, on ne saurait considérer qu'une telle sanction risquait d'avoir un effet dissuasif sur l'exercice de la liberté d'expression du requérant ou de tout autre journaliste souhaitant informer le public au sujet d'une procédure pénale en cours.

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

Freedom to impart information/Liberté de communiquer des informations

Conviction of journalist for broadcasting recording of court hearing without permission: *violation*

Condamnation d'une journaliste pour avoir diffuser l'enregistrement d'une audience sans autorisation : *violation*

Pinto Coelho – Portugal (no. 2/n° 2) - 48718/11
Judgment/Arrêt 22.3.2016 [Section IV]

En fait – En novembre 2005, un journal télévisé diffusa un reportage réalisé par la requérante sur une affaire judiciaire. Des extraits de l'enregistrement sonore de l'audience réalisé par le tribunal lui-même, accompagnés d'un sous-titrage, étaient diffusés dans le reportage. Pour la retransmission de ces extraits, les voix des trois juges qui composaient la chambre du tribunal, ainsi que celles des témoins, avaient été déformées. Après la diffusion du reportage, le président de la chambre qui avait jugé l'affaire saisit le parquet dénonçant l'absence d'autorisation pour la transmission des extraits de l'enregistrement sonore de l'audience et des prises de vues qui avaient été faites dans la salle d'audience. En revanche, les personnes dont les voix furent retransmises ne saisirent pas les tribunaux pour dénoncer une atteinte à leurs droits à la parole. La requérante fut condamnée à une amende de 1 500 EUR.

En droit – Article 10 : La condamnation de la requérante a constitué une ingérence dans son droit à la liberté d'expression. Cette ingérence était prévue par la loi et les buts invoqués par le Gouvernement correspondent aux buts légitimes que sont la garantie de l'autorité et de l'impartialité du pouvoir judiciaire et à la protection de la réputation et des droits d'autrui.

À l'origine du reportage litigieux se trouvait une procédure judiciaire dont l'issue avait été la condamnation au pénal de plusieurs prévenus. La démarche de la requérante visait à dénoncer une erreur judiciaire qui, de son avis, s'était produite à l'égard de l'une des personnes condamnées. Dès lors, un tel reportage abordait un sujet relevant de l'intérêt général.

Par ailleurs, les journalistes ne sauraient en principe être déliés par la protection que leur offre l'article 10 de leur devoir de respecter les lois pénales de droit commun. L'absence de comportement illicite de la requérante dans l'obtention de l'enregistrement n'est pas nécessairement déterminante dans l'appréciation de la question de savoir si elle a respecté ses devoirs et responsabilités. En tout état de cause, elle était à même de prévoir que la divulgation du reportage litigieux était réprimée par le code pénal.

Cela dit, au moment de la diffusion du reportage litigieux l'affaire interne avait déjà été tranchée. Ainsi, il n'est pas évident que la divulgation des extraits sonores aurait pu avoir une influence négative sur l'intérêt de la bonne administration de la justice. Par ailleurs, l'audience tenue dans le cadre de l'affaire a été publique et aucun des intéressés n'a porté plainte à l'égard d'une prétendue atteinte à leur droit à la parole alors qu'ils disposaient de recours en droit interne. Or c'est à eux qu'il incombait au premier chef de faire respecter ce droit. De plus, les voix des participants à l'audience ont fait l'objet d'une déformation empêchant leur identification. En outre, l'article 10 § 2 de la Convention ne prévoit pas de restrictions à la liberté d'expression fondées sur le droit à la parole, celui-ci ne bénéficiant pas d'une protection similaire au droit à la réputation. Ainsi, le second but légitime invoqué perd nécessairement de la force dans les circonstances de l'espèce. Enfin, on voit mal pourquoi le droit à la parole devrait empêcher la diffusion des extraits sonores de l'audience quand, en l'occurrence, l'audience a été publique. Pour finir, même si le montant de l'amende peut paraître modéré, cela n'enlève en rien l'effet dissuasif, vu la lourdeur de la sanction encourue.

Par conséquent, si les motifs de la condamnation étaient pertinents, ils n'étaient pas suffisants pour justifier une telle ingérence dans le droit à la liberté d'expression de la requérante.

Conclusion : violation (six voix contre une).

Article 41 : constat de violation suffisant en lui-même pour le préjudice moral ; 1 500 EUR pour dommage matériel.

ARTICLE 14

Discrimination (Article 3)

Lack of access to protection measures against domestic violence for divorced or unmarried women: *violation*

Inaccessibilité des mesures de protection contre la violence domestique aux femmes non mariées ou divorcées : *violation*

M.G. – Turkey/Turquie - 646/10
Judgment/Arrêt 22.3.2016 [Section II]

(See Article 3 above/Voir l'article 3 ci-dessus, page 14)

Discrimination (Article 8)

Difference in treatment of HIV-positive aliens regarding application for residence permit and permanent ban on re-entering Russia: *violation*

Différence de traitement vis-à-vis des étrangers positifs au VIH concernant des demandes de permis de résidence et des interdictions illimitées du territoire russe : *violation*

Novruk and Others/et autres – Russia/Russie - 31039/11 et al.
Judgment/Arrêt 15.3.2016 [Section III]

Facts – Between 2008 and 2012 the five applicants applied for a temporary residence permit in Russia but their applications were rejected, in accordance with the applicable domestic law, on the grounds that they had been diagnosed HIV-positive. Their appeals were unsuccessful.

Law – Article 14 in conjunction with Article 8: The first three applicants were married to Russian citizens and their children had acquired Russian nationality by birth. Thus, they all enjoyed family life. As to the fifth applicant, he had lived with his same-sex partner since 2007. Despite the domestic courts' refusal to recognise that their relationship amounted to a family or at least a social link, the Court was satisfied that the couple had been living in a stable *de facto* partnership falling within the notions of both private and family life. The fourth applicant had joined her sister and her son who lived in Russia permanently, shared household expenses with her son's family and did not have friends or relatives outside Russia. Her situation was thus covered by the notion of private life. The facts of the case therefore fell within the ambit of Article 8 of the Convention. Since a distinction made on account of an individual's health status, including HIV infection, was covered by the term "other status", Article 14 taken in conjunction with Article 8 was applicable.

The Court further noted that the authorities had based their refusal to grant the applicants a residence permit only on the grounds of their HIV-positive status. Therefore, they were in a situation analogous to that of HIV-negative aliens.

As to whether the difference in treatment was objectively and reasonably justified, the Court first noted that at international and national levels there had been a marked improvement in the situation of people living with HIV as regards restrictions on their entry, stay and residence in a foreign country. Since the expulsion of HIV-positive individuals did not reflect an established European consensus, and had no support in other member States, the respondent State was under an obligation to provide a particularly compelling justification for the differential treatment of the applicants.

In *Kiyutin v. Russia* (2700/10, 10 March 2011, Information Note 139), the Court found that it was internationally and unanimously agreed that entry, stay and residence restrictions on people living with HIV could not be objectively justified by reference to public-health concerns. The Court observed in that respect that the domestic courts had based their exclusion order against the fifth applicant on the manifestly inaccurate premise that he could transmit the infection by using shared facilities in a student dormitory. This view was in turn based on the assumptions that HIV-positive non-nationals would engage in specific unsafe behaviours and that nationals would also fail to protect themselves, which amounted to an unwarranted generalisation having no basis in fact and failing to take into account the specific situation of the applicant. Moreover, unlike the position in *Ndangoya v. Sweden* ((dec.), 17868/03, 22 June 2004), the applicants in the instant case had not been suspected of, or charged with, having unprotected sexual intercourse with others without disclosing their HIV-positive status. As to the fifth applicant, the domestic authorities had deduced an increased risk of unsafe behaviour on his part from his refusal to name his former partners, despite the fact that (a) he had told the authorities that he had disclosed his HIV status to his previous partners and (b) he was living in a stable relationship. Thus, the alleged risk of unsafe behaviour on his part had amounted to mere conjecture unsupported by facts or evidence.

Finally, the decisions declaring the presence of the third to fifth applicants undesirable set no time-limit on their exclusion from Russian territory. As they had been issued in connection with their infection with HIV, which was by today's medical standards a lifetime condition, they had the effect of a permanent ban on their re-entry to Russia, which was disproportionate to the aim pursued.

In the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on the entry, stay and residence of HIV-positive non-nationals, who constitute a particularly vulnerable group, the Court found that the respondent State had not advanced compelling reasons or any objective justification for their differential treatment

Conclusion: violation (unanimously).

Article 46: The Court also found that the Russian authorities' discriminatory application of the domestic provisions on entry and residence based on the applicants' HIV-positive status amounted to a structural problem which could give rise to further repetitive applications. However, in 2015 the Russian Constitutional Court had declared the legislation at the heart of the instant case – the Entry and Exit Procedures Act, the Foreign Nationals Act, and the HIV Prevention Act – incompatible with the Constitution in so far as they allowed the authorities to refuse entry or residence or to deport HIV-positive non-nationals with family ties in Russia solely on account of their diagnosis. A draft law implementing the Constitutional Court's judgment had already been submitted to the Russian Parliament. Since the legislative reform was currently under way the Court abstained from formulating general measures.

The Court also found that the authorities had not hindered the fifth applicant's right of individual petition, and that their behaviour had thus been in compliance with Article 34 of the Convention.

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

(See the Factsheet on Health)

Refusal to prosecute for joke made during television comedy show about homosexual celebrity referred to as a "female": *no violation*

Refus d'ouvrir des poursuites pénales à propos d'une plaisanterie sur un célèbre homosexuel, qualifié de « femme » durant une émission de divertissement à la télévision : *non-violation*

Sousa Goucha – Portugal - 70434/12
Judgment/Arrêt 22.3.2016 [Section IV]

(See Article 8 above/Voir l'article 8 ci-dessus, page 27)

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

Failure to take account of the needs of child with disabilities when determining applicant father's eligibility for tax relief on the purchase of suitably adapted property: *violation*

Défaut de prise en compte des besoins d'un enfant handicapé dans la détermination de l'éligibilité de son père à un abattement d'impôts concernant l'achat une propriété adaptée : *violation*

Guberina – Croatia/Croatie - 23682/13
Judgment/Arrêt 22.3.2016 [Section II]

Facts – The applicant lived with and provided care for his severely disabled child. In order to provide the child with better and more suitable accommodation, the applicant sold the family's third-floor flat, which did not have a lift, and bought a house. He then sought tax relief on the purchase but his request was refused on the grounds that his previous flat had met the family's needs.

In the Convention proceedings the applicant complained that the manner in which the tax legislation had been applied to his situation amounted to discrimination based on his child's disability.

Law – Article 14 in conjunction with Article 1 of Protocol No. 1

(a) *Whether the term "other status" encompassed the disability of the applicant's child* – The applicant had complained of alleged discriminatory treatment relating to the disability of his child not his own disability. In the Court's case-law the expression "other status" had been given a wide meaning and its interpretation was not limited to characteristics which were personal in the sense that they were innate or inherent. Therefore, Article 14 also covered instances in which an individual was treated less favourably on the basis of another person's status or protected characteristics, as in the applicant's case.

(b) *Failure to treat differently persons in relevantly different situations* – There was no doubt that the applicant's previous flat, situated on the third floor of a building without a lift, had severely impaired his son's mobility and consequently threatened his personal development and ability to reach his maximum potential. By seeking to replace that flat with a house adapted to the family's needs, the applicant was in a comparable position to any other person who was replacing a flat or a house by another property equipped with basic infrastructure and technical accommodation requirements. His situation nevertheless differed with regard to the meaning of the term "basic infrastructure requirements" which, in view of his son's disability and the relevant national and international standards, implied necessary accessibility facilities such as a lift. In excluding him from tax exemption, the tax authorities and the domestic courts had not given any consideration to the specific needs of the applicant's family related to the child's disability. They had thus failed to recognise the factual specificity of the applicant's situation with regard to the question of the basic infrastructure and technical accommodation required to meet the family's housing needs.

(c) *Objective and reasonable justification* – As to the Government's argument that the domestic law left no discretion for interpretation to the tax authorities, the Court noted that, while the relevant legislation was couched in rather general terms, other provisions of the domestic law provided some guidance with regard to the question of the basic requirements of accessibility for persons with disabilities. Moreover, by ratifying the UN Convention on the Rights of Persons with Disabilities the respondent State was under an obligation to take into consideration relevant principles, such as reasonable accommodation, accessibility and non-discrimination against persons with disabilities with regard to their full and equal participation in all aspects of social life. However, the domestic authorities had disregarded those national and international obligations. Therefore, the manner in which the domestic legislation had been applied in practice had failed to sufficiently accommodate the requirements of the specific aspects of the applicant's case.

Further, although the protection of financially disadvantaged persons could in general be considered objective justification for alleged discriminatory treatment, this was not the reason given in the case of the applicant, who was in fact denied tax exemption because his previous flat was considered as meeting the basic infrastructure requirements for his family's housing needs.

In view of the above, the respondent State had failed to provide objective and reasonable justification for their lack of consideration of the inequality pertinent to the applicant's situation.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See *Thlimmenos v. Greece* [GC], 34369/97, 6 April 2000, Information Note 17; *Efe v. Austria*, 9134/06, 8 January 2013; and the Factsheet on Persons with disabilities and the ECHR)

ARTICLE 18

Restriction for unauthorised purposes/ Restrictions dans un but non prévu

Human-rights activist arrested and detained for reasons other than those prescribed by the Convention: *violation*

Militant des droits de l'homme arrêté et détenu pour des raisons autres que celles prévues par la Convention : *violation*

Rasul Jafarov – Azerbaijan/ Azerbaïdjan - 69981/14
Judgment/Arrêt 17.3.2016 [Section V]

Facts – The applicant, a prominent human rights activist in Azerbaijan, was arrested in 2014 in connection with criminal proceedings for alleged irregularities in the financial activities of several NGOs. A travel ban was imposed on him, his bank accounts were frozen and he was detained until his conviction and imprisonment in 2015.

In the Convention proceedings he complained, *inter alia*, that his arrest and detention had led to a restriction of his Convention rights prompted for purposes other than those prescribed in the Convention, in breach of Article 18.

Law – Article 18 in conjunction with Article 5: The Court considered that the charges against the applicant had not been based on a "reasonable suspicion" within the meaning of Article 5 § 1 (c) of the Convention, and thus found a violation of that Article. The assumption that the authorities had acted in good faith was therefore undermined. Although that conclusion in itself was not sufficient to conclude that Article 18 had been breached, the Court noted that the following circumstances considered together convincingly established that the restriction of the applicant's rights had been based on improper reasons:

i. The increasingly harsh and restrictive legislative regulation of NGO activity and funding, which had led to the prosecution of a NGO activist for an alleged failure to comply with legal formalities while carrying out his work.

ii. The numerous statements by high-ranking officials and articles published in the pro-government media, where local NGOs and their leaders, including the applicant, were harshly criticised for contributing to a negative image of the country abroad by reporting on the human-rights situation in the country. What was held against them in those statements was not simply an alleged breach of domestic legislation on NGOs and grants, but their activity itself.

iii. The applicant's situation could not be viewed in isolation. Several notable human-rights activists who had cooperated with international organisations for the protection of human rights, including the Council of Europe, had been similarly arrested and charged with serious criminal offences entailing heavy custodial sentences. These facts, taken together with the above-mentioned statements by the country's officials, supported the argument that the applicant's arrest and detention had been part of a larger campaign to "crack down on human-rights defenders in Azerbaijan, which had intensified over the summer of 2014".

The totality of the above circumstances indicated that the actual purpose of the impugned measures had been to silence and punish the applicant for his activities in the area of human rights. In the light of these considerations, the Court found that the restriction of the applicant's liberty had been imposed for purposes other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence, as prescribed by Article 5 § 1 (c) of the Convention.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 5 § 1, in that the charges against the applicant were not based on a "reasonable suspicion", of Article 5 § 4 on account of the lack of adequate judicial review of the lawfulness of his detention, and of Article 34 on account of the impediments to communication between the applicant and his representative put in place by the respondent State.

Article 41: EUR 25,000 in respect of pecuniary and non-pecuniary damage.

(See *Ilgar Mammadov v. Azerbaijan*, 15172/13, 22 May 2014, Information Note 174; *Lutsenko v. Ukraine*, 6492/11, 3 July 2012, Information Note 154; *Tymoshenko v. Ukraine*, 49872/11, 30 April 2013, Information Note 162)

ARTICLE 33

Inter-State application/Requête interétatique

Request for revision of Court's judgment of 18 January 1978: *questions communicated*

Demande en révision de l'arrêt de la Cour du 18 janvier 1978 : *questions communiquées*

Ireland/Irlande – United Kingdom/ Royaume-Uni - 5310/71
[Section III]

In its *Ireland v. the United Kingdom* judgment of 18 January 1978 (5310/71), the Court found, *inter alia*, a violation of Article 3 of the Convention. It held that the use of "five techniques of interrogation" in August and October 1971 constituted a practice of "inhuman and degrading treatment", but not a practice of "torture".

The Irish Government have lodged a request to the Court for the revision of that judgment under Rule 80 § 1 of the Rules of Court. In their submission, certain documents that have now come to light contain new information "unknown to the Court" at the moment of delivery of the original judgment and which could have had a decisive influence on the Court's judgment on the specific issue of torture.

A set of questions by the Court were communicated to the parties on 22 March 2016.

ARTICLE 37

Special circumstances requiring further examination/Motifs particuliers exigeant la poursuite de l'examen de la requête

Procedural issues justifying continued examination of complaint despite expiration of deportation order: *request to strike out dismissed*

Questions procédurales justifiant la poursuite de l'examen de la requête malgré l'expiration de la décision d'expulsion : *rejet de la demande de radiation du rôle*

F.G. – Sweden/Suède - 43611/11
Judgment/Arrêt 23.3.2016 [GC]

(See Article 3 above/Voir l'article 3 ci-dessus, page 16)

ARTICLE 46

Execution of judgment – General measures/ Exécution de l'arrêt – Mesures générales

Respondent State required to continue to adopt measures to address structural problem relating to excessive length of pre-trial detention

État défendeur tenu de continuer de prendre des mesures traitant du problème structurel de la durée excessive des détentions provisoires

Zherebin – Russia/Russie - 51445/09
Judgment/Arrêt 24.3.2016 [Section I]

Facts – In 2009 the applicant was arrested on suspicion of a flagrant breach of public peace and order, committed in concert by an organised group. He was remanded in custody during the investigation and subsequent trial for more than seven months. He was found guilty as charged and sentenced to four years' imprisonment.

Law – Article 5 § 3: By failing to consider alternative "preventive measures", by relying essentially on the seriousness of the charges and by shifting the burden of proof to the applicant, the authorities had extended the applicant's detention on grounds which, although "relevant", could not be regarded as "sufficient" to justify its duration.

Conclusion: violation (unanimously).

Article 46: The Court had delivered more than 110 judgments against Russia in which a violation of Article 5 § 3 on account of the excessive length of detention had been found and approximately 700 applications raising a similar issue were pending before it. This issue had already been considered by the Committee of Ministers. Furthermore, according to official data the domestic courts granted approximately 90% of all initial applications for remand in custody lodged by prosecuting authorities and more than 93% of requests for extension of pre-trial detention. These findings demonstrated that the violation of the applicant's right under Article 5 § 3 was neither prompted by an isolated incident, nor attributable to a particular turn of events, but originated from a structural problem consisting of a practice that was incompatible with the Convention.

The Court welcomed the steps already taken by Russia to remedy the problems related to pre-trial detention. However, in view of the extent of the systemic problem at issue, the respondent State had a legal obligation to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects. In this connection, the Court stressed the importance of the presumption of innocence in criminal proceedings and reiterated the recent recommendations of the Parliamentary Assembly summed up in Resolution no. 2077 (2015) adopted on 1 October 2015, as regards the measures aimed at reducing pre-trial detention.

Article 41: EUR 1,000 in respect of non-pecuniary damage.

REFERRAL TO THE GRAND CHAMBER / RENVOI DEVANT LA GRANDE CHAMBRE

Article 43 § 2

Nagmetov – Russia/Russie - 35589/08
Judgment/Arrêt 5.11.2015 [Section I]

(See Article 2 above/Voir l'article 2 ci-dessus, page 9)

Simeonovi – Bulgaria/Bulgarie - 21980/04
Judgment/Arrêt 20.10.2015 [Section IV]

(See Article 6 § 3 (c) above/Voir l'article 6 § 3 c) ci-dessus, page 25)

Medžlis Islamske Zajednice Brčko and Others/et autres – Bosnia and Herzegovina/Bosnie-Herzégovine - 17224/11
Judgment/Arrêt 13.10.2015 [Section IV]

(See Article 10 above/Voir l'article 10 ci-dessus, page 30)

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

Presumption of innocence and defence through public legal counsel

Présomption d'innocence et défense assurée par un défenseur public

Case of Ruano Torres et al. v. El Salvador -
Series C No. 303 / *Affaire Ruano Torres et al. c. Salvador* – Série C N° 303
Judgment/Arrêt 5.10.2015[1]

Facts – The applicant, José Agapito Ruano Torres, was convicted to fifteen years in prison for the kidnapping of a public bus driver, despite serious doubts as to whether he was indeed the person nicknamed *El Chopo*, who, according to a statement rendered by another person under investigation, had allegedly participated in the offence. Public defenders were appointed to represent the applicant during the course of the criminal proceedings.

During the identification parade, the victim of the offence expressed certainty that the applicant was one of the persons who committed the crime. However, on various occasions during the proceedings, evidence was offered in order to show that the applicant was not the person nicknamed *El Chopo* and that he had been working on rebuilding a school at the time of the kidnapping. The judge of first instance and the sentencing court refused to receive this evidence, either because it was deemed "not essential," or on the grounds that it was time-barred.

At the trial hearing, the victim named all defendants present as responsible for his abduction. The applicant remained silent, but when he was granted last words, stated that he was not the person nicknamed *El Chopo*.

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 website (<www.corteidh.or.cr>).

On 5 October 2001, the sentencing court handed down a conviction against the applicant and other defendants as co-perpetrators of the crime of kidnapping. The applicant's public defender did not appeal against the conviction.

The applicant filed three applications for review before the sentencing court, all of which were declared inadmissible. On 19 September 2014 the sentencing court upheld the conviction after conducting a hearing for review requested by the public defence once the Inter-American Commission had issued its report on the merits.

In the proceedings of the case before the Inter-American Court, El Salvador acknowledged its international responsibility with a full acceptance of the facts and of the points of law argued by the Inter-American Commission.

Law

(a) *Article 8(2) (presumption of innocence) of the American Convention on Human Rights (ACHR), in conjunction with Article 1(1) (obligation to respect and ensure rights)* – Since the beginning of the investigation and throughout the criminal proceedings multiple elements raised questions about the applicant's identity as *El Chopo*. However, the applicant was convicted without police, investigative or judicial authorities adopting minimum proceedings to remove the doubts generated about his identity or to ensure the appearance of the person who could actually be *El Chopo*. The Inter-American Court held that in situations where reasonable arguments existed as to the non-participation of one of the accused in the offence, the presumption of innocence should prevail.

The Court also noted that two pieces of evidence had determined the outcome of the criminal proceedings: the "unanimous and coinciding statements" of the victim of the offence and a co-defendant who benefited from the application of the opportunity principle. The Court found that there was no justification, in criminal procedural terms, for having received the statement of the latter in pre-trial proceedings, without the other co-defendants having had the opportunity to exercise their right to defence and cross-examination. The Court also highlighted the limited probative value of the declaration of a co-defendant when it is the only evidence on which a decision of conviction is based, as it objectively would not be enough by itself to rebut the presumption of innocence. Therefore, basing a conviction solely on a statement by a co-defendant with no other corroborating elements violated the presumption of innocence. In this case, the other evidence assessed by the sentencing court was the applicant's identification during the identification parade and at the public hearing. However, the State had acknowledged irregularities in the identification parade and that the victim of the offence had previously viewed the defendants on various media. Therefore, the Court found the State responsible for the violation of the presumption of innocence.

Conclusion: violation (unanimously).

(b) *Articles 8(1), 8(2)(d) and 8(2)(e) of the ACHR (right to be heard and defence through public legal counsel), in conjunction with Article 1(1)* – The Inter-American Court affirmed that the right of defence is a central component of a fair trial. It recalled that the right of defence is exercised in two ways within the criminal proceedings: (i) by the acts of the accused, mainly by the possibility of providing an unsworn statement concerning the acts attributed to him and, (ii) by means of a technical defence, by a lawyer who counsels the person under investigation.

Subparagraphs (d) and (e) of Article 8(2) of the ACHR indicate that the accused has the right "to defend himself personally or to be assisted by legal counsel of his own choosing" and, if he does not do so, he has "the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides."

The Court held that although these provisions establish different options for the design of the mechanisms to guarantee these rights, in criminal cases – in which the technical defence is an inalienable right, owing to the significance of the rights involved and the intention to ensure both equality of arms and total respect for the presumption of innocence – the right to a lawyer to exercise the technical defence in order to participate in the proceedings adequately means that the defence counsel provided by the State is not limited merely to those cases where there is a lack of resources. In this regard, the Court recognised that a distinctive feature of most of the State Parties to the ACHR is the development of an institutional framework and public policy that ensures, at all stages of the proceedings, the inalienable right to a technical defence in a criminal case by public defenders. In this way, States have contributed to ensuring access to justice to the most disadvantaged, upon whom the selectivity of criminal proceedings generally operates.

However, the Court noted that appointing a public defender merely in order to comply with a procedural formality would be equal to not providing a technical defence; thus, it is essential that this defender act diligently in order to protect the accused's procedural guarantees and prevent his rights from being impaired and breaching the relationship of trust. To this end, the Court found that the public defence, as the means by which the State ensures the inalienable right of everyone accused of an offence to be assisted by legal counsel, must have sufficient guarantees to enable it to act efficiently and with equality of arms to the prosecution. The State must take all necessary measures in order to comply with this duty. These include having qualified and trained defenders who can act with functional autonomy.

In the present case, it was argued that the technical defence provided by the State did not act efficiently. In El Salvador, the Public Defence Unit was part of the Office of the General Prosecutor. As a State organ, its conduct should be considered an act of the State. However, the Inter-American Court established that the State cannot be considered responsible for all public defence failures, in light of the independence of the profession and the professional opinion of the counsel for the defence. Furthermore, it found that as part of the State's duty to ensure an appropriate public defence, it must implement a proper selection of public defenders, develop controls on their work, and provide periodic training.

In order to evaluate a possible violation of the right of defence by the State, the Court analysed whether the act or omission of the public defender constituted inexcusable negligence or an evident error in the exercise of the defence that had or could have had a decisive negative effect on the interests of the accused. The Court indicated that it would need to examine the proceedings as a whole, unless a specific act or omission was so serious that it constituted by itself a violation of the guarantee. In addition, it clarified that a non-substantial disagreement with the defence strategy or with the result of a proceeding would not be sufficient to impair the right of defence; rather, inexcusable negligence or an evident error would have to be proved.

In the present case, the Court found that the public defenders representing the applicant did not argue the nullity of the irregularities verified at the identification parade, which was the foundation for his conviction, and failed to file an appeal against the conviction, thus preventing him from obtaining a comprehensive review of his sentence. The Court concluded that such omissions constituted a violation of the defendant's inalienable right to be assisted by legal counsel.

The Court further noted that the State's international responsibility may also be triggered by the response of judicial organs to the acts and omissions of the public defender. Judicial authorities have an obligation of protection and control in order to ensure that the right of defence does not become illusory due to ineffective legal assistance. Thus, the international responsibility of the State will also be established if the inexcusable negligence or manifest error of the defence should have been evident to judicial authorities, or they were informed of this and failed to take necessary and sufficient measures to prevent and/or rectify the violation of the right of defence.

In the instant case, the Court found that the flagrant errors in the performance of public defenders and the lack of an adequate and effective response by the judicial authorities had left the applicant in a state of total defencelessness, aggravated by the fact that he was deprived of his liberty during the entire criminal proceedings. Under those circumstances, the Court held that he was not heard with due guarantees.

Conclusion: violation (unanimously).

(c) *Other violations of rights enshrined in the ACHR* – The Inter-American Court also found violations of Articles 5(1) and (2) (right to personal integrity and the prohibition of torture), 7(1), (3) and (6) (right to personal liberty) and 25(1) (right to judicial protection) of the ACHR, in conjunction with Article 1(1) thereof, to the applicant's detriment (unanimously).

Lastly, it found a violation of Article 5(1) (personal integrity) of the ACHR, in conjunction with Article 1(1) thereof, to the detriment of his next-of-kin (unanimously).

(d) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) initiate and conduct effectively, in a reasonable time, the investigation and the criminal proceedings against those responsible for the alleged acts of torture against the applicant; (ii) determine the responsibility of the public defence agents that contributed to the violation of the applicant's human rights; (iii) ensure that the conviction issued against the applicant has no legal effect and, therefore, expunge all judicial, administrative, criminal or police records existing against him in regard to such proceedings; (iv) provide free psychological treatment; (v) provide scholarships in El Salvador's public institutions to the applicant and his family; (vi) publish the Judgment; (vii) place a plaque in a visible location at the Public Defence Unit headquarters, in order to avoid repetition of events such as those in the present case; (viii) implement mandatory and permanent training programmes addressed to the National Civil Police on human rights principles and norms, specifically on the investigation and documentation of torture; (ix) strengthen the selection of appropriate public defenders and develop protocols to ensure the efficacy of the public defence in criminal proceedings; (x) adopt or strengthen training programmes addressed to public defenders; and (xi) pay the amounts stipulated in the Judgment as compensation for pecuniary and non-pecuniary damage.

RECENT PUBLICATIONS / PUBLICATIONS RÉCENTES

Admissibility Guide: translation into Spanish/ Guide sur la recevabilité: traduction en espagnol

With the help of the Spanish Ministry of Justice, a translation into Spanish of the third edition of the Practical Guide on Admissibility Criteria has now been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Guía práctica sobre la admisibilidad (spa)

Grâce à l'initiative du ministère espagnol de la Justice, une traduction en espagnol de la troisième édition du Guide pratique sur la recevabilité vient d'être publiée sur le site internet de la Cour (<www.echr.coe.int> – Jurisprudence).

Guide on Article 5: translation into Hungarian / Guide sur l'article 5: traduction en hongrois

A translation into Hungarian of the Guide on Article 5 (Right to liberty and security) has now been published on the Court's Internet site (<www.echr.coe.int> – Case-law).

Az 5. cikkre vonatkozó iránymutatás –
A szabadsághoz és a biztonsághoz
való jog (hun)

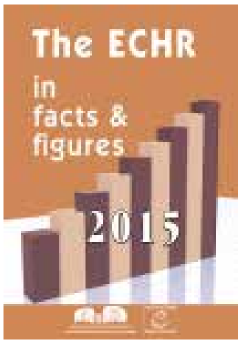
Une traduction en azerbaïdjanais du Guide sur l'article 5 (droit à la liberté et à la sûreté) vient d'être publiée sur le site internet de la Cour (<www.echr.coe.int> – Jurisprudence).

The Court in facts and figures 2015 / La Cour en faits et chiffres 2015

This document contains statistics on cases dealt with by the Court in 2015, particularly judgments delivered, the subject-matter of the violations found and violations by Article and by State. It can be downloaded from the Court's Internet site (<www.echr.coe.int> – The Court).

The ECHR in facts & figures 2015 (eng)

La CEDH en faits & chiffres 2015 (fre)



Ce document contient des statistiques sur les affaires que la Cour a traitées en 2015, notamment sur les arrêts rendus, l'objet des violations constatées ainsi que les violations par article et par État. Il peut être téléchargé à partir du site internet de la Cour (<www.echr.coe.int> – La Cour).

Overview 1959-2015 / Aperçu 1959-2015

This document, which gives an overview of the Court's activities since it was established, has been updated. It can be downloaded from the Court's Internet site (<www.echr.coe.int> – The Court).

Overview 1959-2015 (eng)

Aperçu 1959-2015 (fre)

Ce document, qui donne un aperçu des activités de la Cour depuis sa création, vient d'être mis à jour. Il peut être téléchargé à partir du site internet de la Cour (<www.echr.coe.int> – La Cour).

Annual Activity Report 2015 of the Commissioner for Human Rights / Rapport annuel d'activité 2015 du Commissaire aux droits de l'homme

In March 2016 Mr Nils Muižnieks, the Commissioner for Human Rights, published his Activity Report 2015 which will be presented to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe in the coming months. This report can be downloaded from the Internet site of the Council of Europe (<www.coe.int> – Commissioner for Human Rights).

The Commissioner for Human Rights is an independent and impartial non-judicial institution established in 1999 by the Council of Europe to promote awareness of and respect for human rights in the member States. The activities of this institution focus on three major, closely related areas: country visits and dialogue with national authorities and civil society; thematic studies and advice on systematic human rights work; and awareness-raising activities.

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En mars 2016, M. Nils Muižnieks, Commissaire aux droits de l'homme, a publié son rapport d'activité 2015 qui sera présenté au Comité des Ministres et à l'Assemblée parlementaire du Conseil de l'Europe dans les prochains mois. Ce rapport peut être téléchargé à partir du site internet du Conseil de l'Europe (<www.coe.int> – Commissaire aux droits de l'homme).

Pour rappel, le Commissaire aux droits de l'homme est une instance non judiciaire, indépendante et impartiale, créée en 1999 par le Conseil de l'Europe. Sa mission est de promouvoir la sensibilisation aux droits de l'homme et leur respect dans les États membres. Ses activités s'articulent autour de trois grands axes étroitement liés : des visites dans les pays et un dialogue avec les autorités nationales et la société civile ; un travail thématique et de conseil sur la mise en œuvre systématique des droits de l'homme ; et des activités de sensibilisation.

OTHER INFORMATION / AUTRES INFORMATIONS

Venice Commission / Commission de Venise

At its 106th plenary session held on 11-12 March 2016, the Venice Commission discussed several cases of undue interference in the work of Constitutional Courts in its member States and delivered a Declaration on this subject.

During its session, the Venice Commission also adopted the Rule of Law Checklist. The Checklist aims at enabling an objective, thorough, transparent and equal assessment. Various actors wishing to assess the respect of the rule of law in a country now have therefore a reliable tool for doing so. This applies, for example, to parliaments and other State authorities, civil society and international organisations.

The European Commission for Democracy through Law – better known as the Venice Commission as it meets in Venice – is the Council of Europe's advisory body on constitutional matters. It has 60 member States: the 47 Council of Europe member States, plus 13 other countries (Algeria, Brazil, Chile, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA).

More information on the Internet site of the Venice Commission (<www.venice.coe.int>).

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Lors de sa 106e session plénière tenue les 11-12 mars 2016, la Commission de Venise a débattu de plusieurs cas d'ingérence indue dans le travail des Cours constitutionnelles d'États membres et a fait une Déclaration à ce propos.

Lors de sa session, la Commission de Venise a également adopté la Liste des critères de l'état de droit. Cette liste de critères vise à parvenir à des évaluations objectives, minutieuses, transparentes et justes. Les multiples acteurs désireux de procéder à une évaluation du degré de respect de l'état de droit dans un pays disposent dès lors d'un instrument fiable. Cela vaut par exemple pour les parlements et les autres autorités de l'État, la société civile et les organisations internationales.

Pour rappel, la Commission européenne pour la démocratie par le droit – plus connue sous le nom de Commission de Venise, ville où elle se réunit – est un organe consultatif du Conseil de l'Europe sur les questions constitutionnelles. Elle comprend 60 États membres : les 47 États membres du Conseil de l'Europe ainsi que 13 autres pays (l'Algérie, le Brésil, le Chili, la République de Corée, les États-Unis, Israël, le Kazakhstan, le Kirghizistan, Kosovo, le Maroc, le Mexique, le Pérou et la Tunisie).

Plus d'informations sur le site internet de la Commission de Venise (<www.venice.coe.int>).