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INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

The Court's monthly round-up of case-law

Le panorama mensuel de la jurisprudence de la Cour

European Court of Human Rights

Cour européenne des droits de l'homme

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

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An annual index provides an overview of the cases that have been summarised in the monthly Information Notes. The annual index is cumulative; it is regularly updated.

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Un index annuel récapitule les affaires résumées dans les Notes d'information. L'index est cumulatif pour chaque année ; il est régulièrement édité.

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Derenik Mkrtchyan and/et Gayane Mkrtchyan – Armenia/Arménie, 69736/12, Judgment/Arrêt 30.11.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants are the grandfather and the mother of Derenik G., who died at the age of 10 following a fight at a State school during which he was beaten by two of his classmates when the class teacher had left the room. No medical personnel had been present at the school on the day of the incident. The applicants complained that Derenik G. had died as a result of the failure of the school's authorities to properly perform their duty to protect his life while he was under their supervision and that the domestic authorities had failed to carry out an effective investigation into his death.

Law – Article 2

(a) *Substantive limb* – The cause of Derenik G.'s death had been the development of acute respiratory failure and cardiac function disorder because of an epileptic seizure possibly linked to the beating and to his psychological and emotional state. It had not been disputed that the school's authorities had been unaware of Derenik G.'s particular vulnerability due to his health issues, namely syncope (fainting). However, he had not been diagnosed as suffering from epileptic seizures and no specific recommendations had been made. In those circumstances, the school authorities had not been requested to pay particular attention to Derenik G.

Given the above, the first question to be answered was whether, under the first part of the Osman test, the form teacher nevertheless had known or ought to have known that Derenik G. would have been exposed to a life-threatening danger during her absence from the classroom which should have prompted her to have taken the necessary measures to protect his life. A particular degree of vulnerability would need to be demonstrated in order to impose on the teacher a stringent requirement not to leave the classroom at any time and under any circumstances. While in principle the educational institution was under an obligation to supervise pupils during the period they spent in its care, the members of the teaching staff could not be expected to ensure the permanent supervision of each pupil in order to respond instantly to any unpredictable behaviour. The Court was fully cognisant of the range of risks to which children might be exposed and the paramount duty of school authorities to take supervisory measures to ensure the security of pupils and protect them from all forms of violence to which they might be subjected while under their supervision. However, there was nothing to suggest that (i) on the day of the incident any factors had existed warranting special attention or measures on the part of the form teacher as she had been unaware of Derenik G.'s particular vulnerability due to his health condition; and (ii) any incidents of violence among the pupils had previously occurred in his class. In view of this, it was difficult to maintain that, by merely leaving the classroom, the form teacher could be said to have compromised Derenik G.'s safety, thereby engaging the responsibility of the school's authorities under Article 2.

As it had not been established that the school authorities had known or ought to have known at the relevant time of the existence of a real and immediate risk to Derenik G.'s life, there was no call for the Court to assess the second part of the *Osman* test, namely whether the school authorities had taken the measures which could reasonably have been expected of them.

Consequently, there was insufficient evidence to conclude that the school's authorities had failed to comply with their obligation under Article 2 to provide the requisite standard of protection for Derenik G.'s life.

Conclusion: no violation (five votes to two).

(b) *Procedural limb* – There had been serious shortcomings and delays in the investigation into the circumstances of the school incident which had resulted in Derenik G.'s death. The questioning of witnesses, collection of evidence and institution of criminal proceedings had not been done in a timely manner and there had been omissions at the very initial stages, prior to the institution of the criminal proceedings. There had also been a lack of thoroughness. In particular, the criminal proceedings had been limited solely to the beating, inevitably narrowing the scope of the investigation to

this issue only. The investigation had failed to properly examine the entire chain of events leading to Derenik G.'s death, including the wider issue of the responsibility of the school authorities for the incident. This remained so despite the investigating authority having been provided with statements from Derenik G.'s classmates – which had been taken in the context of the parents' own private investigation – revealing who had beaten him. Although the school authorities' possible responsibility had been addressed in the decisions terminating the criminal proceedings, this had been done in a rather perfunctory manner. Nor had the investigation examined the issue of medical assistance in the school on the day of the incident, including whether the death could have been prevented had medical assistance been provided or the type and the time frame for such assistance, in spite of the fact that the Regional Court had twice drawn the investigating authority's attention to the matter. The Court of Appeal had also failed to examine whether or not the unavailability of medical assistance on the day of the incident had had the effect of compromising Derenik G.'s health condition.

The investigation had thus fallen short of the requirements of Article 2.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there was no need to examine the complaint under Article 13 in conjunction with Article 2 (procedural aspect).

Article 41: EUR 24,000 to the applicants jointly in respect of non-pecuniary damage.

(See also *Osman v. the United Kingdom* [GC], 23452/94, 28 October 1998, Legal Summary, and *Kayak v. Turkey*, 60444/08, 10 July 2012, Legal Summary)

Effective investigation/Enquête effective

Ineffective investigation into child's death after alleged denial of opportunity to seek asylum and order to return to Serbia following train tracks: *violation*

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M.H. and Others/et autres – Croatia/Croatie, 15670/18 and/et 43115/18, Judgment/Arrêt 18.11.2021 [Section I]

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

Effective investigation/Enquête effective

Ineffective investigation into child's death at State school following beating by classmates in teacher's absence: *violation*

Enquête ineffective sur le décès, dans un établissement scolaire public, d'un enfant battu par des camarades de classe en l'absence de l'enseignant : *violation*

Derenik Mkrtchyan and/et Gayane Mkrtchyan – Armenia/Arménie, 69736/12, Judgment/Arrêt 30.11.2021 [Section IV]

(See Article 2 above/Voir l'article 2 ci-dessus, page 8)

ARTICLE 3

Degrading treatment/Traitement dégradant

Child applicants kept in immigration centre with prison-type elements for more than two months in material conditions adequate for the adult applicants: *violation; no violation*

Enfants requérants retenus pendant plus de deux mois dans un centre pour étrangers présentant des caractéristiques carcérales dans des conditions matérielles appropriées pour les adultes requérants : *violation ; non-violation*

M.H. and Others/et autres – Croatia/Croatie, 15670/18 and/et 43115/18, Judgment/Arrêt 18.11.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicants are an Afghan family of fourteen. They left their home country in 2016, travelling, *inter alia*, through Serbia before coming to Croatia. Among other things, they allege that on 21 November 2017, the first applicant and her six children entered Croatia from Serbia, but were taken back to the border by police officers and ordered to go back to Serbia by following the train tracks. One of the children, MAD.H, was hit by a passing train and killed.

On 21 March 2018, the Croatian police caught the applicants clandestinely crossing the Serbian-Croatian border and issued decisions in respect of the first to fourth applicants, placing them and the applicant children in a transit immigration centre in Tovarnik. The applicants complained unsuccessfully of their placement and conditions in the Centre up to the Constitutional Court. The applicants also submitted applications for international protection which

were rejected, the decisions being served on them on 30 March 2018, and against which they appealed unsuccessfully.

Law

Article 2 (procedural aspect): The key elements in the investigation ensuing MAD.H's death had been establishing the exact whereabouts of, and contact between, the first applicant and her children and the Croatian police officers on that date, and verifying allegations of pushbacks and deterrent practices allegedly used by the Croatian authorities in the present case.

The domestic authorities had concluded that the first applicant and her children had never entered Croatian territory and that the police officers had not had any direct contact with them prior to the train hitting the child in Serbia. In so doing they had relied on the statements of the police officers on duty on the relevant date, which they had deemed concurring, whereas the statements of some of the applicants had been deemed contradictory as regards crucial facts. In the circumstances of the case, the Court did not see why the discrepancy in the applicants' statements had been given such crucial importance. On the other hand, the domestic authorities had in no way addressed the change in the police officers' statements during the investigation, nor a discrepancy between the police officers' submission and that of the doctor who had intervened after the accident.

Further, no material evidence had been obtained which could have confirmed beyond any doubt the applicants' and the Croatian police officers' exact whereabouts on the relevant evening. Nor had the investigating authorities addressed the Serbian authorities' finding that the Croatian authorities had forcefully returned the applicant and her children to Serbia on the relevant date in breach of the readmission agreement between the two countries.

Moreover, even though the investigation into the circumstances of MAD.H.'s death had been initiated following a criminal complaint lodged by the lawyer S.B.J. on the applicants' behalf, the investigating authorities had not informed her about the hearing of the first and second applicants on 31 March 2018, where she could have helped clarify the alleged inconsistency in their statements. The investigation authorities had refused to provide S.B.J. with information regarding the investigation, or to take into account her proposals concerning material evidence, and the applicants had been allowed to meet with her only in May 2018. Having regard to the fact that the applicants were an Afghan family with no knowledge of the Croatian language or legal system and no contacts in Croatia, it was hard to imagine how they could have effectively participated in the investigation without the assistance of a lawyer. In those circumstances, the investigative authorities had failed to ensure that the applicants, as MAD.H's next-of-kin, had been involved in the procedure to the extent necessary to safeguard their legitimate interests.

In view of the above-mentioned deficiencies, the State authorities had failed to conduct an effective investigation into the circumstances leading to MAD.H's death.

Conclusion: violation (unanimously).

Article 3 (substantive aspect): The material conditions in the Centre had been satisfactory. However, the Court could not overlook the presence of elements resembling a prison environment; it had been surrounded by a wall, with police officers posted by its entrance and by the doors to each floor, and with barriers in the hallways and bars on the windows. Also, the doors to the applicants' rooms had a glass opening through which it was possible to see from the hallway into the room. The Court noted the Croatian Children's Ombudswoman's remarks, *inter alia*, that the Centre had been inadequate for accommodating families and children, and that the applicants had consistently complained to NGOs that during the initial part of their stay, they had been confined to their rooms and had been restricted in their access to indoor leisure activities and the outdoor facilities. There had been contradictory information received by the authorities in that regard and the Court was unable to make any definitive findings on that particular issue. However, it was important to emphasise that the restriction of access to leisure activities, outdoor facilities and fresh air inevitably causes anxiety and is harmful for children's well-being and development.

Further, the psychologist had established in March 2018 that the applicants had been mourning the death of MAD.H. and experiencing fear of uncertainty. He had recommended providing them with further psychological support and organising activities to occupy the children's time. The Government submitted that the children had been provided with activities without submitting any proof to that effect. In any event, by mid-May 2018, the applicant children had already spent almost two months in the Centre without any organised activities to occupy their time.

The Court was of the view that the detention of children in an institution with prison-type elements, where the material conditions were satisfactory, but where the level of police surveillance was high and there were no activities structuring the children's time, would perhaps not be sufficient to attain the threshold of severity required to engage

Article 3 where the confinement was for a short duration, depending on the circumstances of the case. However, in the case of a protracted period of detention, such an environment would necessarily have harmful consequences for children, exceeding the required threshold.

In that regard, various international bodies, including the Council of Europe, were increasingly calling on States to expeditiously and completely cease or eradicate immigration detention of children. In the present case, the domestic authorities had failed to act with the required expedition in order to limit, as far as possible the detention of the eleven applicant children and their parents. The detention over a period of two months and fourteen days, in the conditions set out above, had exceeded the permissible duration beyond which Article 3 is engaged. Bearing in mind that the applicant children had been in a particularly vulnerable condition due to painful events, as most of them had witnessed the tragic death of their six-year-old sister, the situation must have caused them accumulated psychological disturbance and anxiety.

The Court also noted the applicants' uncertainty as to whether they had been in detention and whether legal safeguards against arbitrary detention had applied, having regard to the fact that they had been placed in the centre on 21 March 2018 and received legal advice in that regard only on 12 April 2018 and that they had not been allowed to see their chosen lawyer S.B.J. until 7 May 2018. Inevitably, that situation had caused additional anxiety and degradation of the parental image in the eyes of the child applicants.

There had accordingly been a violation of Article 3 in respect of the child applicants. However, the Court was unable to conclude that the otherwise acceptable conditions at the Centre for the adult applicants had been particularly ill-suited to their individual circumstances to such an extent as to amount to ill-treatment contrary to Article 3.

Conclusions: violation in respect of the applicant children (six votes to one); no violation in respect of the adult applicants (unanimously).

Article 5 § 1: The police had placed the applicants in detention on 21 March 2018 on the basis of the International and Temporary Protection Act for the purpose of verifying their identities. The Court had serious doubts as to whether in the present case the authorities had carried out an assessment as to whether, in view of the numerous children involved, a less coercive alternative measure to detention had been possible. It had only been on 10 April 2018 that the authorities had sought information with a view to checking the applicants' identity, after an inquiry by the Croatian Ombudswoman with the Ministry of the Interior. By then, the applicants' application for international protection had already been dismissed for over ten days. That circumstance raised concerns as to the authorities' acting in good faith. Furthermore, throughout the proceedings the authorities had maintained that most of the applicants' placement in the Centre had continued to be necessary as their identities had not been established, given that they had not been registered in the Schengen or Eurodac systems, although they had in fact been registered in the Eurodac Bulgarian system. Insisting, in those circumstances, that the applicants' detention had continued to be justified, could raise further concerns as to the authorities' acting in good faith.

On 20 May 2018, the domestic authorities had additionally justified the applicants' detention by the flight risk they had posed under the relevant provision of domestic law. The Court had no cause to call into question the authorities' conclusion related to the flight risk. However, where the domestic authorities had decided, on grounds provided for by law, to detain children and their parents for immigration-related purposes in exceptional circumstances, the related administrative procedures, such as examining their application for international protection, ought to have been conducted with particular vigilance and expedition in order to limit, as far as possible, the detention of the applicant family. In that regard, it had taken another three months, after the applicants' application for international protection had been dismissed, for the domestic court to review their appeal in order for the decision to become enforceable.

The situation had been further compounded by the fact that the applicants had not been afforded relevant procedural safeguards, as shown by the domestic court finding that there had been no evidence that they had been apprised of the decisions placing them in the Centre in a language they could understand.

Conclusion: violation (unanimously).

Article 4 of Protocol No. 4: The applicants had further complained that they had been subjected to collective expulsions without any individual assessment of their circumstances.

The applicants' description of the events of 21 November 2017 had been specific and consistent throughout the whole period following the death of MAD.H. At the same time, there was no material evidence to confirm that the applicants had entered Croatia on 21 November 2017 and had been returned to the border with Serbia by the Croatian police. The alleged return had occurred at nighttime in the winter, without them being handed over to the officials of that country, and without

any kind of official procedure. The Court acknowledged in that connection a large number of reports by various bodies concerning summary returns of persons clandestinely entering Croatia from the borders with Serbia and Bosnia and Herzegovina, where they had been forced to leave the country. The summary returns were allegedly being conducted outside official border crossings and without prior notification of the authorities of the country to which the migrants were being returned.

In that connection, footage of video surveillance might be critical evidence for establishing the circumstances of the relevant events. The area where the applicants had allegedly entered Croatia had been under constant surveillance, including by stationary and thermographic cameras. The Court had already found a violation of Article 2, *inter alia*, because the investigative authorities had never verified the police allegation that there had been no recordings of the impugned events, and that they had failed to inspect the signals from their mobile telephones and the police car GPS in order to establish the applicants' whereabouts and their contact with the Croatian police.

Having regard to the above considerations, in the particular circumstances of the present case, there had been prima facie evidence in favour of the applicants' version of events, and the burden of proving that the applicants had not entered Croatia and had not been summarily returned to Serbia prior to the train hitting MAD.H had rested on the authorities. However, the Government had not submitted a single argument capable of refuting that prima facie evidence. The Court thus considered it to be truthful that on 21 November 2017 the Croatian police officers had returned the first applicant and her six children to Serbia without considering their individual situation. The fact that the first applicant and her six children had entered Croatia irregularly and had been apprehended within hours of crossing the border and possibly in its vicinity did not preclude the applicability of Article 4 of Protocol No. 4. They had been subjected to "expulsion" within the meaning of this provision.

The Government had argued that the applicants had engaged in "culpable conduct" by circumventing the legal procedures that had existed for entry into Croatia. However, the Government had been unable to establish whether at the material time the respondent State had provided any genuine and effective access to procedures for legal entry into Croatia, in particular with a view to claiming protection under Article 3.

Conclusion: violation (unanimously).

The Court also found, unanimously, that there had been a violation of Article 34, in that the respondent State had hindered the effective exercise of the applicants' right of individual application, on the basis of the restriction of contact between the applicants and their chosen lawyer, and the criminal investigation and pressure to which that lawyer had been subjected.

Article 41: EUR 40,000 in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Procedure prescribed by law/Voies légales
Lawful arrest or detention/Arrestation ou détention régulières

Pre-trial detention of judges suspected of membership of an illegal organisation following a coup attempt, on the basis of an unreasonable extension of the concept of *in flagrante delicto*: *violations*

Détention provisoire, à la suite d'une tentative de coup d'État, de magistrats soupçonnés d'appartenir à une organisation illégale, sur la base d'un élargissement déraisonnable de la notion de flagrant délit : *violations*

Turan and Others/et autres – Turkey/Turquie, 75805/16 et al., Judgment/Arrêt 23.11.2021 [Section II]

Traduction française du résumé – Printable version

Facts – The applicants – all of whom were sitting as judges or prosecutors at different types and/or levels of court at the material time – were arrested and placed in pre-trial detention on suspicion of their membership of the "Fetullahist Terrorist Organisation/Parallel State Structure" ("FETÖ/PDY") in the aftermath of an attempted *coup d'état* on 15 July 2016.

Law – Article 5 § 1: The parties diverged on whether the initial pre-trial detention of the applicants – as serving judges and prosecutors enjoying a special status at the time of the events – under the rules of the ordinary law might be said to have satisfied the "quality of the law" requirement.

(a) *Initial pre-trial detention of ordinary judges and prosecutors* – Despite the special procedural safeguards flowing from their status as judges or prosecutors at the material time, the applicants had been placed in pre-trial detention in accordance with the ordinary law, for they had been deemed to have been caught *in flagrante delicto*, as per section 94

of Law no. 2802. The application of the notion of "*in flagrante delicto*" in the specific context of the pre-trial detention of an ordinary judge subject to Law no. 2802 had already led to a finding of violation of Article 5 § 1 in *Baş v. Turkey*, where the Court had found that that notion had been interpreted by the national courts in an extensive manner that had not been in conformity with the requirements of the Convention. The Court saw no reason to depart from its findings in the *Baş* case.

In acknowledging the existence of "discovery *in flagrante delicto*" in the present circumstances, the Constitutional Court had adopted a slightly different approach from that followed by the Court of Cassation as examined in *Baş*. The Constitutional Court had taken the coup attempt as its main reference point, rather than relying solely on the continuing nature of the offence of membership of a terrorist organisation. According to the Constitutional Court, the applicants, and all members of the judiciary caught in the aftermath of the coup attempt, could be considered to have been caught *in flagrante delicto* solely on the basis of their alleged organisational ties with the terrorist organisation behind that attempt. The Court considered that the Constitutional Court's conjectural approach appeared to stretch the concept of "*in flagrante delicto*" beyond the conventional definition provided in domestic law, noting in particular the absence of an affirmation that the applicants had been arrested and placed in pre-trial detention while in the process of, or immediately after, committing an act linked directly to the coup attempt.

The Government had further argued that the pre-trial detention of the relevant applicants under ordinary rules had not necessarily hinged on their discovery *in flagrante delicto*, but that it had also been justified under section 93 of Law no. 2802, as the offence of which they had been accused had been a personal offence governed by that section and not a duty-related one. In the detention orders issued regarding the applicants, no position had been taken on the "personal" or "duty-related" nature of the offence at issue and reference had been made if any, only to section 94 of the Law, which applied to both types of offences. Even in those applications where the detention orders had not made an express reference to section 94, it was clear from the relevant case-law of the Court of Cassation and the Constitutional Court that in the event of the arrest of a member of the judiciary for membership of an armed terrorist organisation, the conditions for "discovery *in flagrante delicto* falling within the jurisdiction of the assize courts" within the meaning of section 94 of Law no. 2802 would be considered to have materialised at the time of apprehension, in view of the continuing nature of the offence of membership of an armed terrorist organisation attributed to them. The Government had moreover acknowledged in their observations that the applicants' pre-trial detention had been conducted in accordance with the general provisions of domestic criminal procedural law on account of their apprehension *in flagrante delicto*.

The Court was therefore not convinced that the finding as regards the existence of a case "*in flagrante delicto*" within the meaning of section 94 of Law no. 2802 might foreseeably have been considered as relevant only for determining the jurisdiction *ratione loci* of the court ordering the detention, without any bearing on the lawfulness of that detention.

The judicial protection provided under Law no. 2802 did not mean impunity. That said, having regard to the importance of the judiciary in a democratic State governed by the rule of law, and to the fact that protection of that kind was granted to judges and prosecutors not for their own personal benefit but in order to safeguard the independent exercise of their functions, the requirements of legal certainty became even more paramount where a member of the judiciary had been deprived of his or her liberty.

Having regard to the foregoing, and to its considerations in the *Baş* case, the Court could not conclude that the pre-trial detention of the applicants who had been subject to Law no. 2802 had taken place in accordance with a procedure prescribed by law within the meaning of Article 5 § 1. Moreover, the measures at issue could not be said to have been strictly required by the exigencies of the situation, within the meaning of Article 15 of the Convention.

Conclusion: violation (unanimously).

(b) *Initial pre-trial detention of members of the Court of Cassation or the Supreme Court* – According to Article 46 of Law no. 2797 governing the members of the Court of Cassation, also applicable to members of the Supreme Administrative Court, the initiation of an investigation against those high court judges was subject to the decision of their relevant Presidency Boards, unless in the case of discovery *in flagrante delicto* falling within the jurisdiction of the assize courts, which triggered the application of the rules of the ordinary law.

That legal framework was similar to that applicable to members of the Constitutional Court, as laid out in the case of *Alparslan Altan v. Turkey*. The extensive application of the notion "*in flagrante delicto*" had resulted in the finding of a violation of Article 5 § 1 in the aforementioned case and the Court saw no reason to depart from its findings. Accordingly, the applicants who had been members of the

Court of Cassation or the Supreme Administrative Court at the time of their pre-trial detention had similarly not been deprived of their liberty in accordance with a procedure prescribed by law. The decision to place those applicants in pre-trial detention might not, moreover, be said to have been strictly required by the exigencies of the situation, within the meaning of Article 15 of the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 5,000 each in respect of non-pecuniary damage.

(See *Baş v. Turkey*, 66448/17, 3 March 2020, Legal Summary, and *Alparslan Altan v. Turkey*, 12778/17, 16 April 2019, Legal Summary)

Lawful arrest or detention/Arrestation ou détention régulières

No causal link between conviction for violent offences and subsequent preventive detention on account of mental condition and recidivism risk: *violation*

Absence de lien de causalité entre la condamnation du requérant pour des infractions violentes et son internement ultérieur au motif de son état de santé mentale et d'un risque de récidive : *violation*

W.A. – Switzerland/Suisse, 38958/16, Judgment/Arrêt 2.11.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant was convicted of several offences, including murder and intentional manslaughter, in a judgment of 1993 (amended in 1995) and served his sentence of twenty years' imprisonment. In 2013, the proceedings against him were reopened and the applicant's subsequent preventive detention was ordered, on account of a new analytic method by a psychiatric expert relating to his mental state and which concluded that there was a very high risk that he would commit further violent offences. The applicant remains in detention in prison.

Law

Article 5 § 1 (a): Only the judgment of 1993/1995, in which it had been established that the applicant was guilty, in particular, of having committed two capital offences, and was sentenced to twenty years' imprisonment, could provide a basis for the applicant's preventive detention for the purposes of Article 5 § 1 (a). By contrast, the order made by the domestic court in 2013, for the applicant's subsequent detention, had not itself constituted a "conviction" as required under Article 5 § 1 (a) as it had not involved the establishment of a (new) offence and a finding of guilt thereof.

The sentencing court's judgment of 1993/1995 and the judgment ordering the applicant's subsequent detention in 2013 were linked as a result of the application of the rules on the reopening of proceedings. According to the Federal Court, the application of those rules had led to the order of subsequent preventive detention becoming part of the initial judgment of the sentencing court.

The court had to determine, in those circumstances, whether there had been a sufficient causal connection between the applicant's "conviction" in 1993/1995 and his subsequent preventive detention.

The commission by the applicant of the capital offences he had been found guilty of in 1993/1995 had not been re-assessed or re-established in the reopened proceedings at issue. Nor had the term of 20 years' imprisonment imposed in 1993/1995 – and which the applicant had fully served – been re-examined. In line with the requirements of domestic law, the domestic courts had only examined whether the requirements for an additional preventive detention of the applicant were met and had already been met at the time of his conviction without this having been known to the sentencing court. The Court considered that, in those circumstances, no fresh determination of a criminal charge in a new decision was made in the reopened proceedings at issue. The proceedings *de facto* amounted to the imposition of an additional sanction aimed at protecting society for an offence which the applicant had previously been convicted of, without there being new elements affecting the nature of the offence or the extent of the applicant's guilt.

In those circumstances, the preventive detention had been incompatible with the aims of the applicant's initial conviction. The Court therefore could not accept that the reopening procedure in question had created a causal link between the initial conviction and the subsequent preventive detention. As the applicant's "conviction" in 1993/1995 had not comprised a preventive detention order, there had consequently been no causal link between that conviction and the applicant's subsequent preventive detention, for the purposes of Article 5 § 1 (a) and his detention had thus not justified under that provision.

Article 5 § 1 (e): The Court agreed that the applicant was a person of "unsound mind" for the purposes of Article 5 § 1 (e). In the proceedings at issue, the domestic courts had established that the applicant suffered from a serious personality disorder and psychopathy and that, owing to that condition,

there was a very high risk that he would commit further serious violent offences if released. However, the applicant had been detained in an ordinary prison and not in an institution suitable for the detention of mental health patients. His detention had thus not been lawful for the purposes of Article 5 § 1 (e).

Further, none of the other sub-paragraphs in Article 5 § 1 could serve to justify the applicant's detention at issue.

Conclusion: violation (unanimously).

Article 7 § 1: The applicant's preventive detention, given notably its imposition by the criminal courts by reference to a conviction for a criminal offence, its characterisation as being similar to a penalty under domestic law and the fact that it had entailed deprivation of liberty of indefinite duration executed in prison, was to be classified as a "penalty" for the purposes of Article 7 § 1.

The Court then determined whether the applicant's subsequent preventive detention had constituted a "heavier" penalty "than the one that was applicable at the time the criminal offence was committed". At the time of the applicant's offences, it had not been possible to place him in preventive detention by a retrospective order made after his conviction by the sentencing court in 1993/1995 had become final. The legal provision on which the applicant's subsequent preventive detention had been based had only been inserted into the Criminal Code after the applicant's offences had been committed. In addition, at the time of the applicant's offences, preventive detention ordered in a sentencing court's judgment had been executed prior to a term of imprisonment ordered in the same judgment. Once preventive detention had been terminated as the reasons for such detention no longer prevailed, the execution of the additional term of imprisonment had either equally ended or the duration of preventive detention had at least been deducted from the term of imprisonment which was still to be served. In contrast, under the amended version of the Criminal Code, a term of imprisonment was executed prior to a preventive detention order made in the same judgment and the person concerned was thus liable to be detained for a longer period of time.

Consequently, the subsequent order for the applicant's preventive detention had amounted to a retrospective imposition of a heavier penalty.

Conclusion: violation (unanimously).

Article 4 of Protocol No. 7: The Federal Court had found that the subsequent preventive detention had been imposed following the reopening of the trial in exceptional circumstances, in accordance with the requirements of Article 4 § 2 of Protocol No. 7. However, the reopening at issue in the present case had not required any new elements affecting the nature of the offences committed by the applicant or the extent of his guilt and no fresh determination of a criminal charge in a new decision had been, or was to be, made. Accordingly, the applicant's case had not been reopened for the purposes of Article 4 § 2 of Protocol No. 7.

Conclusion: violation (unanimously).

Article 41: EUR 40,000 in respect of non-pecuniary damage.

Lawful arrest or detention/Arrestation ou détention régulières

Failure to demonstrate required assessment, vigilance and expedition in proceedings in order to limit asylum seekers' family detention as far as possible: *violation*

Manquement des autorités à démontrer qu'elles ont mené la procédure selon les critères d'évaluation, de vigilance et de célérité requis pour limiter autant que possible la détention de la famille de demandeurs d'asile : *violation*

M.H. and Others/et autres – Croatia/Croatie, 15670/18 and/et 43115/18, Judgment/Arrêt 18.11.2021 [Section I]

(See Article 3 above/Voir l'article 3 ci-dessus, page 9)

ARTICLE 6

Article 6 § 1 (civil)

Access to court/Accès à un tribunal

Disproportionate costs order against applicant in private civil proceedings amounting to double his compensation award: *violation*

Condamnation disproportionnée aux frais et dépens du demandeur à une action civile, deux fois supérieure à l'indemnité qui lui avait été allouée : *violation*

Čolić – Croatia/Croatie, 49083/18, Judgment/Arrêt 18.11.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant brought a successful civil action for damages against a private individual for physical assault. He was ordered to pay the defendant's costs of the proceedings in an amount which

was approximately double than that which he was awarded in damages. The applicant complained about the lack of access to a court and the violation of his property rights due to the excessive costs order.

Law – Article 6 § 1: Bearing in mind the pertinent case-law, in the present case there had been a restriction on the applicant's right of access to court. The key question was whether the restriction was proportionate. A negative answer was arrived at as follows.

Unreasonable costs of proceedings might raise an issue under the Convention primarily in cases in which a party succeeded, at least in part, with the grounds of the civil claim, but not with its entire amount. In such cases, very high costs of proceedings might "consume" a large portion or even the entirety of the party's financial award. In the absence of weighty reasons to justify such a result, the litigation was rendered pointless and that party's right to a court merely theoretical and illusory.

In the present case, the applicant's claim had been deemed well founded and he had been awarded about 75% of his final claim for damages. The fact that one aspect of his claim, namely as per damages for mental anguish resulting in loss of amenities of life, had been dismissed in full, did not alter the fact that he had still succeeded in proving the occurrence of the act in question (the assault) and its causal link to the damage actually suffered by him. Further, what had been at stake for him was a well-founded claim for damages caused by an attack on his physical integrity by a private individual. Moreover, only half of his costs for his legal representation had been reimbursed. The proceedings had thus resulted in the absurd outcome that the applicant had been ordered to pay in costs to the defendant double the amount which he had been awarded in damages as a result of the attack.

The Government had failed to put forward sufficiently convincing reasons to justify this outcome. In this connection, the Court noted the following: the access-to-court guarantees applied with equal strength to private disputes as they did to those involving the State since in both types of proceedings a party could be forced to bear a disproportionate financial burden in the form of costs of proceedings, which could ultimately result in a breach of that party's right of access to court. At the same time, the fact that the defendant in the present case had been a private party formed but an element in assessing the proportionality of the restriction of the applicant's right of access to court. Further, regard being had to the relevant Supreme Court guidelines the applicant's claim could not be considered as being exaggerated whereas the defendant had not born any additional costs when the applicant had reduced his initial claim. Lastly, the Supreme Court had not sufficiently taken into account that the defendant, who had challenged the applicant's assault claim as unfounded, had only objected to the amount of damages as a precaution. Instead, and contrary to previous cases on the matter, that court had mechanically considered that, during the initial part of the proceedings when most procedural activities seemed to have taken place, the applicant had "quantitatively succeeded" with only some 25% of the amount claimed disregarding the fact that he had "qualitatively" succeeded with the grounds of his claim, that is, he had successfully proved the fact that the damage caused to him by the defendant had actually occurred. Consequently, the manner in which it had applied the domestic legislation in the applicant's case fell outside the acceptable margin of appreciation allowed to the domestic courts under Article 6 § 1.

In the circumstances, the impugned restriction had impaired the very essence of the applicant's right of access to court.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: The applicant's claim for compensation had been acknowledged in the amount awarded to him by the Supreme Court's final judgment; it had thus been sufficiently established to qualify as an "asset" protected by Article 1 of Protocol No. 1. The substantial reduction of the amount of that claim resulting from the duty to pay the costs of the proceedings constituted an interference with his right to peacefully enjoy his possessions. Although that interference had been lawful and pursued a legitimate aim, having regard to the case-law on the subject and the reasons for the finding of a violation of Article 6 § 1, it had been disproportionate.

Conclusion: violation (unanimously).

Article 41: EUR 1,750 in respect of pecuniary damage.

(See also *Stankov v. Bulgaria*, 68490/01, 12 July 2007, Legal Summary; *Perdigão v. Portugal* [GC], 24768/06, 16 November 2010, Legal Summary; and *Cindrić and Bešlić v. Croatia*, 72152/13, 6 September 2016, Legal Summary)

Tribunal established by law/Tribunal établi par la loi

Manifest breaches in appointment of judges to newly established Supreme Court's Chamber of Extraordinary Review and Public Affairs following legislative reform: *violation*

Violations manifestes dans la procédure de nomination des juges de la chambre du contrôle extraordinaire et des affaires publiques nouvel-

lement créée au sein de la Cour suprême à l'issue d'une réforme législative : *violation*

Dolińska-Ficek and/et Ozimek – Poland/Pologne, 49868/19 and/et 57511/19, Judgment/Arrêt 8.11.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicants, who are both judges, applied for posts at higher courts in late 2017 and early 2018 respectively, but did not receive a recommendation from the National Council of the Judiciary (NCJ). Their appeals against the relevant NCJ resolutions (on the non-recommendation of their candidature) were examined and dismissed by the newly established Chamber of Extraordinary Review and Public Affairs of the Supreme Court, one of the new two chambers created following the reorganisation of that court effected through the 2017 Amending Act on the NCJ and the 2017 Act on the Supreme Court as part of the large-scale legislative reform of the Polish judicial system initiated by the government in 2017. The NCJ's judicial members were now elected by *Sejm*. Pursuant to the relevant domestic provisions read as a whole, judges were appointed to all levels and types of courts, including the Supreme Court, by the President of Poland following a recommendation of the NCJ which the latter issued after a competitive selection procedure in which it evaluated and nominated the candidates.

The applicants complained that the appointment of the judges of the Chamber of the Extraordinary Review and Public Affairs by the President of Poland upon the NCJ's recommendation was in manifest breach of the domestic law and the principles of the rule of law, separation of powers and the independence of the judiciary.

Law – Article 6 § 1: The Court's task in the present case was to assess the circumstances relevant for the process of appointment of judges to the Chamber of Extraordinary Review and Public Affairs, after the entry into force of the 2017 Act on the Supreme Court establishing that Chamber, and not to consider the legitimacy of the reorganisation of the Polish judiciary as a whole.

The Court examined whether the hearing of the applicants' cases by the Chamber of Extraordinary Review and Public Affairs gave rise to a violation of their right to a "tribunal established by law" in the light of the criteria laid down in *Guðmundur Andri Ástráðsson v. Iceland* [GC] and also applied in *Reczkowicz v. Poland*. In reaching its conclusions, the Court took into account in particular the rulings of the Polish Supreme Court and the Court of Justice of the European Union, as well as multiple reports and assessments by European and international institutions.

(a) *Whether there was a manifest breach of the domestic law* – the alleged breach was twofold

(i) *The alleged lack of independence of the NCJ from executive and legislative powers* – The Court followed the reasoning and methodology applied in *Reczkowicz*, the alleged violation originating in the same fundamental breach of the domestic law. As in that case, it held that there had been a manifest breach of domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. That was because the NCJ, as established under the 2017 Amending Act on the NCJ, did not provide sufficient guarantees of independence from the legislative or executive powers.

(ii) *The President of Poland's appointment of judges to the Chamber of Extraordinary Review and Public Affairs, despite the stay of the implementation of NCJ resolution no. 331/2018 pending judicial review* – On 27 September 2018 the Supreme Administrative Court had issued an interim order staying the implementation of NCJ resolution no. 331/2018 of 28 August 2018 – which had recommended candidates for twenty posts of judges in the Chamber of Extraordinary Review and Public Affairs –, pending its examination of the appeal by a number of non-recommended candidates contesting the legality of the resolution. Notwithstanding, the stay and the fact that the appeals were pending, the President of Poland proceeded with the appointment of the candidates.

The Court fully subscribed to the views expressed by the Polish Supreme Court, the CJEU and the Advocate General, concerning the relevant flagrant breaches of the domestic law. In this connection, it reiterated one of the fundamental aspects of the rule of law was the principle of legal certainty, which required, *inter alia*, that where the courts had finally determined an issue, their ruling should not be called into question. This applied, by definition, to the implementation of judicial decisions on interim measures that remained in force until a final decision determining the case before a court had been given. To hold otherwise would mean rendering a binding, albeit transitional, judicial decision that was devoid of purpose and meaning. Furthermore, the Court had condemned, in the strongest terms, any attempts by the legislative or executive power to intervene in court proceedings, considering such attempts to be *ipso facto* incompatible with the notion of an "independent and impartial tribunal" within the meaning of Article 6 § 1. Whether such interventions had actually affected the course

of the proceedings was of no relevance since, coming from the executive and legislative branches of the State, they revealed a lack of respect for judicial office itself and were such are capable of justifying fears as to the independence and impartiality of the courts concerned.

The State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 was not limited to the judiciary but also implied obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they did not agree with them. Thus, the State's respect for the authority of the courts was an indispensable precondition for public confidence in the judiciary and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary did not suffice. They must be effectively incorporated into everyday administrative attitudes and practices.

Conversely, in the present case the actions of the executive power in the process of appointment of judges to the Chamber of Extraordinary Review and Public Affairs had demonstrated an attitude which could only be described as one of utter disregard for the authority, independence and role of the judiciary. Those actions had been clearly taken with the ulterior motive of not only influencing the outcome of the pending court proceedings but also preventing the proper examination of the legality of the resolution that had recommended candidates for judicial posts and, in consequence, rendering judicial review of the resolution meaningless. They had been aimed at ensuring that the judicial appointments as proposed by the NCJ – a body over which the executive and the legislative authorities held an unfettered power – would be given effect even at the cost of undermining the authority of the Supreme Administrative Court, one of the country's highest courts, and despite the risk of setting up an unlawful court. As such, the actions had been in flagrant breach of the requirements of a fair hearing within the meaning of Article 6 § 1 and were incompatible with the rule of law.

In order to assess fully the gravity of the breach thus committed, the Court considered in detail the functions performed by the Chamber of Extraordinary Review and Public Affairs, the scope of its jurisdiction and its general position within the administration of justice in Poland as well as the concerns about its extensive powers that had been raised at European level already before the 2017 Amending Act. Further, following the 2019 Amending Act the powers of the Chamber of Extraordinary Review and Public Affairs had been extended to cover all matters concerning the independence of the Polish judiciary, thus giving it uncircumscribed power in that regard and enabling it to protect the NCJ's recommendations for judicial appointments by the President of Poland against any challenge.

Assessing all the circumstances as a whole, the Court concluded that the President of Poland's appointment of all the judges to the Chamber of Extraordinary Review and Public Affairs upon NCJ resolution no. 331/2018, notwithstanding the ruling of the Supreme Administrative Court staying the implementation of that resolution, amounted to a manifest breach of the domestic law. Deliberate disregard of a binding judicial decision and interference with the course of justice, in order to vitiate and render meaningless a pending judicial review of the appointment of judges, could only be characterised as blatant defiance of the rule of law.

(b) *Whether the breaches of the domestic law pertained to a fundamental rule of the procedure for appointing judges undermined the very essence of the right to a "tribunal established by law"* – As in *Reczkowicz* with regard to the Disciplinary Chamber of the Supreme Court, there had also been a manifest breach of domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs of that court. That was because the recommendation of candidates for judicial appointment to the Chamber of Extraordinary Review and Public Affairs – a condition *sine qua non* for appointment by the President of Poland – had been entrusted to the NCJ, which, as established under the 2017 Amending Act, lacked sufficient guarantees of independence from the legislature and the executive.

By virtue of that Act, which deprived the judiciary of the right to nominate and elect judicial members of the NCJ – a right afforded to it under the previous legislation and recognised by international standards – the legislative and the executive powers, had achieved a decisive influence on the composition of the NCJ. The Act had practically removed not only the previous representative system but also the safeguards of independence of the judiciary in that regard enabling the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, a possibility of which these authorities had taken advantage – as shown, for instance, by the circumstances surrounding the endorsement of judicial candidates for the NCJ. This situation had been further aggravated by the subsequent appointment of judges to the Chamber of Extraordinary Review and Public Affairs by the President of Poland, carried out in flagrant disregard for the fact that the implementation of NCJ resolution no. 331/2018 recommending their candidatures had been stayed.

A procedure for appointing judges which, as in the present case, disclosed an undue influence of the legislative and executive powers on the appointment of judges was *per se* incompatible with Article 6 § 1 and as such, amounted to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of judges so appointed.

Thus, the breaches in the procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs were of such gravity that they impaired the very essence of the applicants' right to a "tribunal established by law".

(c) *Whether the allegations regarding the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts* – There was no procedure under Polish law whereby the applicant could challenge the alleged defects in the procedure for the appointment of judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court. Consequently, no remedies had been provided.

(d) *Overall* – The Chamber of Extraordinary Review and Public Affairs of the Supreme Court, which examined the applicants' cases, was not a "tribunal established by law".

Conclusion: violation (unanimously).

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

Article 46: The violation of the applicants' rights originated in the amendments to Polish legislation which deprived the Polish judiciary of the right to elect judicial members of the NCJ and enabled the executive and the legislature to interfere directly or indirectly in the judicial appointment procedure, thus systematically compromising the legitimacy of a court composed of the judges appointed in that way. In this situation and in the interests of the rule of law and the principles of the separation of powers and the independence of the judiciary, a rapid remedial action on the part of the Polish State was required. The Court refrained from giving any specific indications as to the type of individual and/or general measures that might be taken in order to remedy the situation and limited its considerations to general guidance. It therefore fell upon the respondent State to draw the necessary conclusions from the judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violations found by the Court and to prevent similar violations from taking place in the future.

(See *Guðmundur Andri Ástráðsson v. Iceland* [GC], 26374/18, 1 December 2020, Legal Summary, and *Reczkowicz v. Poland*, 43447/19, 22 July 2021, Legal Summary; see also *Xero Flor w Polsce sp. z o.o. v. Poland*, 4907/18, 7 May 2021, Legal Summary)

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Statements given by applicants to French authorities on US base at Guantánamo not used as basis for criminal proceedings and convictions in France: *no violation*

Contenu des auditions des requérants par les autorités françaises à la base américaine de Guantánamo n'ayant pas servi de fondement à leurs poursuites et condamnation en France : *non-violation*

Sassi and/et Benchellali – France, 10917/15 and/et 10941/15, Judgment/Arrêt 25.11.2021 [Section V]

English translation of the summary – Version imprimable

En fait – Les requérants, deux ressortissants français, ont été arrêtés à la frontière pakistanaise lorsqu'ils ont quitté l'Afghanistan au début de l'année 2002. Ils ont été remis aux États-Unis et détenus à la base de Guantánamo. Les autorités françaises y ont interrogé les requérants au cours de trois missions « tripartites » (ci-après « les missions ») impliquant un représentant de trois services français (le ministère des Affaires étrangères, la Direction générale de la sécurité extérieure (DGSE) et la Direction de la surveillance du territoire (DST).

Puis les requérants ont été rapatriés en France où ils ont été condamnés pénalement pour terrorisme.

Les requérants se plaignent, au regard de l'article 6 de la Convention, des modalités des auditions à Guantánamo et de l'utilisation de leur contenu au cours des procédures pénales ultérieures en France.

En droit – Article 6 §1

a) *Sur la nature des auditions effectuées sur la base de Guantánamo* – Si une procédure judiciaire a été engagée en France parallèlement aux missions à Guantánamo, différents éléments appuient les conclusions des juridictions internes, pour lesquelles les missions étaient à caractère exclusivement administratif et sans rapport avec les procédures judiciaires concomitantes, et avaient pour objectif d'identifier les personnes détenues et de recueillir des renseignements, et non de collecter des éléments de preuve d'une infraction pénale qui aurait été commise.

Le personnel du ministère des Affaires étrangères, seul maître d'œuvre de ces missions, ainsi que les

agents de la DST (unité renseignement) mis à sa disposition n'avaient pas de mandat judiciaire. Et les comptes-rendus de ces agents, classés « secret défense », ne pouvaient être transmis aux autorités judiciaires et utilisés lors d'une procédure pénale contre les requérants.

Après la première mission, le procureur de la République a ouvert une enquête préliminaire, confiée à la DST (unité judiciaire – unité distincte qui fonctionne de manière indépendante par rapport à l'unité renseignement), visant les requérants mais sans disposer d'éléments permettant de supposer qu'ils avaient commis une infraction susceptible d'être poursuivie en France.

La demande d'entraide judiciaire en matière pénale adressée aux autorités américaines avait pour objet de rechercher des éléments faisant défaut pour connaître et apprécier les circonstances du départ et du parcours des requérants à partir du sol français, les sollicitations, les appuis et les directives dont ils avaient pu être destinataires avant leur formation en Afghanistan.

La troisième mission, menée postérieurement à l'ouverture de l'information judiciaire, avait le même objet que les deux premières missions et elle s'est déroulée de manière autonome vis-à-vis des différentes procédures judiciaires engagées sur le territoire français.

En outre, les renseignements obtenus lors des missions étaient déjà connus par la DST (unité judiciaire) au regard des informations dont elle disposait.

Certes, dès la saisie de la DST (unité judiciaire) par le parquet lors d'une enquête préliminaire, elle avait la charge d'une enquête judiciaire et se trouvait soumise aux règles du code de procédure pénale. La cour d'appel, statuant sur renvoi de la Cour de cassation, a vérifié si les informations transmises aux autorités judiciaires avaient porté atteinte aux droits des prévenus en constituant des éléments à charge, obtenus sans respecter les règles du code de procédure pénale et à la fois nouveaux et déterminants pour l'issue de la procédure judiciaire. Après une chronologie longuement détaillée des différents faits et actes, l'examen des pièces déclassifiées et des procès-verbaux de l'enquête de la DST (unité renseignement) versés au débat contradictoire, la cour d'appel a conclu, dans un arrêt spécialement motivé, que le caractère administratif des missions était avéré et que rien ni personne ne rattachait leur conduite à la procédure judiciaire.

Ainsi, dans le cadre des auditions effectuées par les missions à Guantánamo, sans rapport avec les procédures judiciaires concomitantes en France, les requérants n'ont pas fait l'objet, par les autorités les ayant menées, d'une « accusation en matière pénale » au sens de l'article 6 § 1.

b) *Sur le déroulement de la procédure en France* – Les requérants avaient soulevé un grief tiré de la violation de l'article 3 de la Convention du fait des conditions de leurs auditions par les agents de la DST (unité renseignement) à Guantánamo. La Cour a précédemment relevé des allégations de mauvais traitements et d'abus sur des personnes suspectées de terrorisme et détenues par les autorités américaines dans ce cadre. Dans la présente affaire, le grief des requérants tiré de l'article 3 en ce qui concerne les agents français a été déclaré irrecevable. Compte tenu des circonstances particulières du cas de l'espèce, la Cour s'attachera néanmoins à vérifier, sous l'angle de l'article 6, si et dans quelle mesure les juges internes ont pris en considération les allégations de mauvais traitements des requérants, alors même qu'ils auraient été subis en dehors de l'État du for et leur éventuelle répercussion sur l'équité de la procédure.

En outre, il lui appartient d'apprécier l'utilisation qui a effectivement été faite des déclarations litigieuses au cours de la procédure judiciaire, tant au stade de l'instruction que lors du procès au fond. En particulier, la Cour examinera si les juridictions internes ont répondu de manière adéquate aux objections soulevées par les requérants quant à la fiabilité et à la valeur probante de leurs déclarations et leur ont donné une possibilité effective de contester leur recevabilité et de s'opposer effectivement à leur utilisation.

Dès leur arrivée sur le territoire français, les requérants, interpellés par des agents de la DST (unité judiciaire), furent placés en garde à vue et ont dès lors fait l'objet d'une « accusation en matière pénale ». Les interrogatoires furent menés par des agents différents de ceux qui avaient participé aux missions. En outre, ces agents n'étaient pas au courant du contenu des informations collectées par leurs collègues à Guantánamo. Les requérants, interrogés à treize reprises, ont apporté de très nombreux détails sur leur parcours, leur formation en Afghanistan, ainsi que sur leurs motivations.

Les requérants, assistés de leurs avocats, ont été interrogés par le juge d'instruction, respectivement à dix et huit reprises.

En première instance, le tribunal correctionnel a ordonné un supplément d'information qui a conduit à l'audition d'un certain nombre de personnes, mais également à la déclassification de divers documents établis par les services français lors des missions qui furent ensuite versés au dossier de la procédure et soumis au débat contradictoire.

Tout au long de la procédure, les requérants et leurs conseils ont pu faire valoir leurs arguments, présenter leurs demandes et exercer les recours qui leur étaient ouverts. Ils ont eu accès aux documents versés au dossier après leur déclassification et ils ont été en mesure d'en débattre dans le respect du principe du contradictoire.

Enfin, si les documents litigieux ont été utilisés dans la procédure au fond, le tribunal correctionnel puis la Cour d'appel, ayant statué sur renvoi après cassation, se sont quasi exclusivement fondés, dans des décisions longuement motivées, sur d'autres éléments à charge pour retenir la culpabilité des requérants tels que les informations extraites d'autres procédures judiciaires qui étaient déjà en possession des services de renseignement, ainsi que les déclarations détaillées des requérants au cours de leur garde à vue et durant l'information judiciaire. Le jugement du tribunal correctionnel ne comporte qu'une seule référence à des informations obtenues dans le cadre d'une mission sur le contenu de la formation dans un camp en Afghanistan.

Compte tenu de ce qui précède, et constatant que les éléments recueillis au cours des auditions menées dans le cadre des missions n'ont servi de fondement ni aux poursuites engagées à l'encontre des requérants ni à leur condamnation, dans les circonstances de l'espèce, la procédure pénale suivie pour chacun des requérants a été équitable dans son ensemble.

Conclusion : non-violation (unanimité).

(Voir aussi *Ibrahim et autres c. Royaume-Uni* [GC], 50541/08 et al., 13 septembre 2016, Résumé juridique, et *Beghal c. Royaume-Uni*, 4755/16, 28 février 2019, Résumé juridique)

ARTICLE 7

Heavier penalty/Peine plus forte Retroactivity/Rétroactivité

Subsequent order for preventive detention amounting to retrospective imposition of a heavier penalty: *violation*

Ordonnance d'internement ultérieure s'analysant en l'imposition rétroactive d'une peine « plus forte » : *violation*

W.A. – Switzerland/Suisse, 38958/16, Judgment/Arrêt 2.11.2021 [Section III]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 14)

ARTICLE 8

Respect for private life/Respect de la vie privée

No possibility of tailor-made response in deprivation of legal capacity proceedings: *violation*

Impossibilité de moduler le degré d'incapacité juridique : *violation*

N. (no. 2/n° 2) – Romania/Roumanie, 38048/18, Judgment/Arrêt 16.11.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The present application concerns proceedings in which the domestic courts, basing their decisions mainly on medical expert opinions, divested the applicant of his legal capacity and placed him under the full authority of a legal guardian. The applicant also complained that he had had no say in the subsequent proceedings leading to the change of his legal guardian.

Law – Article 8

(a) *Legal incapacitation* – The applicant's rights had been restricted by law more than had been strictly necessary. The consequences of that interference had been very serious. As a result of his incapacitation, the applicant had become fully dependent on his legal guardians, to whom the courts had transferred the exercise of his rights. Admittedly, in reaching their decision, the courts had referred to medical expert reports prepared for the purposes of the proceedings in question after direct examination of the applicant, who had participated in the proceedings and benefited from the assistance of counsel. However, that measure could not be modulated and the applicant's actual needs and wishes could not be factored into the decision-making process. Indeed, the existing legislative framework did not leave the judges, or in this case the forensic experts, any room for an individualised assessment of the applicant's situation. The civil code distinguished between full capacity and full incapacity but did not provide for a "tailor-made response".

The Court, however, noted with satisfaction that, in its recent decision no. 601 of 16 July 2020, the Constitutional Court has declared the legal provisions in question to be unconstitutional and in violation of the State's international obligations with respect to the protection of the rights of people with disabilities.

Conclusion: violation (unanimously).

(b) *Change of legal guardian* – On account of his legal incapacitation, the applicant had been ulti-

mately prevented from deciding for himself about who would protect his interests and exercise his rights. Given the significant role of a legal guardian, that aspect was accordingly to be considered as another interference with the applicant's right to respect for his private life.

The said procedure had lacked safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake. The proceedings had taken place between the social welfare authorities and the two legal guardians. The applicant had not been present in court. He had been excluded from those proceedings for the sole reason that he had been placed under guardianship, without any consideration for his actual condition or capacity to understand the matter and express his preferences. Although the applicant at one point appeared to have given his consent to the change of legal guardian, his opinion had not featured in the court's reasoning (in fact, it had not even been part of the court file). The Court was not convinced that he would have had a real opportunity to appeal against the impugned decision. It had never been served on the applicant. Moreover, at that time, the only instance in which a person divested of legal capacity could apply to a court was to seek to have his or her incapacitation measure lifted.

In sum, the decision-making process had not been conducted so as to ensure that the applicant's current state of health was properly assessed and that all views and interests were duly taken into account. The interference had not been based on "relevant and sufficient reasons".

Conclusion: violation (unanimously).

Article 46: The Court found it crucial that the respondent State adopted the appropriate general measures with a view to bringing its legislation and practice on legal incapacitation into line with the findings of the Constitutional Court in its decision of 16 July 2020 and with the international standards, including the Court's case-law, in the matter.

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

(See also *Shtukaturov v. Russia*, 44009/05, 27 March 2008, Legal Summary; *A.N. v. Lithuania*, 17280/08, 31 May 2016, Legal Summary; and *Nikolyan v. Armenia*, 74438/14, 3 October 2019, Legal Summary)

Respect for family life/Respect de la vie familiale

Failure of domestic authorities to take reasonable and timely measures to reunite mother and children after kidnapping by paternal grandfather: *violation*

Défaut d'adoption en temps voulu par les autorités internes de mesures raisonnables en vue de réunir une mère et ses enfants après leur enlèvement par leur grand-père paternel : *violation*

Tapayeva and Others/et autres – Russia/Russie, 24757/18, Judgment/Arrêt 23.11.2021 [Section III]

(See article 14 below/Voir l'article 14 ci-dessous, page 32)

Respect for home/Respect du domicile

Order by domestic courts for eviction of a mother and her daughter from their home and for its demolition on the ground that it was an unauthorised construction built on State-owned land assigned for petroleum operations: *violation in case of eviction without proper review*

Décision des tribunaux internes prononçant l'expulsion d'une mère et de sa fille de leur domicile et la démolition de celui-ci au motif qu'il s'agissait d'un bâtiment construit sans autorisation sur un terrain appartenant à l'Etat affecté à des opérations pétrolières : *violation en cas d'expulsion sans examen approprié*

Ahmadova – Azerbaijan/Azerbaïdjan, 9437/12, Judgment/Arrêt 18.11.2021 [Section V]

Traduction française du résumé – Printable version

Facts – In 2007 the applicant purchased a recently built house and lived there with her daughter. The sale and purchase contract were not approved by a notary and there was no entry in the State register. According to a certificate issued by the Social Development Department of the State Oil Company of the Azerbaijan Republic ("SOCAR"), the applicant lived in the house without proper registration.

In 2010 the Azneft Production Union ("Azneft"), a subsidiary of SOCAR, brought a court action against the applicant.

The demolition of the house and the applicant's eviction from it were decided by the domestic courts on the ground that it was an unauthorised construction built on a State-owned plot of land which was assigned for petroleum operations. Therefore, the squatted land was to be returned to Azneft without any compensation being paid to the applicant.

The applicant's appeals were unsuccessful.

By the date of the latest information provided to the Court, the applicant's house had not yet been demolished and she continued to live there.

Law – Article 8: The applicant had lived in the house with her daughter after purchasing it in 2007. Therefore, the house had been the applicant's home within the meaning of Article 8.

The eviction order, not yet enforced, had been upheld by a final court decision and had become enforceable, and the applicant had no further legal recourse against it. Accordingly, there was an interference with the applicant's right to respect for her home that was in accordance with the domestic law and pursued the legitimate aim of protecting the rights of Azneft.

It remained to be determined whether the interference was proportionate to the aim pursued and thus "necessary in a democratic society".

While ordering the demolition of the house and the applicant's eviction, the domestic courts had focused exclusively on the fact that it had been an unauthorised construction built on State-owned land. Even though the applicant had argued in her appeals that the house in question had been her only home and that she and her daughter would become homeless if they were evicted as they had no means to buy another house, the domestic courts had entirely ignored this point and had failed to weigh the competing interests against each other.

Furthermore, neither Azneft, in its claim brought before the domestic courts, nor the Government, in their submissions, had argued that the land had been needed urgently for petroleum operations or any other development purposes.

The Government had not argued that the applicant could have obtained a proper examination of the proportionality of her eviction by using other remedies under domestic law. Domestic law had provided for the possibility to request the courts to delay the enforcement of a final judgment or for the bailiffs to postpone the execution of a judgment. However, even if the applicant had used this avenue, all she could have obtained would have been a temporary reprieve from the effects of the eviction order rather than a comprehensive examination of its proportionality.

Finally, it had not been claimed either that there had been a procedure for considering alternative housing accessible to the applicant. Moreover, the applicant did not appear to belong to any specific category of persons who had had the right to apply for State-provided housing. The Government had not argued either that a temporary stay at a social shelter could be seen as a solution satisfying the proportionality requirement in the particular circumstances of the present case.

In sum, the applicant had not been afforded a procedure enabling her to obtain an adequate review of the proportionality of the interference, in the light of her personal circumstances.

Conclusion: violation in case of eviction without a proper review of its proportionality in the light of the applicant's personal circumstances (unanimously).

Article 41: finding of a violation sufficient for non-pecuniary damage; claim for pecuniary damage dismissed.

(See also *Ivanova and Cherkezov v. Bulgaria*, 46577/15, 21 April 2016, Legal Summary; *Bagdonavicius and Others v. Russia*, 19841/06, 11 October 2016, Legal Summary; and *Kaminskas v. Lithuania*, 44817/18, 4 August 2020)

Respect for correspondence/Respect de la correspondance

Lack of sufficient procedural safeguards to protect privileged data covered during the seizure and subsequent examination of a lawyer's laptop and mobile telephone: *violation*

Garanties procédurales insuffisantes pour protéger des données couvertes par le secret professionnel lors de la saisie puis de l'examen de l'ordinateur et du téléphone portables d'un avocat : *violation*

Särgava – Estonia/Estonie, 698/19, Judgment/Arrêt 16.11.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The laptop and mobile telephone of the applicant, a lawyer, were seized in his home and car and subsequently examined by the authorities within the framework of criminal proceedings.

Appeals by the applicant, to declare unlawful the seizure and not to use material copied from the carriers as evidence in the criminal proceedings, were unsuccessful.

The applicant, referring to legal professional privilege and the inviolability of data carriers related to the provision of legal services, complained that the seizure of his laptop and mobile telephone and their subsequent examination had violated his rights under Article 8 of the Convention.

Law – Article 8: The seizure of the applicant's data carriers and their subsequent examination had constituted an interference with his right to respect for his correspondence. The Court left open the question whether domestic law met the requirements of clarity and foreseeability since in any event if did not provide sufficient procedural safeguards to

prevent arbitrary or disproportionate interference with legal professional privilege.

Domestic law did not seem to contain any specific procedure or safeguards to address the examination of electronic data carriers and prevent communication covered by legal professional privilege from being compromised. The search warrant had not provided for safeguarding possible privileged material protected by professional secrecy, Moreover, the decision of whether to conduct a keyword-based search (or use any other method of sifting) as well as the choice of relevant keywords (some notably broad in scope) had been left entirely up to the investigative authorities. Domestic law had not granted the applicant any right to be present during the keyword-based search and did not seem to contain any specific rules on the procedure to be followed in the event of an objection to a seizure or content examination with reference to lawyer-client confidentiality.

The Court had no basis on which to decide whether or not lawyer-client confidentiality had actually been compromised in the case at hand. However, the lack of procedural guarantees relating specifically to the protection of legal professional privilege already fell short of the requirements flowing from the criterion that the interference must be "in accordance with the law" within the meaning of Article 8 § 2.

Conclusion: violation (four votes to three).

Article 41: claim in respect of non-pecuniary damage dismissed.

(See also *Smirnov v. Russia*, 71362/01, 7 June 2007, Legal summary; *Robathin v. Austria*, 30457/06, 3 July 2012, Legal summary; and *Sérvulo & Associados – Sociedade de Advogados, RL and Others v. Portugal*, 27013/10, 3 September 2015, Legal summary)

Positive obligations/Obligations positives

Lack of any opportunity to have same-sex relationships formally acknowledged: *case referred to the Grand Chamber*

Absence de toute possibilité de faire officialiser une relation entre personnes de même sexe : *affaire renvoyée devant la Grande Chambre*

Fedotova and Others/et autres – Russia/Russie, 40792/10 et al., Judgment/Arrêt 13.7.2021 [Section III]

On 22 November 2021 the case was referred to the Grand Chamber at the Government's request (see the Legal Summary of the Chamber judgment).

Le 22 novembre 2021, cette affaire a été renvoyée devant la Grande Chambre à la demande du Gouvernement (voir le Résumé juridique de l'arrêt de chambre).

Positive obligations/Obligations positives

Authorities' failure to protect the applicant from bullying by colleagues: *violation*

Manquement des autorités à leur obligation de protéger le requérant contre toute forme de harcèlement par ses collègues : *violation*

Špadijer – Montenegro/Monténégro, 31549/18, Judgment/Arrêt 9.11.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The applicant worked as a prison guard. She experienced incidents of bullying both at work and outside of her workplace, caused by colleagues after she had reported five of them for indecent behaviour, leading to disciplinary proceedings and sanctions.

The Court of First Instance ruled against the applicant in civil proceedings. This judgment was upheld by the High Court and the Supreme Court respectively. And the Constitutional Court dismissed the applicant's constitutional appeal.

The applicant complained of a violation of her psychological integrity caused by bullying and of the failure of the domestic bodies to protect her from it.

Law – Article 8

(a) *Applicability* – The applicant had felt distress as a result of the incidents allegedly imputable to her colleagues, including both her subordinates and her superiors, and had complained that the State had failed to protect her. An expert opinion issued in the course of the civil proceedings had confirmed that the incidents in question had had an adverse impact on the applicant's moral integrity and had left long-lasting effects on her well-being and capacity to work. In such circumstances, the causal link between the incidents in question and the alleged failure by the authorities, on the one hand, and the applicant's psychological problems, on the other hand, could be regarded as clearly established.

Conclusion: Article 8 applicable.

(b) *Merits* – The domestic law had provided for various possibilities for the applicant to seek protection against harassment at work. There was no indication that those had been inherently inadequate or insufficient to provide the requisite protection against incidents of harassment. However, the available remedies should function in practice.

Firstly, the mediation proceedings before her employer had not been in compliance with the relevant legislation in that they had been neither initi-

ated nor completed within the statutory time-limits. More importantly, the mediator had examined whether the applicant's request had been well-founded, thereby overstepping his statutory competence.

Secondly, while the civil courts had found at least some causal link between the incidents and the applicant's illness and psychological suffering, the applicant had not received protection because the courts had required proof of incidents occurring every week for six months. Nevertheless, complaints about bullying should be thoroughly examined on a case-by-case basis, in the light of the particular circumstances of each case and taking into account the entire context.

The relevant case-law in Montenegro was scarce and not settled, in particular as to how often bullying needed to have occurred in order to trigger the application of the relevant law.

The courts had examined only some of the incidents and had made no attempt to establish how often any of the incidents had been repeated and over what period. The acts of harassment to which the applicant had been subjected had been in reaction to her reporting some of her colleagues and had been aimed at silencing and "punishing" her. States' positive duty under Article 8 to effectively apply in practice laws against serious harassment took on a particular importance in circumstances where such harassment might have been triggered by "whistle-blowing" activities.

In addition to the incidents at work, the applicant's car had been damaged and she had been assaulted. The relevant criminal legal framework provided sufficient protection in respect of such assaults (*Milićević v. Montenegro*). However, the State prosecutor had issued no decision in over than eight and six years respectively in response to the applicant's criminal complaints, thereby effectively preventing her from bringing private charges .The applicant had raised the State prosecutor's failure before the Constitutional Court but that court had made no reference to it.

In view of the above, the manner in which the civil and criminal-law mechanisms had been implemented in the particular circumstances of the applicant's case, in particular the lack of assessment of all the incidents in question and the failure to take account of the overall context, including the potential whistle-blowing context, had been defective to the point of constituting a violation of the respondent State's positive obligations under Article 8.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 for non-pecuniary damage.

(See *Sandra Janković v. Croatia*, 38478/05, 5 March 2009, Legal summary, and *Milićević v. Montenegro*, 27821/16, 6 November 2018, Legal summary)

ARTICLE 9

Freedom of religion/Liberté de religion

Failure to protect Krishna religious organisation's beliefs from hostile speech used by regional State authorities in "anti-cult" brochure: *violation*

Défaut de protection des croyances de l'organisation religieuse de Krishna face aux propos hostiles tenus par les autorités régionales de l'État dans une brochure « antisectes » : *violation*

Centre of Societies for Krishna Consciousness in Russia and Frolov/Centre des sociétés pour la conscience de Krishna en Russie et Frolov – Russia/Russie, 37477/11, Judgment/Arrêt 23.11.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The first applicant is the Centre of Societies for Krishna Consciousness in Russia, a centralised religious organisation established under Russian law ("the applicant centre"). It complained about the State authorities' failure to suppress hostile speech targeting the Krishna movement; more specifically, in relation to the Ulyanovsk State authorities "anti-cult project" and the brochure they had published "Watch out for cults!". The second applicant, a follower of Vaishnavism, complained about being prevented by the Moscow authorities to hold public religious meetings promoting the teachings of Vaishnavism. The proceedings brought by the applicants before the domestic courts were unsuccessful.

Law

Article 9 (in respect of the applicant centre): The publication by the regional authorities had represented the applicant centre as a money-greedy "totalitarian cult" "destructive" for Russian society and had accused it of "psychological manipulation" and "zombification" of the youth. It had been distributed to educators for further dissemination among their students and had been made available for download from the regional Government's website. There had thus been an interference with the applicant centre's right to freedom of religion. That interference had been "prescribed by law" and pursued the legitimate aims of the protection of public safety and the rights of others. The Court found, however, that the domestic authorities had overstepped their margin of appreciation

and, therefore, that it not been "necessary in a democratic society". In particular, there had been no indication that the regional authorities had taken into account the "need to reconcile the interests of various religious groups and to ensure that everyone's beliefs had been respected" at any time before or during the "anti-cult" campaign. Rather it appeared that the exclusion of new or minority religious movements had been embedded in the set-up of the project from its inception. The publication had painted a starkly negative picture of new religious movements, including the Krishna movement, and had used emotionally charged and derogatory terms for describing its teachings. This did not suggest that any consideration had been given to the State's duty to abstain from assessing the legitimacy of religious beliefs or the ways in which those beliefs were expressed. Further, the allegations against the applicant centre's beliefs had been unsubstantiated. Indeed, it was particularly striking that the regional State authorities had considered themselves at liberty of casting aspersions on the religion of the applicant centre which was an officially registered and lawfully operating religious organisation.

Conclusion: violation (unanimously).

Article 11 interpreted in the light of Article 9 (in respect of the second applicant): The Moscow authorities' rejection of the second applicant's notifications of a public religious event constituted an interference with his rights under Article 11, interpreted in the light of Article 9. The grounds for that rejection had, however, been unforeseeable and not "prescribed by law". The second applicant had sent the notifications within the time-limits established by law. Nonetheless, the authorities had held that the planned event could not proceed because missionary activities – which the promotion of Vaishnavism was taken to be – were inconsistent with the purposes of a public event as defined in the Public Events Act and also incompatible with the respect for the religious beliefs of others. They did not have any objections to the planned events being held at a specific location or time, but rather to their religious nature. This amounted to content-based restrictions on freedom of assembly which should be subjected to the most serious scrutiny by the Court.

The Public Events Act did not contain a list of permissible purposes or a requirement that a public event should pursue only permissible purposes. Nor did it specify how the purpose of the event should be assessed or provide for the authorities' discretion in determining which purposes were permissible and which were not. It also gave a broad definition of a "public event". The domestic courts had given no reasons whatsoever for their finding that the promotion of Vaishnavism and a healthy lifestyle fell outside the scope of that definition. They had also failed to specify the nature of the alleged incompatibility of the planned event with the concept of a "meeting" (the term that had been used by the second applicant in the notifications to describe the form of the event).

Additionally, the Court found that the restriction on the second applicant's right had not been "necessary in a democratic society". In this connection, the Court was not convinced by the argument that the conduct of a public assembly for the promotion of Vaishnavism had been "incompatible with the religious beliefs of others". Further, the peaceful character of the planned religious events had not been disputed and there had been no reason to presume a risk of any disturbance of public order or breach of peace on their part. It would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. It was also significant that the textually identical notifications filed in another Russian region had not been met with any objections and there had been no evidence of any disturbances during those events which appeared to have been able to proceed peacefully. This reinforced the Court's finding that the Moscow authorities had acted in an arbitrary manner. Lastly, as to the allegation that a public event for the promotion of Vaishnavism had amounted to missionary work, it had not been shown that unlawful means of conversion, infringing the rights of others, had been or were likely to be employed by the second applicant or other participants.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there was no need to examine separately the applicant centre's complaint under Article 14 taken in conjunction with Article 9.

Article 41: EUR 7,500 to each applicant for non-pecuniary damage.

(See also *Barankevich v. Russia*, 10519/03, 26 July 2007, Legal Summary, and *Lashmankin and Others v. Russia*, 57818/09 et al., 7 February 2017, Legal Summary)

ARTICLE 10

Freedom of expression/Liberté d'expression

Unjustified sanctioning of NGO for disseminating election-monitoring material on the basis of statutory ban on all election-related publications during pre-election "silence period": *violation*

Des ONG ayant diffusé du matériel d'observation électorale sanctionnées de manière injustifiée en application de l'interdiction légale de toute publication liée aux élections pendant la « période de silence » préélectorale : *violation*

Assotsiatsiya NGO Golos and Others/et autres – Russia/Russie, 41055/12, Judgment/Arrêt 16.11.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The first applicant was a not-for-profit association created by several non-governmental organisations aiming to provide short-term and long-term monitoring of electoral campaigns. On an unspecified date in 2011, the first applicant launched a project, in partnership with an Internet news outlet, which consisted in creating a website called "Map of Violations"; its own website had textual or visual hyperlinks to this project website. Following a complaint by a group of State Duma members and the Chief Officer of the Central Elections Committee, administrative offence proceedings were instituted against the first applicant resulting in its conviction for the internet publication of election-related materials (including texts, visual material, an interactive map and a list of results following a keyword search) during the electoral campaign to the State Duma within the "silence period" prohibiting the dissemination of certain information during the five days preceding an election day provided by the Electoral Rights Act 2002. A fine was also imposed. The first applicant's appeal and subsequent request for review were dismissed as were the review requests made by the Russian Federation Human Rights Ombudsman.

The applicants complained under Article 10 that the proceedings against the first applicant had interfered – through the enforcement of the statutory ban on all election-related publications in the days preceding the election day – with the election monitoring project that they had been running or had otherwise engaged in.

Law – Article 10: The dissemination of the impugned materials on both the NGO's and the project website and the provision of the project's Internet platform for user-generated content had amounted to the exercise of the right to freedom of expression as protected by Article 10 § 1. The first applicant's conviction and sentence constituted an "interference" with its freedom of expression aimed at protecting the "rights of others". The interference, however, had not been "necessary in a democratic society". More specifically, the domestic courts had failed to provide relevant and sufficient reasons for enforcing the temporal restriction in the present case, to apply standards in conformity with the principles embodied in Article 10 or to conduct an acceptable assessment of the relevant facts. In particular, they had failed to discuss or even refer to any of the internet printouts that had been before them, to establish that the impugned materials had been uploaded or otherwise "published" within the relevant statutory five-day period, to specify what elements had led them to conclude that the impugned material fell within the scope of the notion of "research report" – one of the notions of material under the Electoral Rights Act – and to assess in any detail the content of various Internet publications on either website. The Court was not able to discern from their reasoning any element allowing them to reach the conclusion that any such material could reasonably amount to "research reports" "relating to" the ongoing election period.

It appeared that the first applicant's conviction had been related to the printouts showing user-generated content, specifically texts alleging violations of the electoral legislation, and the interactive map of Russia. It was uncontested that this interactive and constantly updated map had been made available prior to the "silence period". The application of that period to that technological tool and the first applicant's conviction meant, in substance, that it had been unlawful under domestic law to impart in this manner data on a matter of public interest. The domestic courts' reasoning had contained no elements disclosing whether that aspect of the interference was convincingly shown to have been "necessary in a democratic society".

The first applicant, who had provided an Internet platform for users to generate content, specifically reports of alleged violations during the ongoing election period, had been punished, in substance, for continuing to run (for not suspending) – during the "silence period" – the Map of Violations online project, including the operation of the online interactive map. The unspecified nature of the charge against it in the administrative-offence report (deemed to constitute an act of accusation under the Federal Code of Administrative Offences) and the courts' rather superficial approach to assessing this charge had also created an unjustified "chilling effect" *vis-à-vis* the first applicant's exercise of its "social watchdog" function. When an NGO drew attention to matters of public interest, it was exercising a "public watchdog" role of similar importance to that of the press and might be characterised as a "social watchdog" warranting similar protection under the Convention as that afforded to the press.

Furthermore, the overbroad reach of the electoral legislation on the "silence period" extending to all material "relating to" an ongoing election – as interpreted and applied by the domestic courts and as confirmed by the Government in the present

case – had disproportionately interfered with the first applicant's exercise of the freedom to impart information and ideas on issues relating to the running of free and fair elections to the national legislature, specifically in so far as some publications had not been classified, for instance, as (last-minute) partisan or adverse political campaigning. In this connection, the Court considered that election observers should generally be able to draw the public's attention to potential violations of electoral laws and procedures as they occur, otherwise such reporting would lose much of its value and interest.

There was little scope under Article 10 § 2 for restrictions on freedom of expression in the fields of political speech and other matters of public interest, including during electoral periods. Although, it could be assumed that the imposition of a short "silence and reflection period" on active campaigning before an election fell, in principle, within the scope of the State's discretion in regulating certain forms of electoral campaigning with a view to safeguarding the democratic order within their own political systems, in the present case it had been overstepped by the sanctioning of the dissemination during the silence period of all content that could be considered as "relating to" a forthcoming election.

Conclusion: violation in respect of the first applicant (unanimously).

The Court also held, unanimously, that there was no need to examine the first applicant's complaints under Article 6.

Article 41: claims in respect of pecuniary and non-pecuniary damage dismissed.

(See also *Animal Defenders International v. the United Kingdom* [GC], 48876/08, 22 April 2013, Legal Summary; *Orlovskaya Iskra v. Russia*, 42911/08, 21 February 2017, Legal Summary; and *OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia*, 43351/12, 18 May 2021)

Freedom of expression/Liberté d'expression

Civil sanctioning of an editor for lengthy refusal to de-index article on a criminal case against private persons, easily accessible by typing the latter's names into Internet search engine: *no violation*

Condamnation au civil d'un éditeur au motif qu'il avait longtemps refusé de désindexer un article qui portait sur une affaire pénale dirigée contre de simples particuliers et auquel on pouvait facilement accéder en tapant leur nom dans un moteur de recherche en ligne : *non-violation*

Biancardi – Italy/Italie, 77419/16, Judgment/Arrêt 25.11.2021 [Section I]

Traduction française du résumé – Printable version

Facts – The applicant, editor-in-chief of an online newspaper, published an article about a fight, followed by a stabbing, which had taken place in a restaurant, and the related criminal proceedings. One of the accused and the restaurant requested that the article be removed from the Internet. The applicant initially refused to do so, but eventually, eight months later, de-indexed the article in an effort to settle the case they had brought before the domestic courts. The latter, however, found the applicant liable for not having de-indexed it for an excessive period of time despite the plaintiffs' formal request, thus allowing anyone to access information related to the criminal proceedings in issue by simply typing into the search engine the names of the restaurant or of the accused. The applicant was ordered to pay EUR 5,000 to each plaintiff in compensation for the breach of their right to respect for their reputation.

Law – Article 10

(a) *Preliminary remarks* – The present case departed from the previous Article 10 and 8 cases of the Court related to the content of an Internet publication (*Delfi AS v. Estonia* [GC]), or to the way an information is published as for instance, its anonymisation or qualification (*M.L. and W.W. v. Germany*). What was at stake in the present case was the length and ease of access to the data concerned and not their simple maintenance on the Internet. Indeed, the crux of the case related to the applicant's failure, for an excessive period and despite the plaintiffs' formal request, to de-index from the Internet search engine the tags to the article published by him.

The terms "de-indexing", "de-listing" and "de-referencing", often used interchangeably in different sources of European Union and international law, indicated the activity of a search engine consisting of removing, on the initiative of its operators, from the list of results displayed (following a search made on the basis of a person's name) Internet pages published by third parties that contain information relating to that person. Technically, de-indexing could also be carried out by an editor. Therefore, the obligation to de-index material could be imposed not only on Internet search engine providers, but also on the administrators of newspaper or journalistic archives accessible through the Internet.

(b) *The Court's assessment of the proportionality of the impugned interference* – The strict application of the criteria in the context of balancing freedom of expression and right to reputation set out in *Axel*

Springer AG v. Germany [GC] would be inappropriate because of the factual differences with the present case. The former case had concerned the publication, by the applicant company, of print articles reporting the arrest and conviction of a well-known television actor whereas the present case dealt with the maintenance online, for a certain period of time, of an Internet article concerning a criminal case against private individuals.

Therefore, two main features characterised the present case: (1) the period for which the online article had remained on the Internet and the impact thereof on the right of the private individual in question to have his reputation respected; and (2) the nature of the data subject in question, a private individual not acting within a public context as a political or public figure. Indeed, anyone, well-known or not, could be the subject of an Internet search, and his or her rights could be impaired by continued Internet access to his or her personal data.

Thus, the Court paid special attention to the following three criteria.

(i) *The length of time for which the article had been kept online, particularly in the light of the purposes for which claimant's data had been originally processed* – The criminal proceedings had still been pending at the time that the Supreme Court had adopted its judgment in the applicant's case. However, the information contained in the article had not been updated since the occurrence of the events in question. Moreover, notwithstanding the formal notice that the claimant had sent to the applicant requesting the removal of the article from the Internet, the said article had remained online and easily accessible for eight months. In that regard, the applicable domestic law read in the light of international legal instruments supported the idea that the relevance of the applicant's right to disseminate information decreased over the passage of time, compared to the plaintiff's right to respect for his reputation.

(ii) *The sensitiveness of the data at issue* – The subject matter of the article in question had related to criminal proceedings instituted against one of the plaintiffs. The circumstances in which information concerning sensitive data was published constituted a factor to be taken into account when balancing the right to disseminate information and the right of a data subject to respect for his or her private life.

(iii) *The gravity of the sanction imposed* – The applicant had been held liable under civil and not criminal law. The severity of the sentence and the amount of compensation awarded for non-pecuniary damage (EUR 5,000 per each plaintiff) must not be regarded as excessive, given the circumstances of this case.

In view of the above, the finding by the domestic jurisdictions that the applicant had breached the plaintiff's right to respect for his reputation by virtue of the continued presence on the Internet of the impugned article and by his failure to de-index it had constituted a justifiable restriction of his freedom of expression, all the more so given the fact that no requirement had been imposed on the applicant to permanently remove the article from the Internet or to anonymise it.

Conclusion: no violation (unanimously).

(See *Delfi AS v. Estonia* [GC], 64569/09, 16 June 2015, Legal summary; *M.L. and W.W. v. Germany*, 60798/10 and 65599/10, 28 June 2018, Legal summary; and *Axel Springer AG v. Germany* [GC], 39954/08, 7 February 2012, Legal summary; see also *Hurbain v. Belgium*, 57292/16, 22 June 2021, Legal summary (this case was referred to the Grand Chamber. It concerns a newspaper publisher required to anonymise, under the "right to be forgotten" of a driver who had caused a fatal accident, the online archived version of an article published twenty years previously); see also the judgment by the Court of Justice of the European Union in Google Spain SL and Google Inc., C-131/12, 13 May 2014, Information Note 174)

Freedom of expression/Liberté d'expression

Unjustified conviction and fine for spray-painting a monument connected to communist regime in the context of political protest: *violation*

Condamnation injustifiée au pénal à une amende pour avoir aspergé de peinture un monument se rapportant au régime communiste dans le contexte d'une manifestation politique : *violation*

Genov and/et Sarbinska – Bulgaria/Bulgarie, 52358/15, Judgment/Arrêt 30.11.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicants were convicted of hooliganism and fined for spray-painting a monument to "partisans" on the anniversary of the 1917 Bolshevik Revolution, in the context of nation-wide protests against a government chiefly supported by the Bulgarian Socialist (formerly Communist) Party, which had been the dominant political force during the communist regime in Bulgaria. They complained that their Article 10 right to freedom of expression had been violated.

Law – Article 10

(a) *Existence of an interference* – The applicants had not overtly admitted that it had been them who

had spray-painted the monument, and had attempted to conceal their participation in that. A question might hence arise about whether there had been an interference at all with the exercise of their right to freedom of expression. The fact remained, however, that their conviction of hooliganism had been directed at activities falling within the scope of freedom of expression. That conviction had to therefore be regarded as an interference with their exercise of that right.

(b) *Whether the interference was justified* – The Court accepted that the interference had been prescribed by law and had pursued the legitimate aim of protecting morals and the rights of others. There had been, however, no indication that the interference had sought to protect the property rights of the monument's owner (whose identity remained unclear), nor that it had been intended to protect "public safety": the applicants' act had been peaceful and had been carried out surreptitiously in the early hours of the morning. Nothing suggested that it had been likely to cause public disturbances.

The sanctions imposed on each of the applicants – administrative fines amounting to the equivalent of EUR 767 – had been mild, veering towards the minimum possible for the offence with which they had been charged. It followed that if the applicants' conviction was considered justified, the sanctions which it had entailed could not be seen as disproportionate in themselves.

The question thus was, more specifically, whether it had been at all "necessary in a democratic society" to penalise the applicants' act. The Court had recently held in *Handzhiyski v. Bulgaria* that measures, including proportionate sanctions, designed to dissuade acts which could destroy or damage a public monument could be seen as "necessary in a democratic society", however legitimate the motives which might have inspired those acts. That was because (a) public monuments were often physically unique and formed part of a society's cultural heritage, and because (b) in a democratic society governed by the rule of law, debates about the fate of a public monument had to be resolved through the appropriate legal channels rather than by covert or violent means. Here, the Court added that in this context, the physical damage to a monument, though not an exclusive factor for assessing the necessity of interferences with such acts, would in principle carry the greatest weight.

There had been no evidence that the applicants had caused any sort of irreversible harm to the monument. It was true that spray-painting, though usually not impairing an underlying surface, altered that surface visually. It was also true that spray-painting affected the visual appearance of a monument in a way which could be permanent, or at least long-lasting, in the absence of appropriate efforts to remove the paint and thus restore the monument to its unadulterated state. It remained the case, however, that the visual impairment which spray-painting produced, although requiring some inconvenience and expense to eliminate, was usually fully reversible. It did not therefore harm a monument in a way or to an extent which prevented it, after being cleaned, from continuing to form part of a country's cultural heritage. That was exactly what had happened in this case, since the spray-painting had indeed been cleaned from the monument. In that context, the court which had convicted the applicants had found that their act had not caused any pecuniary damage and the Government had not submitted any evidence about how much it had cost to clean the spray-paint and who had covered that cost. Nor had there been any indication that the fines imposed on the applicants had been intended to contribute, or had in fact contributed, towards those expenses. In those circumstances, it could not be said that the applicants' act had affected the monument to a degree sufficient to consider that it had damaged it.

If followed that the necessity of penalising the applicants' acts had to be assessed in the light of the range of context-specific factors identified in *Handzhiyski*. As already noted, there was no evidence that the applicants' act had caused serious or irreversible damage to the monument, or that the removing of the spray-paint had required significant resources. Nor could that act be qualified as vulgar or gratuitously offensive. The context clearly suggested that the intention behind the act had been to express disapproval toward the recent parliamentary record of the political party which had provided main parliamentary support for the government of the day, in the context of prolonged nation-wide protests initially sparked by that very parliamentary record. The act in addition had sought to condemn the overall role which that political party, which had ruled during the communist regime, and the "partisans" associated with it, had played in Bulgaria's history. It could thus hardly be said that it had meant to express disdain for deep-seated social values. It had also to be noted that the monument had been put up during the communist regime in Bulgaria, and had clearly been connected to the values and ideas for which that regime had stood. It could thus hardly be seen as enjoying universal veneration in the country.

It followed that the interference with the applicants' right to freedom of expression – the finding that they had been guilty of hooliganism and the resultant fines – had not been shown to be "neces-

sary in a democratic society" within the meaning of Article 10.

Conclusion: violation (six votes to one).

Article 41: EUR 998.33 to the first applicant in respect of pecuniary damage; EUR 4,000 each in respect of non-pecuniary damage.

(See *Handzhiyski v. Bulgaria*, 10783/14, 6 April 2021, Legal Summary)

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

Refusal to provide a journalist with information not "ready and available" about the number of employees and collaborators of the Foreign Intelligence Service and its predecessor organisation who had been affiliated to Nazi organisations: *inadmissible*

Refus de communiquer à un journaliste des informations qui n'étaient pas « déjà disponibles » sur le nombre d'agents et de collaborateurs du service fédéral de renseignement et de l'organisme l'ayant précédé qui avaient appartenu à des organisations nazies : *irrecevable*

Saure – Germany/Allemagne, 6106/16, Decision/Décision 19.10.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicant, a journalist of a daily newspaper, requested information concerning the number of employees and collaborators of the Foreign Intelligence Service and its predecessor organisation who had been members of the Nazi Party, the SS, the Gestapo or the "Foreign Armies East".

The Foreign Intelligence Service was not able to accept his request because at the material time it did not have the relevant information, which was being gathered by an independent commission of historians.

Law – Article 10: The Court assessed the case in the light of its particular circumstances and having regard to the four criteria developed in *Magyar Helsinki Bizottság v. Hungary* [GC] taken cumulatively: (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information was ready and available.

Firstly, the applicant's role as a journalist had been undeniably compatible with the scope of the right to solicit access to State-held information.

Secondly, the nature of the information sought had met the public-interest test, as the information request had concerned a matter that was of interest for society as a whole, notably the level of pervasion of the Foreign Intelligence Service by employees with a Nazi background in the decades following the end of the Second World War. This matter raised important and sensitive questions relating to the respondent State's recent history that had been and had continued to be the subject of considerable public debate. The fact that the Foreign Intelligence Service in 2011 had appointed a commission of historians to comprehensively study the service's history over a period of several years, including in relation to the issues covered by the applicant's information request, reinforced this conclusion.

Yet, that commission's establishment, terms of reference and publications in subsequent years also demonstrated that the information requested by the applicant had not been "ready and available". Indeed, as the domestic courts had pointed out, the independent commission of historians, whose research had been ongoing at the material time, had been established because the information requested by the applicant had not been available within the Foreign Intelligence Service. The Federal Administrative Court had established that previous membership in the said Nazi organisations had not been systemically recorded. The domestic courts had taken the view that the purpose of the applicant's information request essentially had been to have the authorities carry out extensive research and analysis in order to generate the requested information. The Court, also having regard to the publications of the independent commission of historians, saw no reason to depart from these findings and considered that a situation, in which a journalist sought the disclosure of information which would first have to be created through comprehensive research and analysis, and in which not even the entire raw data (from which such information had to be generated) existed within the authority due to a lack of recording, was distinct from one where the requested information existed within the authority and would merely need to be compiled in order to respond to the request (*Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*). Reiterating that Article 10 did not impose an obligation to collect information on the applicant's request, particularly when a considerable amount of work was involved, the Court considered that this applies *a fortiori* where the requested information did not even exist within the authority as in the present case.

Therefore, the authorities' refusal to provide the applicant with the requested information had not amounted to *de facto* censorship, nor had it pre-

vented him from exercising his role as a "public watchdog". In this connection, in so far as the personnel files had been analysed and respective information had been made available to the public through archives, the applicant could access part of the information he had sought to obtain. Against this background, the Court did not need to determine whether the applicant had sufficiently substantiated the purpose of his information request before the domestic courts.

In the light of the foregoing, the applicant's complaint about the refusal of his information request, including about the lack of expedition of the respective proceedings, was incompatible *ratione materiae* with Article 10.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, 39534/07, 28 November 2013, Legal Summary, and *Magyar Helsinki Bizottság v. Hungary* [GC], 18030/11, 8 November 2016, Legal Summary; see also *Centre for Democracy and the Rule of Law v. Ukraine* (dec.), 75865/11, 3 March 2020, Legal Summary)

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique

Unlawful and arbitrary refusal to allow Vaishnavism follower to hold peaceful public religious events: *violation*

Refus illégal et arbitraire d'autoriser un adepte du vishnuisme à tenir des rassemblements publics religieux pacifiques : *violation*

Centre of Societies for Krishna Consciousness in Russia and Frolov/Centre des sociétés pour la conscience de Krishna en Russie et Frolov – Russia/Russie, 37477/11, Judgment/Arrêt 23.11.2021 [Section III]

(See Article 9 above/Voir l'article 9 ci-dessus, page 25)

ARTICLE 14

Discrimination (Article 8)

Failure to assist widow in being reunited with her children kidnapped by paternal grandfather against the background of regional gender stereotypes and patrilineal practices: *violation*

Défaut d'assistance à une veuve qui cherchait à être réunie avec ses enfants enlevés par leur grand-père paternel dans une région marquée par les stéréotypes sexistes et par les pratiques patrilinéaires : *violation*

Tapayeva and Others/et autres – Russia/Russie, 24757/18, Judgment/Arrêt 23.11.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants are a mother and her children from the Chechen Republic. In 2015 the husband of the first applicant and father to the children died. Subsequently, the paternal grandfather (B.A.) kidnapped the children and prevented the first applicant from communicating with them. The first applicant successfully brought two sets of proceedings which determined that the children's residence should be with her, and instituted enforcement proceedings with the District Bailiffs' Service after B.A. refused to comply. The decisions remain unenforced.

After a cassation appeal from B.A., the Supreme Court quashed the judgment granting the first applicant a residence order and the domestic courts determined that the children should reside instead with B.A.

Law

Article 8: The Court had to determine whether, in the particular circumstances of the case, the national authorities had taken all the necessary measures which could reasonably have been expected of them to facilitate the applicants' reunion and whether the measures taken had complied with the urgency requirement warranted by the nature of the relations at stake.

Unable to recover the children from their paternal grandfather, who had refused to comply with the 2016 judgment voluntarily, the first applicant had applied to the District Bailiffs' Service for institution of the enforcement proceedings. The enforcement proceeding had been instituted almost a month later, following the first applicant's complaint about the initial refusal to institute them on the ground of lack of indication in the writ of enforcement of actions which B.A. was required to perform. Without applying for the domestic court for clarification of the 2016 judgment, in the subsequent period of five months the District Bailiffs' Service had discontinued the enforcement proceedings twice. No account of any enforcement measures undertaken by the District Bailiffs' Service during that period had been provided by the Government.

Meanwhile, the first applicant had pursued another set of proceedings seeking to obtain her daughters' removal from B.A. The Supreme Court of the

Chechen Republic had taken note in its appeal decision that the bailiffs' service had "practically withdrawn from the enforcement of the judgment…". The following month, the District Bailiffs' Service had instituted enforcement proceedings in respect of that appeal decision. The enforcement measures taken by the bailiffs in the ensuing four months' period had been limited to B.A.'s summons to appear, which he had ignored, and three visits to his place of residence, at which he had been absent. No evidence had been provided by the Government to challenge the first applicant's allegation that the parties had not been informed about those enforcement measures and no evidence of any coercive measures applied to B.A. within the enforcement period had been provided either.

The Court noted with serious concern that, following the quashing of the judgment of June 2017, as upheld on appeal, a new judgment had been taken by the domestic court and upheld on appeal, ordering that the children should reside with their paternal grandfather B.A. The judgment in question had been taken in disregard of the legal provision securing the parents' right to take priority over any other person in raising and educating their children and their right to seek the return of their children from any person who retains them without any legal basis, without referring to any exceptional circumstances, in disregard of B.A.'s unlawful retention of the children, his obstruction of the first applicant's contact with the children, and the domestic authorities' manifest inaction and unwillingness to enforce the previous judgments in the first applicant's favour.

The Russian authorities had therefore failed to take, without delay, all the measures that could reasonably have been expected of them to assist the applicants in being reunited.

Conclusion: violation (unanimously).

Article 14 in conjunction with Article 8: The first applicant had complained that the domestic authorities' failure to assist her in being reunited with her daughters had amounted to discrimination on grounds of sex.

The first applicant had argued that the alleged difference in treatment of women had been strongly supported by overtly discriminatory policies and practices in the region and the statements of high-ranking officials, as well as the facts of the present case. In particular, she had referred to concerns raised by the CEDAW, the Government's statements made in the case of *Elita Magomadova v. Russia* (77546/14, 10 April 2018) and on Human Rights Watch's Reports. The third-party interveners had reported the existence of systemic gender discrimination of women in the North Caucasus Region, including in the sphere of custody of the children.

Turning to the circumstances of the present case, the judgments rendered in favour of the first applicant as the mother of the children and their only surviving parent in line with domestic law, which gives parents priority in custody disputes, had not been enforced. The protracted non-enforcement had ultimately led to a judgment which had retrospectively approved B.A.'s refusal to return the children to the mother based on his claim that, as the family elder, he had wanted his granddaughters to be raised and educated in his home. The authorities had thus, without any valid reason, contributed to and legalised a situation in which the mother of the children, as a result of gender stereotypes and prevalence of customary patrilineal practices in the region, had been deprived of her right to raise and educate her children.

The Court further noted that it had previously examined several cases lodged by women applicants from the Russian North Caucasus Region, in which violations of Article 8 had been found against the background of circumstances similar to the present case.

In the light of the foregoing, the manner in which the relevant legislation had been applied in practice in the present case had amounted to the first applicant's discrimination on grounds of sex. No objective and reasonable justification had been provided by the respondent Government.

Conclusion: violation (unanimously).

Article 41: EUR 16,250 to the first applicant in respect of non-pecuniary damage.

ARTICLE 34

Victim/Victime

No evidence of a real risk of having to take an oath with a religious element in the absence of realistic prospects to become President or a member of the Council of State: *inadmissible*

Pas de preuve d'un risque réel de devoir prêter un serment religieux faute de perspective réaliste de devenir président ou membre du Conseil d'État : *irrecevable*

Shortall and Others/et autres – Ireland/Irlande, 50272/18, Decision/Décision 19.10.2021 [Section V]

Traduction française du résumé – Printable version

Facts – The seven applicants are politicians and three of them are members of the lower and upper houses of the Irish legislature.

Pursuant to the Constitution, persons taking up office as President or as members of the Council of

State, a body advising the President, must take an oath with religious element, "In the presence of Almighty God... May God direct and sustain me", before they can take up office.

The applicants believe that, due to their political prominence, they have a realistic prospect of either being appointed to the Council, or of being elected to the Presidency, but claim that the religious elements of the declarations required by the Constitution would either prevent them from taking up these offices or require them to make a religious declaration against their conscience.

Law – Article 34

(a) *The declaration for Council of State appointees* – Under the Constitution, the President has "absolute discretion" to appoint seven members of the Council of State. The question of whether any of the applicants were directly affected by the requirement for such members to make the declaration required by the Constitution would only arise if and when one of the applicants could show that his or her appointment had been a realistic possibility. However, none of the applicants had so far been invited to serve on the Council of State, and none had claimed that such an appointment had been under consideration. While the first, second and fourth applicants had suggested that their current or future experience had qualified them for service on the Council, or might qualify them in the future, this could only be a matter of speculation, given the purely discretionary nature of appointments to this body. The third applicant had made no submissions as to the Council and the fifth had not addressed the likelihood of such an invitation. It followed that none of the applicants had produced reasonable and convincing evidence of the likelihood that a violation affecting any of them personally would occur; mere conjecture was insufficient to establish their victim status.

Accordingly, none of the applicants could claim to be "victims" of the alleged violation.

(b) *The Presidential declaration* – Any Irish citizen who had reached thirty-five years of age might take active steps to seek the Presidency, but a candidate must be nominated by twenty members of the Houses of the Parliament or four local authorities to satisfy the requirements of the Constitution in order to run for office, and then submit to a popular vote.

In certain cases, the class of persons at real risk of being directly affected by an impugned measure might indeed be very broad when, for example, applicants had complained about their ineligibility to stand for election on account of their Roma and Jewish origin and could claim to be victims of the alleged violations due to their "active participation in public life" (*Sejdić and Finci v. Bosnia and Herzegovina* [GC]).The applicants in the present case had complained about a requirement applicable only upon election to the highest office in the Irish State and the class of persons who could claim to be "victims" of such a violation necessarily had to be much narrower.. Therefore, in order for the present applicants to be "victims" within the meaning of Article 34 they would have had to provide the Court with reasonable and convincing evidence that they had a real intention of seeking the office of President and that they had some realistic prospects in that regard. None of the applicants, however, had sought to establish that they had a realistic prospect of successfully seeking that office with reference to their own particular political circumstances and the constitutional requirements to be nominated.

For the Court, the applicants were seeking to have their victim status accepted, not in the context of a clear, immediate and compelling factual matrix which would allow them to adduce reasonable and convincing evidence that they were at a real risk of being adversely affected by the impugned measure, but rather as a hypothetical outcome, without addressing the very many challenges they would potentially have to overcome to secure that office. Thus, the dilemma of conscience described by the applicants was neither immediate nor imminent. Their situation therefore had to be distinguished from those of the applicants who faced the dilemma either of complying with the impugned legal provision, or refusing to do so, on account, respectively, of their religious belief or sense of professional ethics, and in so doing exposed themselves to sanction (*S.A.S. v. France* [GC] or *Michaud v. France*).

In the absence of reasonable and convincing evidence that the applicants were at real risk of being directly affected by the impugned requirement of the Constitution, the complaints of all five applicants could be rejected pursuant to Article 34.

Conclusion: inadmissible (absence of victim status).

(See *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 27996/06 and 34836/06, 22 December 2009, Legal Summary; *Michaud v. France*, 12323/11, 6 December 2012, Legal Summary; *S.A.S. v. France* [GC], 43835/11, 1 July 2014, Legal Summary)

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 unjustified length of pre-trial detention and house arrest

État défendeur tenu de continuer de prendre des mesures visant à remédier au problème structurel de la durée excessive des détentions provisoires et des assignations à résidence

Kovrov and Others/et autres – Russia/Russie, 42296/09, Judgment/Arrêt 16.11.2021 [Section III]

Traduction française du résumé – Printable version

Facts – The applicants were arrested on suspicion of various crimes and were placed under house arrest. Some of them were remanded in custody and then the preventive measure was changed to house arrest. The domestic courts extended the applicants' pre-trial detention and house arrest by using formulaic reasoning and listing the grounds provided for by the Code of Criminal Procedure (such as the gravity of the offence, the possibility of the applicant absconding, putting pressure on witnesses, interfering with the investigation or reoffending), without linking them to the circumstances of the applicants' cases or verifying whether these grounds remained valid at the advanced stages of the proceedings. The appellate courts reproduced the wording of the first-instance courts' decisions and dismissed the applicants' appeals against the detention and house arrest orders.

Law – Article 5 § 3: The periods of pre-trial detention and house arrest to be taken into consideration had ranged from one year and one month to four years and 10 months. When examining the applicants' complaints about their pre-trial detention and house arrest, the Court applied the same criteria for the evaluation of deprivation of liberty, irrespective of the place where the applicants had been detained. By failing to address specific facts underpinning the existence of such risks or properly consider alternative preventive measures, and by relying essentially on the gravity of the charges, the courts had extended the applicants' detention and house arrest on grounds which could not be regarded as sufficient to justify the length.

Conclusion: violation (unanimously).

The Court also found, unanimously, a violation of Article 5 § 5 in the case of Mr Kovrov, given that the latter did not have an enforceable right to compensation for his detention, which had been in breach of Article 5 § 3.

Article 41: awards in respect of non-pecuniary damage ranging from EUR 1,000 to 2,700; claim in respect of pecuniary damage submitted by one of the applicants dismissed.

Article 46: Russia's highest courts – the Constitutional Court and the Supreme Court – had directed their attention to the issue of the unjustified pre-trial detention and house arrest, providing specific explanations on how to secure the rights of detained persons within the framework of the existing legislation and how to comply with the requirements of Article 5 § 3. In line with the above indications relating to alternative preventive measures, in the recent years the domestic courts had increasingly applied house arrest instead of pre-trial detention.

Therefore, the Court acknowledged that the respondent State had already taken important steps to remedy the problems related to unjustified deprivation of liberty. The Court welcomed the efforts made by the Russian authorities aimed at bringing Russian legislation and practice in compliance with the Convention requirements and the statistics demonstrating a reduction in the excessive use of detention as a preventive measure. At the same time, the Court considered that consistent and long-term efforts had to continue in order to achieve compliance with Articles 5 §§ 3 and 5, in particular, as regards reasoning of detention and house arrest orders and in strengthening the judicial control over the extension of such deprivation of liberty, where the rate of judicial approval remained very high, as well as establishing framework relating to compensation for unjustified deprivation of liberty.

In the *Zherebin* judgment the Court had held that the existing situation relating to detention called for the adoption of general measures by the respondent State. The above findings were relevant in the present case as well. In particular, the Court reiterated the standards established in Resolution no. 2077 (2015) of the Parliamentary Assembly and the importance of ensuring that decisions on deprivation of liberty contained relevant and sufficient reasons with due consideration of the detainee's particular situation and linked grounds for deprivation of liberty with concrete circumstances of the case; encouraging further application of more lenient preventive measures such as bail; establishing a clearer framework for compensations for unjustified preventive measures, including house arrest; and taking other measures to remedy the issues raised in the present case. It was for the Committee of Ministers then to assess the effectiveness of the measures proposed by the Russian Government and to follow up on their subsequent implementation in line with the Convention requirements.

(See *Zherebin v. Russia,* no. 51445/09, 24 March 2016, Legal Summary)

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

Peaceful enjoyment of possessions/ Respect des biens

Disproportionate costs order against applicant in private civil proceedings amounting to double his compensation award: *violation*

Condamnation disproportionnée aux frais et dépens du demandeur à une action civile, deux fois supérieure à l'indemnité qui lui avait été allouée : *violation*

Čolić – Croatia/Croatie, 49083/18, Judgment/Arrêt 18.11.2021 [Section I]

(See Article 6 § 1 above/Voir l'article 6 § 1 ci-dessus, page 15)

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

Vote

Unjustified restriction on voting rights of applicant serving prison sentence outside the electoral constituency of his place of residence: *violation*

Restriction injustifiée au droit de vote d'un requérant purgeant une peine d'emprisonnement hors de la circonscription électorale de son lieu de résidence : *violation*

Mironescu – Romania/Roumanie, 17504/18, Judgment/Arrêt 30.11.2021 [Section IV]

Traduction française du résumé – Printable version

Facts – The applicant complained about his inability to vote in legislative elections while he was serving a sentence in a prison situated outside the electoral constituency of his place of residence.

Law – Article 3 of Protocol No. 1: While the applicant's right to vote had not been restricted by the court which had convicted and sentenced him, it had, in practice, been removed in so far as the domestic law only permitted voting in the electoral constituency where the voter's place of residence was situated. As the applicant had been serving his sentence in a prison situated outside his electoral district on the date of the elections, he had been deprived of the ability to cast his vote. His right to vote enshrined in Article 3 of Protocol No. 1 had therefore been restricted.

The Court accepted that an electoral system which, such as that in place in Romania, imposed a territorial link between the voters and their elected representatives, pursued a legitimate aim compatible with the principle of the rule of law and the general objectives of the Convention. It therefore had to determine whether there had been arbitrariness or a lack of proportionality, and whether the restriction had interfered with the free expression of the will of the people.

While States were afforded a wide margin of appreciation in organising and running their electoral systems, the situation was not the same when an individual or group had been deprived of the right to vote. Such a situation had to pass a more stringent proportionality test. Moreover, in none of the member States surveyed for the purpose of the present application would a prisoner be prevented from voting in legislative elections for the sole reason that he or she had been serving a sentence in a detention facility situated outside the electoral constituency of their place of residence. It could thus be inferred that there was a strong European consensus that prisoners in the applicant's situation be allowed to exercise their right to vote.

Twelve of the forty-two electoral constituencies on Romanian territory did not have a detention facility. Moreover, a detention facility might not be regarded as a prisoner's place of residence for the purpose of elections. It followed that any prisoner, who, like the applicant, had his or her residence in one of the twelve electoral constituencies without a detention facility would automatically be banned from voting during their detention. Such a situation could not be construed as being compatible with the provisions of the Convention. States had to ensure that voters' particular circumstances were taken into account when organising the electoral system. However, it was not clear if and how this had been done in the present case.

The Government had argued that the applicant should have applied to have his place of residence moved to the city where he had been serving his sentence. However, they had not provided any convincing explanation as to how realistic such action would have been. According to the applicable law, the applicant should have provided a rental agreement, a statement from a host willing to take him in, or a report by a police officer attesting that he actually lived in that city. The Court was not convinced that a prisoner in the applicant's situation would be able to produce such documents for any address outside the prison. The burden imposed on the applicant thus appeared to have been disproportionately high.

In the same vein, the possibility for prisoners to request to be transferred to a detention facility situated in the electoral constituency of his or her residence remained purely speculative in so far as

the law did not clearly provide for it. Moreover, the situation in which the applicant had found himself – subjected to multiple transfers to prisons belonging to different electoral constituencies – made such a request appear unpredictable. In any case, that option remained illusory for the applicant, whose residence was in an electoral constituency which did not have a detention facility.

While the Court accepted that the law could not take account of every individual case, it could not but observe with concern that, in the respondent State, the ability for a prisoner to exercise the right to vote (when not restricted by court) became a completely random act entirely outside the control of the person concerned and exclusively in the hands of the authorities.

Lastly, the fact that, in the respondent State, solutions had been found so that non-residents and military and police personnel stationed abroad could vote in a different electoral constituency from that of their domicile or residence, showed that the residence requirement had not been essential in the current electoral system.

It was not the role of the Court to indicate to the respondent Government what would be the best solution to allow prisoners in the applicant's situation to vote. However, several different arrangements were possible and had already been put in place in the member States surveyed for the purpose of the present application. Consequently, the State's task to secure the exercise of the right to vote to prisoners in the applicant's situation did not appear insurmountable.

Conclusion: violation (unanimously).

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

ARTICLE 4 OF PROTOCOL No. 4/ DU PROTOCOLE N° 4

Prohibition of collective expulsion of aliens/Interdiction des expulsions collectives d'étrangers

Summary return of parent and six children by Croatian police outside official border crossing and without prior notification of Serbian authorities: *violation*

Expulsion sommaire, par la police croate, de six enfants et de leurs parents en dehors des points de passage officiels des frontières et sans en aviser au préalable les autorités serbes : *violation*

M.H. and Others/et autres – Croatia/Croatie, 15670/18 and/et 43115/18, Judgment/Arrêt 18.11.2021 [Section I]

(See Article 3 above/Voir l'article 3 ci-dessus, page 9)

ARTICLE 4 OF PROTOCOL No. 7/ DU PROTOCOLE N° 7

Right not to be tried or punished twice/ Droit à ne pas être jugé ou puni deux fois

Limited reopening proceedings leading to subsequent preventive detention order not a reopening of the case for the purposes of Article 4 § 2 of Protocol No. 7: *violation*

Une procédure de révision limitée qui aboutit à une ordonnance d'internement ultérieur n'est pas une réouverture du procès aux fins de l'article 4 § 2 du Protocole n° 7 : *violation*

W.A. – Switzerland/Suisse, 38958/16, Judgment/Arrêt 2.11.2021 [Section III]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 14)

RULE 39 OF THE RULES OF COURT/ ARTICLE 39 DU RÈGLEMENT DE LA COUR

Interim measures/Mesures provisoires

Interim measures applied in former Georgian President Saakashvili's case

Mesures provisoires appliquées dans le procès de M. Saakashvili, l'ancien président géorgien

Press release – Communiqué de presse

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Fedotova and Others/et autres – Russia/Russie, 40792/10 et al., Judgment/Arrêt 13.7.2021 [Section III]

(See Article 8 above/Voir l'article 8 ci-dessus, page 24)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

European Union – Court of Justice (CJEU) and General Court/Union européenne – Cour de justice (CJUE) et Tribunal

The application of the principle of mutual recognition to financial penalties prevents the executing State from questioning the legal qualification given by the issuing State to the act at issue

L'application du principe de reconnaissance mutuelle aux sanctions pécuniaires s'oppose àce que l'État d'exécution remette en cause la qualification juridique donnée par l'État d'émission à l'agissement sanctionné

Case/Affaire C-136/20, Judgment/Arrêt 6.10.2021

Communiqué de presse (in French only)

Transfers without consent of a judge from one court to another or between two divisions of the same court are liable to undermine the principles of the irremovability of judges and judicial independence

Les mutations non consenties d'un juge vers une autre juridiction ou entre deux sections d'une même juridiction sont susceptibles de porter atteinte aux principes d'inamovibilité et d'indépendance des juges

Case/Affaire C-487/19, Judgment/Arrêt 6.10.2021

Press release – Communiqué de presse

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Romanian/Roumain

Ghid privind art. 15 din Convenție – Derogarea în caz de stare de urgență

Ghid privind jurisprudența în materie de terorism

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Sözleşme'nin 13. Maddesi Hakkında Rehber – Etkili Başvuru Hakkı

Sözleşme'nin 14. maddesi (ayrımcılık yasağı) ve Sözleşme'ye Ek 1 No.lu Protokol'ün 12. maddesine ilişkin rehber

Madde 6 § 3 c) Gözaltinin ilk günlerinde avukat yokluğu