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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, news and publications

Le panorama mensuel de la jurisprudence, de l'actualité et des publications 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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Only one version of the Information Note will be issued monthly from January 2019. This replaces the provisional and subsequent monolingual versions which had been published since 1998. Translations of the legal summaries of the Court's cases into the other official language can now be accessed directly through hyperlinks in the Note. These hyperlinks lead to the HUDOC database, which is regularly updated with new translations.

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Depuis janvier 2019, il n'y aura plus qu'une seule version mensuelle de la Note d'information, remplaçant ainsi la version provisoire et ses versions unilingues ultérieures publiées depuis 1998. Les traductions des résumés juridiques des affaires de la Cour vers l'autre langue officielle seront désormais accessibles directement à partir de la Note d'information, au moyen d'hyperliens pointant vers la base de données HUDOC qui est alimentée au fur et à mesure de la réception des traductions.

The Information Note contains legal summaries of the cases examined during the month in question which the Registry considers to be of particular interest. The summaries are drafted by Registry's lawyers and are not binding on the Court. They are normally drafted in the language of the case concerned. The translation of the legal summaries into the other official language can be accessed directly through hyperlinks in the Note. These hyperlinks lead to the HUDOC database, which is regularly updated with new translations. There will thus no longer be a provisional version and subsequent monolingual versions of the Information Note. The electronic versions of the Note (in PDF, EPUB and MOBI formats) may be downloaded at www.echr.coe.int/NoteInformation/en.

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An annual index provides an overview of the cases that have been summarised in the monthly Information Notes. The index for 2019 is cumulative and is updated regularly.

-ooOoo-

La Note d'information contient les résumés d'affaires dont le greffe de la Cour a indiqué qu'elles présentaient un intérêt particulier. Les résumés sont rédigés par des juristes du greffe et ne lient pas la Cour. Ils sont en principe rédigés dans la langue de l'affaire concernée. Les traductions des résumés vers l'autre langue officielle de la Cour sont accessibles directement à partir de la Note d'information, au moyen d'hyperliens pointant vers la base de données HUDOC qui est alimentée au fur et à mesure de la réception des traductions. Il n'y aura donc plus de version provisoire ni de versions unilingues de la Note d'information. Les versions électroniques de la Note (en format PDF, EPUB et MOBI) peuvent être téléchargées à l'adresse suivante : www.echr.coe.int/NoteInformation/fr.

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Un index annuel récapitule les affaires résumées dans les Notes d'information. L'index pour 2019 est cumulatif ; il est régulièrement édité.

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Khan – France, 12267/16, Judgment | Arrêt 28.2.2019 [Section V]

English translation of the summary | Version imprimable

En fait – Le requérant, mineur isolé étranger (MIE), a vécu durant six mois dans la zone Sud de la lande de Calais à l'âge de douze ans. N'ayant pas été pris en charge par les autorités comme la majorité des MIE, il habitait dans une cabane.

Le 19 février 2016, une organisation non gouvernementale saisit le juge des enfants d'une demande de placement provisoire du requérant. Par une ordonnance du même jour, le juge des enfants, constatant que le requérant n'avait pas de représentants légaux en France, désigna un administrateur *ad hoc*. Par une ordonnance du 22 février 2016, il ordonna que le requérant fût confié à l'aide sociale à l'enfance afin de le mettre à l'abri et permettre son regroupement avec des membres de sa famille résidant en Grande-Bretagne, et ce dans un délai d'un mois.

Le requérant indique que ni le département du Pas-de-Calais ni les services préfectoraux n'agirent pour sa mise à l'abri. Ainsi, après la destruction de sa cabane lors des opérations de démantèlement de la zone Sud du 2 mars 2016, le requérant s'installa dans un « abri de fortune » dans la zone Nord. Puis, la semaine du 20 mars 2016, il quitta la lande et entra clandestinement en Angleterre.

En droit – Article 3 (*volet matériel*) : À défaut de prise en charge par les autorités et malgré le soutien qu'il a pu trouver auprès d'organisations non gouvernementales présentes sur la lande, le requérant a vécu durant six mois dans un environnement manifestement inadapté à sa condition d'enfant, caractérisé notamment par l'insalubrité, la précarité et l'insécurité. Le défaut de prise en charge du requérant s'est empiré après le démantèlement de la zone Sud de la lande, du fait de la destruction de la cabane dans laquelle il vivait et de la dégradation générale des conditions de vie sur le site. C'est, au demeurant, au motif de la situation de danger dans laquelle il se trouvait que le juge des enfants a, le 22 février 2016, ordonné qu'il soit confié à l'aide sociale à l'enfance.

Or, jusqu'à l'ordonnance de placement du requérant, les autorités compétentes n'avaient pas même identifié le requérant comme un MIE alors qu'il se trouvait sur le site de la lande depuis plusieurs mois et que son jeune âge aurait dû tout particulièrement attirer leur attention. Les moyens mis en œuvre pour identifier les MIE étaient insuffisants.

Aussi, si le requérant était favorable à une solution de mise à l'abri, il ne lui appartenait pas, en tant qu'enfant âgé de douze ans ayant une connaissance limitée de la langue française, d'effectuer lui-même les démarches nécessaires à la mise en œuvre de sa prise en charge. Il ne peut pas non plus être reproché aux organisations non gouvernementales qui avaient bénévolement apporté leur soutien au requérant, à l'avocate qui l'avait représenté dans la procédure qui avait abouti à l'ordonnance du 22 février 2016 et à l'administrateur *ad hoc* qui avait été désigné le 19 février 2016, de ne pas l'avoir conduit dans le foyer désigné par les autorités pour le recevoir, dès lors que cela relevait manifestement de la responsabilité de ces dernières.

La tâche des autorités internes est complexe, eu égard en particulier au nombre de personnes présentes sur la lande à l'époque des faits de la cause, ainsi qu'à la difficulté d'identifier les MIE parmi elles et de définir et mettre en place des modalités d'accueil adaptées à leur situation alors qu'ils n'étaient pas toujours demandeurs d'une prise en charge. Cependant, les autorités, qui ont omis d'exécuter l'ordonnance de placement provisoire du requérant, n'ont pas fait tout ce que l'on pouvait raisonnablement attendre d'elles pour répondre à l'obligation de prise en charge et de protection du requérant, s'agissant d'un MIE en situation irrégulière âgé de douze ans, c'est-à-dire l'une des personnes les plus vulnérables de la société.

La précarité de l'environnement, totalement inadapté à la condition d'enfant, dans laquelle le requérant a ainsi vécu durant plusieurs mois dans le « bidonville » de la lande de Calais et l'inexécution de l'ordonnance du juge des enfants destinée à protéger le requérant, examinées ensemble, constituent un traitement dégradant.

Conclusion : violation (unanimité).

Article 41 : 15 000 EUR pour préjudice moral ; demande pour le dommage matériel rejetée.

ARTICLE 4

Article 4 § 2

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Penalty of community work for administrative offence: *communicated*

Infliction d'une peine de travaux d'intérêt général pour une infraction administrative : *affaire communiquée*

Tiunov – Russia/Russie, 29442/18, Communication [Section III]

Traduction française du résumé | Printable version

In 2012 the penalty of community work was introduced into the federal Code of Administrative Offences (CAO) for offences relating to public rallies. In 2013 the Constitutional Court declared this penalty unconstitutional and instructed the federal legislator to amend the CAO. In 2017 the applicant was sentenced to thirty hours of community work for having taken part in an unlawful rally. He did not serve that sentence and, in separate proceedings, he was convicted of the offence of non-compliance with a sentence imposed in a CAO case and sentenced to three days of detention.

Communicated under Articles 4, 5 § 1, 6 § 1, 7, 10 and 11 of the Convention.

ARTICLE 6

Article 6 § 1 (civil)

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Immunité de juridiction d'un État étranger dans un litige de travail, par l'interprétation stricte des notions de renonciation ou de résidence : *non-violation*

Ndayegamiye-Mporamazina – Switzerland/Suisse, 16874/12, Judgment | Arrêt 5.2.2019 [Section III]

English translation of the summary | Version imprimable

En fait – De nationalité burundaise, la requérante fut recrutée en 1995 comme secrétaire administrative par la Mission permanente de représentation de la République du Burundi auprès des Nations unies à Genève, sur le mode du « recrutement local » ; la requérante résidait alors à proximité de Genève, mais sur le territoire de la France. Une clause du contrat prévoyait la compétence du pouvoir judiciaire local pour autant que les « usages diplomatiques » le permettent.

En 2007, la requérante engagea une action pour licenciement abusif, devant la justice suisse. Le Burundi excipa de son immunité de juridiction. Le tribunal de première instance examina néanmoins l'affaire, estimant que la clause susmentionnée révélait la commune intention des parties d'opter pour le for suisse. Au contraire, les juridictions supérieures reconnurent l'immunité de juridiction du Burundi : pour le Tribunal fédéral, la réserve des usages diplomatiques empêchait de voir dans la clause litigieuse une renonciation anticipée à l'immunité de juridiction ; d'autre part, la nationalité et le lieu de résidence de la requérante entraient dans les cas d'exclusion de la compétence particulière reconnue, en matière de contrats de travail, à l'État sur le territoire duquel sont accomplies les tâches.

En droit – La Cour se réfère à la Convention des Nations unies sur les immunités juridictionnelles des États et de leurs biens (CNUIJE – non encore en vigueur), qui reprend essentiellement des règles d'origine coutumière, ainsi qu'aux commentaires de la Commission du droit international sur le projet d'articles qui l'avait précédée.

a) *Sur le refus de considérer que le Burundi avait renoncé d'avance à son immunité de juridiction* – Comme le reflète l'article 7 § 1 b) de la CNUIJE, le droit international admet qu'un État étranger puisse renoncer, notamment par le biais de clauses contractuelles, à l'immunité de juridiction dont il bénéficie coutumièrement devant les tribunaux d'un autre État, mais à la condition que ce consentement soit exprès. Autrement dit, expliquait la Commission du droit international, ce consentement ne peut être présumé : il doit être clair et non équivoque.

Or, la clause pertinente du contrat de travail de la requérante a été interprétée de manière très différente par les trois instances qui l'ont examinée. Par conséquent, on ne saurait dire qu'il s'agissait d'une clause contractuelle exprimant de manière claire et non équivoque l'intention de la République du Burundi de renoncer à son immunité de juridiction. Quant à l'interprétation du Tribunal fédéral selon laquelle la réserve des « usages diplomatiques » contenue dans la clause litigieuse devait être comprise comme incluant l'immunité de juridiction, la Cour n'y voit rien d'arbitraire.

b) *Sur le refus d'écarter l'immunité de juridiction au titre des liens de l'employée avec la Suisse* – En ce qui concerne les litiges relevant d'un contrat de travail conclu entre des ambassades ou missions permanentes et leur personnel subalterne, la Cour a toujours protégé les ressortissants de l'État du for ou les non-ressortissants qui y résident (voir *Sabeh El Leil c. France* [GC], 34869/05, 29 juin 2011, Note d'information 142; *Cudak c. Lituanie* [GC], 15869/02, 23 mars 2010, Note d'information 128; *Fogarty c. Royaume-Uni* [GC], 37112/97, 21 novembre 2001, Note d'information 36; *Naku c. Lituanie et Suède*, 26126/07, 8 novembre 2016, Note d'information 201; *Wallihauser c. Autriche*, 156/04, 17 juillet 2012, Note d'information 154).

Cette jurisprudence constante est en ligne avec la coutume internationale, codifiée par la CNUIJE: en principe, un État ne peut invoquer l'immunité de juridiction dans le cadre d'un litige relatif à un contrat de travail exécuté sur le territoire de l'État du for. Mais au nombre des exceptions à ce principe figure le cas où « l'employé est ressortissant de l'État employeur au moment où l'action est engagée, à moins qu'il n'ait sa résidence permanente dans l'État du for » (article 11 § 2 e)). En outre, expliquait la Commission du droit international, si l'employé a la nationalité de l'État employeur, il dispose de recours devant les tribunaux de ce dernier.

En l'occurrence, la requérante a la nationalité de l'État employeur. Or, au moment où elle a engagé son action, elle n'avait de résidence en Suisse ni au sens du droit international public ni au sens du droit interne.

En effet, au moment où elle a engagé son action, la requérante vivait avec son mari et ses enfants sur le territoire de la France. Ni le fait que le poste de travail était en Suisse ni l'existence d'une prétendue pratique administrative entre la France et la Suisse en la matière ne permettent à la Cour de remettre en cause la conclusion des tribunaux suisses selon laquelle, d'un point de vue objectif, la condition de résidence dans l'État du for n'était pas remplie. Peu importe que la requérante se soit installée en Suisse par la suite.

Ceci suffit à justifier le refus d'écarter l'immunité de juridiction (les alinéas pertinents de la CNUIJE étant alternatifs, il n'y pas lieu d'examiner la nature des tâches exercées par la requérante).

c) *Sur l'absence alléguée de tout accès à la justice ailleurs qu'en Suisse* – Quant aux doutes émis par la requérante quant à la possibilité d'accéder à un tribunal indépendant et impartial au Burundi, la Cour rappelle que la compatibilité de l'immunité de juridiction avec l'article 6 § 1 de la Convention ne dépend pas de l'existence d'alternatives raisonnables pour la résolution du litige (voir *Stichting Mothers of Srebrenica et autres c. Pays-Bas* (déc.), 65542/12, 11 juin 2013, Note d'information 164).

Au demeurant, la requérante n'est pas dépourvue de tout recours. D'une part, il apparaît que la requérante avait déjà, par le passé, soumis un litige de travail aux autorités burundaises, que ces dernières avaient bien su résoudre. D'autre part, durant la procédure en Suisse, le Burundi a fourni à la requérante des assurances quant au fait que la saisine d'un tribunal suisse serait reconnue par les tribunaux du Burundi comme valant interruption de la prescription.

***

Bref, les tribunaux suisses ne se sont pas écartés des principes de droit international généralement reconnus en matière d'immunité des États. La restriction au droit d'accès à un tribunal n'a pas lieu d'être considérée comme disproportionnée.

Conclusion: non-violation (unanimité).

Article 6 § 1 (criminal/pénal)

Fair hearing/Procès équitable

Adequate safeguards in respect of hearsay evidence in competition law proceedings: *no violation*

Admission de témoignage par ouï-dire entourée de garanties adéquates dans une procédure en droit de la concurrence: *non-violation*

SA-Capital Oy – Finland/Finlande, 5556/10, Judgment | Arrêt 14.2.2019 [Section I]

Traduction française du résumé | Printable version

Facts – The applicant company complained that it had not had a fair trial as it had been ordered to pay penalty payments in competition law proceedings on the basis of hearsay evidence but without being able to examine or have examined the persons at the origin of that evidence.

Law – Article 6 § 1: Cases concerning restrictions of competition typically involved complex and often wide-ranging economic matters and related factual issues, which meant that the relevant elements of evidence were also multifaceted. There was a strong public interest involved in the effec-

tive enforcement of competition law. Moreover, as a rule, the financial penalties applicable in that field were not imposed on natural persons but on corporate entities, quantified on the basis of the harmful effects of the anti-competitive conduct and taking into account the business turnover of the entities found to be in breach of competition rules.

The question was whether the proceedings before the domestic courts had been fair from the point of view of the rights of defence, given the applicant company's complaint about the Supreme Administrative Court having relied on evidence which could not be tested before it.

(a) *The reasons behind the extent to which evidence by witnesses was examined* – At the first instance level, a large amount of evidence had been adduced by the Competition Authority and the defendants and had been examined before the Market Court in adversarial proceedings. The Market Court had concluded that the defendant companies, including the applicant company, had participated in the operation of a nationwide cartel in the market for central government contracts in the asphalt sector. By contrast, as regards the market for local government and private sector asphalt works and supplies, the Market Court had conducted a separate analysis of the evidence and had found that there was insufficient evidence of a cartel in the areas where the applicant company had been doing business. Consequently, while the Market Court had found the applicant company in breach of competition rules for participating in the nationwide cartel for central government contracts, it had not made a similar finding in respect of the alleged cartel for local government and private sector contracts.

The central issue before the Supreme Administrative Court on appeal concerned the question whether the Market Court had been right in its analysis of the scope of the restrictive practices, in particular in separating from each other the different segments of the market depending on whether the business concerned central government contracts or local government or private sector contracts. That issue was not solely one of facts or evidence alone but one which had required an intricate analysis of market-related economic factors as well as relevant legal considerations.

(b) *Importance of the untested indirect evidence* – The Supreme Administrative Court had heard, as witnesses for the Competition Authority, three persons who at the relevant time had held positions in the management or as employees of some of the defendant companies having their main business in different parts of the country. One of those witnesses, a former owner of one of the companies concerned, had directly implicated the applicant company as a participant in the cartel. In addition, the Supreme Administrative Court had relied on transcripts of testimonies by further witnesses given before the Market Court, whose testimonies had corroborated the evidence inculpating the applicant company.

In its analysis, the Supreme Administrative Court had arrived at a conclusion different from that of the Market Court, concluding that the asphalt sector was to be regarded as a whole in terms of the restrictive practices, and finding that there had been a single cartel encompassing all the segments of the asphalt contracts. The finding that the applicant company had participated in the cartel had been reached on the basis of documentary evidence and the testimony of witnesses who had either been heard before the court itself or before the Market Court and who, as insiders in the companies concerned, had told the courts about their own experiences in relation to the impugned restrictive practices. The relevant witnesses had been named and the gist of their testimonies quoted, without there being any indication that the court had in any significant degree relied on testimony consisting of hearsay. To the extent that the testimonies might also have included references to second-hand information received from others, the account provided in the Supreme Administrative Court's judgment of all the evidence on the basis of which its conclusions were reached did not support the allegation that the court's findings depended on such elements in the testimonies. Although the incriminating witnesses, who were cartel insiders, might also have related information based on hearsay, the Court was not persuaded that such elements played a decisive role in the Supreme Administrative Court's judgment. The indirect evidence was not decisive for the outcome of the impugned proceedings.

(c) *The fairness of the proceedings as a whole* – The judgment of the Supreme Administrative Court had been principally based on conclusions drawn from documentary evidence and witness testimony of a kind which had been open for challenge by the applicant company, including cross-examination, in the course of the proceedings. The applicant company's right to submit evidence in order to rebut the evidence presented by the Competition Authority and to explain extensively its own assessment of the evidence accepted by the domestic court had been fully respected. In the written and oral proceedings before the Supreme Administrative Court, the applicant company had

had the opportunity to exercise rights of defence providing adequate safeguards also in respect of the evidence on the basis of which the domestic court reached its judgment in the case. In the circumstances of the case, the extent to which the Supreme Administrative Court had relied on the untested indirect evidence had not been unjustified.

Conclusion: no violation (unanimously).

(See also *Jussila v. Finland* [GC], 73053/01, 23 November 2006, Information Note 91; and *Ibrahim and Others v. the United Kingdom* [GC], 50541/08 et al., 13 September 2016, Information Note 199)

ARTICLE 8

Respect for private and family life/ Respect de la vie privée et familiale

Female to male transsexual registered under former female forename and as child's mother in birth register: *communicated*

Personne transgenre passée du sexe féminin au sexe masculin inscrite sous son ancien prénom féminin en tant que mère d'un enfant dans un acte de naissance : *affaire communiquée*

O.H. and/et G.H. – Germany/Allemagne, 53568/18 and/et 54741/18, Communication [Section V]

(See Article 14 below/Voir l'article 14 ci-dessous, page 16)

Respect for private and family life/ Respect de la vie privée et familiale

Refusal to issue birth certificate indicating both child's parents as her mothers in case of adoption by biological mother's partner in same-sex couple: *communicated*

Refus de délivrance d'un certificat de naissance mentionnant deux parents comme étant les mères d'une enfant adoptée par la partenaire de la mère biologique : *affaire communiquée*

S.W. and Others/et autres – Austria/Autriche, 1928/19, Communication [Section V]

(See Article 14 below/Voir l'article 14 ci-dessous, page 16)

Respect for private life/Respect de la vie privée

Convention compliance of secret surveillance regime including the bulk interception of external communications: *case referred to the Grand Chamber*

Conformité à la Convention de programmes de surveillance secrète comprenant l'interception massive de communications externes : *affaire renvoyée devant la Grande Chambre*

Big Brother Watch and Others/et autres – United Kingdom/Royaume-Uni, 58170/13 et al., Judgment | Arrêt 13.9.2018 [Section I]

Traduction française du résumé | Printable version

The applicants, a number of companies, charities, organisations and individuals, complained about the scope and magnitude of the electronic surveillance programmes operated by the Government of the United Kingdom. The applicants all believed that due to the nature of their activities, their electronic communications were likely to have either been intercepted by the United Kingdom intelligence services; obtained by the United Kingdom intelligence services after being intercepted by foreign governments; and/or obtained by the United Kingdom authorities from Communications Service Providers (CSPs).

The applicants complained about the Article 8 compatibility of three discrete regimes: the regime for the bulk interception of communications under section 8(4) of the Regulation of Investigatory Powers Act (RIPA); the intelligence sharing regime; and the regime for the acquisition of communications data under Chapter II of RIPA.

In a judgment of 13 September 2018 (see Information Note 221), a Chamber of the Court found, by five votes to two, that there had been a violation of Article 8 as regards the section 8(4) regime, finding that the regime did not meet the "quality of law" requirement and was incapable of keeping the "interference" to what was "necessary in a democratic society". As regards the intelligence sharing regime, the Chamber held, by five votes to two, that there had been no violation of Article 8 as there had been no evidence of any significant shortcomings in the application and operation of that regime. The Chamber further found, by six votes to one, a violation of Article 8 as regards the Chapter II Regime which was held not to be in accordance with the law.

The Chamber also found, by six votes to one, a violation of Article 10 as regards both the section 8(4) and the Chapter II regimes.

On 4 February 2019 the case was referred to the Grand Chamber at the applicants' request.

Respect for private life/Respect de la vie privée

Power of border control officials to stop and question without suspicion or access to lawyer: *violation*

Agents de contrôle aux frontières habilités à arrêter et interroger sans avocat des voyageurs ne faisant l'objet d'aucun soupçon : *violation*

Beghal – United Kingdom/Royaume-Uni, 4755/16, Judgment | Arrêt 28.2.2019 [Section I]

Traduction française du résumé | Printable version

Facts – The applicant, a French national, was ordinarily resident in the United Kingdom. Her husband, also a French national, was in custody in France in relation to terrorist offences. Following a visit to her husband, the applicant was stopped at East Midlands airport and questioned under Schedule 7 to the Terrorism Act 2000. She and her luggage were searched. The applicant refused to answer most of the questions put to her. The applicant was subsequently charged with, among other things, wilfully failing to comply with a duty under Schedule 7.

Schedule 7 empowered police, immigration officers and designated customs officers to stop, examine and search passengers at ports, airports and international rail terminals. Questioning had to be for the purpose of determining whether the person appeared to be concerned or to have been concerned in the commission, preparation or instigation of acts of terrorism. No prior authorisation was required and the power to stop and question could be exercised without suspicion of involvement in terrorism.

Law – Article 8: The principal question was whether the safeguards provided by domestic law sufficiently curtailed the powers under Schedule 7 so as to offer the applicant adequate protection against arbitrary interference with her right to respect for her private life.

(a) *The geographic and temporal scope of the powers* – Schedule 7 powers were wide in scope, having permanent application at all ports and border controls. That did not, in itself, run contrary to the principle of legality. Ports and border controls would inevitably provide a crucial focal point for detecting and preventing the movement of terrorists and/or foiling terrorist attacks. Indeed, all States operated systems of immigration and customs control at their ports and borders, and while those controls were different in nature to the Schedule 7 powers, it was nevertheless the case that all persons crossing international borders could expect to be subject to a certain level of scrutiny.

(b) *The discretion afforded to the authorities in deciding if and when to exercise the powers* – Examining officers enjoyed a very broad discretion, since "terrorism" was widely defined and the Schedule 7 powers could be exercised whether or not he or she had objective or subjective grounds for suspicion. A requirement of reasonable suspicion was an important consideration in assessing the lawfulness of a power to stop and question or search a person; however, there was nothing to suggest that the existence of reasonable suspicion was, in itself, necessary to avoid arbitrariness. Rather, that was an assessment to be made having regard to the operation of the scheme as a whole and the absence of a requirement of reasonable suspicion by itself did not render the exercise of the power in the applicant's case unlawful.

There was clear evidence that the Schedule 7 powers had been of real value in protecting national security. Were "reasonable suspicion" to be required, terrorists could avoid the deterrent threat of Schedule 7 by using people who had not previously attracted the attention of the police; and the mere fact of a stop could alert a person to the existence of surveillance.

It was important to distinguish between the two distinct Schedule 7 powers, being the power to question and search a person; and the power to detain a person. As the applicant had not been formally detained, the Court's examination was limited to the lawfulness of the power to question and search. It was relevant that the Schedule 7 power – and in particular the power to question and search – was a preliminary power of inquiry expressly provided in order to assist officers stationed at ports and borders to make counterterrorism inquiries of any person entering or leaving the country. While there was no requirement of "reasonable suspicion", guidance was nevertheless provided to examining officers. The decision to exercise Schedule 7 powers had to be based on the threat posed by the various active terrorist groups and be based on a number of other considerations, such as, for example, known or suspected sources of terrorism and possible current, emerging and future terrorist activity.

(c) *Any curtailment on the interference occasioned by the exercise of the powers* – At the time the applicant had been examined, Schedule 7 had provided that a person detained under that power had to be released not later than the end of a period of nine hours from the beginning of the examination. At the beginning of the examination, the examining officer had to explain to the person concerned either verbally or in writing that he or she was being examined under Schedule 7 and that officers had the power to detain him or her should he or she refuse to co-operate and insist on leaving. A record had to be kept of the examination; at the port, if the examination lasted less than one hour, or centrally, if it lasted longer. However, despite the fact that persons being examined were compelled to answer the questions asked, neither the Terrorism Act nor the Code of Practice in force at the relevant time made any provision for a person being examined (who was not detained) to have a solicitor in attendance. Consequently, persons could be subjected to examination for up to nine hours, without any requirement of reasonable suspicion, without being formally detained, and without having access to a lawyer.

(d) *The possibility of judicial review of the exercise of the powers* – While it was possible to seek judicial review of the exercise of the Schedule 7 powers, it appeared from domestic cases that the absence of any obligation on the part of the examining officer to show "reasonable suspicion" had made it difficult for people to have the lawfulness of the decision to exercise the power judicially reviewed.

(e) *Any independent oversight of the use of the powers* – The use of the powers was subject to independent oversight by the Independent Reviewer of Terrorism Legislation. The significance of the role lay in its complete independence from government, coupled with access based on a very high degree of clearance to secret and sensitive national security information and personnel. Nevertheless, his reviews were invariably *ad hoc* and insofar as he was able to review a selection of examination records, he would not be in a position to assess the lawfulness of the purpose for the stop. Moreover, while his reports had been scrutinised at the highest level, a number of important recommendations had not been implemented. In particular, the Independent Reviewer had repeatedly called for the introduction of a suspicion requirement for the exercise of certain Schedule 7 powers, including the power to detain and to download the contents of a phone or laptop; and criticised the fact that answers given under compulsion were not expressly rendered inadmissible in criminal proceedings. Therefore, while of considerable value, the oversight of the Independent Reviewer was not capable of compensating for the otherwise insufficient safeguards applicable to the operation of the Schedule 7 regime.

(f) *Conclusion* – At the time the applicant had been stopped, the power to examine persons under Schedule 7 had been neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse. While the absence of any requirement of "reasonable suspicion" alone was not fatal to the lawfulness of the regime, when considered together with the fact that the examination could continue for up to nine hours, during which time the person would be compelled to answer questions without any right to have a lawyer present, and the possibility of judicially reviewing the exercise of the power was limited, the Schedule 7 powers were not "in accordance with the law".

The Court did not consider the amendments which flowed from the Anti-Social Behaviour, Crime and Policing Act 2014 and the updated Code of Practice; nor did it consider the power to detain under Schedule 7, which had the potential to result in a much more significant interference with a person's rights under the Convention.

Conclusion: violation (unanimously).

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

(See also *Gillan and Quinton v. the United Kingdom*, 4158/05, 12 January 2010, Information Note 126)

Respect for private life/Respect de la vie privée

Dam construction threatening important archaeological site: *inadmissible*

Construction d'un barrage menaçant un site archéologique d'une grande importance : *irrecevable*

Ahunbay and Others/et autres – Turkey/Turquie, 6080/06, Decision | Décision 29.1.2019 [Section II]

English translation of the summary | Version imprimable

En fait – En 2006 démarra le chantier de construction du barrage d'Ilısu, sur le fleuve Tigre. Ce projet doit entraîner la submersion de dizaines de sites de grand intérêt culturel et historique (abritant pour certains des vestiges de l'antique Mésopotamie)

et n'ayant pas encore tous fait l'objet de fouilles archéologiques. Les requérants – des personnes physiques impliquées dans des projets archéologiques locaux – y voient une violation du droit à la connaissance du patrimoine culturel et à la transmission des valeurs y afférentes aux générations futures.

Par une décision du 21 juin 2016 (voir la Note d'information 198), la Cour décida de communiquer la requête au gouvernement turc sous l'angle des articles 8 et 10 de la Convention. À l'heure actuelle, la construction du barrage se trouve achevée à 90 %.

En droit – Article 8 : Certes, en lien avec l'émergence progressive des valeurs liées à la conservation du patrimoine culturel, un certain cadre juridique international s'est dessiné en faveur de la protection de l'accès à ce dernier. La présente affaire pourrait, dès lors, être considérée comme relevant d'un sujet en évolution (voir, parmi d'autres, *Magyar Helsinki Bizottság c. Hongrie* [GC], 18030/11, 8 novembre 2016, Note d'information 201). Dans ce contexte, au vu des instruments internationaux et des dénominateurs communs des normes de droit international, fussent-elles non contraignantes, la Cour n'exclut pas *a priori* qu'il puisse exister une communauté de vues européenne et internationale sur la nécessité de protéger l'accès au patrimoine culturel.

Cependant, la protection internationale actuellement observable vise généralement des situations et réglementations afférentes aux droits culturels des minorités nationales, ainsi qu'au droit des peuples autochtones de conserver, contrôler et protéger leur patrimoine culturel. Ainsi, en l'état actuel du droit international, les droits liés au patrimoine culturel paraissent intrinsèquement liés au statut spécifique des individus appartenant à des minorités nationales ou à des peuples autochtones. Par contre, la Cour n'observe, à ce jour, aucun « consensus européen » ni même une tendance parmi les États membres du Conseil de l'Europe qui puisse nécessiter une remise en cause de l'étendue des droits en question ou qui autoriserait à inférer des dispositions de la Convention un droit individuel universel à la protection de tel ou de tel patrimoine culturel.

Conclusion : irrecevable (incompatibilité *ratione materiae*).

Respect for private life/Respect de la vie privée

LGBT rights film screening interrupted by group shouting homophobic abuse: *communicated*

Projection d'un film sur les droits des personnes LGBT interrompue par un groupe criant des insultes homophobes : *affaire communiquée*

Association ACCEPT and Others/et autres – Romania/Roumanie, 19237/16, Communication [Section IV]

(See Article 14 below/Voir l'article 14 ci-dessous, page 15)

Respect for private life/Respect de la vie privée

Interview with minor broadcast without prior parental consent: *communicated*

Interview d'une mineure diffusée sans le consentement préalable des parents : *affaire communiquée*

Ţurţulea – Romania/Roumanie, 35582/15, Communication [Section IV]

Traduction française du résumé | Printable version

The applicant's minor daughter gave an interview with a TV channel without prior parental consent. The applicant brought civil proceedings against the TV channel, contending that, as a result of the statements made, her daughter had been mistreated and oppressed by her teachers and colleagues. The claim was dismissed, the domestic courts holding that in the absence of negligence the TV station could not be held liable for tort.

The applicant complains that her minor daughter was interviewed without prior parental consent and that no appropriate measures to protect her identity and privacy, such as facial and voice distortion, were taken.

Communicated under Article 8 of the Convention.

Respect for correspondence/Respect de la correspondance

Proportionality and safeguards of Swedish legislation on signals intelligence: *case referred to the Grand Chamber*

Proportionnalité et garanties offertes par la législation suédoise sur le renseignement d'origine électromagnétique : *affaire renvoyée devant la Grande Chambre*

Centrum för rättvisa – Sweden/Suède, 35252/08, Judgment | Arrêt 19.6.2018 [Section III]

English translation of the summary | Version imprimable

La requérante est une organisation suédoise à but non lucratif qui, dans des litiges contre l'État notamment, représente ses clients qui s'estiment victimes d'une violation de leurs droits et libertés découlant de la Convention et du droit suédois. Compte tenu de la nature de ses fonctions d'organisation non gouvernementale contrôlant attentivement les activités d'acteurs étatiques, elle estime qu'il existe un risque que ses communications par téléphonie mobile et réseaux mobiles à large bande aient été ou soient à l'avenir interceptées et examinées dans le cadre des activités de renseignement d'origine électromagnétique.

Par un arrêt du 19 juin 2018 (voir la Note d'information 219), une chambre de la Cour a conclu, à l'unanimité, à la non-violation de l'article 8, après avoir examiné notamment: l'étendue du renseignement d'origine électromagnétique; la durée des mesures de surveillance secrète; leur système d'autorisation; les procédures à suivre pour la conservation, la consultation, l'examen, l'utilisation et la destruction des données interceptées; les conditions dans lesquelles les données interceptées peuvent être communiquées à d'autres parties; le contrôle de l'application de mesures de surveillance secrète; la notification de ces mesures et les recours disponibles.

Pour la chambre, bien que des améliorations soient possibles dans certains domaines, le système suédois de renseignement d'origine électromagnétique, examiné *in abstracto*, ne fait pas apparaître de défaillances majeures dans sa structure et son fonctionnement, lesquels sont proportionnés au but poursuivi, et il offre des garanties adéquates et suffisantes contre l'arbitraire et le risque d'abus. Toutefois, cette conclusion n'exclut pas un examen *in concreto* de la responsabilité de l'État au regard de la Convention si, par exemple, un requérant venait à avoir connaissance d'une interception effective.

Le 4 février 2019, l'affaire a été renvoyée devant la Grande Chambre à la demande de la requérante.

ARTICLE 14

Discrimination (Article 8)

LGBT rights film screening interrupted by group shouting homophobic abuse: *communicated*

Projection d'un film sur les droits des personnes LGBT interrompue par un groupe criant des insultes homophobes : *affaire communiquée*

Association ACCEPT and Others/et autres – Romania/Roumanie, 19237/16, Communication [Section IV]

Traduction française du résumé | Printable version

The applicants, an LGBT rights non-governmental organisation and five private individuals, attended a public screening of a film on the topic of LGBT rights. The screening was interrupted by a group of people who entered the venue and shouted homophobic abuse. Some of the intruders were holding a flag of a dissolved far-right party. The event could no longer continue. The investigation into the applicants' criminal complaint was closed by the prosecutor and that decision upheld by the courts.

Communicated under Articles 3, 8, 11, 13 and 14 of the Convention and Article 1 of Protocol No. 12.

Discrimination (Article 8)

Failure to provide abortion free of charge: *communicated*

Manquement à proposer une interruption volontaire de grossesse gratuite : *affaire communiquée*

A and/et B – United Kingdom/Royaume-Uni, 80046/17, Communication [Section I]

Traduction française du résumé | Printable version

In Northern Ireland abortion is only lawful in very narrow circumstances and many pregnant women ordinarily resident there travel to England in order to access abortion services. Prior to June 2017 women who did so were not entitled to obtain an abortion free of charge under the National Health Service (as women ordinarily resident in England were entitled to do) and instead had to attend private, fee-paying clinics. The applicants – a mother and daughter – argue that the failure to provide for the first applicant, a United Kingdom citizen resident in Northern Ireland, to have an abortion in England free of charge under the National Health Service breached their rights under Article 14 of the Convention read together with Article 8.

Communicated under Article 14 read together with Article 8 of the Convention.

Discrimination (Article 8)

Female to male transsexual registered under former female forename and as child's mother in birth register: *communicated*

Personne transgenre passée du sexe féminin au sexe masculin inscrite sous son ancien prénom féminin en tant que mère d'un enfant dans un acte de naissance : *affaire communiquée*

O.H. and/et G.H. – Germany/Allemagne, 53568/18 and/et 54741/18, Communication [Section V]

Traduction française du résumé | Printable version

The first applicant, a female to male transsexual, had changed his former female forename to a male forename and his female registration to a male registration in the public records. He subsequently become pregnant through self-insemination from an anonymous sperm donation and gave birth to the second applicant. The applicants requested that the first applicant be registered as the father of the second applicant in the birth register. On advice from the courts, the Registry Office registered the first applicant under his former female forename as the second applicant's mother. The applicants' constitutional complaint was unsuccessful.

Communicated under Article 8 and Article 14 in conjunction with Article 8 of the Convention.

Discrimination (Article 8)

Refusal to issue birth certificate indicating both child's parents as her mothers in case of adoption by biological mother's partner in same-sex couple: *communicated*

Refus de délivrance d'un certificat de naissance mentionnant deux parents comme étant les mères d'une enfant adoptée par la partenaire de la mère biologique : *affaire communiquée*

S.W. and Others/et autres – Austria/Autriche, 1928/19, Communication [Section V]

Traduction française du résumé | Printable version

The first and the third applicant are a same-sex couple living in a registered partnership. The second applicant is the first applicant's biological daughter and was adopted by the third applicant. The first and third applicants lodged an application to be issued a birth-certificate for the second applicant indicating both the first and the third applicant as the second applicant's mothers. The Register Office dismissed the application stating that documents indicating civil status had to be issued pursuant to the sample forms annexed to the regulations. The sample forms included two data fields to fill in the child's parents' data, one headed "Mother/Parent" and the other one headed "Father/Parent". The appeal was dismissed and the Constitutional Court decided not to deal with the complaint due to lack of prospects of success.

The applicants complain that it was clear from the fact that the third applicant was listed under the header "Father/Parent" that she was not the second applicant's biological mother. While it was obvious from their first names that both the first and the third applicant were women, and therefore that one of them was not the second applicant's biological mother, that was discriminatory, as the birth certificate of a child of different sex parents did not reveal if the parents were biological or adoptive parents.

Communicated under Articles 8 and 14 of the Convention.

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

Alleged discrimination in provision of disability benefits to civilian as opposed military beneficiaries: *communicated*

Discrimination alléguée entre bénéficiaires civils et militaires pour le versement de pensions d'invalidité : *affaire communiquée*

Popović and Others/et autres – Serbia/Serbie, 26944/13 et al., Communication [Section III]

Traduction française du résumé | Printable version

The applications concern alleged discrimination by the respondent State in the provision of disability benefits. The applicants, civilian beneficiaries, maintain that they were awarded a lower amount than those classified as military beneficiaries, despite having exactly the same paraplegic disability. The applicants brought civil proceedings, but were ultimately unsuccessful, including before the Constitutional Court.

Communicated under Article 14 of the Convention, Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12.

ARTICLE 34

Hinder the exercise of the right of application/Entraver l'exercice du droit de recours

Proceeding with examination of complaint about failure to comply with interim measure would amount to circumventing exhaustion rule

Examiner le grief tiré d'un non-respect de la mesure provisoire indiquée par la Cour reviendrait à contourner la règle de l'épuisement des voies de recours internes

Tunç and/et Yerbasan – Turkey/Turquie, 4133/16 and/et 31542/16, Decision | Décision 29.1.2019 [Section II]

(See Article 35 § 1 below/Voir l'article 35 § 1 ci-dessous, page 18)

ARTICLE 35

Article 35 § 1

Exhaustion of domestic remedies/Épuisement des voies de recours internes

No exemption from requirement to apply to Constitutional Court: *inadmissible*

Requérant non exempté de l'obligation d'exercer le recours ouvert devant la Cour constitutionnelle : *irrecevable*

Elçi – Turkey/Turquie, 63129/15, Decision | Décision 29.1.2019 [Section II]

Traduction française du résumé | Printable version

Facts – In 2015 the security situation in south-east Turkey deteriorated on account of the intensification of hostilities by illegal armed groups affiliated with the PKK (the Workers' Party of Kurdistan). In response, curfews were imposed by the Turkish authorities in certain towns and cities with the stated aim of clearing the trenches dug up and the explosives planted by members of the armed groups, as well as protecting civilians from violence.

In September 2015 a round-the-clock curfew was imposed in the town of Cizre. The applicant applied to the administrative court requesting the suspension and annulment of the curfew, arguing that the governor had acted *ultra vires*, as the law did not give him the authority to declare a curfew. The administrative court rejected the applicant's request for the suspension of the curfew and dismissed the case on the merits. The Constitutional Court subsequently rejected his request for an interim measure. The examination as to the merits was still pending.

In December 2015 a further round-the-clock curfew was imposed and remained in force until March 2016. The operations intensified in the applicant's neighbourhood and in January 2016 the applicant and his family left their home and moved to another neighbourhood of Cizre where the clashes were less severe.

Referring to events occurring after the imposition of the curfew in December 2015, the applicant complained to the European Court under Article 2 that the security operation conducted in his neighbourhood had not been carried out with a view to minimising the risk to the lives of civilians residing in the area. He also complained under Article 5 that he had effectively been imprisoned in his home during the course of the curfew, which had lacked an adequate legal basis.

Law – Article 35 § 1 (*exhaustion of domestic remedies*)

(a) *In relation to the applicant's Article 2 complaints* – The applicant had decided to bring his complaints arising from the December 2015 curfew directly before the Court, without first resorting to any domestic remedies. He argued that he had already attempted domestic remedies which had not proven effective in the circumstances. He contended in particular that the manner in which the Constitutional Court had disposed of his request for an interim measure had made it clear that that court could not afford an effective remedy in respect of complaints arising from curfews.

In respect of the applicant's complaints under Article 2, the Constitutional Court's impugned decision had been delivered in response to a specific request for an interim measure, which had been limited in its scope to the particular threats that the applicant had allegedly faced during the curfew imposed in September 2015. That decision had been delivered on the basis of the facts and documents that the applicant had presented before the Constitutional Court as evidence of those threats, and had not as such prejudged that court's decision in respect of a future request concerning new circumstances. The subsequent refusal of requests for interim measures lodged by other people in respect of the December 2015 curfew could not, for the same reason, be taken to render an application to the Constitutional Court futile.

The applicant's allegations before the Constitutional Court as to the presumed risks to his life were of a rather general nature. In those circumstances, the applicant could not rule out the possibility that the Constitutional Court might decide otherwise if presented with more concrete evidence as to the risks to his life, particularly if the operations in his neighbourhood had intensified after the December 2015 curfew as he had alleged.

The Constitutional Court's decision only concerned the applicant's request for an interim measure. Having regard to the very particular purpose served by the interim measure mechanism, which came into play where urgent measures were needed to prevent harm until a decision on the merits was taken, the refusal of such a measure could not as such be said to prejudice or predetermine the Constitutional Court's eventual assessment of the merits of the applicant's complaint under Article 2. The applicant could not be considered to have been exempted from resorting to the domestic remedies at his disposal in connection with his complaints under Article 2, in particular the remedy before the Constitutional Court.

(b) *In relation to the applicant's Article 5 complaint* – The Constitutional Court had not yet ruled on the issue of the lawfulness of the curfews. In its interim decision, the Constitutional Court had held that the decision to impose a curfew could not be said to have been "unfounded", as it had been taken with a view to ensuring public order and protecting people's lives and property. However, the specific question whether the curfew had had a valid basis in domestic law remained to be addressed by the Constitutional Court as part of its examination of the merits of the case.

The individual application lodged with the Constitutional Court was still pending before that court, and the Constitutional Court was yet to deliver its decision on the merits. The complaint under that provision was therefore premature. The procedure of individual application to the Constitutional Court available in Turkey provided, in principle, an effective remedy for violations of the rights and freedoms protected by the Convention and therefore had to be attempted.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See also *Vučković and Others v. Serbia* (preliminary objection) [GC], 17153/11 et al., 25 March 2014, Information Note 172; and *Koçintar v. Turkey* (dec.), 77429/12, 1 July 2014, Information Note 176)

Exhaustion of domestic remedies/ Épuisement des voies de recours internes

No special circumstances for exemption from requirement to apply to Constitutional Court: *inadmissible*

Absence de circonstances particulières qui justifieraient une exemption de l'obligation d'exercer le recours ouvert devant la Cour constitutionnelle : *irrecevable*

Tunç and/et Yerbasan – Turkey/Turquie, 4133/16 and/et 31542/16, Decision | Décision 29.1.2019 [Section II]

Traduction française du résumé | Printable version

Facts – In 2015 the security situation in south-east Turkey deteriorated on account of the intensification of hostilities by illegal armed groups affiliated with the PKK (the Workers' Party of Kurdistan). In response, curfews were imposed by the Turkish authorities in certain towns and cities with the stated aim of clearing the trenches dug up and the explosives planted by members of the armed groups, as well as protecting civilians from violence. On 14 December 2015 a curfew was imposed in the town of Cizre, prohibiting people from leaving their homes at any time of day. The 24-hour curfew in Cizre continued until it was modified in March 2016.

On 18 January 2016, Orhan Tunç, the applicants' relative, was allegedly shot by fire opened from armoured vehicles. Although repeated calls were made by a number of people to the emergency services, no ambulance was sent. On 19 January 2016 the European Court granted an interim measure under Rule 39 of the Rules of Court indicating to the Turkish authorities that they should ensure Orhan Tunç's immediate access to a hospital. On 3 February 2016, Orhan Tunç had still not been taken to hospital. On 15 February 2016 he was found dead in the basement of a building where he had taken refuge, allegedly shot by the security forces when they had shelled that building.

The applicants complained, *inter alia*, that the authorities had failed to comply with their positive obligation to protect Orhan Tunç's life as they had not ensured his access to medical facilities despite having been aware that he had been seriously injured. They further complained that he had been killed as a result of disproportionate use of force by agents of the State in the building in which he had taken refuge and that no effective investigation had been conducted into his death. Under Article 34 of the Convention the applicants complained that the respondent State had failed to comply with the interim measures indicated by the Court.

Law

Article 35 § 1 (*exhaustion of domestic remedies*): The procedure available in Turkey of an individual application to the Constitutional Court was an effective

remedy for violations of the rights and freedoms protected by the Convention and offered prospects of appropriate redress. The applicants' complaints were prima facie premature, having regard to their applications in respect of those complaints pending before the Constitutional Court.

(a) *Existence of special circumstances* – According to the generally recognised rules of international law, there might be special circumstances which exempted an applicant from the obligation to exhaust domestic remedies. One such reason might be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they had failed to undertake investigations or offer assistance. The threshold for a "special circumstances" dispensation was high and the existence of such special circumstances had been found only in exceptional cases.

The grave allegations of human rights violations committed in south-east Turkey during the curfews and the arguments as to the existence of a practice of impunity in Turkey in respect of human rights violations committed by the security forces did not exempt the applicants from the obligation to exhaust the available domestic remedies. All of the complaints regarding both the unlawful acts allegedly committed by State agents and the ineffective response of the judicial apparatus to those acts had been, or could have been, brought by the applicants before the Constitutional Court.

The remedy of an individual application, available before the Constitutional Court since 23 September 2012, was fully capable of leading to an examination of those allegations, as well as any other complaints raised by the applicants before the European Court. Although the applicants had argued that since September 2012 the Constitutional Court had yet to deliver a single judgment on violations committed by the security forces within the context of counterterrorism operations, and expressed doubts as to its capacity to address such complaints, in a legal system providing constitutional protection for fundamental rights, it was incumbent on the aggrieved individual to test the extent of that protection. Mere doubts regarding the effectiveness of a particular remedy would not exempt applicants from the obligation to try it.

Allegations of erosion of judicial independence in Turkey had been made by a number of international bodies. While the Court noted the seriousness of those concerns, it could not examine in the abstract whether there existed in Turkey a general problem of independence and impartiality that affected the overall functioning of the judiciary, and draw conclusions from such an assessment for the purposes of the applicants' case. The Court had rather to focus its examination on the facts and evidence presented before it. It considered in that regard that the applicants had not submitted sufficient evidence to support the argument that the Turkish judiciary in general, and the Constitutional Court in particular, lacked the willingness and the competence to examine their complaints in an independent and impartial manner owing to the undue influence of the executive. Doubts as to the lack of independence and impartiality of investigatory authorities or courts might in certain circumstances raise an issue under Article 2 of the Convention but they could not, in principle, be raised as a pre-emptive claim to escape the obligation to exhaust domestic remedies.

(b) *Length of the proceedings before the Constitutional Court* – It was not unreasonable that the Constitutional Court had remained somewhat inactive while the criminal investigations into deaths, including that of Orhan Tunç, were still pending and the factual circumstances surrounding the death were, at least in theory, being uncovered by the investigating authorities. It appeared that, after the criminal proceedings had ended, the Constitutional Court had started to deal with the case more actively. Bearing in mind that it had only been about one year and six months since the conclusion of the relevant criminal proceedings and also noting the apparent complexity of the case and the reasonable progress of the proceedings before the Constitutional Court, that court could not yet be said to have failed to examine the applicants' allegations in a timely manner.

(c) *Alleged non-enforcement of the Constitutional Court's decisions* – The decisions of the Constitutional Court were binding on all State organs and authorities, as well as on all natural and legal persons. Deliberate failure to implement a final and enforceable judgment might have the effect of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness. However, in the absence of any compelling evidence to the contrary, there was no cause at that time to doubt that any eventual findings of a violation by the Constitutional Court in respect of the applicants' complaints would be effectively implemented.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Article 34: The complaint under Article 34 about failure to comply with the interim measure under

Rule 39 of the Rules of Court concerned, in effect, the respondent State's positive obligation under Article 2 to safeguard the lives of those within its jurisdiction. The Constitutional Court, as the supreme judicial authority, had to be given the opportunity to examine the substance of that complaint. Bearing in mind the close relationship between the complaints under Articles 2 and 34 in the present context, the Court considered that it should refrain from examining the complaint under Article 34 for the time being, as the latter necessarily entailed an examination of the State's positive obligations under Article 2. While there was no exhaustion requirement in respect of Article 34 complaints and the Court was the sole authority to verify compliance with an interim measure, proceeding with an examination of the complaint under Article 34 would in effect amount to circumventing the exhaustion rule in respect of the related complaints under Article 2.

Conclusion: inadmissible (premature).

(See also *Sargsyan v. Azerbaijan* [GC], 40167/06, 16 June 2015, Information Note 186; *Vučković and Others v. Serbia* (preliminary objection) [GC], 17153/11 et al., 25 March 2014, Information Note 172; *Kaya and Others v. Turkey* (dec.), 9342/16, 20 March 2018; *Akdivar and Others v. Turkey*, 21893/93, 16 September 1996)

Exhaustion of domestic remedies/Épuisement des voies de recours internes
Effective domestic remedy/Recours interne effectif – Republic of Moldova/République de Moldova

Effectiveness of new remedy for physical conditions of detention: *inadmissible*

Effectivité d'un nouveau recours pour les conditions matérielles de détention : *irrecevable*

Draniceru – Republic of Moldova/République de Moldova, 31975/15, Decision | Décision 12.2.2019 [Section II]

English translation of the summary | Version imprimable

En fait – Par sa requête déposée en 2015, le requérant se plaint de ses conditions de détention.

À la suite de l'arrêt *Shishanov c. République de Moldova* (11353/06, 15 septembre 2015, Note d'information 188), le parlement moldave a adopté deux lois (n° 163 et n° 272) instituant, entre autres, une nouvelle voie de recours en matière de conditions de détention. Ces deux lois ont été publiées le 20 octobre 2017 et le 12 décembre 2018 respectivement, et les dispositions relatives au nouveau recours sont entrées en vigueur le 1er janvier 2019.

En droit – Article 35 § 1 : Même si l'épuisement des voies de recours internes s'apprécie en principe à la date d'introduction de la requête, cette règle connaît des exceptions qui peuvent se justifier par les circonstances d'une affaire donnée, en particulier lorsqu'une voie de recours a été instaurée à la suite d'un arrêt de la Cour, comme c'est le cas dans la cause du requérant.

a) *Examen de l'effectivité de la nouvelle voie de recours, sur la base des dispositions légales* – Pour les raisons exposées ci-après, la Cour estime que la nouvelle voie de recours présente, en principe, des perspectives de redressement approprié des violations de la Convention résultant des mauvaises conditions de détention. Toutefois, s'agissant d'un recours qui n'est disponible que depuis peu, la présente analyse de la Cour est nécessairement opérée sur la base des dispositions légales. La conclusion qui précède ne préjuge donc en rien, le cas échéant, d'un éventuel réexamen de la question à la lumière des décisions rendues par les juridictions nationales et de leur exécution effective.

La Cour observe d'abord avec satisfaction :

– que la procédure relative au nouveau recours se déroule devant un juge qui présente les garanties d'indépendance et d'impartialité, ainsi que toutes les autres garanties associées à une procédure judiciaire contradictoire, et dont les décisions sont contraignantes pour les autorités administratives compétentes et d'exécution immédiate ;

– que la charge de la preuve pesant sur le détenu n'apparaît pas excessive ;

– que le juge doit, pour évaluer les conditions de détention, tenir compte des principes élaborés par la Cour ;

– que la durée de trois mois accordée au juge pour rendre sa décision n'est pas déraisonnable ; cependant, les juges devront veiller au respect strict de ce délai et, lorsque les circonstances appellent une célérité particulière, ils devront même traiter l'affaire dans un délai plus court (comparer avec *Atanasov et Apostolov c. Bulgarie* (déc.), 65540/16 et 22368/17, 27 juin 2017, Note d'information 209).

La Cour examine ensuite les mesures préventives ou compensatoires qui peuvent être obtenues par l'exercice de la nouvelle voie de recours.

i. *Volet préventif* – Il ressort des nouvelles dispositions que le juge peut ordonner à l'établissement pénitentiaire de redresser la situation dans un délai maximal de quinze jours ; à l'issue de ce délai, l'administration pénitentiaire doit informer le juge des mesures concrètes prises. Rien n'indique que le nouveau recours n'offrira pas des chances réelles d'améliorer les conditions inadéquates de détention ou qu'il ne sera pas susceptible de fournir aux détenus une possibilité effective de rendre ces conditions conformes aux exigences de l'article 3 de la Convention.

La Cour invite instamment les autorités moldaves, et plus particulièrement les juridictions internes, à réduire le recours à la détention provisoire et à élargir l'utilisation des mesures alternatives à la détention (comparer avec *Ananyev et autres c. Russie*, 42525/07 et 60800/08, 10 janvier 2012, Note d'information 148).

ii. *Volet compensatoire* – Les nouvelles dispositions se présentent comme suit :

– Pour les personnes détenues en exécution d'une peine, les formes de compensation offertes sont : i) une réduction de la peine, à raison de un à trois jours de remise de peine pour dix jours de détention dans des conditions inadéquates ; ii) lorsque la remise de peine n'apporte pas une compensation suffisante ou lorsque la détention dans des conditions inadéquates est inférieure à dix jours, un dédommagement pécuniaire d'un montant maximal de 100 lei moldaves (soit environ 5,10 EUR au 1er janvier 2019) pour chaque jour de détention dans des conditions inadéquates.

– Pour les personnes en détention provisoire, le tribunal qui fixe l'éventuelle peine privative de liberté réduira la peine infligée de deux jours pour chaque jour de détention provisoire dans de mauvaises conditions. En cas d'impossibilité, le détenu pourra rechercher un dédommagement en engageant une action civile.

De plus, il ressort de ces dispositions que l'octroi d'une compensation pour les mauvaises conditions de détention n'est pas assujetti à l'existence d'une conduite illicite de la part des responsables ou des autorités spécifiques.

La Cour n'estime pas déraisonnable le montant maximal prévu de 5,10 EUR par jour de détention dans de mauvaises conditions. Il est vrai que le droit moldave ne prévoit pas de limite inférieure quant au montant de l'indemnisation à allouer. Cela étant, la Cour ne saurait en déduire que les tribunaux moldaves ne parviendront pas à établir une jurisprudence cohérente et uniforme compatible avec sa jurisprudence.

b) *Obligation immédiate d'épuiser la nouvelle voie de recours interne* – Le recours nouvellement institué est ouvert aux personnes condamnées ou placées en détention provisoire, ainsi que – sous réserve du respect des délais impartis – aux personnes remises en liberté. De plus, les personnes qui ont une requête pendante devant la Cour se voient offrir un délai de quatre mois à partir du 1er janvier 2019 pour l'exercer.

En l'espèce, il incombe donc au requérant d'exercer dès à présent le nouveau recours. Il pourra, le cas échéant, présenter ensuite une nouvelle requête à la Cour au vu de la décision qui sera rendue. Il en va de même pour toute personne se trouvant dans la même situation.

Conclusion : irrecevable (non-épuisement des voies de recours internes).

(Voir aussi *Stella et autres c. Italie* (déc.), 49169/09 et al., 16 septembre 2014, Note d'information 177, et *Domján c. Hongrie* (déc.), 5433/17, 14 novembre 2017, Note d'information 212)

ARTICLE 1 OF PROTOCOL No. 7 / DU PROTOCOLE N° 7

Procedural safeguards relating to expulsion of aliens/Garanties procédurales en cas d'expulsion d'étrangers

Removal decided by court on the basis of classified documents concerning national security that were not disclosed to the applicants: *relinquishment in favour of the Grand Chamber*

Décision judiciaire d'éloignement rendue sur la base de documents classifiés relatifs à la sécurité nationale, non communiqués aux requérants : *dessaisissement au profit de la Grande Chambre*

Muhammad and/et Muhammad – Romania/Roumanie, 80982/12 [Section III]

English translation of the summary | Version imprimable

Les requérants sont deux ressortissants pakistanais. À l'époque des faits, ils séjournaient en Roumanie avec un visa d'étudiant. En décembre 2012, le parquet engagea à leur encontre une procédure

judiciaire visant à les déclarer indésirables sur le territoire roumain, au motif qu'il existait des indices sérieux selon lesquels les requérants menaient des activités de nature à mettre en péril la sécurité nationale. Le parquet produisit un document classé « secret » du service national de renseignement (SDI). La cour d'appel fit droit à la demande du parquet. Dans sa décision, elle se référa aux dispositions légales visant le terrorisme et le soutien à des activités en relation avec le terrorisme. La juridiction supérieure justifia le refus de communiquer aux requérants la note du SDI par le danger que constituerait la divulgation des indices recueillis. Elle estima que les garanties procédurales exigées par l'article 1 du Protocole n° 7 avaient été suffisamment assurées par le fait que les tribunaux avaient pu s'assurer du bien-fondé de l'allégation d'existence d'indices de leur intention de déployer des activités de nature à mettre en péril la sécurité nationale. Les requérants furent reconduits hors du pays.

Devant la Cour européenne, les requérants se plaignent de n'avoir pas été informés des raisons concrètes qui justifiaient leur éloignement.

Le 27 février 2019, la chambre de la Cour à laquelle l'affaire avait été attribuée s'est dessaisie au profit de la Grande Chambre.

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

General prohibition of discrimination/ Interdiction générale de la discrimination

Inability to vote and stand in local election due to legal void in legislation: *communicated*

Impossibilité de voter ou de se porter candidat à une élection locale en raison d'un vide législatif : *affaire communiquée*

Baralija – Bosnia and Herzegovina/Bosnie-Herzégovine, 30100/18, Communication [Section IV]

Traduction française du résumé | Printable version

On 25 November 2010 the Constitutional Court of Bosnia and Herzegovina declared certain provisions of the Electoral Law of Bosnia and Herzegovina and the Statute of the City of Mostar, dealing with the election of the councillors to the City Council of Mostar, as unconstitutional and, *inter alia*, ordered the Parliamentary Assembly to amend those provisions within six months. As this order had not been implemented, the Constitutional Court declared the contested provisions null and void in its decision of 18 January 2012. The relevant provisions dealing with local elections in the city of Mostar have not yet been amended, and as a result those elections cannot be held.

The applicant is the president of the local branch of her political party "Naša stranka" in the city of Mostar, where she is also resident. The application concerns the applicant's inability to vote and stand in the elections of the councillors to the City Council of Mostar, because of the legal void in the relevant legislation. The applicant complains that she is being unjustifiably treated differently from residents of all other municipalities in Bosnia and Herzegovina, who can vote and stand in the local elections.

Communicated under Article 1 of Protocol No. 12.

GRAND CHAMBER (PENDING)/ GRANDE CHAMBRE (EN COURS)

Referrals/Renvois

Big Brother Watch and Others/et autres – United Kingdom/Royaume-Uni, 58170/13 et al.

(See Article 8 above/Voir l'article 8 ci-dessus, page 11)

Centrum för rättvisa – Sweden/Suède, 35252/08

(See Article 8 above/Voir l'article 8 ci-dessus, page 14)

Relinquishments/Dessaisissements

Muhammad and/et Muhammad – Romania/ Roumanie, 80982/12

(See Article 1 of Protocol No. 7 above/Voir l'article 1 du Protocole n° 7 ci-dessus, page 21)

OTHER JURISDICTIONS/ AUTRES JURIDICTIONS

European Committee of Social Rights/ Comité européen des droits sociaux

Lack of appropriate legal, social and economic protection for unaccompanied foreign minors

Absence de protection juridique, sociale et économique appropriée pour les mineurs isolés étrangers

European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF)/ Comité européen d'action spécialisée pour l'enfant et la famille dans leur milieu de vie (EUROCEF) – France, 114/2015, Decision | Décision 24.1.2018, made public/rendue publique 15.6.2018

Le comité auteur de la réclamation se plaint qu'en France les mineurs étrangers non accompagnés ou mineurs isolés étrangers (MIE), incapables juridiquement, vulnérables du fait de l'absence ou de l'éloignement de ses représentants légaux et ne disposant pas des avantages propres aux nationaux, ne reçoivent pas une protection juridique, sociale et économique appropriée en raison de modalités d'accueil initial défectueuses dû à la saturation des dispositifs nationaux de mise à l'abri, d'évaluation et d'orientation ; de la détention dans les zones d'attente ; de l'évaluation abusive de l'âge ; du manque d'accès à l'éducation ; et du manque d'accès à la santé et à la protection sociale.

En droit

Article 17 § 2 (droit de la mère et de l'enfant à une protection sociale et économique) de la Charte sociale européenne (révisée) (ci-après « la Charte »)

a) *Le dispositif d'accueil des mineurs étrangers non accompagnés en France* – La mise à l'abri peut ne pas être effectuée au moment de la présentation du MIE, mais seulement à compter du moment où le jeune est évalué mineur par les autorités, le laissant dans une situation d'errance sans possibilité de logement et sans protection. De plus, les conditions de mise à l'abri des jeunes dans l'attente d'une décision définitive sur leur demande de protection peuvent parfois être très en deçà des normes minimales de prise en charge socio-éducative.

En outre, des MIE pris en charge au titre de la protection de l'enfance se trouvent hébergés en hôtel, ne permettant ni un hébergement approprié, ni un encadrement avec du personnel dûment qualifié, ni même un accès aux services de base.

De surcroît, certains MIE sont présentés aux services de police avant toute évaluation socio-éducative. Parfois même, on n'y procède pas. La plupart des MIE subissent un examen osseux sur réquisition du parquet ainsi qu'un interrogatoire de police et font ensuite l'objet d'un placement en rétention administrative, car évalués majeurs et considérés comme en infraction avec la législation relative au séjour des étrangers en France.

Enfin, certains MIE ne disposent pas d'un représentant légal désigné dès que possible.

Conclusion : violation (unanimité).

b) *Les mineurs étrangers non accompagnés arrivant par avion détenus en zone d'attente* – La détention automatique des MIE dans des zones d'attente d'aéroports ou d'hôtels et autres lieux de détention administrative, parfois avec des adultes, est inappropriée pour respecter pleinement les obligations de non-refoulement.

La nomination d'un administrateur *ad hoc* est rarement efficace, privant ainsi les MIE du droit d'être assistés dans les procédures les concernant pour nommer un avocat ou renvoyer l'affaire devant le tribunal compétent par exemple.

Conclusion : violation (unanimité).

c) *Évaluation de l'âge* – Les évaluations d'âge, fondées sur l'examen osseux, peuvent être lourdes de conséquences pour le mineur. De nombreux MIE se voient déclarés majeurs lors de cet examen, alors même qu'ils sont en possession de documents d'état civil attestant de leur minorité. Tant en France qu'au niveau international, le recours à cet examen est très contesté pour son absence de fiabilité et l'atteinte portée à la dignité et à l'intégrité physique des enfants.

Conclusion : violation (unanimité).

d) *Le droit à un recours effectif des mineurs étrangers non accompagnés* – Lorsqu'un MIE, après évaluation de sa minorité, est déclaré majeur, celui-ci est alors écarté des dispositifs de protection de l'enfance. Mais il peut faire appel de la décision. Le jeune doit se voir remettre un document attestant de l'évaluation en cas de majorité avérée. Mais ce document ne comporte aucune indication sur les informations devant lui être données quant à son accès aux droits. Aussi, il existe des retards dans la nomination d'un représentant légal pour représenter un mineur dans les procédures judiciaires et de sérieuses difficultés pour accéder aux recours disponibles. Une telle insécurité juridique entourant l'accès à un recours est préjudiciable au mineur, dont la situation de danger appelle une réponse urgente.

Conclusion : violation (unanimité).

e) *Sur l'accès à l'éducation des mineurs étrangers non accompagnés* – En vertu de la législation française, l'obligation de fréquenter l'école ne s'étend pas au-delà de l'âge de 16 ans. Les MIE âgés de plus de 16 ans n'étant dès lors pas prioritaires pour accéder à l'éducation, leur droit à l'éducation et à la formation est alors bafoué, ce qui réduit leurs chances

d'intégration sociale et professionnelle en France et de régulariser leur statut.

Conclusion : violation (huit voix contre sept).

Article 7 § 10 (droit des enfants et des adolescents à la protection) de la Charte : En raison des centres d'accueil surpeuplés et du manque de foyers d'accueil, les MIE vivant dans la rue voient leur droit à la vie, leur intégrité physique et morale, et leur dignité humaine menacés par la traite, l'exploitation de la mendicité et l'exploitation sexuelle.

Conclusion : violation (unanimité).

Le Comité européen des droits sociaux (CEDS) a aussi décidé, à l'unanimité, de la violation des articles 11 (droit à la protection de la santé), 13 § 1 (droit à l'assistance sociale et médicale) et 31 § 2 (droit au logement) de la Charte. Si, dans tout le pays, des services de santé sont dispensés gratuitement aux MIE et lorsqu'ils sont identifiés majeurs, un certain nombre d'entre eux n'y ont toutefois pas accès. Les autorités locales doivent mobiliser les ressources médicales, sociales, éducatives et juridiques nécessaires à la pleine protection des droits fondamentaux des MIE.

Le CEDS a également décidé, par dix voix contre cinq, de la non-violation de l'article 30 (droit à la protection contre la pauvreté et l'exclusion sociale) de la Charte, car la France fait des efforts en faveur d'une approche coordonnée pour protéger les MIE de la pauvreté et lutter contre leur exclusion sociale. Il a aussi décidé, par onze voix contre quatre, que l'article E (non-discrimination) de la Charte ne s'applique pas en l'espèce.

(S'agissant de la jurisprudence de la CEDH, voir les arrêts *Rahimi c. Grèce*, 8687/08, 5 avril 2011, Note d'information 140, et *Popov c. France*, 39472/07 et 39474/07, 19 janvier 2012, Note d'information 148, ainsi que la fiche thématique Les mineurs migrants non-accompagnés en détention)

European Committee of Social Rights/ Comité européen des droits sociaux

Compulsory sex-change operation with sterilisation for transgender persons in order to obtain legal recognition of their gender identity

Obligation d'une opération de changement de sexe avec stérilisation des personnes transgenres pour obtenir la reconnaissance juridique de leur identité de genre

Transgender Europe and/et ILGA-Europe – Czech Republic/République tchèque, 117/2014, Decision | Décision 15.5.2018, made public/ rendue publique 1.10.2018

In the Czech Republic, the law prescribes that a transgender person wishing to have his or her gender identity legally recognised must undergo a sex-change operation which entails sterilisation. Without such an operation the person cannot change his or her identity papers to reflect the sex-change.

Law – Article 11 § 1 (right to protection of health) of the European Social Charter (Revised) (hereafter "the Charter"): the sex-change operation required for a change of gender identity, which can be detrimental to health, is not necessary for the protection of health. It is contrary to the State's obligation to refrain from any interference in the exercise of the right to health.

Furthermore, medical treatment carried out without the informed consent of the person concerned is contrary to the right to physical and mental integrity and can, in certain cases, be damaging to both physical and mental health. The "informed consent" safeguard is a prerequisite for the exercise of the right to health; it is an integral part of human dignity and autonomy, as well as of the obligation to protect the right to health.

Conclusion: violation (eleven votes to two).

(As regards the ECHR case-law, see the judgments in *Christine Goodwin v. the United Kingdom* [GC], 28957/95, 11 July 2002, Information Note 44; *Van Kück v. Germany*, 35968/97, 12 June 2003, Information Note 54; *Y.Y. v. Turkey*, 14793/08, 10 March 2015, Information Note 183; and *A.P., Garçon and Nicot v. France*, 79885/12 et al., 6 April 2017, Information Note 206; and also the Factsheet on Gender identity issues)

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En République tchèque, selon la loi, une personne transgenre qui souhaite faire reconnaître juridiquement son identité de genre doit subir une opération de changement de sexe physique qui implique une stérilisation. Sans cette intervention, elle ne peut faire modifier ses documents d'identité pour qu'ils reflètent son changement de sexe.

En droit – Article 11 § 1 (droit à la protection de la santé) de la Charte sociale européenne (révisée) (ci-après « la Charte ») : L'opération chirurgicale de changement de sexe requise pour un changement d'identité de genre, qui peut être préjudiciable à

la santé, n'est pas nécessaire à la protection de la santé. Elle est contraire à l'obligation pour l'État de s'abstenir de toute ingérence dans l'exercice du droit à la santé.

De plus, un traitement médical mis en œuvre sans le consentement éclairé de l'intéressé est contraire au droit à l'intégrité physique et psychologique et peut, dans certains cas, être préjudiciable à la santé tant physique que psychologique. La garantie d'un consentement éclairé est essentielle à l'exercice du droit à la santé ; elle fait partie intégrante à l'autonomie et à la dignité humaine, ainsi que de l'obligation de protéger le droit à la santé.

Conclusion : violation (onze voix contre deux).

(S'agissant de la jurisprudence de la CEDH, voir les arrêts *Christine Goodwin c. Royaume-Uni* [GC], 28957/95, 11 juillet 2002, Note d'information 44 ; *Van Kück c. Allemagne*, 35968/97, 12 juin 2003, Note d'information 54 ; *Y.Y. c. Turquie*, 14793/08, 10 mars 2015, Note d'information 183 ; et *A.P., Garçon et Nicot c. France*, 79885/12 et al., 6 avril 2017, Note d'information 206 ; ainsi que la fiche thématique Identité de genre)

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

Killings (also known as *falsos positivos* – "false positives") carried out by members of the armed forces as part of attacks on civilians in various parts of Colombia

Homicides (également appelés *falsos positivos* – « faux positifs ») perpétrés par des membres des forces armées dans le cadre d'attaques contre des civils dans différentes régions de la Colombie

Case of Villamizar Durán et al. v. Colombia/Affaire Villamizar Durán et autres c. Colombie, Series C No. 364/Série C n° 364, Judgment | Arrêt 20.11.2018

[This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. It relates only to the merits and reparations aspects of the judgment. A more detailed, official abstract (in Spanish only) is available on that Court's website: www.corteidh.or.cr.]

[Le présent résumé a été fourni gracieusement (en anglais uniquement) par le Secrétariat de la Cour interaméricaine des droits de l'homme. Il porte uniquement sur les questions de fond et de réparation traitées dans l'arrêt. Un résumé officiel plus détaillé (en espagnol uniquement) est disponible sur le site web de cette cour : www.corteidh.or.cr.]

The case concerned the death, in the 1990s, of six civilians at the hands of members of the armed forces during the Colombian armed conflict. The Inter-American Court of Human Rights ("the Court") found that five of the victims had been killed by the armed forces following the *modus operandi* of what later became known as "false positives", which is characterised by the killing of civilians who are subsequently presented as members of illegal armed groups discharged in combat between 1995 and 1997. The killings took place in three departments of the country, namely Arauca, Santander and Casanare. The case also referred to the killing of a civilian by an off-duty soldier that occurred in 1992 in the municipality of Hato Corozal.

Merits – Articles 4(1) (right to life), 5(1) (right to humane treatment), 7 (right to personal liberty) and 11(1) (right to honour and dignity), in conjunction with Article 1(1) (obligation to respect and guarantee rights without discrimination) of the American Convention on Human Rights (ACHR): In the proceedings before the Court, the State recognised its international responsibility for certain actions and omissions related to the execution of five civilians by the armed forces.

The Court found that the State was responsible for the violation of the victims' right to life, as well as for the violation of the right to personal integrity and personal liberty of four of the victims (in respect of the deprivation of their liberty and the mistreatment they were subjected to before their deaths). The State was also responsible for the violation of the right to honour and dignity of two of the victims and their families (having made an unsubstantiated claim that the two deceased were guerrilla fighters who had died in an armed confrontation).

As regards the killing of an individual by a soldier who was off-duty, the Court found that the act was attributable to the State (responsibility of the State *ultra vires*) and constituted a violation of the victim's right to life. According to the Court the victim was killed by a person who could reasonably be perceived as carrying out those actions on behalf of the State. Likewise, it was also concluded that the State was responsible for the violation of Article 7 of the ACHR, considering that the victim suffered a restriction of his right to personal liberty. In addition, taking into account the fact that the victim was deprived of his life after he had been stabbed fourteen times, the Court stated that it was reasonable to assume that the moments prior to his death were accompanied by intense pain that also affected his right to integrity.

On the other hand, regarding the alleged acts of torture suffered by three of the victims, the Court

stated that there was not enough evidence proving that several acts of torture had been committed against them. It observed that the forensic evidence led to the conclusion that the injuries present on the three corpses were probably due to the shots intended to kill the victims outright rather than to any intended ill-treatment that would have caused prolonged suffering.

Articles 8(1) (right to fair trial) and 25 (right to judicial protection), in conjunction with Article 1(1) (obligation to respect and guarantee rights without discrimination) of the ACHR, and Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture: Regarding the rights to judicial guarantees and judicial protection, it was noted that the State had partially acknowledged its responsibility and that there were no more issues in dispute in relation to: (i) the violation of the guarantee of a competent judge found on the grounds that the military judiciary conducted the investigations and proceedings related to the death of five of the victims; (ii) a violation of the reasonable time in the investigation in the ordinary courts in investigations and proceedings for the death of three of the victims; and (iii) the violation of Articles 1 and 8 of the Inter-American Convention to Prevent and Punish Torture to the detriment of relatives of three of the victims. The Court concluded that the State was responsible for the violation of the right to judicial guarantees and judicial protection of the relatives of five of the victims for not acting with due diligence during the investigations related to the deaths of the victims.

On the alleged violation of Article 6 of the Inter-American Convention to Prevent and Punish Torture to the detriment of the next of kin of three of the victims, the Court found that the State was responsible for the violation of the said Article since it had not initiated an investigation into the torture the victims had allegedly suffered.

Regarding the alleged violation of the guarantee of a competent judge in the military proceedings to investigate the death of a civilian at the hands of a soldier who was off-duty, the Court did not carry out an analysis of this allegation as there was no violation in respect of the investigation into and the trial concerning the death of that civilian.

Lastly, the Court established that, as a direct consequence of the facts of the case, the relatives of the victims suffered distress and anguish which affected their psychological and moral integrity.

Reparations – The Court established that the judgment constituted *per se* a form of reparation and ordered that the State: (i) continue and conduct the ongoing investigation and criminal proceedings; (ii) publish the judgment and its official summary; (iii) publicly acknowledge the State's international responsibility; (iv) make available psychological and/or psychiatric support to the relatives of the victims who so request; and (v) pay pecuniary and non-pecuniary damages, as well as costs and expenses.

United Nations Committee on the Rights of the Child (CRC)/Comité des droits de l'enfant des Nations unies (CRC)

Denial of visa to child taken in under *kafalah*

Refus de visa à une enfant accueillie en *kafala*

Y.B. and/et N.S. – Belgium/Belgique, communication 12/2007, Views | Constatations 5.11.2018

The authors of the communication were married and lived in Belgium. They submitted the communication on behalf of a child, a Moroccan national, who they had taken in under a *kafalah* arrangement. Under Moroccan law, *kafalah* was a commitment to take responsibility for the protection, education and maintenance of an abandoned child. The child, who had been born in Marrakesh in 2011, had been abandoned by her mother at birth and her father was unknown. The Court of First Instance of Marrakesh had designated the authors as the foster parents (under the *kafalah* system) of the child and concluded that they had the necessary material and social qualifications to take her in under such an arrangement. The authors' applications for a visa for the child were refused by the Belgian authorities.

Law – Articles 3 (*best interests of the child*) and 12 (*right to be heard*) of the Convention on the Rights of the Child: In all actions concerning children, the best interests of the child had to be a primary consideration. The Belgian immigration authorities had refused to grant a visa mainly on the basis that *kafalah* arrangements did not confer a right of residence and because the authors had failed to demonstrate that: (i) the child could not be taken care of by her biological family in Morocco; (ii) the authors could not ensure her education by leaving her in Morocco; and (iii) the authors had the financial means to support the child.

Those reasons, which were of a general nature, reflected a failure to have considered the child's specific situation. As a child born to an unknown

father and abandoned at birth by her biological mother, the possibility that she could be taken care of by her biological family seemed unlikely. The Moroccan authorities had acknowledged that the authors' situation was satisfactory, by granting the authors a *kafalah* arrangement for the child, while the Belgian authorities had done the same by allowing the authors to act as her special guardians.

The idea of leaving the child in Morocco seemed to ignore the difference between attending to a child's educational needs while leaving him or her in an orphanage and attending to his or her emotional, social and financial needs while living with the child as a parent would. That argument suggested that the immigration authorities had not given any consideration to the emotional ties that had bound the authors and the child since 2011. In addition to the legal relationship established by *kafalah*, the immigration authorities seemed to have taken no account of the *de facto* family ties that had naturally been forged by their life together over the years.

Article 12 imposed no age limit on the right of the child to express her or his views. The fact that a child was very young or in a vulnerable situation did not deprive him or her of the right to express his or her views, nor did it reduce the weight that had to be given to them in determining his or her best interests. The adoption of specific measures to guarantee the exercise of equal rights for children in such situations had to be subject to an individual assessment which assured a role to the children themselves in the decision-making process.

The child had been 5 years old when the second decision on the authors' application for a humanitarian visa had been made and she would have been perfectly capable of forming views of her own regarding the possibility of living permanently with the authors in Belgium. The implications of the proceedings in the authors' case were of paramount importance for the child's life and future, insofar as they were directly tied to her chances of living with the authors as a member of their family.

Conclusion: violation.

Article 10 (*right to family reunification*): Article 10 of the Convention did not oblige a State party in general to recognise the right to family reunification for children in *kafalah* arrangements. However, in assessing and determining the best interests of the child for the purpose of deciding whether to grant a residence permit, the State party was obliged to take into account the *de facto* ties between the child and the authors that had developed on the basis of *kafalah*.

In view of the fact that no consideration had been given to the *de facto* family ties that existed, and since it had been more than seven years since the authors submitted an application for a visa, the Committee concluded that the State party had failed to comply with its obligation to deal with the authors' request, which had been the equivalent to an application for family reunification, in a positive, humane and expeditious manner, and that it had failed to ensure that the submission of the request entailed no adverse consequences for the applicants and for the members of their family.

Conclusion: *violation*.

The State party was under an obligation to urgently reconsider the application for a visa for the child in a positive spirit, while ensuring that her best interests were a primary consideration and that her views were heard, taking into account the family ties that had been forged. The State party was also under an obligation to do everything necessary to prevent similar violations from occurring in the future.

(As regards the ECHR case-law, see the judgments in *Harroudj v. France*, 43631/09, 4 October 2012, Information Note 156; and *Chbihi Loudoudi and Others v. Belgium*, 52265/10, 16 December 2014, Information Note 180)

United Nations Human Rights Committee (CCPR)/Comité des droits de l'homme des Nations unies (CCPR)

Right to vote in elections to the Sami parliament granted by Supreme Administrative Court to individuals who had been found ineligible to vote by the Sami parliament

Droit de vote à l'élection du parlement des Samis accordé par la Cour administrative suprême à des personnes qui selon ce parlement n'ont pas ce droit

Tiina Sanila-Aikio – Finland/Finlande, communication 2668/2015, Views | Constatations 1.2.2019
Klemetti Kakkalajarvi and Others/et autres – Finland/Finlande, communication 2950/2017, Views | Constatations 1.2.2019

The author of the first communication was the President of the Sami Parliament of Finland and the authors of the second communication were twenty-six Finnish and Norwegian nationals who presented themselves as members of the indigenous Sami people.

The authors complained that the 2011 decision of the Supreme Administrative Court of the State Party (hereafter "the Court") had departed from the consensual interpretation of Section 3 of the Sami Parliament Act defining who was entitled to enter the electoral roll to the elections to the Sami parliament, and that the Court had subsequently given the right to vote to 93 persons who had been found ineligible to vote by the Sami parliament. The author of the first communication argued that that weakened the voice of the Sami people in the Parliament and the effectiveness of the Parliament in representing the Sami people. The authors of the second communication argued that the decisions of the Court granting the right to vote to individuals who had not been considered eligible by the competent organs of the Sami parliament had amounted to a direct intervention of the State Party into a core area of the enjoyment and exercise of the Sami indigenous people's right to self-determination and an intervention in the Sami people's right to define their own identity. By including non-Sami in the electoral roll corresponding to the Sami parliament, the Court had corrupted its representative value, affecting their right to effective participation in public affairs.

Law – Article 25 (right to political participation) and Article 27 (rights of ethnic, religious and linguistic minority to enjoy their own culture, to profess their own religion, and to use their own language) of the International Covenant of Civil and Political Rights: Any conditions on the exercise of the rights to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, had to be based on objective and reasonable criteria. The category of persons belonging to an indigenous people might in some instances need to be defined to protect the viability and welfare of a minority as a whole (see *Lovelace v. Canada* (CCPR/C/OP/1 at 83)).

Under Article 33 of the UN Declaration on the Rights of Indigenous Peoples, "indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions (…) and the right to determine the structures and to select the membership of their institutions in accordance with their own procedures." Article 9 of that Declaration provides that "indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right."

It was undisputed by the parties that the objective elements under section 3 of the Sami Parliament Act, for a person to be considered a Sami for the purposes of being allowed to vote in the elections for the Parliament had not been applied by the Supreme Court in the majority of cases.

According to the State Party, the authors had failed to establish in what way they had been directly affected by the Supreme Administrative Court rulings. Although the rights protected under Article 27 were individual rights, they depended in turn on the ability of the group to maintain its culture, language or religion. In the context of indigenous peoples' rights, Articles 25 and 27 had a collective dimension and some of them could only be enjoyed in community with others. The rights to political participation of an indigenous community in the context of internal self-determination under Article 27, read in light of Article 1 of the Covenant, and in pursuance of the preservation of the rights of members of the community to enjoy their own culture or to use their own language in community with the other members of their group, were not enjoyed merely individually. Consequently, when considering the individual harm in the context of the communications, the Committee had to take into account the collective dimension of such harm. With respect to dilution of the vote of an indigenous community in the context of internal self-determination, harm directly imposed upon the collective might injure each and every individual member of the community. The authors were members of an indigenous community and all of their claims were related to their rights as such.

The powers of the Sami Parliament included looking after the Sami language and culture as well as taking care of matters relating to the Sami's status as an indigenous people; to act as representative of the Sami people nationally and internationally in matters pertaining to its tasks; and to be consulted by all authorities in a long list of matters that concern the Sami as an indigenous people or developments within the Sami homeland. The Sami Parliament constituted the institution by which the State Party ensured the effective participation of the members of the Sami people as an indigenous community in the decisions that affected them.

Consequently, the State Party's obligations contained in Article 27 depended on the effective role that the Sami Parliament might play in decisions that affected the rights of members of the Sami community to enjoy their own culture or to use their own language in community with the other members of their group. The electoral process for the Sami Parliament accordingly had to ensure the effective participation of those concerned in the internal self-determination process, which was

necessary for the continued viability and welfare of the indigenous community as a whole. Pursuant to Article 25, restrictions affecting the right of members of the Sami indigenous community to effective representation in the Sami Parliament had to have a reasonable and objective justification and be consistent with the other provisions of the Covenant, including the principle of internal self-determination relating to indigenous peoples.

The Supreme Administrative Court had failed to require satisfaction of at least one of the objective criteria in the majority of cases, instead applying an "overall consideration" and examining whether a person's own opinion about considering themselves a Sami was "strong". The Court had thereby infringed on the capacity of the Sami people, through its Parliament, to exercise a key dimension of Sami self-determination in determining who was a Sami.

The Court rulings affected the rights of the authors and of the Sami community to engage in the electoral process regarding the institution intended by the State Party to secure the effective internal self-determination and the right to their own language and culture of members of the Sami indigenous people. By departing in that manner from the consensual interpretation of the law determining membership in the electoral rolls of the Sami Parliament, the Court's interpretation had not been based on reasonable and objective criteria.

Conclusion: violation of Article 25, read alone and in conjunction with Article 27 of the Covenant.

The State Party was obligated, *inter alia*, to review Section 3 of the Sami Parliament Act with a view to ensuring that the criteria for eligibility to vote in Sami Parliament elections were defined and applied in a manner that respected the right of the Sami people to exercise their internal self-determination, in accordance with Articles 25 and 27 of the Covenant. The State Party was also under an obligation to take all steps necessary to prevent similar violations in the future.

COURT NEWS/DERNIÈRES NOUVELLES DE LA COUR

Superior Courts Network: new member/ Réseau des cours supérieures: nouveau membre

In February 2019 the Superior Courts Network welcomed a new member: the Supreme Court of Latvia, which brings the membership of the SCN to 73 courts from 36 States. The list of the member courts is available on the Court's website.

-ooOoo-

En février 2019, le Réseau des cours supérieures a accueilli un nouveau membre : la Cour suprême de Lettonie, faisant passer le nombre de membres actuels à 73 juridictions de 36 États. La liste des juridictions membres est disponible sur le site web de la Cour.

The ECHR and social networks/La CEDH et les réseaux sociaux

The Court would like to point out that it has no Facebook account and that any account using the name "European Court of Human Rights" or its abbreviation "ECHR", claiming to represent the Court, is a fake account.

-ooOoo-

La Cour tient à préciser qu'elle n'a pas de compte Facebook et que tout compte utilisant abusivement le nom de « Cour européenne des droits de l'homme » ou son abréviation « CEDH » en se faisant passer pour elle est un faux compte.

RECENT PUBLICATIONS/ PUBLICATIONS RÉCENTES

Case-Law Guides: new translations/ Guides sur la jurisprudence : nouvelles traductions

The Court has recently published a translation into Italian of the Guide on Article 4 (prohibition of slavery and forced labour) and a translation into Turkish of the Guide on Article 9 (Freedom of thought, conscience and religion) on its website.

Guida all'articolo 4 della Convenzione – Proibizione della schiavitù e del lavoro forzato (ita)

9. Madde rehberi – Düşünce, vicdan ve din özgürlüğü (tur)

La Cour a récemment publié une traduction en italien du guide sur l'article 4 (interdiction de l'esclavage et du travail forcé) et une traduction en turc du guide sur l'article 9 (liberté de pensée, de conscience et de religion) sur son site web.