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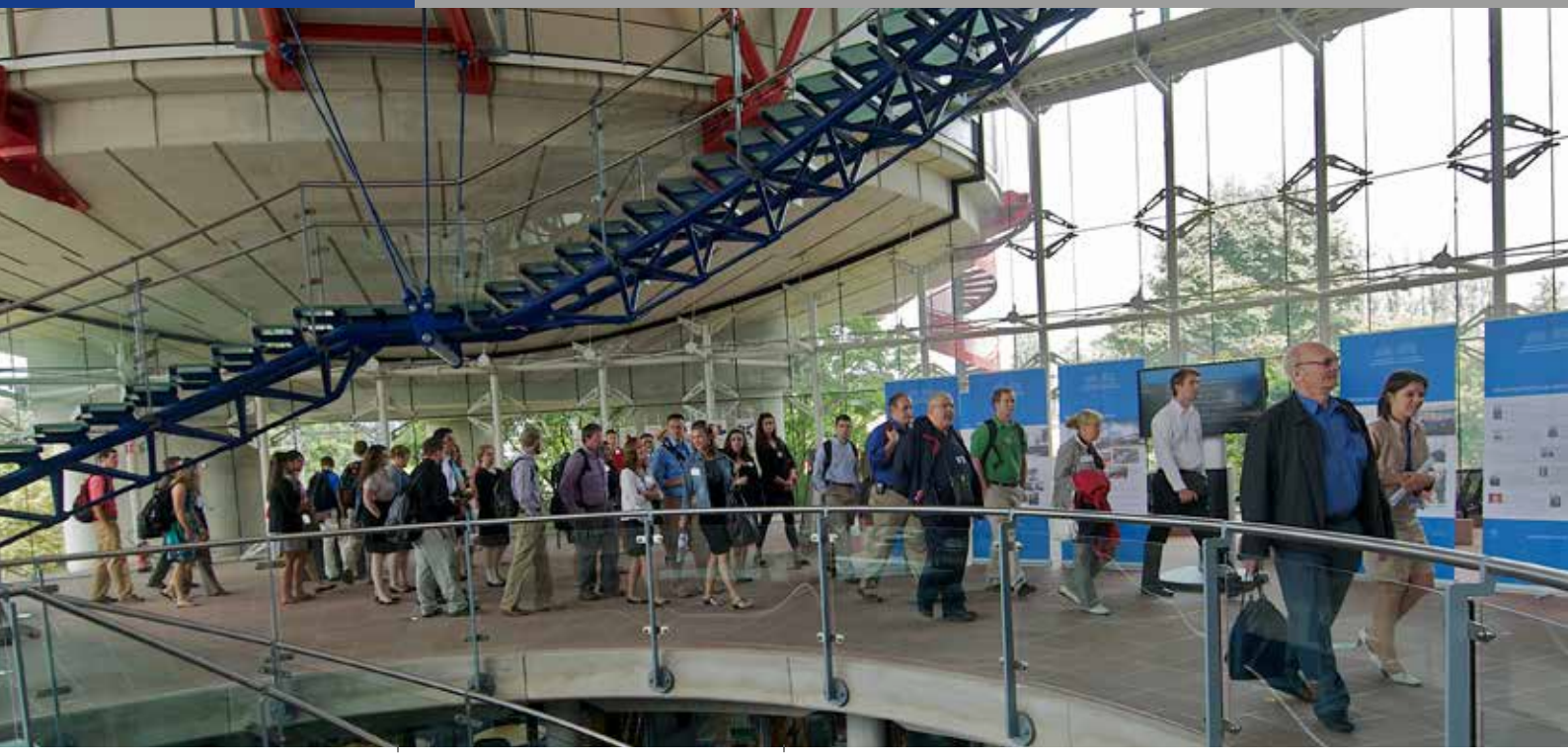
INFORMATION NOTE
on the Court's case-law

NOTE D'INFORMATION
sur la jurisprudence de la Cour

PROVISIONAL/PROVISOIRE



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European Court of Human Rights

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Non-fourniture de soins psychiatriques dans l'une des langues officielles de l'État défendeur à une personne internée : *violation*

Rooman – Belgium/Belgique, 18052/11, judgment/arrêt 18.7.2017 [Section II]

En fait – Souffrant d'un grave déséquilibre mental le rendant incapable de contrôler ses actions, le requérant est interné depuis 2004 dans un établissement spécialisé mais dépourvu de personnel médical germanophone, alors que lui-même ne parle que l'allemand (l'une des trois langues officielles de la Belgique).

La commission de défense sociale (CDS) signala à maintes reprises que la difficulté de communiquer revenait à priver le requérant de tout traitement de ses troubles mentaux (ce qui empêchait par ailleurs d'envisager sa remise en liberté), mais ses recommandations ne furent que faiblement ou tardivement suivies par l'administration. L'autorité judiciaire compétente fit des constats similaires en 2014.

En droit

Article 3 : La thèse de l'absence de lien de causalité entre l'absence de personnel médical de langue allemande et les difficultés thérapeutiques est à écarter : tous les éléments du dossier tendent au contraire à démontrer que la raison principale du défaut de prise en charge thérapeutique de l'état de santé mentale du requérant est l'impossible communication entre le personnel soignant et le requérant.

Les démarches entreprises par les instances de défense sociale pour trouver une solution au cas du requérant se sont heurtées à l'inertie de l'administration : il a fallu attendre 2014 pour que soient prises des mesures concrètes préconisées depuis des années, avec la mise à disposition d'une psychologue parlant allemand (qui au demeurant semble avoir cessé à la fin de 2015). Quant aux autres contacts que le requérant a pu avoir avec du personnel qualifié parlant allemand (des experts, un infirmier ou une assistante sociale), ils n'avaient pas de visée thérapeutique.

En tenant compte de ce que l'allemand est une des trois langues officielles en Belgique, ces carences peuvent être considérées comme une absence de prise en charge adéquate de l'état de santé du requérant. Quelles que soient les entraves que le requérant a pu lui-même provoquer par son comportement, celles-ci ne dispensaient pas l'État de ses obligations.

Son maintien en détention sans encadrement médical approprié depuis treize ans – à l'exception des deux périodes durant lesquelles fut mise à sa disposition une psychologue germanophone (entre mai et novembre 2010 et entre juillet 2014 et fin 2015) – ni espoir réaliste de changement excède le niveau inévitable de souffrance inhérent à la détention, et a constitué un traitement dégradant.

Conclusion : violation (unanimité).

Article 5 § 1 : Nonobstant le manque de soins constaté sur le terrain de l'article 3 et sa durée (treize ans), la privation de liberté du requérant était régulière à l'aune des critères établis par la jurisprudence de la Cour au sujet de l'alinéa e) :

– l'établissement de défense sociale en cause était *a priori* adapté à son état de santé mentale comme à sa dangerosité ;

– il y a eu toujours un lien entre le motif de l'internement et la maladie mentale du requérant (l'absence de soins appropriés tenant à des raisons étrangères à la nature même de l'établissement de détention, elle n'a pas rompu ce lien).

Conclusion : non-violation (six voix contre une).

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

(Voir également la fiche thématique Détention et santé mentale et l'arrêt pilote *W.D. c. Belgique*, 73548/13, 6 septembre 2016, Note d'information 199)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention/Arrestation ou détention régulières

Arrest and detention of football supporters for over seven hours without charge: *relinquishment in favour of the Grand Chamber*

Arrestation et détention de supporters de football pendant plus de sept heures sans mise

en examen : *dessaisissement au profit de la Grande Chambre*

Schwabach and Others/et autres – Denmark/Danemark, 35553/12 et al. [Section II]

The three applicants were Danish football supporters who were arrested along with some 135 other supporters under section 5(3) of the Police Act when they went to see a match between Denmark and Sweden in Copenhagen. They were held for over seven hours before being released without charge.

The City Court dismissed applications by the applicants for compensation after finding that there had been a concrete and immediate danger to public order as rival fans had been intent on fighting each other. The first applicant had been overheard encouraging others to come and fight and the second and third applicants had been involved in a brawl. The police had acted within their powers, less interfering measures would not have sufficed to avert the danger of further disturbance and the applicants had been released as soon as order had been re-established. As to the length of the detention, the City Court found that the police had been justified in exceeding the statutory six-hour maximum in view of the aim of the arrest, the organised character of the disturbances and the extent and duration of the disturbances. The City Court's decision was upheld on appeal.

In the Convention proceedings, the applicants complain that the deprivation of their liberty was in breach of Articles 5 (right to liberty and security), 7 (no punishment without law) and 11 (freedom of assembly and association) of the Convention.

On 11 July 2017 a Chamber of the Court relinquished jurisdiction in favour of the Grand Chamber.

Article 5 § 1 (e)

Persons of unsound mind/Aliéné

Psychiatric care impaired by linguistic barriers as opposed to institutional shortcomings: *no violation*

Traitement de troubles mentaux compromis par des barrières linguistiques, sans inadéquation de l'établissement d'internement en lui-même : *non-violation*

Rooman – Belgium/Belgique, 18052/11, judgment/arrêt 18.7.2017 [Section II]

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

Article 5 § 4

Review of lawfulness of detention/Contrôle de la légalité de la détention

Failure to ensure equality of arms in successful prosecution appeal against applicant's release from pre-trial detention: *Article 5 § 4 applicable; violation*

Défaut de garantie de l'égalité des armes dans un appel formé avec succès par l'accusation contre la libération du requérant de sa détention provisoire : *article 5 § 4 applicable ; violation*

Oravec – Croatia/Croatie, 51249/11, judgment/arrêt 11.7.2017 [Section II]

Facts – In April 2011 the applicant was arrested and detained on suspicion of drug-trafficking. He was subsequently released by order of the investigating judge. That decision was quashed following an appeal by the prosecution and on 31 May 2011 the judge re-examined the case and confirmed his previous decision. The prosecution lodged an appeal which was not communicated to the applicant or his counsel. On 10 June 2011 a three-judge panel, held a closed session in the parties' absence. They reversed the investigating judge's decision and ordered the applicant's pre-trial detention. On 14 June 2011 the applicant was again placed in pre-trial detention. His appeals to the Supreme Court and Constitutional Court were unsuccessful.

Before the European Court, the applicant complained, *inter alia*, that the conduct of the appeal proceedings had violated the principle of equality of arms, guaranteed by Article 5 § 4.

Law – Article 5 § 4: The applicant had been released from custody pursuant to the order of 31 May 2011. However, the decision of the investigating judge was subject to further review following an appeal and was not therefore final. An appeal was in fact lodged by the prosecution against the investigating judge's decision. In calling for that decision to be quashed, the prosecutor's office sought, through the appeal proceedings, to have the initial detention order upheld. Had the prosecution's appeal been dismissed the decision to release the applicant would have become final; since it was accepted, the applicant was again placed in custody. The appeal thus represented a continuation of the proceedings relating to the lawfulness of the applicant's detention. In those circumstances, the outcome of the appeal proceedings was a crucial factor in the decision as to the lawfulness of the applicant's detention, irrespective of whether at that precise time the applicant was or

was not held in custody. Article 5 § 4 was therefore applicable to the appeal proceedings.

A court examining an appeal against a decision related to detention had to provide guarantees of a judicial procedure. The proceedings had to be adversarial and had to ensure equality of arms between the parties. In view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5 § 4 should in principle meet, to the largest extent possible under the circumstances of an ongoing investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure.

In its appeal against the investigating judge's decision ordering the applicant's release, the prosecution advanced numerous reasons for ordering detention. That appeal was not communicated to the defence and thus, the applicant had no opportunity to answer the arguments put forward by the prosecution. The three-judge panel which ordered the applicant's detention on 10 June 2011 did so in a closed meeting without informing, let alone inviting, the applicant or his representative who were thus not given an opportunity to put forward arguments concerning his detention. Since the defence was unable to present any arguments to the court in those proceedings, either in writing or orally, the applicant could not effectively exercise his defence rights in the proceedings. The principle of equality of arms had not been respected.

Conclusion: violation (unanimously).

The Court also found a further violation of Article 5 § 4 in respect of the decision of the Constitutional Court and no violation of Article 5 § 1 in respect of the panel's failure to set a time-limit for the applicant's detention.

(See *Fodale v. Italy*, 70148/01, 1 June 2006, Information Note 87)

ARTICLE 6

Article 6 § 1 (criminal/pénal)

Criminal charge/Accusation en matière pénale
Access to court/Accès à un tribunal
Fair hearing/Procès équitable

Complaint about refusal by domestic court to re-open criminal proceedings following finding of a violation of Article 6 by European Court: *admissible*

Refusal by Supreme Court of request for revision of a criminal judgment further to a judgment of European Court finding a violation of Article 6: *no violation*

Plainte concernant le refus par une juridiction nationale de rouvrir une procédure pénale suite au constat d'une violation de l'article 6 par la Cour européenne : *recevable*

Rejet par la Cour suprême d'une demande de révision d'un jugement pénal suite à un arrêt de la Cour européenne concluant à violation de l'article 6 : *non-violation*

Moreira Ferreira – Portugal (no. 2/n° 2), 19867/12, judgment/arrêt 11.7.2017 [GC]

En fait – Un arrêt de la Cour suprême du 21 mars 2012 a rejeté la demande de révision d'un jugement pénal qui avait été présentée par la requérante suite à un arrêt rendu par la Cour européenne des droits de l'homme (« la Cour ») concluant à une violation de l'article 6 § 1 (*Moreira Ferreira c. Portugal*, 19808/08, 5 juillet 2011). Au regard de l'article 41, la Cour concluait qu'un nouveau procès ou une réouverture de la procédure à la demande de l'intéressé représenterait en principe un moyen approprié de redresser la violation constatée. À cet égard, elle notait que l'article 449 du code de procédure pénale portugais permet la révision d'un procès sur le plan interne lorsque la Cour a constaté la violation des droits et libertés fondamentaux de l'intéressé.

La Cour suprême a considéré que l'arrêt de la Cour n'était pas inconciliable avec la condamnation qui avait été prononcée à l'encontre de la requérante et ne soulevait pas de doutes graves sur son bien-fondé comme l'exige l'article 449 § 1 g) du code de procédure pénale.

La requérante se plaint d'une mauvaise interprétation faite par la Cour suprême de l'arrêt de la Cour, emportant une violation des articles 6 § 1 et 46 § 1 de la Convention.

En droit – Article 6 § 1

a) *Recevabilité*

i. *L'article 46 de la Convention fait-il obstacle à l'examen par la Cour du grief tiré de l'article 6 de la Convention ?* – Le manque d'équité allégué de la procédure conduite dans le cadre de la demande de révision, et plus précisément les erreurs qui, selon la requérante, ont entaché le raisonnement de la Cour suprême, constituent des éléments nouveaux par rapport au précédent arrêt de la Cour.

Par ailleurs, la procédure de surveillance de l'exécution de l'arrêt, à ce jour pendante devant le Comité des Ministres, n'empêche pas la Cour d'examiner une nouvelle requête dès lors que celle-ci renferme des éléments nouveaux non tranchés dans l'arrêt initial.

Partant, l'article 46 de la Convention ne fait pas obstacle à l'examen par la Cour du grief nouveau tiré de l'article 6 de la Convention.

ii. *Le nouveau grief de la requérante est-il compatible* ratione materiae *avec l'article 6 § 1 de la Convention ?* – La Cour suprême doit confronter la condamnation en question aux motifs retenus par la Cour pour conclure à la violation de la Convention. Aussi appelée à statuer sur la demande d'autorisation de révision, la Cour suprême a fait un réexamen sur le fond d'un certain nombre d'éléments de la question litigieuse de la non-comparution de la requérante en appel et des conséquences de cette absence sur le bien-fondé de sa condamnation et de l'établissement de sa peine. Au vu de la portée du contrôle opéré par la haute juridiction, celui-ci doit être considéré comme un prolongement de la procédure close par l'arrêt du 19 décembre 2007 confirmant la condamnation de la requérante. Ce contrôle a donc une nouvelle fois porté sur le bien-fondé, au sens de l'article 6 § 1 de la Convention, de l'accusation pénale dirigée contre la requérante. Dès lors, les garanties de l'article 6 § 1 s'appliquaient à la procédure devant la Cour suprême.

L'exception du Gouvernement tirée d'une incompétence *ratione materiae* de la Cour pour connaître du fond du grief soulevé par la requérante sous l'angle de l'article 6 de la Convention doit, par conséquence, être rejetée.

Conclusion : recevable (majorité).

b) *Fond* – Selon l'interprétation donnée par la Cour suprême à l'article 449 § 1 g) du code de procédure pénale, les irrégularités procédurales du type de celle constatée en l'espèce n'entraînent pas de plein droit la réouverture de la procédure.

Cette interprétation, qui a pour conséquence de limiter les cas de réouverture des procédures pénales définitivement closes ou au moins de les assujettir à des critères soumis à l'appréciation des juridictions internes, n'apparaît pas arbitraire et elle est en outre confortée par la jurisprudence constante de la Cour selon laquelle la Convention ne garantit pas le droit à la réouverture d'une procédure ou à d'autres formes de recours permettant d'annuler ou de réviser des décisions de justice définitive et par l'absence d'approche uniforme parmi les États membres quant aux modalités de fonctionnement des mécanismes de réouverture existants. Par ailleurs, un constat de violation de l'article 6 de la Convention ne crée pas généralement une situation continue et ne met pas à la charge de l'État défendeur une obligation procédurale continue.

La chambre, dans son arrêt du 5 juillet 2011, avait dit qu'un nouveau procès ou une réouverture de la procédure à la demande de l'intéressé représentait « en principe un moyen approprié de redresser la violation constatée ». Un nouveau procès ou une réouverture de la procédure étaient ainsi qualifiés de moyens appropriés mais non pas nécessaires ou uniques. De plus, l'emploi de l'expression « en principe » relativise la portée de la recommandation, laissant supposer que dans certaines situations, un nouveau procès ou la réouverture de la procédure n'apparaîtront pas comme des moyens appropriés. Ainsi la Cour s'est abstenue de donner des indications contraignantes quant aux modalités d'exécution de son arrêt et a choisi de laisser à l'État une marge de manœuvre étendue dans ce domaine. En outre, la Cour ne saurait préjuger de l'issue de l'examen par les juridictions internes de la question de l'opportunité d'autoriser, compte tenu des circonstances particulières de l'affaire, le réexamen ou la réouverture.

Dès lors, la révision du procès n'apparaissait pas comme la seule façon d'exécuter l'arrêt de la Cour du 5 juillet 2011 ; elle constituait tout au plus l'option la plus souhaitable dont l'opportunité en l'espèce devait être examinée par les juridictions internes au regard du droit national et des circonstances particulières de l'affaire.

La Cour suprême, dans la motivation de son arrêt du 21 mars 2012, a analysé le contenu de l'arrêt de la Cour du 5 juillet 2011 et en a donné sa propre interprétation. Compte tenu de la marge d'appréciation dont jouissent les autorités internes dans l'interprétation des arrêts de la Cour, à la lumière des principes relatifs à l'exécution, celle-ci estime qu'il n'est pas nécessaire de se prononcer sur la validité de cette interprétation. En effet, il lui suffit de s'assurer que l'arrêt du 21 mars 2012 n'est pas entaché d'arbitraire, en ce qu'il y aurait eu une déformation ou une dénaturation par les juges de la Cour suprême de l'arrêt rendu par la Cour.

La Cour ne saurait conclure que la lecture par la Cour suprême de l'arrêt rendu par la Cour en 2011, était, dans son ensemble, le résultat d'une erreur de fait ou de droit manifeste aboutissant à un « déni de justice ». Eu égard au principe de subsidiarité et aux formules employées par la Cour dans l'arrêt de 2011, le refus par la Cour suprême d'octroyer à la requérante la réouverture de la procédure n'a pas été arbitraire.

L'arrêt rendu par cette juridiction indique de manière suffisante les motifs sur lesquels il se fonde. Ces motifs relèvent de la marge d'appréciation des autorités nationales et n'ont pas dénaturé les constats de l'arrêt de la Cour.

Les considérations ci-dessus n'ont pas pour but de nier l'importance qu'il y a à garantir la mise en place de procédures internes permettant le réexamen d'une affaire à la lumière d'un constat de violation de l'article 6 de la Convention. Au contraire, de telles procédures peuvent être considérées comme un aspect important de l'exécution de ses arrêts et leur existence démontre l'engagement d'un État contractant de respecter la Convention et la jurisprudence de la Cour.

Conclusion : non-violation (neuf voix contre huit).

(Voir aussi *Meftah et autres c. France* [GC], 32911/96 et al., 26 juillet 2002, Note d'information 44 ; *Lenskaïa c. Russie*, 28730/03, 29 janvier 2009, Note d'information 115 ; *Verein gegen Tierfabriken Schweiz (VgT) c. Suisse (n° 2)* [GC], 32772/02, 30 juin 2009, Note d'information 120 ; *Egmez c. Chypre* (déc.), 12214/07, 18 septembre 2012, Note d'information 155 ; *Bochan c. Ukraine (n° 2)* [GC], 22251/08, 5 février 2015, Note d'information 182 ; et *Yaremenko c. Ukraine (n° 2)*, 66338/09, 30 avril 2015)

Access to court/Accès à un tribunal
Reasonable time/Délai raisonnable

Delays in hearing appeal where case file was no longer located in an area under Government control: *no violation*

Lenteurs d'un procès en appel parce que le dossier ne se trouvait plus dans une zone contrôlée par le Gouvernement : *non-violation*

Khlebik – Ukraine, 2945/16, judgment/arrêt 25.7.2017 [Section IV]

Facts – In 2013 a court in the Luhansk Region of Ukraine convicted the applicant and four co-defendants of various offences following a series of armed attacks in the region and gave him a prison term. The applicant appealed. However, the court of appeal was unable to hear his appeal because the parts of the Luhansk Region where the case file was located were no longer under Ukrainian government control following the creation of the self-proclaimed "Luhansk People's Republic". The applicant was released in March 2016 following on order of the domestic courts rejecting the prosecutor's interpretation of the relevant legislation which would have required his continued detention. The applicant's appeal was still pending at the date of the Court's judgment.

Law – Article 6 § 1: The key reason why the applicant's case had not yet been examined by the court of appeal was that his case file was no longer available as a result of hostilities in the areas the Government did not control. In the absence of any intentional restriction or limitation on the exercise of the applicant's right of access to that court, the question was whether Ukraine had taken all the measures available to it to organise its judicial system in a way that would render the rights guaranteed by Article 6 effective in practice in the applicant's case and, in particular, whether any practical avenues had been open to the Ukrainian authorities to proceed with the examination of the appeal. Three possible avenues had been suggested by the applicant: (i) requesting the assistance of the Parliamentary Commissioner for Human Rights to obtain the case file from the territory not under the Government's control; (ii) conducting a new investigation and trial; and (iii) reviewing the judgment based on the basis of the available material.

In the Court's view, none of these were viable options. As to the first, the effectiveness of the Parliamentary Commissioner's intervention would depend on the goodwill and cooperation of the forces controlling the territory not under the Government's control and not exclusively on the respondent Government's efforts. The Commissioner had in fact been unable to provide any help in a context in which hostilities in the area were continuing and no stable and lasting ceasefire had been established. As to the second option – conducting a new investigation and trial – there was no reason to doubt the domestic court's conclusion that no relevant material concerning the case was available as both the offences and the trial had taken place in the areas not currently under the Government's control. The third option – a review of conviction and sentence based on the available material – would entail an examination of questions of both law and fact and thus require access to the evidence. While the evidence was not currently available it might become so in the future. To examine the entirety of the issues in the case before such evidence was available might prejudice the possibility of a more informed review in the future.

The Court also reiterated that in determining the reasonableness of the length of proceedings in criminal cases, the question of whether the applicant is in detention is a relevant factor. It thus attached importance to the domestic courts' decision to release the applicant on the basis of an extensive interpretation of the relevant legislation.

In sum, the authorities had duly examined the possibility of restoring the applicant's case file and done all in their power under the circumstances to address the applicant's situation. Indeed, the Court welcomed the initiatives taken by the authorities to attempt to gather evidence in areas under their control, to solicit the help of the International Committee of the Red Cross in facilitating recovery of the files located in the territory not under their control, and legislative proposals intended to facilitate examination of appeals in situations where part of a case file remained unavailable.

Conclusion: no violation (unanimously).

Article 6 § 3 (b)

Access to relevant files/Accès au dossier

Restrictions on defence access to classified information: *no violation*

Restrictions pour la défense à l'accès à des informations classifiées : *non-violation*

M – Netherlands/Pays-Bas, 2156/10, judgment/arrêt 25.7.2017 [Section III]

(See Article 6 § 3 (c) below/Voir l'article 6 § 3 c) ci-après)

Article 6 § 3 (c)

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

Restrictions on divulgation by accused of classified information to his defence counsel: *violation*

Restrictions à la divulgation par l'accusé d'informations classifiées à l'avocat de la défense : *violation*

M – Netherlands/Pays-Bas, 2156/10, judgment/arrêt 25.7.2017 [Section III]

Facts – The applicant, a former audio editor and interpreter for the Netherlands General Intelligence and Security Service (*Algemene Inlichtingen- en Veiligheidsdienst* – AIVD), was convicted of divulging State secret information. His appeals failed.

Before the European Court the applicant alleged, in particular, that the criminal proceedings against him had violated Article 6 §§ 1 and 3 (b), (c) and (d) in that the AIVD had exercised decisive control over the evidence, thereby restricting both his and the domestic courts' access to information contained in the documents and controlling its use, and preventing him from instructing his defence counsel and offering witness evidence effectively.

Law

Article 6 §§ 1 and 3 (b): The applicant had sought disclosure of the report of the internal AIVD investigation and of the redacted parts of the AIVD documents contained in the case file.

(a) *Internal AIVD investigation* – The domestic courts had not found it established that any report actually existed. The Court was satisfied that no such document was in the hands of the prosecution and that accordingly it could not form part of the prosecution case. In so far as the applicant wished to imply that the investigation might have yielded disculpatory information, the Court dismissed such a suggestion as entirely hypothetical.

(b) *Disclosure of documents in redacted form* – The information blacked out could in itself be of no assistance to the defence. Since the applicant was charged with having supplied State secret information to persons not entitled to take cognisance of it, the only question in relation to those documents was whether or not they were State secret. The evidence on which the applicant was convicted included AIVD statements attesting that the documents in issue were classified State secret and explaining the need to keep the information contained in the documents secret. The National Public Prosecutor for Counter-terrorism had confirmed that the documents contained in the case file of the criminal proceedings were in fact copies of the documents they purported to represent and the applicant did not dispute this. The remaining legible information was sufficient for the defence and domestic authorities to make a reliable assessment of the nature of the information in the documents.

Conclusion: no violation (unanimously).

Article 6 §§ 1 and 3 (c): The Court had tolerated certain restrictions imposed on lawyer-client contacts in cases of terrorism and organised crime. Nonetheless, the fundamental rule of respect for lawyer-client confidentiality may only be derogated from in exceptional circumstances and on condition that adequate and sufficient safeguards against abuse are in place. A procedure whereby the prosecution itself attempts to assess the importance of concealed information for the defence and weigh that against the public interest in keeping the information secret cannot comply with the requirements of Article 6 § 1.

The applicant had not been denied access to prosecution evidence: he had been ordered not to disclose to his counsel factual information to be used in his defence. There was no interference with the confidentiality between the applicant and his lawyer. No independent monitoring of the information passed between the applicant and his counsel took place; rather, the applicant was threatened with prosecution if he gave counsel secret information. What mattered was that communication between the applicant and his counsel was not free and unrestricted as to its content, as the requirements of a fair trial normally required.

The Court accepted that secrecy rules applied generally, and there was no reason of principle why they should not apply when members of staff of the security service were prosecuted for criminal offences related to their employment. The question for the Court was how a ban on divulging secret information affected the suspect's rights to defence, both in connection with his communications with his lawyers and as regards the proceedings in court. The Advocate General had given an undertaking not to prosecute the applicant for breach of his duty of secrecy if such breach was justified by the rights of the defence, as guaranteed by Article 6 of the Convention. That laid upon the applicant the burden to decide, without the benefit of counsel's advice, whether to disclose facts not already recorded in the case file and in so doing risk further prosecution, the Advocate General retaining full discretion in the matter. The Court considered that it could not be expected of a defendant to serious criminal charges to be able, without professional advice, to weigh up the benefits of full disclosure of his case to his lawyer against the risk of prosecution for doing so.

In those circumstances the fairness of the proceedings were irretrievably compromised by the interference with communication between the applicant and his counsel.

Conclusion: violation (unanimously).

Article 6 §§ 1 and 3 (d): The defence had not been denied the possibility to cross-examine prosecution witnesses with a view to testing the veracity of the statements made by them earlier in the proceedings. Rather, it was the applicant's case that he was denied access to information to which AIVD members were privy that would have been capable of casting doubt on his guilt.

It was a perfectly legitimate defence strategy in criminal cases to create doubt as to the authorship of a crime by demonstrating that the crime could well have been committed by someone else. It did not however, entitle the suspect to make specious demands for information in the hope that perchance an alternative explanation might present itself. The evidence on which the domestic courts grounded its conviction included several items linking the applicant directly to the leaked documents and to the unauthorised persons found in possession of them. In the circumstances, it could not be said that the domestic courts had acted unreasonably or arbitrarily either by not allowing him all the witnesses requested or in holding that his defence had not been materially impaired by the conditions under which those witnesses who were not refused were questioned.

Conclusion: no violation (unanimously).

Article 41: new trial or the reopening of the domestic proceedings at the request of the applicant represented appropriate redress; finding of a violation constituted in itself sufficient just satisfaction in respect of the non-pecuniary damage.

Article 6 § 3 (d)

Examination of witnesses/Interrogation des témoins

Restrictions on access to classified information defence wished to use to examine witnesses: *no violation*

Restrictions à l'accès à des informations classifiées dont la défense souhaitait se servir pour interroger des témoins : *non-violation*

M – Netherlands/Pays-Bas, 2156/10, judgment/arrêt 25.7.2017 [Section III]

(See Article 6 § 3 (c) above/Voir l'article 6 § 3 c) ci-dessus, page 14)

ARTICLE 8

Respect for private life/Respect de la vie privée

Ban on wearing face covering in public: *no violation*

Interdiction du port de vêtements cachant le visage dans l'espace public : *non-violation*

Dakir – Belgium/Belgique, 4619/12, judgment/arrêt 11.7.2017 [Section II]
Belcacemi and/et Oussar – Belgium/Belgique, 37798/13, judgment/arrêt 11.7.2017 [Section II]

En fait – Les requérantes sont des femmes de religion musulmane se plaignant de l'impossibilité de porter le voile intégral. La loi du 1er juin 2011 punit d'amende et/ou d'emprisonnement (jusqu'à 200 EUR et sept jours, respectivement) le fait de cacher son visage dans les lieux accessibles au public. Auparavant, des interdictions similaires avaient déjà été édictées localement par certaines communes.

Les requérantes tentèrent de faire annuler l'un des règlements communaux litigieux devant le Conseil d'État (affaire *Dakir*) ou la loi de 2011 devant la Cour constitutionnelle (affaire *Belcacemi et Oussar*).

En droit – Articles 8 et 9

a) *Sur la base légale et sa qualité* – S'agissant des règlements communaux en cause dans l'affaire *Dakir*, la requérante ne contestait pas leur valeur de base légale et concentrait ses critiques sur la loi ultérieurement adoptée.

S'agissant de la loi du 1er juin 2011, la Cour ne voit rien d'arbitraire au raisonnement de la Cour constitutionnelle belge qui, à l'aune des mêmes critères que les siens, a considéré que celle-ci répondait aux exigences de précision et de prévisibilité pour autant que les termes « lieux accessibles au public » soient interprétés comme ne visant pas les lieux destinés au culte. Au surplus, l'interdiction litigieuse est formulée dans des termes très proches de ceux de la loi française examinée dans l'affaire *S.A.S. c. France*.

b) *Sur le but légitime poursuivi* – Parmi les buts poursuivis par les règlements communaux litigieux ou la loi de 2011 figuraient : la sécurité publique, l'égalité entre l'homme et la femme et une certaine conception du « vivre ensemble » dans la société. Comme dans l'arrêt *S.A.S. c. France*, le souci de répondre aux exigences minimales de la vie en société peut ici être considéré comme un élément de la « protection des droits et libertés d'autrui ». Rien ne permet par ailleurs de considérer que l'objectif d'égalité ait eu plus de poids que les autres dans le contexte belge.

c) *Sur la nécessité de l'interdiction dans une société démocratique* – Aucune argumentation spécifique n'est développée contre les règlements communaux théoriquement en cause dans l'affaire *Dakir*.

D'après les travaux préparatoires de ladite loi et l'analyse qu'en a faite la Cour constitutionnelle, les termes de la problématique débattue en Belgique sont très proches de ceux qui ont présidé à l'adoption de l'interdiction française examinée dans l'arrêt *S.A.S. c. France* ([GC], 43835/11, 1er juillet 2014, Note d'information 176).

La Cour se réfère donc aux différentes considérations de cet arrêt, et notamment au fait :

– que l'interdiction litigieuse représente un choix de société, arbitrage démocratiquement opéré par le législateur, appelant de la part de la Cour une certaine réserve ;

– que s'il est vrai que son champ est large, l'interdiction litigieuse n'affecte pas la liberté de porter dans l'espace public tout habit ou élément vestimentaire, ayant ou non une connotation religieuse, qui n'a pas pour effet de dissimuler le visage ;

– qu'il n'y a, entre les États membres du Conseil de l'Europe, toujours aucun consensus en la matière, ce qui justifie de leur reconnaître une marge d'appréciation très large.

Certaines spécificités alléguées du contexte belge sont écartées comme suit.

i. *Quant à la manière dont la règle est appliquée en cas d'infraction (affaire Belcacemi et Oussar)* – Certes, la loi belge se distingue de la législation française en prévoyant, outre l'amende, la possibilité d'une peine d'emprisonnement.

Toutefois, cette peine d'emprisonnement ne peut être appliquée qu'en cas de récidive. De plus, l'application de la loi par les juridictions pénales doit se faire dans le respect du principe de proportionnalité et de la Convention, et la lourdeur théorique de la sanction d'emprisonnement est tempérée par l'absence d'automatisme dans son application.

En outre, en droit belge, l'infraction de dissimulation du visage dans l'espace public est une infraction « mixte » relevant tant de la procédure pénale que de l'action administrative. Or, dans le cadre de cette dernière, des mesures alternatives sont possibles et couramment prises en pratique au niveau communal.

Pour le reste, l'appréciation *in concreto* du caractère proportionné d'une sanction qui viendrait à devoir être infligée en rapport avec l'interdiction litigieuse est une tâche qui relève de la compétence du juge national (le rôle de la Cour se limitant à constater un éventuel dépassement de la marge d'appréciation de l'État défendeur).

ii. *Quant à la circonstance alléguée que le processus démocratique ayant mené en Belgique à l'interdiction du port du voile intégral n'aurait pas été à la hauteur des enjeux (affaire Dakir)* – Outre le fait que cette critique ne s'adresse pas directement aux règlements en cause mais vise la loi du 1er juin 2011, la Cour note

que le processus décisionnel relatif à l'interdiction litigieuse a duré plusieurs années et a été marqué par un large débat au sein de la Chambre des représentants ainsi que par un examen circonstancié et complet de l'ensemble des intérêts en jeu par la Cour constitutionnelle.

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En conclusion, quoique controversée et présentant indéniablement des risques en termes de promotion de la tolérance au sein de la société, l'interdiction litigieuse peut, au regard de la marge d'appréciation reconnue à l'État défendeur, passer pour proportionnée au but poursuivi ; à savoir, la préservation des conditions du « vivre ensemble » en tant qu'élément de la « protection des droits et libertés d'autrui ». Cette conclusion vaut au regard de l'article 8 de la Convention comme de l'article 9.

Conclusion : non-violation (unanimité).

Article 14 combiné avec l'article 8 ou l'article 9 : Le grief de discrimination indirecte est écarté, la mesure ayant pour les mêmes raisons que ci-dessus une justification objective et raisonnable.

Conclusion : non-violation (unanimité).

Dans l'affaire *Dakir*, la Cour conclut en revanche à la violation de l'article 6 § 1 (à l'unanimité) pour défaut d'accès à un tribunal, en raison d'un formalisme excessif.

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

Lack of regulation of thermal power plant operating in close vicinity to residential flats: *violation*

Défaut de cadre légal régissant les activités d'une centrale thermique très proche d'appartements résidentiels : *violation*

Jugheli and Others/et autres – Georgia/Géorgie, 38342/05, judgment/arrêt 13.7.2017 [Section V]

Facts – Under section 4(2)(b) of the Environmental Permits Act of 15 December 1996 energy generating industrial activities, including thermal power plants, required an environmental permit issued by the Ministry of Environment based on an environmental impact assessment study and an ecological expert report. However, the Act applied only to industrial activities commenced after its entry into force. For companies that had commenced their industrial activities before then, the deadline for submitting the environmental impact assessment studies was set at 1 January 2009.

At the material time the applicants lived in a block of flats in the city centre in close proximity (approximately 4 metres) to a thermal power plant that provided the adjacent residential areas with electricity and heat. The plant had been in operation since 1939 but partially ceased generating power in 2001 owing to financial problems. According to the applicants, while operational the plant's dangerous activities were not subject to the relevant regulations and as a result emitted various toxic substances into the atmosphere that negatively affected their well-being.

Law – Article 8: Even assuming that the air pollution did not cause any quantifiable harm to the applicants' health, it may have made them more vulnerable to various illnesses. Moreover, there could be no doubt that it had adversely affected their quality of life at home. There had thus been an interference with the applicants' rights that reached a sufficient level of severity to bring it within the scope of Article 8 of the Convention.

The crux of the matter in the instant case was the virtual absence (until 2009) of a regulatory framework applicable to the plant's dangerous activities and the failure to address the resultant air pollution that negatively affected the applicants' rights under Article 8.

In the context of dangerous activities in particular, States have an obligation to set in place regulations geared to the specific features of the activity in question, especially with regard to the level of risk potentially involved. Such regulations must govern the licensing, setting-up, operation, security and supervision of the activity and must make it compulsory for all concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. The virtual absence of any legislative and administrative framework applicable to the potentially dangerous activities of the plant in the present case had enabled it to operate in the immediate vicinity of the applicants' homes without the necessary safeguards to avoid or at least minimise the air pollution and its negative impact upon the applicants' health and well-being, which had been confirmed by the expert examinations commissioned by the domestic courts. The situation had been exacerbated by the fact that, despite ordering the plant to install the relevant filtering and purification equipment to minimise the impact of toxic emissions on the residents of the

building, no effective steps were taken by the competent authorities to follow up on that instruction.

In these circumstances, the respondent State had not succeeded in striking a fair balance between the interests of the community in having an operational thermal power plant and the applicants' effective enjoyment of their right to respect for their home and private life.

Conclusion: violation (unanimously).

Article 41: EUR 4,500 in respect of non-pecuniary damage.

(See also *Fadeyeva v. Russia*, 55723/00, 9 June 2005, Information Note 76; *Di Sarno and Others v. Italy*, 30765/08, 10 January 2012, Information Note 148; and the Factsheet on the Environment and the ECHR)

ARTICLE 9

Freedom of thought/Liberté de pensée

Dismissal of alien's application for citizenship following discretionary assessment of his loyalty to the State: *Article 9 not applicable*

Refus d'accorder la nationalité à un étranger au terme d'une appréciation discrétionnaire de son loyalisme envers l'État : *article 9 non applicable*

Boudelal – France, 14894/14, decision/décision 13.6.2017 [Section V]

En fait – Ressortissant algérien né avant l'indépendance du pays et régulièrement installé en France depuis 1967, le requérant demanda en 2009 sa réintégration dans la nationalité française. Cette demande fut rejetée, au motif des renseignements dont les autorités disposaient sur le requérant (qui le décrivaient notamment comme étant l'animateur d'une association pro-palestinienne qualifiée de « relai local [d'une organisation] proche de l'idéologie du Hamas », et ayant par ailleurs relayé la parole d'un représentant de ce mouvement lors d'une manifestation). Pour rejeter son recours, la cour administrative d'appel retint que ces renseignements faisaient naître un doute sur son loyalisme envers la France. Le requérant conteste ces motifs, qui reviennent selon lui à sanctionner son engagement associatif et à instituer un « délit d'opinion ».

En droit – Articles 9, 10 et 11 : Dans l'arrêt *Petropavlovskis c. Lettonie* (44230/06, 13 janvier 2015, Note d'information 181), la Cour a souligné i) que le choix des critères aux fins de la procédure de naturalisation n'étant, en principe, pas soumis à des règles particulières de droit international, les États décident librement d'accorder ou non la naturalisation aux individus qui la demandent ; et ii) que, si, dans certaines circonstances, des décisions arbitraires ou discriminatoires rendues dans le domaine de la nationalité pouvaient soulever des questions en matière de droits de l'homme, ni la Convention ni le droit international en général ne prévoient un droit à acquérir une nationalité spécifique.

Or, par-delà les différences de contexte, les deux affaires se rapprochent :

– à l'instar du droit letton, le droit français ne garantit pas aux étrangers un droit inconditionnel à l'obtention de la nationalité française, mais la subordonne au loyalisme des postulants, tel qu'évalué par les autorités ;

– l'appréciation de cette loyauté ne renvoie pas à la loyauté envers le gouvernement au pouvoir, mais à la loyauté envers l'État ;

– des garanties contre l'arbitraire sont apportées par l'obligation de motiver les refus et l'ouverture de recours juridictionnels (garanties dont le requérant a effectivement bénéficié) ;

– le refus litigieux n'était accompagné d'aucune autre mesure et ne présentait pas de caractère punitif : l'autorité se bornait en réalité à prendre acte du fait que l'un des critères fixés par le droit interne pour la naturalisation ou la réintégration dans la nationalité française n'était pas rempli ;

– le requérant a pu, après comme avant le refus opposé à sa demande de réintégration dans la nationalité française, librement exprimer ses opinions, participer à des manifestations et adhérer aux associations de son choix ;

– quant à l'effet dissuasif de la mesure litigieuse sur l'aptitude à exercer les droits garantis par les articles 9, 10 et 11 de la Convention, cette allégation n'est pas étayée (au demeurant, il ne ressort pas du dossier que le requérant ait renoncé à des engagements associatifs ou à l'expression de ses opinions à la suite de cette mesure).

Partant, la Cour en tire la même conclusion : le requérant n'ayant pas été empêché d'exprimer ses opinions ou de participer à quelque rassemblement ou mouvement que ce soit, les articles 9, 10 et 11 de la Convention ne s'appliquent pas.

Conclusion : irrecevable (incompatibilité *ratione materiae*).

Manifest religion or belief/Manifester sa religion ou sa conviction

Ban on wearing face covering in public: *no violation*

Interdiction du port de vêtements cachant le visage dans l'espace public : *non-violation*

Dakir – Belgium/Belgique, 4619/12, judgment/arrêt 11.7.2017 [Section II]
Belcacemi and/et Oussar – Belgique, 37798/13, judgment/arrêt 11.7.2017 [Section II]

(See Article 8 above/Voir l'article 8 ci-dessus, page 15)

ARTICLE 10

Freedom of expression/Liberté d'expression

Dismissal of alien's application for citizenship following discretionary assessment of his loyalty to the State: *Article 10 not applicable*

Refus d'accorder la nationalité à un étranger au terme d'une appréciation discrétionnaire de son loyalisme envers l'État : *article 10 non applicable*

Boudelal – France, 14894/14, decision/décision 13.6.2017 [Section V]

(See Article 9 above/Voir l'article 9 ci-dessus, page 18)

ARTICLE 11

Freedom of peaceful assembly/Liberté de réunion pacifique
Freedom of association/Liberté d'association

Dismissal of alien's application for citizenship following discretionary assessment of his loyalty to the State: *Article 11 not applicable*

Refus d'accorder la nationalité à un étranger au terme d'une appréciation discrétionnaire de son loyalisme envers l'État : *article 11 non applicable*

Boudelal – France, 14894/14, decision/décision 13.6.2017 [Section V]

(See Article 9 above/Voir l'article 9 ci-dessus, page 18)

ARTICLE 14

Discrimination (Article 8)

Reduction in damages award on grounds of sex and age of claimant: *violation*

Réduction d'une indemnité fondée sur le sexe et l'âge de la demanderesse : *violation*

Carvalho Pinto de Sousa Morais – Portugal, 17484/15, judgment/arrêt 25.7.2017 [Section IV]

Facts – The applicant, who had been diagnosed with a gynaecological disease, brought a civil action against a hospital for clinical negligence following an operation for her condition. The Administrative Court ruled in her favour and awarded her compensation. On appeal the Supreme Administrative Court upheld the first-instance judgment but reduced the amount of damages.

In the Convention proceedings, the applicant complained that the Supreme Administrative Court's judgment in her case had discriminated against her on the grounds of her sex and age. She complained, in particular, about the reasons given by the court for reducing the award and about the fact that it had disregarded the importance of a sex life for her as a woman.

Law – Article 14 in conjunction with Article 8: The advancement of gender equality was a major goal for the member States of the Council of Europe and very weighty reasons would have to be put forward before a difference of treatment could be regarded as compatible with the Convention. In particular, references to traditions, general assumptions, or prevailing social attitudes in a particular country were insufficient justification for a difference in treatment on the grounds of sex. The issue with stereotyping of a certain group in society lay in the fact that it prohibited the individualised evaluation of their capacity and needs.

The Supreme Administrative Court had confirmed the findings of the first-instance court but considered that the applicant's physical and mental pain had been aggravated by the operation, rather than considering that it had resulted exclusively from the injury during surgery. It relied on the fact that the applicant was "already fifty years old at the time of the surgery and had two children, that is, an age when sexuality is not as important as in younger years, its significance diminishing with age" and the fact that she "probably only needed to take care of her husband", considering the age of her children.

The question at issue was not considerations of age or sex as such, but rather the assumption that sexuality was not as important for a fifty-year old woman and mother of two children as for someone of a younger age. That assumption reflected a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignored its physical and psychological relevance for the self-fulfilment of women as people. Apart from being judgemental, it omitted to take into consideration other dimensions of women's sexuality in the concrete case of the applicant. The Supreme Administrative Court had, in other words, made a general assumption without attempting to look at its validity in the concrete case.

The wording of the Supreme Administrative Court's judgment could not be regarded as an unfortunate turn of phrase. The applicant's age and sex appeared to have been decisive factors in the final decision, introducing a difference in treatment based on those grounds.

The Court noted the contrast between the applicant's case and the approach that had been taken by the Supreme Court of Justice in two judgments of 2008 and 2014 in which two male patients aged 55 and 59 respectively had alleged medical malpractice. In those judgments the Supreme Court of Justice found that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous shock" and "strong mental shock". In assessing the quantum of damages it took into consideration the fact that the men could not have sexual relations and the effect that had had on them, regardless of their age, of whether or not the plaintiffs already had children, or of any other factors.

Conclusion: violation (five votes to two).

Article 41: EUR 3,250 in respect of non-pecuniary damage.

Discrimination (Articles 8 and/et 9)

Alleged indirect discrimination underlying ban on wearing face covering in public: *no violation*

Discrimination indirecte alléguée dans l'interdiction du port de vêtements cachant le visage dans l'espace public : *non-violation*

Dakir – Belgium/Belgique, 4619/12, judgment/arrêt 11.7.2017 [Section II]
Belcacemi and/et Oussar – Belgique, 37798/13, judgment/arrêt 11.7.2017 [Section II]

(See Article 8 above/Voir l'article 8 ci-dessus, page 15)

ARTICLE 35

Article 35 § 1

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

Complaints relating to conditions of detention following introduction of new domestic remedies in response to *Neshkov and Others* pilot judgment: *inadmissible*

Griefs tirés de conditions de détention à la suite de l'introduction d'un nouveau recours interne à la suite de l'arrêt pilote *Neshkov et autres* : *irrecevable*

Atanasov and/et Apostolov – Bulgaria/Bulgarie, 65540/16 and/et 22368/17, decision/décision 27.6.2017 [Section V]

Facts – In its pilot judgment in *Neshkov and Others v. Bulgaria* (36925/10 et al., 27 January 2015, Information Note 181), the Court required Bulgaria to put in place a combination of effective preventive and compensatory remedies in respect of the poor conditions of detention in Bulgarian correctional facilities.

In January 2017 new legislation (Act of 25 January 2017 amending the Execution of Punishments and Pre-Trial Detention Act 2009) was introduced in response to the pilot judgment. The new legislation amended the definition of inhuman and degrading treatment in relation to conditions of detention, laid down a requirement that each inmate have at least 4 square metres of living space; introduced more flexibility in the allocation and re-allocation of convicted prisoners to correctional facilities and in the imposition and modification of prison regimes; widened the scope for early conditional release; and introduced dedicated preventive and compensatory remedies in respect of poor conditions of detention.

At the same time, the Bulgarian authorities carried out a programme of works in correctional facilities, refurbishing many of them and putting into operation two new closed-type prison hostels with a total capacity of 540 inmates. As a result of that programme and of the drop in the number of prisoners in the country the overcrowding in some parts of the correctional system noticeably receded.

Both applicants were convicted prisoners who complained under Article 3 of the Convention of their conditions of detention.

Law – Article 35 § 1: The Court had to examine whether the new remedies created as a result of the amendment of the 2009 Act were effective and complied with the precepts set out in *Neshkov and Others*, and whether the applicants were required to have recourse to those remedies in order to comply with Article 35 § 1 of the Convention. Since the remedy had been put in place in response to a pilot judgment, it could be taken into account even though it was not yet in force when the applications were lodged.

(a) *Preventive remedy* – The preventive remedy (new sections 276 to 283 of the 2009 Act) afforded inmates the possibility to enjoin the prison authorities to refrain from, end or prevent torture or cruel, inhuman or degrading treatment, including through the various ways in which conditions of detention could fall short of the requirements of Article 3 of the Convention. Applications were heard before an administrative court in adversarial judicial proceedings in the inmate's presence. The procedure was intended to be simple and speedy and did not place an undue evidential burden on the inmate as the court was required to establish the facts of its own motion by resorting to all possible sources of information. If well-founded, an application had to result in an injunction requiring the prison authorities to take, within a certain time, specific steps to prevent or end the breach. Lastly, in view of the improvement of the overcrowding situation in Bulgarian correctional and pre-trial detention facilities and the likelihood that that situation would remain manageable, such injunctions did not at this juncture appear hard or impossible to comply with in cases of overcrowding.

(b) *Compensatory remedy* – The compensatory remedy (new sections 284 to 286 of the 2009 Act) enabled inmates or former inmates to seek damages before an administrative court in respect of their conditions of detention. As with the preventive remedy, claims were heard before an administrative court, the remedy was simple to use and did not place an undue evidentiary burden on the inmate. There was nothing to suggest that claims would not be heard within a reasonable time. The criteria for examining inmates' claims appeared to be fully in line with the principles flowing from the Court's case-law under Article 3 of the Convention, including that conditions of detention and their effect on the inmate must be assessed as a whole – and be regarded as a continuing situation rather than a string of unrelated actions and omissions – and that poor conditions of detention must be presumed to cause non-pecuniary damage. As regards quantum, the new remedy did not lay down a scale for the sums to be awarded in respect of non-pecuniary damage and would thus have to be determined under the general rule under Bulgarian tort law – in equity. It could not be assumed that the Bulgarian courts would not give proper effect to the new statutory provisions or fail to develop a coherent body of case-law in their application. They should, however, be careful to apply them in conformity with the Convention and the Court's case-law.

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In conclusion, the two new remedies, which were meant to operate in parallel, could be regarded as effective with respect to inhuman or degrading conditions of detention in correctional and pre-trial detention facilities in Bulgaria and the applicants were therefore required to exhaust them.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Article 35 § 2 (b)

Matter already examined by the Court/Requête déjà examinée par la Cour

Development in Court's jurisprudence did not constitute "relevant new information" for purposes of Article 35 § 2 (b): *inadmissible*

Un développement dans la jurisprudence de la Cour ne constitue pas un « fait nouveau » pour les besoins de l'article 35 § 2 b) : *irrecevable*

Harkins – United Kingdom/Royaume-Uni, 71537/14, decision/décision 15.6.2017 [GC]

Facts – The applicant faced extradition from the United Kingdom to the United States, accused of killing a man during an attempted armed robbery.

In 2007 he lodged an application with the Court, complaining that his extradition would be in breach of Article 3 of the Convention on account of the risk that if convicted he would face, *inter alia*, a mandatory sentence of life imprisonment without the possibility of parole. In January 2012 the Court gave judgment in *Harkins and Edwards v. the United Kingdom*. It found, that a mandatory life sentence without the possibility of parole would not be grossly disproportionate. The applicant was not extradited and brought further domestic proceedings.

In his second application to the Court, the applicant complained that his extradition to the US to face a mandatory sentence of life imprisonment without parole would be in breach of Article 3 since

the sentencing and clemency regime in Florida did not satisfy the mandatory procedural requirements identified by the Grand Chamber in *Vinter and Others v. the United Kingdom* and that the imposition of a mandatory sentence of life imprisonment without parole would be grossly disproportionate. He further complained under Article 6 that the imposition of such a sentence would constitute a flagrant denial of justice.

Law

Article 35 § 2 (b): An application would generally fall foul of the first limb of Article 35 § 2 (b) where an applicant had previously brought an application which related essentially to the same person, the same facts and raised the same complaints. Contrary to the applicant's submission, his Article 3 complaint was substantially the same as that raised in his previous application and the facts upon which his original complaint was based had not changed. The applicant contended that there was relevant new information in the form of the Court's judgments in *Vinter*, *Trabelsi v. Germany* and *Murray v. the Netherlands* and the reconsideration of his complaints at the domestic level in light of the first two of those judgments.

The new domestic proceedings had been based on the Court's judgments in *Vinter* and *Trabelsi*, both of which had been handed down following the judgment in *Harkins and Edwards*. Therefore, while the facts of the case had not changed, it could not be said that the arguments raised by the applicant in the new domestic proceedings had been the subject of previous examination by the Court. Nevertheless, the sole question before the domestic court was whether those judgments had sufficiently developed the case-law so as exceptionally to permit it under the domestic rules to reopen its final determination. Having answered that question in the negative, the domestic court had declined to reopen the case. As such, the question of whether the recent domestic proceedings constituted relevant new information was inextricably linked to the question of whether the development of the Court's case-law constituted new relevant information.

The principle purpose of the admissibility criterion laid down in the first limb of Article 35 § 2 (b) was to serve the interests of finality and legal certainty by preventing an applicant from seeking, through lodging a fresh application, to appeal against previous judgments or decisions. Legal certainty constituted one of the fundamental elements of the rule of law, which required that, when a court had finally determined an issue, its ruling should not be called into question. If that were not the case, the parties would not enjoy the certainty or stability of knowing that a matter had been subject to a final disposal by the Court. It was precisely for that reason that Rule 80 of the Rules of Court restricted the circumstances in which a party might seek revision of a final judgment to the discovery of a fact which might by its nature have a decisive influence and which was unknown to the Court and could not possibility have been known to that party at the date of the judgment.

In addition to serving the interests of finality and legal certainty, Article 35 § 2 (b) also marked out the limits of the Court's jurisdiction. In dealing with applications which had already been submitted to another procedure of international investigation or settlement, Article 35 § 2 (b) excluded its jurisdiction in relation to any application falling within its scope. Although the Court had not made specific reference to jurisdiction or competence in its case-law concerning applications which were substantially the same as matters it had already decided, it saw no logical reason for treating the two situations provided for in Article 35 § 2 (b) differently.

The development in the Court's jurisprudence did not constitute "relevant new information" for the purposes of Article 35 § 2 (b). The Court's case-law was constantly evolving and if these jurisprudential developments were to permit unsuccessful applicants to reintroduce their complaints, final judgments would continually be called into question by the lodging of fresh applications. That would have the consequence of undermining the strict grounds set out in Rule 80, as well as the credibility and authority of those judgments. In addition, the principle of legal certainty would not apply equally to both parties, as only an applicant, on the basis of subsequent jurisprudential developments, would effectively be permitted to "reopen" previously examined cases. Accordingly, the applicant's Article 3 complaints were substantially the same as the complaints already examined by the Court in *Harkins and Edwards*.

Conclusion: inadmissible (matter already examined by Court).

Article 6: It had not been excluded that an issue might exceptionally be raised under Article 6 in an extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of a fair trial in the requesting country. A flagrant denial of justice was a stringent test of unfairness which went beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State. What was required was a breach of the principles of a fair trial guaranteed by Article 6

which was so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.

As to the burden of proof, it was for the applicant to adduce evidence capable of proving that there were substantial grounds for believing that, if he were removed from a Contracting State, he would be exposed to a real risk of being subject to a flagrant denial of justice. Where such evidence was adduced, it was for the Government to dispel any doubts about it. The applicant had relied solely on the mandatory nature of the sentence of life imprisonment without parole. That sentence would follow from a trial process which the applicant had not suggested would be in itself unfair. The facts of the present case did not disclose any risk that the applicant would suffer a flagrant denial of justice within the meaning of Article 6 in the US.

Conclusion: inadmissible (manifestly ill-founded).

(See *Harkins and Edwards v. the United Kingdom*, 9146/07 and 32650/07, 17 January 2012, Information Note 148; *Vinter and Others v. the United Kingdom*, 66069/09 et al., 9 July 2013, Information Note 165; *Trabelsi v. Germany*, 41548/06, 13 October 2011; and *Murray v. the Netherlands* [GC], 10511/10, 26 April 2016, Information Note 195. See also *Othman (Abu Qatada) v. the United Kingdom*, 8139/09, 17 January 2012, Information Note 148; and *Kafkaris v. Cyprus* (dec.), 21906/04, 11 April 2006, Information Note 86)

Article 35 § 3 (a)

Competence *ratione materiae*/Compétence *ratione materiae*

Referendum on Scottish Independence did not fall within scope of Article 3 of Protocol No. 1: *inadmissible*

Le référendum sur l'indépendance de l'Écosse ne relevait pas de l'article 3 du Protocole n° 1 : *irrecevable*

Moohan and/et Gillon – United Kingdom/Royaume-Uni, 22962/15 and/et 23345/15, decision/décision 13.6.2017 [Section I]

Facts – In October 2012 the Scottish and United Kingdom Governments signed an agreement on a referendum on independence for Scotland. Under the Scottish Independence Referendum Franchise Act, convicted prisoners in detention were prohibited from voting. The applicants, British nationals serving sentences of life imprisonment for murder, petitioned for judicial review of the Franchise Act. The petitions were dismissed and appeals refused. The independence referendum took place in September 2014.

Before the European Court, the applicants complained under Article 10 of the Convention and Article 3 of Protocol No. 1 that they were subject to a blanket ban on voting in the independence referendum.

Law

Article 3 of Protocol No. 1: The principle question was whether the independence referendum could be considered to fall within the scope of Article 3 of Protocol No. 1. To date, the Court and former Commission had unequivocally held that the Article was limited to elections concerning the choice of legislature and did not apply to referendums. It was true, as observed domestically, that in the independence referendum the people of Scotland were effectively voting to determine the *type of legislature* that they would have. Consequently, at first glance it might appear anomalous for such a referendum to fall outside the sphere of protection provided by Article 3 of Protocol No. 1, while elections concerning the *choice of the legislature* fell within it. However, such a conclusion was consistent with the wording of the Article and its consistent interpretation by the Convention organs.

Given that there were numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe which it was for each Contracting State to mould into their own democratic vision, the possibility that a democratic process described as a referendum by a Contracting State could potentially fall within the ambit of Article 3 of Protocol No. 1 was not excluded. However, in order to do so the process would need to take place at reasonable intervals by secret ballot, under conditions which would ensure the free expression of the opinion of the people in the choice of the legislature.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 10 of the Convention: The Convention organs had repeatedly found that Article 10 did not protect the right to vote, either in an election or a referendum.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See *X v. the United Kingdom* (dec.), 7096/75, 3 October 1975)

Abuse of the right of application/Requête abusive

Disclosure by applicant's lawyers of unilateral declaration and of friendly settlement: *admissible; inadmissible*

Révélation par les avocats du requérant de la déclaration unilatérale et de la transaction amiable : *recevable ; irrecevable*

Eskerkhanov and Others/et autres – Russia/Russie, 18496/16 et al., judgment/arrêt 25.7.2017 [Section III]

Facts – In the Convention proceedings, all three applicants complained under Article 3 of the conditions of their pre-trial detention and in the van which transported them from prison to the courthouse.

In the first applicant's case, the Government issued a unilateral declaration and asked the Court to strike the application out of its list. The first applicant's lawyer subsequently disclosed the terms of the declaration to the media, which published the information on their websites. In the light of that development, the Government withdrew its declaration.

In the case of the second and third applicants, their lawyer informed several media outlets of the details of friendly-settlement negotiations that had taken place between the Government and the two applicants. That information was published by the media on their websites.

In their submissions to the Court, the Government asked for all three applications to be struck out for abuse of the right to individual petition as the friendly-settlement process was confidential and, in the first applicants' case, a unilateral declaration should be assimilated to that process.

Law – Article 35 § 3 (a): According to Article 39 § 2 of the Convention friendly-settlement negotiations are confidential and Rule 62 § 2 of the Rules of Court further states that no written or oral communication and no offer or concession made in the framework of an attempt to secure a friendly settlement may be referred to or relied on in contentious proceedings.

However, as clearly stated in the rules, a distinction must be drawn between, on the one hand, declarations made in the context of strictly confidential friendly-settlement proceedings and, on the other, unilateral declarations made by a respondent Government in public and adversarial proceedings before the Court, even though the material outcome of those procedures may be similar.

It was therefore important to distinguish the procedures launched in the cases in question. In the first applicant's case, no friendly-settlement negotiations were put in place and the Government had made a declaration of its own motion. The Government's preliminary objection was therefore rejected and the application declared admissible.

Conclusion: preliminary objection dismissed (unanimously).

In the cases of the second and third applicants, Article 39 of the Convention and Rule 62 § 2 were explicitly cited and a proper procedure of friendly-settlement negotiations launched. The information in Russian enclosed with the Court's letter to the two applicants made it clear that all friendly-settlement negotiations were strictly confidential. The applicants and their representative should therefore have complied with that requirement and had not advanced any justification for not doing so. Accordingly, such conduct amounted to an intentional breach of the rule of confidentiality, which had to be considered as an abuse of the right of individual application.

Conclusion: applications of second and third applicants inadmissible (abuse of the right of petition).

On the merits, the Court unanimously found a violation of Article 3 and of Article 5 § 4 in the first applicant's case and awarded him EUR 6,000 in respect of non-pecuniary damage.

ARTICLE 37

Striking out applications/Radiation du rôle Respect for human rights/Respect des droits de l'homme

Individual and general measures taken pursuant to *Rutkowski and Others* pilot judgment in length-of-proceedings cases: *struck out*

Mesures d'ordre individuel et mesures d'ordre général adoptées à la suite de l'arrêt pilote *Rutkowski et autres* dans les affaires de durée de procédure : *radiation du rôle*

Załuska, Rogalska and Others/et autres – Poland/Pologne, 53491/10 et al., decision/décision 20.6.2017 [Section I]

Facts – In its pilot judgment in *Rutkowski and Others v. Poland* (72287/10, 7 July 2015, Information Note 187) the Court found a violation of Articles 6 § 1 and 13 of the Convention on account of the length

of judicial proceedings and the lack of an effective domestic remedy for such complaints. As regards the Article 6 complaint it noted that while Poland had recognised the need to take action to expedite and modernise the procedure, further, consistent long-term efforts were required. As to the Article 13 complaint, although Polish law afforded a compensatory remedy under a Law of 17 June 2004 (2004 Act) for undue delays in proceedings, the level of compensation awards made by the domestic courts was generally inadequate. In these circumstances, it indicated general measures under Article 46 of the Convention requiring Poland to secure through appropriate legal or other measures, the national courts' compliance with the relevant principles under Article 6 § 1 and Article 13.

On 30 November 2016 the Government passed legislation (the 2016 Amendment) amending the 2004 Act so as to require the domestic courts to apply the Act in accordance with the standards deriving from the Convention. In response to two specific failings of Polish practice that had been identified by the Court in *Rutkowski and Others*, the 2016 Amendment also (i) required the domestic courts to assess the reasonableness of the length of proceedings as a whole (rather than in fragments as had been the practice up till then) and (ii) set minimum levels for awards of compensation in length-of-proceedings cases.

The 400 applications in the instant case, which also concerned length-of-proceedings complaints under Article 6 § 1 and Article 13, were communicated to the Government after the pilot judgment had been delivered. The Government subsequently submitted a series of unilateral declarations acknowledging a violation of those provisions, offering compensation and making a series of proposals regarding general measures to speed up judicial proceedings in Poland. A majority of the applicants accepted the Government's offer of compensation but a substantial minority considered that they should be awarded significantly higher levels of compensation.

Law – Article 37 § 1: In deciding whether the applications should be struck out following the unilateral declarations, the Court had to have regard not only to the applicants' situation *vis-à-vis* individual measures taken by the State but also to measures aimed at resolving the general underlying defect in the domestic legal order identified in the principal judgment as the source of the violation.

(a) *Individual measures* – The sums offered by the Government amounted on average to 50-60% of what would have been the Court's award if there had been no remedy in Poland. As regards those applicants who had not accepted the Government's offer, the Court considered that in cases involving, as here, many similarly situated victims a unified approach was called for in order to ensure that the applicants remained aggregated and that no disparity in the level of the awards would have a divisive effect on the applicants.

(b) *General measures* – The Polish Government, by the various measures adopted in implementation of the pilot judgment and promised legislative actions stated in their unilateral declarations, had demonstrated an active and reliable commitment to take measures intended to remedy the systemic defects in the Polish legislahtion and judicial practice identified by the Court. While, by virtue of Article 46 of the Convention, it was for the Committee of Ministers to evaluate the general measures taken by the Government and their implementation as far as the supervision of the Court's judgment was concerned, the Court in exercising its own power to decide whether to strike the cases out of the list could not but rely on the Government's actual and promised remedial action as an important positive factor going to the issue of "respect for human rights as defined in the Convention and the Protocols thereto".

Having regard to the object of the pilot judgment and the fact that within some 15 months after it becoming final the respondent State had introduced general measures in the interests of other persons similarly affected, as well as committed itself to taking such necessary measures in the future, the Court was satisfied that the settlement was based on respect for human rights as defined in the Convention and its Protocols. Accordingly, it found no reason to justify a continued examination of the applications.

Conclusion: struck out (unanimously).

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

Deprivation of property/Privation de propriété_

Confiscation on grounds of strict liability where innocent owner could seek compensation from guilty party for breach of contract: *no violation*

Régime objectif de confiscation, moyennant la possibilité pour le propriétaire de bonne foi d'obtenir réparation auprès du contrevenant pour faute contractuelle : *non violation*

S.C. Service Benz Com S.R.L. – Romania/Roumanie, 58045/11, judgment/arrêt 4.7.2017 [Section IV]

En fait – En 2010, deux camions-citernes appartenant à la société requérante furent confisqués dans le cadre d'une procédure contraventionnelle dirigée contre une de ses clientes (qui avait faussement déclaré la nature de la marchandise, afin d'échapper au paiement du droit d'accise sur les carburants). L'ignorance alléguée de la requérante fut jugée inopérante ; le tribunal retint également qu'en tant que transporteur, elle avait une obligation de diligence.

Dès 2006, la Cour constitutionnelle avait admis l'automaticité de la confiscation, eu égard à la possibilité pour le propriétaire de se retourner contre son cocontractant.

En droit – Article 1 du Protocole n° 1

a) *Nature, légalité, et but légitime de l'ingérence* – S'agissant d'une mesure définitive sans possibilité de restitution, la confiscation des camions-citernes de la requérante s'analyse en une privation de propriété. Sa base légale était l'article 220 §§ 1k et 2b du code des procédures fiscales (CPF), ces dispositions poursuivant par ailleurs un objectif d'intérêt général (réprimer les faits de fraude fiscale).

b) *Proportionnalité* – Au vu de la substance de la contravention (le transport non déclaré de produits soumis au droit d'accise), l'objet de la confiscation (des camions-citernes) n'apparaît pas dépourvu de rapport avec l'objectif de lutte contre la fraude fiscale poursuivi par les dispositions en cause.

Certes, selon les dispositions en cause, la confiscation du moyen de transport utilisé était obligatoire. De fait, le tribunal de recours a estimé qu'il n'y avait lieu : ni de distinguer selon que le moyen de transport appartenait au contrevenant lui-même ou à un tiers ; ni, dans le second cas, de prendre en considération l'attitude personnelle du tiers, ou la nature de son lien avec la contravention.

Il convient dès lors de vérifier si la requérante disposait, par ailleurs, d'un recours lui permettant de faire valoir plus utilement la thèse de sa bonne foi.

Or, la Cour constitutionnelle a été appelée plusieurs fois à examiner contre les dispositions litigieuses le moyen tiré de ce qu'elles autorisaient la confiscation de biens n'appartenant pas au contrevenant. Dans sa décision n° 685 de 2006, elle avait déjà estimé cette critique infondée, considérant : 1° qu'en confiant le véhicule à son cocontractant, le propriétaire avait assumé le risque que celui-ci en fasse mauvais usage ; 2° qu'il restait loisible au propriétaire de réclamer réparation auprès du contrevenant, par le biais d'une action en justice sur la base du contrat qui les liait ; 3° qu'une interprétation différente permettrait un contournement facile de la loi.

Ainsi, bien avant les faits de la présente requête, la Cour constitutionnelle avait confirmé l'existence d'un recours que le propriétaire d'un moyen de transport confisqué pouvait engager contre le contrevenant sur la base des règles générales de la responsabilité civile contractuelle.

Cette jurisprudence de la Cour constitutionnelle, comportant une interprétation du droit national faisant autorité, suffit pour conclure à l'effectivité du recours en question. Qui plus est, cette approche a reçu une consécration législative explicite en matière de transport, à travers l'article 1961 § 3 du nouveau code civil (qui, même s'il n'est entré en vigueur que quelques mois après le terme de la procédure judiciaire engagée par la requérante, était public depuis juillet 2009).

Dans les affaires où la Cour européenne a jugé ineffectifs des recours de ce genre, c'était pour des raisons liées au cas concret de l'espèce (par exemple, la faillite ou la dissolution de la société commerciale responsable, le risque sérieux de faillite compte tenu de la sévérité des amendes infligées aux auteurs de fraudes, le décès de l'auteur du délit ou l'absence de pratique des tribunaux internes en la matière).

Aucune circonstance particulière de cette nature n'étant invoquée par la requérante, il n'y a pas lieu de mettre en doute l'effectivité du recours judiciaire dont elle disposait ainsi aux fins de la réparation du préjudice subi. Un juste équilibre était donc ménagé entre le respect de ses droits et l'intérêt général.

Conclusion : non-violation (quatre voix contre trois).

(Voir dans le même sens (non-violation) : *Sulejmani c. l'ex-République yougoslave de Macédoine*, 74681/11, 28 avril 2016 ; ou à l'inverse (violation) : *Andonoski c. l'ex-République yougoslave de Macédoine*, 16225/08, 17 septembre 2015, Note d'information 188)

ARTICLE 2 OF PROTOCOL NO. 7 / DU PROTOCOLE N° 7

Right of appeal in criminal matters/Droit à un double degré de juridiction en matière pénale

Refusal, owing to unforeseeable application of rules of criminal procedure, of leave to appeal against conviction: *violation*

Refus, à la suite d'une application imprévisible des règles de procédure pénale, d'autoriser l'appel d'une condamnation : *violation*

Rostovtsev – Ukraine, 2728/16, judgment/arrêt 25.7.2017 [Section IV]

Facts – The applicant, who was unrepresented at his trial, was convicted of the illegal purchase and possession of drugs, an offence under Article 309 § 2 of the Criminal Code, and given a prison sentence. He sought to appeal on the grounds that he should have been charged with the lesser offence of breaking the rules related to the purchase and circulation of drugs and analogous products under Article 320 of the Criminal Code. However, he was denied leave to appeal after the court of appeal noted that, because he had admitted the circumstances of the offence at his trial, he was precluded by Article 394 § 2 of the Code of Criminal Procedure[1] from appealing.

In the Convention proceedings, the applicant complained under Article 2 of Protocol No. 7 that he had been deprived of his right to appeal and, in particular, to challenge the legal classification of the acts he had admitted to committing.

Law – Article 2 of Protocol No. 7: It was uncontested that in principle the applicant had the right to have his case examined on appeal and that he had been unable to do so because he had admitted to the circumstances on which his conviction was based, thereby accepting the use of an abridged form of proceedings. However, although the applicant's admission may have amounted to a waiver of some of his procedural rights, it was also uncontested that any such waiver did not encompass the right to appeal on the grounds of the legal classification of his acts. This was precisely the grounds of his appeal. Accordingly, it could not be said that the applicant had waived his right to appeal.

The court of appeal explicitly referred to the legal classification of the applicant's acts as one of the grounds on which the decision was not amenable to appeal and its conclusions were endorsed by the Higher Specialised Civil and Criminal Court (HSC). However, that position was in direct contradiction with the Government's interpretation of the relevant domestic legal provisions and with the HSC's case-law cited by the Government, according to which the notion of "circumstances" used in the relevant domestic proceedings extended only to the factual circumstances of the case and did not include their criminal-law classification. Moreover, the HSC had, with reference to the instant application pending before the Court, itself reiterated in a circular letter to the lower courts that the admission of factual circumstances at the trial did not deprive the defendant of the right to appeal on the grounds that the substantive criminal law had been incorrectly applied. It could not therefore be said that the applicant should have foreseen that, by admitting to the facts as established by the court in the course of his trial, he was forgoing the possibility of appealing against his conviction if he believed the legal classification of his acts was incorrect.

Accordingly, the interpretation of the relevant domestic legal provisions adopted by the domestic courts in the applicant's case was not "foreseeable" and, by adopting it, the domestic courts had infringed the very essence of his right of appeal.

Conclusion: violation (unanimously).

Article 41: finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage, the reopening of the proceedings being in principle the most appropriate form of redress and available in Ukrainian law.

1. Article 394 § 2 of the Code of Criminal Procedure provides: "No appeal may be lodged against a trial court judgment on the grounds that the appellant contests circumstances which were uncontested by the parties at the trial and which the trial court ruled it was unnecessary to examine under Article 349 § 3 of this Code".

PENDING GRAND CHAMBER / GRANDE CHAMBRE PENDANTES

Relinquishments/Dessaisissements

Schwabach and Others/et autres – Denmark/Danemark, 35553/12 et al. [Section II]

(See Article 5 § 1 above/Voir l'article 5 § 1 ci-dessus, page 10)

OTHER JURISDICTIONS / AUTRES JURIDICTIONS

African Court on Human and Peoples' Rights/ Cour africaine des droits de l'homme et des peuples

Evictions of indigenous minority ethnic group from their ancestral homes purportedly for conservation purposes

Expulsion d'un groupe ethnique minoritaire indigène de ses terres ancestrales censément à des fins de conservation

Case of *African Commission on Human and Peoples' Rights v. Kenya*/Affaire *Commission africaine des droits de l'homme et des peuples c. Kenya*, No./n° 006/2012, judgment/arrêt 26.5.2017

Facts – The case concerned the Ogiek Community, an indigenous minority ethnic group in Kenya most of whom inhabit the greater Mau Forest complex in Kenya. In October 2009 the Kenyan Government issued an eviction notice to the Ogiek and other settlers of the forest on the grounds that it constituted a reserved water catchment area which needed protection for conservation purposes and was also government land. According to the Ogiek, their eviction would have far reaching implications on their political, social and economic survival.

In its application to the African Court, the African Commission alleged various violations of the African Charter on Human and Peoples' Rights.

Law – As a preliminary point, the African Court considered whether or not the Ogieks constituted an "indigenous population". That concept was not defined in the Charter and there was no universally accepted definition in other international human rights instruments. However, drawing on the work of other international bodies[1], the Court found the following factors to be relevant: (i) the presence of priority in time with respect to the occupation and use of a specific territory; (ii) a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; (iii) self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and (iv) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.

The Ogieks, a hunter-gatherer community which had for centuries depended on the Mau Forest for their residence and as a source of their livelihood, had priority in time with respect to the occupation and use of the forest, which was their ancestral home. They exhibited a voluntary perpetuation of cultural distinctiveness, which included aspects of language, social organisation, religious, cultural and spiritual values, modes of production, laws and institutions through self-identification and recognition by other groups and by State authorities as a distinct group. They had suffered from continued subjugation and marginalisation. They were thus an indigenous population that was part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.

Article 14 of the Charter (*right to property*): The right to property as guaranteed by Article 14 could apply to groups or communities as well as to individuals; it could be individual or collective. It followed from Article 26 of the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples that the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land. Since the Ogiek Community had occupied lands in the Mau Forest since time immemorial and constituted an indigenous community, they had the right to occupy, use and enjoy their ancestral lands.

Although Article 14 of the Charter envisaged the possibility of necessary and proportional restrictions on the right to property in the public interest, Kenya had not provided any evidence that the Ogieks' continued presence in the area was the main cause for the depletion of the natural environment there. The continued denial of access to and eviction from the Mau Forest of the Ogiek population could not, therefore, be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.

Conclusion: violation.

Article 2 of the Charter (*right to freedom from discrimination*): The Kenyan authorities' refusal to recognise and grant the Ogieks tribal status (which would have enabled them to enjoy the same rights to receive land as other ethnic groups such as the Maasai) amounted to a "distinction" based on ethnicity and/or "other status".

The purported justification that the evictions were prompted by the need to preserve the natural ecosystem of the Mau Forest could not, by any standard, serve as a reasonable and objective justification for the lack of recognition of the Ogieks' indigenous or tribal status and denying them the associated rights derived from such status. Moreover, the Mau Forest had been allocated to other people in a manner which could not be considered as compatible with

1. The ACHPR cited Article 1 of the International Labour Organisation Indigenous and Tribal Peoples Convention No. 169 adopted by the 76th Session of the International Labour Conference on 27 June 1989; the Advisory Opinion of the African Commission on the United Nations Declaration on the Rights of Indigenous Peoples, adopted In May 2007; and the Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CNA/Sub.2/1986/7/AddA, paragraph 379.

the preservation of the natural environment and Kenya had itself conceded that the depletion of the natural ecosystem could not be entirely imputed to the Ogieks.

Conclusion: violation.

Article 8 of the Charter (*right to freedom of conscience*): In the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment. In indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment.

The Ogiek population could no longer undertake their religious practices due to their eviction from the Mau Forest, which constituted their spiritual home and was central to the practice of their religion. In addition, they had to annually apply and pay for a licence for access to the forest. The eviction measures and regulatory requirements had thus interfered with their freedom of worship.

The necessity for and reasonableness of that interference had not been demonstrated. In particular, other less onerous measures than eviction could have been put in place that would have ensured the Ogieks' continued enjoyment of their right while ensuring maintenance of law and order and public health. Such measures included undertaking sensitisation campaigns on the requirement to bury their dead in accordance with the requirements of the law, and collaborating towards maintaining the religious sites and waiving the fees for access to their religious sites.

Conclusion: violation.

Article 17(2) and (3) (*right to education*): The protection of the right to culture goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity. The Ogiek population had a distinct way of life centred and dependent on the Mau Forest Complex and thus its own distinct culture that had not been entirely eliminated by the alleged shifts and transformation in their lifestyle. It was natural that some aspects of indigenous populations' culture such as a certain way of dressing or group symbols could change over time. Yet, the values, mostly, the invisible traditional values embedded in their self-identification and shared mentality often remain unchanged.

The restrictions on access to and evictions from the forest had greatly affected the Ogieks' ability to preserve their traditions and had thus interfered with their enjoyment of their right to culture. That interference could not be said to have been warranted by an objective and reasonable justification as the purported justification – the preservation of the natural ecosystem – had not been adequately substantiated.

Conclusion: violation.

Article 21 (*right to free disposal of wealth and natural resources*): Provided they do not call into question the sovereignty and territorial integrity of the State without the latter's consent, the notion of "people" used by the Charter included sub-state ethnic groups and communities that were part of the population of the State. The Court had already recognised for the Ogieks a number of rights to their ancestral land, namely, the right to use (*usus*) and the right to enjoy the produce of the land (*fructus*), which presupposed the right of access to and occupation of the land. In so far as those rights had been violated there had also been a violation of Article 21 of the Charter since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands.

Conclusion: violation.

Article 22 (*right to economic, social and cultural development*): Their continuous evictions had adversely impacted on the Ogieks' economic, social and cultural development. They had also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.

Conclusion: violation.

The African Court also found a violation of Article 1 of the Charter (obligations of Member States) and no violation of Article 4 (right to life).

Reparations: question reserved.

(See also the judgment of the Inter-American Court of Human Rights in *Kaliña and Lokono Peoples v. Suriname*, Series C No. 309, 23 November 2015, Information Note 198)

Court of Justice of the European Union (CJEU)/ Cour de justice de l'Union européenne (CJUE)

Incompatibility with Charter of Fundamental Rights of a number of provisions of draft agreement between Canada and the European Union on the transfer and processing of Passenger Name Record data

Incompatibilité avec la Charte des droits fondamentaux de plusieurs dispositions du projet d'accord sur le transfert des données des dossiers passagers aériens, entre l'Union européenne et le Canada

Opinion 1/15 of the Court/Avis 1/15 de la Cour, 26.7.2017 (Grand Chamber/Grande Chambre)

L'Union européenne et le Canada ont négocié un accord sur le transfert et le traitement des données des dossiers passagers aériens (accord PNR) qui a été signé en 2014. Le Conseil de l'Union européenne ayant demandé au Parlement européen de l'approuver, ce dernier a décidé de saisir la CJUE pour savoir si l'accord envisagé était conforme au droit de l'Union et, en particulier, aux dispositions relatives au respect de la vie privée ainsi qu'à la protection des données à caractère personnel.

Si le transfert, la conservation et l'utilisation systématiques de l'ensemble des données des passagers sont pour l'essentiel admissibles, plusieurs dispositions du projet d'accord sont incompatibles avec les droits fondamentaux (articles 7 et 8 ainsi que 52, paragraphe 1, de la Charte des droits fondamentaux), à moins qu'elles ne soient révisées pour mieux encadrer et préciser les ingérences. Ainsi, la CJUE considère que l'accord devrait :

a) déterminer de manière claire et précise les données des dossiers passagers à transférer depuis l'Union européenne vers le Canada ;

b) prévoir que les modèles et les critères utilisés dans le cadre du traitement automatisé des données des dossiers passagers seront spécifiques et fiables ainsi que non discriminatoires ; prévoir que les bases de données utilisées seront limitées à celles exploitées par le Canada en rapport avec la lutte contre le terrorisme et la criminalité transnationale grave ;

c) soumettre, hormis dans le cadre des vérifications relatives aux modèles et aux critères préétablis sur lesquels sont fondés les traitements automatisés des données des dossiers passagers, l'utilisation de ces données par l'autorité canadienne compétente pendant le séjour des passagers aériens au Canada et après leur départ de ce pays, de même que toute communication desdites données à d'autres autorités, à des conditions matérielles et procédurales fondées sur des critères objectifs ; subordonner cette utilisation et cette communication, sauf cas d'urgence dûment justifiés, à un contrôle préalable effectué soit par une juridiction soit par une entité administrative indépendante, dont la décision autorisant l'utilisation intervient à la suite d'une demande motivée de ces autorités, notamment dans le cadre de procédures de prévention, de détection ou de poursuites pénales ;

d) limiter la conservation des données des dossiers passagers après le départ des passagers aériens à celles des passagers à l'égard desquels il existe des éléments objectifs permettant de considérer qu'ils pourraient présenter un risque en termes de lutte contre le terrorisme et la criminalité transnationale grave ;

e) soumettre la communication des données des dossiers passagers par l'autorité canadienne compétente aux autorités publiques d'un pays tiers à la condition qu'il existe soit un accord entre l'Union européenne et ce pays tiers équivalent à l'accord entre le Canada et l'Union européenne sur le transfert et le traitement de données des dossiers passagers, soit une décision de la Commission européenne, au titre de l'article 25, paragraphe 6, de la directive 95/46/CE du Parlement européen et du Conseil, du 24 octobre 1995, relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, couvrant les autorités vers lesquelles la communication des données des dossiers passagers est envisagée ;

f) prévoir un droit à l'information individuelle des passagers aériens en cas d'utilisation des données des dossiers passagers les concernant pendant leur séjour au Canada et après leur départ de ce pays ainsi qu'en cas de divulgation de ces données par l'autorité canadienne compétente à d'autres autorités ou à des particuliers , et

g) garantir que la surveillance des règles prévues par l'accord entre le Canada et l'Union européenne sur le transfert et le traitement de données des dossiers passagers, relatives à la protection des passagers aériens à l'égard du traitement des données des dossiers passagers les concernant, est assurée par une autorité de contrôle indépendante.

Étant donné que les ingérences que comporte l'accord envisagé ne sont pas toutes limitées au strict nécessaire et ne sont pas ainsi entièrement justifiées, la CJUE en conclut que l'accord envisagé ne peut pas être conclu sous sa forme actuelle.

Enfin, l'accord poursuivant deux objectifs indissociables et d'importance égale, à savoir, d'une part, la lutte contre le terrorisme et la criminalité transnationale grave – qui ressort de l'article 87 du Traité sur le fonctionnement de l'Union européenne (TFUE) – et, d'autre part, la protection des données à caractère personnel – qui ressort de l'article 16 TFUE, il doit être conclu sur la base de ces deux articles.

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

Duty to carry out an independent investigation into killings and sexual violence committed by police officers

Obligation de conduire une enquête indépendante sur des meurtres et des violences sexuelles commis par des policiers

Case of *Nova Brasilia Favela v. Brazil*/Affaire *Nova Brasilia Favela c. Brésil*, Series C No. 333/Série C nº 333, judgment/arrêt 16.2.2017

[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.]

Facts – On 18 October 1994 and 8 May 1995 the Rio de Janeiro civil police carried out two operations in the Nova Brasilia Favela. During the first they killed thirteen males, including four minors, and perpetrated acts of sexual violence against three young women, including a fifteen and a sixteen year old. The second incursion resulted in three wounded police officers and the deaths of thirteen male members of the community, including two minors. The State recognised that the conduct of public agents during these two police incursions constituted violations of the right to life and the right to personal integrity, even if the facts were not within the temporal jurisdiction of the Inter-American Court.

All 26 deaths were registered as "resistance to arrest resulting in the deaths of the opponents" and "drug-trafficking, [participation in an] armed group and resistance followed by death." As a result of both operations, investigations were initiated by the Rio de Janeiro Civil Police; however, the investigations were closed in 2009 under the statute of limitations. In addition, a Special Investigation Commission was set up in late 1994, focusing on the events of the first police operation. The investigations did not clarify the events surrounding the killings and no one was sanctioned therefor. The authorities did not conduct any investigation into the acts of sexual violence.

Law

(a) *Articles 8(1) (right to a fair trial) and 25(1) (right to judicial protection), in relation to Articles 1(1) (obligation to respect and ensure rights) and 2 (domestic legal effects) of the American Convention on Human Rights (ACHR) in respect of 74 relatives of the men killed during the police incursions, and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and Article 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará"), in respect of the three female victims* – The Inter-American Court considered that the essential element of a criminal investigation into a death resulting from police intervention is to ensure that the investigating body is independent of the officials involved in the incident. Such independence implies the absence of an institutional or hierarchical relationship, as well as its independence in practice. In that regard, in cases of alleged serious crimes in which prima facie it appears that police personnel is involved, the investigation must be carried out by an independent body different from the police force involved in the incident.

The Inter-American Court referred to the case-law of the European Court of Human Rights[1] and identified a number of circumstances in which the independence of investigators may be affected in the event of a death resulting from State intervention. Among them, the Court highlighted the following features: (i) the investigating police themselves are potentially suspect, are colleagues of the accused or have a hierarchical relationship with the accused; (ii) the conduct of the investigating bodies indicates a lack of independence, such as a failure to take certain key steps to clarify the case and, where appropriate, punish those responsible; (iii) excessive weight is accorded to the accused's version of the events; (iv) there has been a failure to explore certain lines of investigation that were clearly necessary; or (v) there has been excessive inertia.

For the Inter-American Court this did not mean that the investigating body must be absolutely independent, but that it must be "sufficiently independent of the persons or structures whose responsibility is being attributed" in the specific case. The determination of the degree of independence will be assessed in light of all the circumstances of the case. The Court noted that if the independence or impartiality of the investigating body is questioned, a more stringent scrutiny should be exercised. It should also be examined whether and to what extent the alleged lack of independence and impartiality impacted on the effectiveness of the proceedings. The Court set out interrelated criteria in order to establish the effectiveness of the investigation in such cases: (i) the adequacy of the investigative measures; (ii) the diligence of the investigation; (iii) the participation of

1. See, among many other authorities cited, *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], 24014/05, 14 April 2015, Information Note 184; *Al-Skeini and Others v. the United Kingdom* [GC], 55721/07, 7 July 2011, Information Note 143; and *Armani Da Silva v. the United Kingdom* [GC], 5878/08, 30 March 2016, Information Note 194.

the family of the deceased person in the investigation; and (iv) the independence of the investigation.

In the instant case, the Court noted that the investigations into both police operations had been assigned to the same branch responsible for the incursions and so found a violation of the guarantee of independence and impartiality. In addition, the investigations carried out by other branches of Rio de Janeiro's civil police did not comply with the minimum standards of due diligence in cases of extrajudicial executions and gross human-rights violations. Even if the conduct of the police was plagued with omissions and negligence, other State bodies had had the opportunity to rectify these problems but had failed to do so. The Court further noted that the authorities had not taken any steps to diligently investigate the sexual violence committed against the three young women. Lastly, it found that there had been a denial of justice for the victims, as they had not been guaranteed, materially and legally, their right to judicial protection.

Conclusion: violation (unanimously).

(b) *Reparations* – The Inter-American Court established that the judgment constituted *per se* a form of reparation and ordered the State, *inter alia*, to: (i) conduct an effective investigation into the facts related to the deaths that occurred in the 1994 incursion, with due diligence and within a reasonable time, to identify, prosecute and, if applicable, punish those responsible; (ii) initiate or restart an effective investigation regarding the deaths that had occurred during the 1995 incursion; (iii) initiate an effective investigation regarding the sexual violence; (iv) publish annually an official report with data on deaths caused during police operations in all states of the country, with updated information on the investigations conducted in respect of each incident resulting in the death of a civilian or a police officer; (v) set up the necessary mechanisms to ensure that, in cases of deaths, torture or sexual violence resulting from police intervention, in which prima facie police officers appear as the accused, the investigation is delegated to an independent body that is different from the public authority involved in the incident; (vi) adopt the necessary measures for the state of Rio de Janeiro to establish goals and policies to reduce police killings and violence; (vii) adopt legislative or other measures necessary to enable victims of crime or their family members to participate, formally and effectively, in the investigation of crimes conducted by the police or by the Public Prosecutor's Office; (viii) adopt the necessary measures to standardise the expression "personal injury or homicide resulting from police intervention" in the reports and investigations in cases of death or injuries caused by police action; and (ix) pay compensation in respect of non-pecuniary damage, as well as costs and expenses.

RECENT PUBLICATIONS / PUBLICATIONS RÉCENTES

Overview of the Court's case-law/Aperçu de la jurisprudence de la Cour

The Court has recently published an Overview of its case-law for the first 6 months of 2017. This annual *Overview* series, available in English and French, focuses on the most important cases the Court deals with each year and highlights judgments and decisions which raise either new issues or important matters of general interest.

The Overviews can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law). Moreover, a print edition of the 2016 Overview is also available from Wolf Legal Publishers (the Netherlands) at sales@wolfpublishers.nl.

La Cour vient de publier un Aperçu de sa jurisprudence pour le premier semestre de 2017. Cette série, *Aperçu de la jurisprudence*, disponible en français et en anglais, se concentre sur les affaires les plus importantes qui sont traitées chaque année par la Cour, et met en exergue les arrêts et décisions qui traitent d'une question nouvelle ou d'un sujet important d'intérêt général.

Les Aperçus peuvent être téléchargés à partir du site internet de la Cour (www.echr.coe.int – Jurisprudence). Par ailleurs, une version imprimée de l'Aperçu 2016 est désormais en vente auprès des Éditions juridiques Wolf (Pays-Bas) : sales@wolfpublishers.nl.

Reports of Judgments and Decisions/Recueil des arrêts et décisions

A cumulative index for the judgments and decisions published in the *Reports* series from 1999 to 2014 has just been published and can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law). The print edition is available from Wolf Legal Publishers (the Netherlands) at sales@wolf-publishers.nl.

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Un index cumulatif pour les arrêts et décisions publiés dans la série du *Recueil* de 1999 à 2014 vient d'être mis en ligne sur le site internet de la Cour (www.echr.coe.int – Jurisprudence). La version imprimée est en vente auprès des Éditions juridiques Wolf (Pays-Bas) à l'adresse sales@wolfpublishers.nl.

Human rights factsheets by country/Fiches « droits de l'homme » par pays

The Country Profiles containing data and information, broken down by individual State, on significant cases considered by the Court or currently pending before it, have been updated on 1 July 2017. All Country Profiles can be downloaded from the Court's Internet site (www.echr.coe.int – Press).

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Les « Fiches pays », contenant des données et informations par État, sur les affaires marquantes examinées par la Cour ou actuellement pendantes devant elles, ont été mises à jour au 1er juillet 2017. Toutes les fiches peuvent être téléchargées à partir du site internet de la Cour (www.echr.coe.int – Presse).

Factsheets: translation into Greek/Fiches thématiques: traduction en grec

The factsheet on Violence against women has been translated into Greek. All the Court's factsheets, in English, French and some non-official languages, are available for downloading from the Court's Internet site (www.echr.coe.int – Press).

Βία κατά των γυναικών (gre)

La fiche thématique sur la Violence à l'égard des femmes a été traduite en grec. Toutes les fiches thématiques en français et en anglais, mais aussi pour certaines dans d'autres langues non officielles, sont disponibles sur le site internet de la Cour (www.echr.coe.int – Presse).

Joint FRA/ECHR Handbooks: Maltese translations/Manuels conjoints FRA/CEDH : traduction en maltais

The Handbook on European law relating to access to justice – which was published jointly by the Court, the Council of Europe and the European Union Agency for Fundamental Rights (FRA) in 2016 – and the Handbook on European law relating to the rights of the child – which was published jointly by the Court, the Council of Europe and the European Union Agency for Fundamental Rights (FRA) in 2015 – have been translated into Maltese.

All FRA/ECHR Handbooks on European law can be downloaded from the Court's Internet site (www.echr.coe.int – Case-law).

Manwal dwar id-dritt tal-Unjoni relatat mal-aċċess għall-ġustizzja (mlt)

Manwal dwar il-liġi Ewropea li għandha x'taqsam mad-drittijiet tat-tfal (mlt)

Le Manuel de droit européen en matière d'accès à la justice – publié conjointement en 2016 par la Cour, le Conseil de l'Europe et l'Agence des droits fondamentaux de l'Union européenne (FRA) – et le Manuel de droit européen en matière de droits de l'enfant – publié conjointement en 2015 – sont maintenant disponible en maltais.

Tous les Manuels FRA/CEDH de droit européen peuvent être téléchargés à partir du site internet de la Cour (www.echr.coe.int – Jurisprudence).