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The European Convention on Human Rights and national case-law, 2006

La Convention européenne des Droits de l'Homme dans la jurisprudence nationale, 2006

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Directorate General of Human Rights and Legal Affairs, Council of Europe
Direction générale des droits de l'homme et des affaires juridiques, Conseil de l'Europe

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Preface
Préface

This supplement to the *Human rights information bulletin* contains a selection of decisions of national courts where the question of implementing provisions of the European Convention on Human Rights arises.

They are extracted from a wide range of elements of legislation, case-law and publications relating to the Convention within certain member states of the Council of Europe, which appear in the *Yearbook of the European Convention on Human Rights*, published by Martinus Nijhoff Publishers in the Netherlands.

The following information has been drafted in the member states by contributors of various nationalities who are also, in some cases, responsible for the translations into English or French. Some distinctive linguistic or legal features may be encountered.

Ce Supplément au *Bulletin d'information sur les droits de l'homme* présente une sélection de décisions de tribunaux nationaux dans lesquelles s'est posée la question de l'application des dispositions de la Convention européenne des Droits de l'Homme.

Elles sont extraites d'un ensemble plus large d'éléments de législation, de jurisprudence et de doctrine relatives à la Convention dans l'ordre interne de certains Etats membres du Conseil de l'Europe qui figurent dans l'*Annuaire de la Convention européenne des Droits de l'Homme*, publié par les Editions Martinus Nijhoff, aux Pays-Bas.

Les informations ci-après ont été rédigées dans les pays membres par des contributeurs de différentes nationalités, qui en ont, pour certains, assumé la traduction en français ou en anglais. Il peut subsister des particularismes linguistiques ou juridiques.

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Concerns: Mobile communications and health hazards

Administrative Court

28 March 2006
Ref.: http://www.ris.bka.gv.at/vwgh/ – 2002/06/0165

Principal facts and complaints

By ruling of 26 February 2002, the appellate commission of the Lauterach municipality (Land Vorarlberg) denied a request of the M. AG & Co. KG company to give planning permission for the construction of a mobile phone base station. It gave as reasons that it was established technical knowledge that certain doses of microwaves had a fatal impact on human beings. As long as there existed no sufficient legal regulations nor value limits fixed by the law nor a common practice under the telecommunication authorities capable of binding the construction authorities, it was bound to prevent every endangerment of neighbours within the meaning of para. 6 (10) of the 1972 Vorarlberg Construction Act. In view of the inadequate enforcement of Article 8 of the European Convention on Human Rights (ECHR) by Austria, the domestic authorities were under a duty to act provided that an obligation existed under human rights to respond to immediate health hazards. The ruling was subsequently set aside by the Bregenz district authority on the grounds that the appellate commission had ignored provisions of constitutional law, laying down the competences of federal and provincial authorities in health matters. Against this decision, the Lauterach municipality (applicant) filed a complaint with the Administrative Court.

Findings of the court

The Administrative Court has repeatedly held that with regard to mobile phone base stations the construction authorities are not allowed to check health matters as this very aspect comes within the competence of federal law laid down in Article 10 (1) No. 9 of the Federal Constitutional Law (cf. judgment of 19 March 2002, No. 2001/05/0031). These observations apply also to para. 6 (10) of the 1972 Vorarlberg Construction Act. The respondent authority thus cannot be opposed when arguing that the applicant lacked the competence to observe, in construction proceedings, the aspect of a potential endangerment of the health of neighbours living in the vicinity of mobile phone base stations, since this very aspect is comprised by the provisions of the 1997 Telecommunications Act.

Besides, the argument forwarded by the applicant, namely that concerning the protection of neighbours against electromagnetic pollution the lawmaker had hitherto been completely inactive and that the municipal organs were entitled by the law to (re)act and intervene immediately for the protection of neighbours (in this connection the applicant refers to Articles 2, 6, 8 and 13 ECHR), may not substitute, against the background of the "principle of legality" embodied in Article 18 (1) of the Federal Constitutional Law, the existence of a legal basis for a refusal of the requested planning permission.

The applicant's reference to the municipality's "competence of local defence of hazards" is neither capable of constituting a legal basis for the refusal of planning permission (the applicant had alleged that the European Convention comprised, under certain circumstances, a right to "self-intervention", and that the municipalities in their capacity as territorial authority of the lowest level of state administration stood under a "duty of guarantee" towards its citizens to prevent them from imminent danger). The responsible authority set out in detail with the applicant's concerns regarding potential health hazards through electromagnetic radiation emanating from mobile phone stations. There is no evidence that the applicant was required to seek a kind of "emergency competence", in order to arrive to its decision. The complaint was therefore rejected.

Article 3 of the Convention

Concerns: Death of a deportee during a hunger strike

Independent Administrative Panel for Upper Austria

13 February 2006
Ref.: http://www.ris.bka.gv.at/uvs/ – UVS VwSen-400740/38/Gf/Mu/Ga u.a.

Principal facts and complaints

The complaint was filed by the brother of Y.C., who died in Oct. 2005 in the Linz police detention centre in the course of a hunger strike. According to an expert opinion, the deceased did not show any signs of acute malnutrition and none of a classic dehydration nor could there be ascertained a life-threatening situation. A clinical laboratory test showed, however, an inherited disturbance of the blood-forming system (known as sickle-cell anaemia) which had existed only latently (as is very often the case with persons of black skin) while the deceased was still alive. The only way to discover it would have been the performance of a "sickle-cell anaemia test", which had not been done. The interplay between pre-disposition towards sickle-cell anaemia and lack of liquid led to a permanent disturbance of the electrolytic balance which eventually caused the death of Y.C. by acute heart failure.

Findings of the Panel

According to the medical expertise, the brother of the applicant suffered from a latent sickle-cell anaemia which remained undiscovered until his death. It could have been revealed by means of a prophylactic test. Such a test, however, is generally not applied with respect to persons arrested with a view to deportation, neither is it provided or required by general or individual provisions of the domestic law, though it would not have been very expensive compared with – for instance – an Aids test.

It should be common ground for institutions specially trained in medical matters that sickle-cell anaemia represents a hereditary disease which occurs almost exclusively among black Africans. Detainees belonging to such a geographical area are, like persons suffering from Aids, to be considered as a specific risk group. This is especially true when such persons face an additional "risk element", namely the threat of dehydration as immediate consequence of a hunger strike. As a result, the death of the applicant's brother could have been avoided on condition that, at the beginning of the hunger strike at the latest, a "sickle-cell anaemia test" had been carried out and, as a consequence, a force-feeding ordered (in case Y.C. refused to undergo such a treatment, he could have been provided with information about his serious medical state) to be able to prevent the collapse of blood cells. Since precautionary measures were taken neither by the law-maker nor by the administration, the Panel comes to the conclusion that Y.C. was violated in his constitutionally guaranteed right to protection against inhuman treatment pursuant to Article 3 of the European Convention on Human Rights.

In the present case it is undisputed between the parties that Y.C. had been formally expelled by final decision of 5 July 2005. In the case of refusal to leave state territory, he should have been aware of the risk of being expelled by coercive means. This does not mean, however, that he was in any event subject to be taken into detention with a view to deportation. The reason is that the imposition of detention with a view to deportation proves to be illegal if the alien authorities could have resorted to more lenient means within the meaning of para. 66 (1) of the 1997 Aliens Act. Furthermore, attention is drawn to the judgment of the Administrative Court of 8 September 2005, No. 2005/21/0301, where it held that an enforceable residence ban or expulsion decree did not suffice as such to justify the imposition of detention with a view to deportation. On the contrary, examination should be made in any individual case as to whether there was a pressing need to apply such a security measure.

The authority responsible, however, seems not to have considered in its reasoning whether the use of more lenient means in respect of Y.C., such as the order to stay at a certain place and to report daily to the police or – otherwise – his expulsion to Italy, would have been sufficient to "clarify" the situation. There is some evidence that it was not aware of the judgment of the Administrative Court at the time of the issue of its decision. Anyway, this cannot alter the fact that the authority responsible was bound by law to observe this judgment. As a result, the detention of Y.C., based upon the 1997 Aliens law, proves to be illegal as well.

Article 5 of the Convention

Concerns: Proportionality of detention on remand

Supreme Court

13 June 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 11 Os 48/06b

Principal facts and complaints

By judgment of 28 March 2006, the Wiener Neustadt Regional Court, sitting as a court of lay assessors, convicted H.K.B. for, *inter alia*, attempted aggravated sexual abuse of minors under paras. 15 and 206 (1) of the Criminal Code. The accused filed a plea of nullity and an appeal against the judgment which are both still pending.

By ordinance of 27 July 2005, detention on remand was imposed on H.K.B., on the grounds of a risk of (repeated) committal of the offence he was accused of (para. 180 (2) No. 3 (b) of the Code of Criminal Procedure). He has been kept in detention since 26 July 2005. On 7 April 2006 a request for release from detention was refused by the investigating judge for the same reasons. The accused filed a "Fundamental Rights Complaint" with the Supreme Court, alleging that the length of the detention on remand in the amount of more than nine months had been excessive.

Findings of the court

By contrast to the applicant's view, the principle that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law does not rule out a deprivation of liberty in the cases comprised by Article 5 of the European Convention on Human Rights (ECHR). This applies also in circumstances where a person is kept in lawful detention after conviction by a competent court (Article 5 (1) (a) ECHR – cf. judgment of the Supreme Court of 23 November 2004, 14 Os 139/04). The applicant's objection, namely that it contradicted the principle of the rule of law and the presumption of innocence to let a person serve a prison sentence not yet imposed by final decision in advance, can therefore be regarded as refuted. In view of the fact that the detention on remand (under which falls any detention between the verdict at first instance and (appellate) decision of last instance, regardless of the requirement of taking the time passed in prison into account in respect of the imposed term of imprisonment) pursues completely different goals compared to a detention imposed after final sentence, there is no question of an "anticipated execution of a sentence", which would be, in any case, at variance with the presumption of innocence.

The presumption of innocence is no criterion for carrying out a "proportionality test" in cases where an urgent suspicion of having committed the offence continues and a lawful reason for arrest exists, respectively. When assessing the reasonableness of detention on remand in relation to the importance of the matter, attention must be paid to the "abstract threat of punishment" (by which is meant the degree of penalty of a given criminal offence) and the concrete legal situation resulting from a certain state of suspicion. In view of the sanction prescribed by para. 206 (1) of the Criminal Code (imprisonment for between one and ten years) and the seriousness of the criminal conduct ascertained by the criminal court of first instance (which convicted the applicant to a partly suspended term of three years' imprisonment), it may be ruled out that the detention on remand of the applicant served until now is excessive, compared to the importance of the matter. The length of the detention on remand in the amount of nine months cannot either be considered as inappropriate, taking into account the amount of punishment to be expected in the present case, the crucial "starting point" being the full term of the sentence imposed by the first instance court (imprisonment comprising three years), but not the unconditional part of the sentence (imprisonment comprising one year).

Since in the present case the length of detention on remand, lasting nine months at the time of the contested decision, has not yet reached the unconditional part of the sentence, the applicant's objection against the reason for arrest of risk of committal of the said offence is unfounded. H.K.B. was therefore not violated in his right to personal freedom. As a result, the "Fundamental Rights Complaint" was rejected.

Article 6 of the Convention

Concerns: Effective defence by several assigned counsels

Administrative Court

25 April 2006
Ref.: http://www.ris.bka.gv.at/vwgh/ – 2002/06/0100

Principal facts and complaints

In criminal proceedings pending against him, the accused (who joined the applicant's complaint as "affected party") successfully filed an application under para. 41 (2) of the Code of Criminal Procedure to appoint his then counsel for the defence (the applicant) as assigned counsel. The Austrian bar association nominated the applicant as defence counsel, together with two additional barristers to assist him in the matter. The applicant filed an appeal against this decision, arguing that – as he was already familiar with the case – he had consented to deal with it also in his capacity as assigned counsel, in order to prevent a delay of proceedings. The appointment of two additional defence counsels had been neither practicable nor necessary. The Austrian bar association dismissed the appeal on the grounds that under para. 45 (3) of its rules of procedure in cases of extensive length of proceedings several legal advisers could be appointed for joint legal representation. There was no reason to depart from this practice. Against this decision, the applicant filed a complaint with the Administrative Court.

Findings of the court

Concerning the concurrent appointment of several lawyers as assigned counsel in cases of extensive length of proceedings (in order to avoid above-average workload), such a procedure may have a negative affect on or be at variance with the correct fulfilment of a lawyer's duties when representing a party before the courts, especially when the said counsels face difficulties with the co-ordination and distribution of their tasks. The reason is that the concurrent appointment of several lawyers as assigned counsel does not exempt the single lawyer from his duty to represent and defend a party with the same diligence as a lawyer of his/her own choice.

The aim set down in para. 45 of the Lawyers' Code, namely to recruit lawyers belonging to the Austrian bar association for the "legal aid scheme" by distributing the workload between them as evenly as possible, is clearly met by the appointment of several lawyers in cases of legal representation being particularly exhaustive. In the present case, however, the respondent authority has referred, when dealing with the applicant's appeal, exclusively to a common practice applied by the Austrian bar association. It did not examine the question whether such a procedure was necessary and practicable with a view to an effective representation and defence of the affected party, within the meaning of Article 6 of the European Convention on Human Rights. By acting in such a manner, the authority responsible breached the law. The contested ruling was therefore set aside.

Concerns: Right to an oral hearing

Constitutional Court

26 September 2006
Ref.: http://www.ris.bka.gv.at/vfgh/ – B 507/06

Principal facts and complaints

By criminal judgment of 11 August 2005, the St. Pölten district authority imposed on the applicant an administrative fine, amounting to €109, for speeding within a rural community. The applicant filed a complaint against this judgment, alleging that he had not driven the vehicle at the time at issue. Furthermore, there had occurred limitation of prosecution in respect of the said offence in the meanwhile. The Independent Administrative Panel for Lower Austria denied his appeal without holding an oral hearing, basing its findings as to the evidence exclusively on the contents of the file.

The applicant claims a violation of his constitutionally guaranteed (defence) rights under Article 6 §1 and §3 (d) of the European Convention on Human Rights (ECHR) as he was not legally represented during the administrative (criminal) proceedings and had not been instructed by the responsible authority about the possibility of filing a request for carrying out an oral hearing. By acting so, the latter had deprived him of the opportunity to have examined witnesses against him or to obtain the attendance and examination of witnesses on his behalf who would have been able to confirm that at the time of the committal of the offence he had been abroad.

Findings of the court

According to the case-law of the European Court of Human Rights, in criminal proceedings before one tribunal as the only instance, it follows from the right to a fair trial under Article 6 ECHR that a departure from the requirement to hold an oral hearing is allowed only in exceptional circumstances (judgment of 19 Feb. 1998, *Allan Jacobsson v. Sweden (No. 2)*).

In its judgment of 18 June 2003, B 1312/02, the Constitutional Court held with respect to para. 51 (e) (3) of the Administrative (Criminal) Proceedings Act that it would be inadmissible under the Constitution to conclude exclusively from the amount of a fine that an oral hearing was not required. This very provision acknowledges discretionary power on the part of the authorities, thereby allowing for an interpretation in conformance with the Constitution. As far as it is required by Article 6 ECHR, the Independent Administrative Panels are obliged to carry out an oral hearing as long as the parties have not waived their respective rights.

In the circumstances of the case, the applicant's conduct cannot be interpreted as conclusive (implicit) waiver concerning his right to an oral hearing pursuant to Article 6 §1 ECHR. The latter was not legally represented during the proceedings and had been instructed neither by the district authority nor by the authority responsible about the possibility of filing a request for carrying out an oral hearing. No additional circumstances are made out which could support the conclusion that the applicant should have known about the possibility of filing such a request (for the question of conclusive (implicit) waiver, see also the judgment of the European Court of Human Rights of 3 October 2002 in the case of *Cetinkaya v. Austria*). These shortcomings lead not only to the conclusion that the ruling in issue must be considered as illegal but speak also for a violation of Article 6 §1 ECHR since there existed no special reasons which could justify the non-performance of an oral hearing. The contested ruling was therefore set aside.

Concerns: Divergence in the qualification of legal facts between the judgment and the Bill of indictment

Supreme Court

14 November 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 14 Os 84/06v

Principal facts and complaints

In 2006, the Innsbruck Regional Court, sitting as a court of lay assessors, found E.D. guilty under para. 83 (1) of the Criminal Code of having committed the offence of actual bodily harm, contrary to the initial charge of attempted robbery. Against the judgment the accused filed a plea of nullity pursuant to para. 281 (1) No. 8 of the Code of Criminal Procedure, alleging that the Innsbruck Regional Court had failed to hear him on the altered legal facts, as prescribed by para. 262 of the Code of Criminal Procedure.

Findings of the court

In the present case, the prosecution authorities went out from the assumption that the applicant had attempted to steal the purse of a certain G.T. by having recourse to considerable violence. However, they cannot be reproached of having not referred to para. 83 (1) of the Criminal Code in the Bill of indictment. The reason is that in respect of all offences which "lead" to a higher degree of punishment in cases entailing serious injuries (here: grave robbery), the causing of bodily harm "comprises" not the committing of an additional crime under para. 83 (1) of the Criminal Code in the form of a so-called Idealkonkurrenz, but is replaced by "apparent Idealkonkurrenz" or – in other words – "consumption".

Since the first instance court felt itself unable to subsume the offence under para. 142 of the Criminal Code (robbery), but saw, on the other hand, the causing of intentional bodily harm as established, the verdict was not based on a different offence (in a material sense) in relation to the initial charge. In his observations to the plea of nullity, the applicant therefore should have specified why the fact that he had not been heard to the altered legal facts had deprived him of the opportunity to defend himself in the one or the other way and to pose questions and file motions to the end that in view of the changed legal situation his defence strategy would have been a different one.

The applicant would have been dispensed from such a pleading (in order to assert "successfully" the above "ground for nullity") only on the condition that the trial court had found him guilty of having committed a different criminal offence (in a material sense) – instead of the one indicated in the Bill of indictment – and, contrary to the requirements of a fair trial, had not corresponded to

the "protective goal" underlying para. 262 of the Code of Criminal Procedure. The judgments of the European Court of Human Rights of 25 March 1999 and 20 April 2006 in the cases of *Pélissier and Sassi v. France* and *I.H. and others v. Austria* likewise reveal that special attention is drawn to the "protective goal" of Article 6 §3 of the European Convention on Human Rights (ECHR), that is to prevent any bar to an accused person's defence.

Since the judgment of the Supreme Court of 6 June 2000, 14 Os 34/00, divergences in the legal assessment of the facts underlying a charge may be claimed now under para. 281 (1) No. 8 of the Code of Criminal Procedure as well, namely because of disregard of the provision of para. 262 of the Code of Criminal Procedure. Given that the facts of the case underlying the offence of which the accused was found guilty differ from the one underlying the Bill of indictment in such a way that one does not "cover up" the other, one might easily draw the conclusion that an adequate instruction under para. 262 of the Code of Criminal Procedure is required, otherwise the requirements of Article 6 §3 (a) or (b) ECHR are not fulfilled. In cases which concern only divergences of minor relevance, the onus is on the applicant to assert in the plea of nullity, at least to some extent, that the required instruction had not been afforded him, in order to avoid "superfluous" procedures before the courts. Those would lead, as a rule, to a deterioration of the state of evidence and stand, additionally, in a strained relationship with the right to the termination of proceedings within a reasonable time pursuant to Article 6 §1 ECHR.

The applicant should have been well aware of the fact that the Supreme Court automatically "draws" nullity from the "ground for nullity" under para. 281 (1) No. 8 of the Code of Criminal Procedure only in case of divergence of the criminal elements of the case, the more as the above-mentioned leading case has been published and discussed by the doctrine several times so that the applicant should have acted accordingly. The plea of nullity was therefore rejected.

Article 8 of the Convention

Concerns: Protection of persons not known to the public with respect to pictures taken of them

Supreme Court

24 January 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 4 Ob 246/05p

Principal facts and complaints

The defendant is the editor of a weekly news magazine. The plaintiff requested the domestic courts to order the defendant to refrain, without his consent, from publishing and spreading his picture showing him taking part in commercial activities. The Vienna Upper Regional Court allowed his request in part, ordering the defendant to refrain from publishing the said pictures insofar as the accompanying text contained certain remarks about the plaintiff.

Findings of the court

In his extraordinary appeal before the Supreme Court, the plaintiff refers to the case-law of the European Court of Human Rights, according to which pictures of celebrities, showing them in private, might not be published, irrespective of the underlying accompanying text. By ruling so, the Court had confirmed that even prominent persons enjoyed "absolute protection" regarding pictures taken of them.

The plaintiff misapprehends the Court's case-law in the above-mentioned cases which related to totally different legal matters. He is neither known to the public nor is the picture showing him taken in private. Accordingly, the protection of private and family life pursuant to Article 8 of the European Convention on Human Rights, on which the Court based its decision, plays no role in the case in issue.

Nor can it be derived from the case-law of the European Court of Human Rights that the right of persons not known to the public is protected against any publication of photographs taken of them. According to para. 78 of the Copyright Act, the publication of pictures is only permissible if it is capable of infringing the legitimate interests of the depicted person. This may be the case, *inter alia*, on condition that he/she would be subjected to public exposure in case of publication of the picture, that his/her private life would be revealed to the public or his/her picture would be used in a manner giving rise to misinterpretation or would have to be regarded as degrading or debasing (cf. ruling of the Supreme Court of 7 April 1992, 4 Ob 14/92).

The legitimate interests of the depicted person may be infringed by the picture itself – for instance by a photomontage associating the face of a certain person (here: the leader of a political party) with the portrayal of a naked body (cf. ruling of the Supreme Court of 17 September 1996, 4 Ob 2249/96f). In case the picture gives "no cause for concern", the accompanying text must also to be taken into account (cf. ruling of the Supreme Court of 29 September 1987, 4 Ob 363/87).

The publication of a "harmless" picture, followed by an accompanying text – which, as such, does not interfere with the interests of the depicted person – is not capable of violating para. 78 of the Copyright Act. The extraordinary appeal was therefore rejected.

Concerns: Family life between adults and their grown-up children

Administrative Court

26 January 2006
Ref.: http://www.ris.bka.gv.at/vwgh/ – 2002/20/0423

Principal facts and complaints

On July 2001, the applicant, a Turkish national, filed an application for asylum with the Federal Asylum Office which was denied as inadmissible under para. 5 (1) of the Asylum Act on the grounds that according to Article 6 of the Dublin Convention the examination of the application fell within Italy's competence. In his appeal against that ruling the applicant claimed that he enjoyed family life in Austria within the meaning of Article 8 of the European Convention on Human Rights (ECHR). There existed between his father and him a special dependency (in the form of financial support) and mutual relationship since his father was partly unable to work and ill. The appeal was rejected by the Independent Asylum Panel, which found that in respect of the applicant there could not be established a "state of dependence" going beyond the usual emotional ties with his father. Although the applicant lived together with his close relatives, he had to be considered as living in a "state of independence" from his family. Furthermore, neither the applicant nor his father were subject to the support of others.

Findings of the court

In the present case, the applicant alleges that Article 8 ECHR guarantees him the right to lead a family life together with his close relatives.

The responsible authority argued that the notion of "family life" in Article 8 ECHR required, apart from the existence of family relations, additional – closer – ties of relevance. With respect to relatives already grown up, there had to be proven that the relationship showed a certain intensity or that a "factual state of dependency" existed – as for instance a person's need to be supported or be cared for by other relatives. Taking into account that the applicant had lived alone in Turkey and had earned his living there by doing casual labour, there could not be said that he found himself in a "state of dependence" *vis-à-vis* his family. As a result, the existence of family life within the meaning of Article 8 ECHR had to be answered in the negative.

Wiederin holds an opposite view (in: Korinek/Holoubek, Constitutional Law [5th ed., 2002], Article 8 ECHR, §76). He claims that at least in respect of natural born children an existing family life of children with their parents continues beyond reaching the age of majority *ipso iure* – provided that the ties between them are still "direct". Such an approach could be derived from the judgments of the European Court of Human Rights of 18 Feb. 1991 and 24 Apr. 1996 in the cases of *Moustaquim v. Belgium* and *Boughanemi v. France*, respectively. Therefore, the existence of a "state of dependence" between spouses and their grown-up children would not constitute the crucial point as long as the relations between them were "direct". The Administrative Court cannot adhere to such an approach, however.

According to the constant case-law of the European Court of Human Rights, the existence of family life within the meaning of Article 8 ECHR beyond the scope of existing family life between spouses and their minor children *ipso iure* depends on the particular circumstances of each individual case. With regard to whether a relationship is to be considered sufficiently intense and personal, the duration and intensity of living together is of special relevance.

Against this background, the Administrative Court comes to the conclusion that the authority responsible should have considered the applicant's continued stay with his parents and siblings in a common household in Austria as well as the financial support through his father by carrying out the necessary "balancing test" under Article 8 §2 ECHR. These circumstances are not opposed to the latter's view, according to which a family life of the type protected by Article 8 ECHR was not in

issue. The ruling was therefore annulled for "illegality of its content".

Concerns: "Incognito adoption" and right to obtain information about one's own descent

Supreme Court

10 August 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 2 Ob 129/06v

Principal facts and complaints

On Nov. 2005 the local youth welfare office approved the adoption of T.M. The child was six months old at the time of the decision and had lived, practically from the moment of birth, with his foster parents who cared for him. Three days after the birth, T.M.'s natural mother had made a declaration giving approval to a so-called "incognito-adoption" while refusing to indicate the father's name. The foster parents subsequently declared their wish to disclose to T.M. that he was an adoptive child. The district court, however, denied the motion of the local youth welfare office for approval of the adoption on the grounds that such a request violated the right of the minor to get knowledge of his/her parents and to be cared for by them, as guaranteed by Article 7 of the UN Convention on the rights of the child. Both the foster parents and the local youth welfare office filed an appeal with the Salzburg Regional Court which, however, confirmed the decision. It shared the view of the first instance court, according to which an "incognito-adoption" was not in the best interests of the child, in addition it stated doubts from the point of view of constitutional law, since this "adoption alternative" might violate a child's protected right under Article 8 of the European Convention on Human Rights (ECHR) to obtain information about his/her own personal identity. Against this decision, the local youth welfare office filed an appeal with the Supreme Court.

Findings of the court

Austrian law contains several provisions which deal with children's right to receive information about their own parentage. Para. 37 of the Law relating to the civil status of persons (*Personenstandsgesetz*), for instance, provides in cases of "incognito-adoption" that minor foster children, at the age of fourteen, are given the possibility of inspecting the register of births, deaths and marriages in person (the register includes the names, the places of birth and residence as well as the birthday of the child's parents). At the same age, minor foster children are also entitled to inspect the court records relating to their adoption without the consent of their legal guardian. Those records contain, even in cases of "incognito-adoption", the particulars of the natural parents or at least the natural mother.

In its judgment of 13 February 2003 in the case of *Odièvre v. France*, the European Court of Human Rights denied a violation of Article 8 ECHR in a case concerning an anonymous birth being admissible under French law. The decision of the Court was subsequently criticised mainly on the grounds that in cases of anonymous birth foster children had no possibility of enforcing their right to knowledge of their own parentage without the consent of the natural mother.

Austrian legislation reacted to these criticisms by granting the child a right to inspect the register of births, deaths and marriages in person, independently from the consent of the natural mother; while at the same time making the exercise of that right dependent upon reaching a certain age. The Supreme Court is of the opinion that such a procedure constitutes a reasonable alternative, corresponding to children's best interests: on the one side the interests of the adoptive parents in preventing undesired interventions on the part of the natural relatives are preserved, on the other side the natural mother's wish (who, by choosing an "incognito-adoption", expressed her will not to get into contact with her child) is respected for a certain time. Provided that child have been informed about the adoption, they have, on reaching the age of fourteen, several options of obtaining adequate information.

The appellate court recognises that the "open adoption" and the factual enforcement of the right to information of the foster child depend likewise on the willingness of the adoptive parents to disclose information. To this extent, one cannot discern a difference between an "incognito-adoption" and a "normal" adoption. The legal opinion of the appellate according to which an "incognito-adoption" endangered the child's best interests cannot therefore be agreed with. As a result, the adoption was approved and the decisions of the lower courts altered accordingly.

Concerns: "Biometric measuring" of employees to survey their coming and going

Supreme Court

20 December 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 9 ObA 109/06d

Findings of the court

According to the constant jurisprudence of the Supreme Court, employers' duty to care for their employees implies that they are bound to apply the most lenient means of surveillance which is adequate to reach its goals. The defendant party was neither able to demonstrate that this is true of the system under review, nor that the "traditional systems" mentioned could not reach the goals pursued with it. The plaintiff certified, on the contrary, that the "biometric measuring" of employees, including the necessary daily comparison with the biometric patterns made possible by the operation of finger-scanners, attains an intensity in relation to the pursued aim (being rather trivial (surveillance of the coming and going of the employees)) which was subject to approval, on account of "affecting" human dignity within the meaning of para. 96 (1) No. 3 of the Constitutional Act on industrial relations.

There can be no doubt that the human dignity of employees is "affected" by the contested measure, in view of the considerable impact the controlling measure has on the employees by taking and processing their fingerprints. The defendant party therefore violated the "participation rights" of the work council under para. 96 (1) No. 3 of the Constitutional Act, by introducing and applying, without its approval and in a one-sided manner, a "biometric time registration system", based on "biometric finger-scanning". Consequently, the described controlling system must be considered as illegal and inadmissible. The defendant party's appeal was therefore not followed.

Articles 8 and 14 of the Convention

Concerns: Adoption by a life partner of the same sex

Supreme Court

27 September 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 9 Ob 62/06t

Findings of the court

Para. 182 (2), 2nd sentence, of the General Civil Code governs the legal consequences in adoption cases involving only one male (female) adoptive parent. Given that the adoptive child is adopted by an adoptive father (adoptive mother), the family relationship is nullified only in respect of the natural father (the natural mother) and his (her) relatives. The said paragraph thus prohibits generally the adoption by a male person (excluding cases of homosexual life partners) as long as there exist relations with the natural father; or adoption by a female person as long as there exist relations with the natural mother. According to that provision, the single adoptive parent does not replace the parent of its own choice but the one that corresponds to his (her) gender. Consequently, the adoption of a child by the female life partner of its natural mother is not permitted under current law.

By contrast to the claimants' opinion, the provision in issue is also capable of coping with a test under the angle of the European Convention on Human Rights (ECHR). In its judgment of 26 Feb. 2002 in the case of *Fretté v. France*, the European Court examined whether the decision of the authorities to refuse a homosexual the adoption of a child had constituted an unlawful discrimination. According to the Court, the State had to see to it that the persons chosen to adopt were those who could offer the child the most suitable home in every respect. Not least in respect of the large differences in the national and international opinion about the possible consequences of child adoption by one parent or several parents and taking into account that not enough children were "at disposal to meet the demand", the states were provided with a wide discretionary power in this area. A violation of Article 8 ECHR in connection with Article 14 could not be established therefore, provided that the refusal of adoption by a homosexual corresponded to the legitimate aim of ensuring the child's best interest and the principle of proportionality.

The claimants are not able to demonstrate for what reasons the regulation of para. 182 (2) of the General Civil Code would be at variance with the margin of appreciation left to the states and the principle of proportionality to be observed in this special area. Consequently, there is no reason for the Supreme Court to

question the constitutionality of the said provision. The appeal was therefore not followed.

Concerns: Request for deletion of a conviction from the criminal record

Constitutional Court

4 October 2006
Ref.: http://www.ris.bka.gv.at/vfgh/ – B 742/06

Principal facts and complaints

On 29 Aug. 1997 the applicant was sentenced to six months' imprisonment for homosexual indecency, committed with persons aged under eighteen (§209 of the Criminal Code). The conviction is still recorded in the register of convictions. Subsequently, para. 209 of the Criminal Code was removed by the 2002 Act amending the criminal law. The applicant then filed an application under para. 8 (1) of the Act governing the register of convictions with the Home Office, seeking a declaration that the registration of the said conviction under the "inhumane" provision of para. 209 of the Criminal Code was "inadmissible and should therefore be annulled". Such a procedure, however, was refused by the Home Office on the grounds that it was barred from the arbitrary removal of a conviction from the register of conviction on account of the separation of powers between justice and administration.

Findings of the court

The applicant alleges that the denial of his request for deletion of his conviction in the register of convictions violated his right to respect for private life (Article 8 of the European Convention on Human Rights [ECHR]), to the deletion of personal data processed by way of illegal means (para. 1 (3) No. 2 of the Data Protection Act), to non-discrimination (Article 14 ECHR) and to equality of all citizens before the law (Article 7 of the Constitutional Law). In view of the relevant case-law of the European Court of Human Rights (*L. and V., S.L.*, 9 Jan. 2003; *Wolfmeyer*, 26 May 2005; *H.G. and G.B*, 2 June 2005 v. Austria), Austria was under a duty to remove the adverse effects of fundamental rights breaches emerging from convictions under para. 209 of the Criminal Code. This was also true of cases in which – as in the present case – the European Court of Human Rights had not been seized.

Applications under para. 8 of the Act governing the register of convictions, aimed at checking whether stored data "give no cause for concern", are restricted to the discovery of possible "registration errors", attributable to the "criminal registration authority". The applicant fails, however, to conceive the real purpose of the underlying registration system: para. 8 of the Act governing the register of convictions allows for the determination and removal of only such errors which fall within the competence of the "criminal registration authorities", especially when details of a given judgment registered in the register of conviction do not correspond with the contents of the decision. The so-called "determination proceedings" thus do not involve the revision of "data in respect of judgments" (a competence reserved only to the courts) upon which the "criminal registration authorities" may react only in case of information provided by the courts by way of a judicial decision.

The applicant's argumentation amounts to a form of legal interpretation according to which the Home Office was competent to review, with "substantive effect", the lawfulness of court decisions "standing behind" the entries into the register of conviction. This amounts in the end to a breach of the separation of powers between justice and administration, laid down in Article 94 of the Federal Constitutional Law.

The later removal of the criminal elements of an offence, initially decisive of leading to a conviction, may not therefore, in the absence of a decision by the courts or a respective Decree of the Federal President, constitute a reason for deletion on the part of the administrative authorities. This is also true of a violation established by the European Court of Human Rights in a different, but comparable case. Besides, the judgments of the Court itself do not have immediate effect (to be understood as being capable of providing immediately for a claim in respect of "affected" state decisions), but are, nevertheless, required to be implemented by the domestic authorities.

Since the respondent authority was obstructed under constitutional law from interpreting the law in the way desired by the applicant, the alleged violation of constitutionally guaranteed rights could not be established.

Concerns: Award of Austrian citizenship

Constitutional Court

13 October 2006
Ref.: http://www.ris.bka.gv.at/vfgh/ – B 329/06

Principal facts and complaints

By a ruling of 9 February 2006 the (provincial) government of Carinthia denied the applicant's application for award of the Austrian citizenship and extension to his wife and three minor children pursuant to paras. 10 (1) and 11 of the 1985 Citizenship Act, on the grounds that doubts existed as to his lasting personal integration. The applicant had failed to manage, in spite of the fact that he had lived for fifteen years in the Federal territory, to align in many areas to the customs and culture of his host country. A special "integration deficit" was seen in the circumstance that the communication with him, especially in relation to his superiors, colleagues and women, proved to be very difficult. Furthermore, he was not even prepared to reply to greetings by shaking hands. The observance of public interests pointed therefore against the requested naturalisation. The applicant then applied to the Constitutional Court.

Findings of the court

According to para. 11 of the 1985 Citizenship Act, the interests of the applicant in a positive handling of the case are to be weighed against the public interests arguing against it. When assessing this question, the law acknowledges a certain margin of appreciation left to the competent authorities (argumentum: "the extent of integration" in para. 11 of the Citizenship Act), but it is nevertheless necessary to carry out a thorough "weighing of interests" and to give sufficient and "understandable" reasons for its findings.

In the present case, the reasoning of the (provincial) government of Carinthia in its ruling is incapable of delivering a thorough "weighing of interests" of the kind described above. The reason is that the respondent authority has limited itself to basing its decision on the one-sided selection of statements of headmasters and former colleagues of the applicant, according to which he failed to show flexibility regarding common behaviour in public (by greeting and shaking hands) which would demonstrate that he showed "manifest integration deficits".

On the other hand, the applicant claimed that he had forwarded certificates of several schools and headmasters demonstrating that he performed his duties as religious (instruction) teacher in a correct and careful manner and that a good relationship existed between him and his colleagues and the school management. He could also furnish written statements of the Klagenfurt prison – where he had been in charge of prison inmates of Muslim faith – and an invitation by the Governor of Carinthia to take part in the event "Dialogue of cultures and religions" in Apr. 2003. He was therefore capable of disproving the criticisms directed against him. He showed a positive attitude towards the Republic of Austria and nobody could accuse him of having an anti-democratic opinion. On the contrary, he had always abided by the law during his stay in Austria.

In its ruling, the (provincial) government of Carinthia has limited itself to replying the following: "When A. (the applicant) holds the opposite view during the hearing of the parties by forwarding various statements underlining his standpoint, this may not alter the fact that there exist considerable integration deficits on his part." Such a rudimentary reasoning is at variance with the demands of constitutional law. The respondent authority has failed to consider also the reasons speaking in favour of an award of the Austrian citizenship.

By acting so, the respondent authority has failed to weigh the applicant's interests in the awarding of Austrian citizenship and the public interests conflicting with it against each other and to decide the issue on the basis of the "better" arguments. The errors on the part of the respondent authority are of such severity that they reveal an arbitrary conduct. The applicant was therefore violated in his constitutionally guaranteed right to the equal treatment of aliens *inter se.* The ruling was set aside.

Article 10 of the Convention

Concerns: Limits of permissible criticism by journalists

Supreme Court

16 February 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 6 Ob 245/04d

Principal facts and complaints

The plaintiff is the editor-in-chief of a daily newspaper. The defendants are the publisher of a news magazine and a journalist working there. In Feb. 2004 the first defendant published an article written by the second defendant in which the latter criticised certain statements of the plaintiff in his recent columns. He wrote, *inter alia*: "Readers of the [plaintiff's] columns might get the impression that they are written by persons 'residing' in the Sigmund-Freud-Klinik" (a psychiatric institution in Graz). By interim injunction of 9 June 2006, the Graz Regional Court ordered the defendants to refrain from this statement. The Upper Regional Court confirmed the decision: the challenged statement could give the impression that the plaintiff was mentally ill and that he was not capable of settling his own personal matters. By agitating in such a manner, the defendants had made ridiculous the plaintiff's personal trait and insulted him. Against this decision the defendants filed an appeal with the Supreme Court.

Findings of the court

The defendants must be considered correct in assuming that the challenged statement does not represent an allegation of facts, but a value judgment which may, in its capacity as an insult against honour, infringe para. 1330 of the General Civil Code. According to the constant case-law of the European Court of Human Rights, the limits of permissible criticism are wider in respect of politicians in exercise of their duties than compared to private individuals. They must show a higher degree of tolerance, especially when uttering public statements which are, as such, capable of giving rise to criticism. The Supreme Court has adopted the view held by the European Court, according to which this principle applies also to private individuals provided that they have entered the "political stage" – which is true especially of journalists and editors of the mass media (judgment of 27 Feb. 2001 in the case of *Jerusalem v. Austria*; cf. judgments of 27 September 2001, 6 Ob 168/01a, and 19 Feb. 2004, 6 Ob 250/03p).

As a result, the present legal issue has already been resolved by the Supreme Court. The appeal is not capable of revealing a new – relevant – legal issue either. The Supreme Court finds itself unable to share the Upper Regional Court's view, according to which the plaintiff had not entered the political stage – since he had not criticised the first defendant but, on the contrary, only the persons responsible acting in the course of a political affair. The question of whether one enters the political stage may not depend on whether he utters criticisms against those who criticise him later on. This – incorrect – view of the appellate court is, however, not decisive in the present dispute, in as much as the question of whether a certain statement must be qualified as "evaluation excess" depends on the circumstances of every individual case. The Supreme Court notes that the second defendant, in his article, does not disclose the facts underlying the challenged statement, however.

According to the case-law of the European Court of Human Rights, the requirement to disclose the facts standing underlying a value judgment is less stringent in cases where they are known to the public (27 Oct. 2005, *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*). Even assuming that readers were aware that the plaintiff's columns referred to the said political affair, the appellate court's view, according to which the challenged statement went beyond the limits of permissible criticism, must be considered as arguable at least. The courts' view that the plaintiff was not obliged to tolerate the implicit statement of suffering from a mental disease because it made him ridiculous in the public eye and constituted a degradation does not constitute an incorrect assessment of the facts either. The appeal is inadmissible.

Concerns: Limits of permissible criticism

Supreme Court

27 April 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 6 Ob 81/06i

Principal facts and complaints

The defendant is the governor of Carinthia. In the course of the so-called "Carinthian town sign conflict", he described the plaintiff's way of acting, namely to challenge, to the level of the Constitutional Court, a criminal charge for speeding as the "conduct of a maniac". The appellate court allowed the plaintiff's claim for insult against honour as well as his request for issue of an injunction and public retraction of the said judgment. It gave as reason that the defendant had given an offensive value judgment about the plaintiff's conduct which could be equated to an insult.

Findings of the court

Notwithstanding the plaintiff's right to freedom of opinion and the competing interests coming into play, the challenged conduct was capable of infringing para. 1330 (1) of the General Civil Code. The defendant's statement was not acceptable even in controversial political disputes such as the "Carinthian town sign conflict".

According to the constant jurisprudence of the Supreme Court, the question whether a different assessment of a certain statement would have been arguable and whether it would have to be qualified as "evaluation excess" depends so much on the special circumstances of the case that the existence of relevant questions of law within the meaning of para. 502 (1) of the Code of Civil Procedure may be ruled out in the present case. This is also true of the question of whether interests worth protecting on the part of the violated party had been infringed, the question of who "benefits" from the "weighing of interests" under para. 1330 (1) of the General Civil Code and, finally, the question of what can still be regarded as permissible criticism (cf. judgment of the Supreme Court of 23 May 1991, 7 Ob 535/91).

The defendant invokes, *inter alia*, the decision of the European Court of Human Rights in the case of *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, which had concerned him in person – as did the judgment of *Oberschlick v. Austria (No. 2)* of 1 July 1997. He overlooks, however, that the European Court, in the first decision mentioned, stressed that the defendant was a leading politician who was known already for a long time for his suggestive remarks concerning the regime of the National-Socialists and the Second World War, which implied that he had to show a particular high degree of tolerance. In the second decision, the Court did not find his description as "dope" to be inappropriate, by taking into account the displeasure he had provoked by intention. Such circumstances to the plaintiff's detriment are not apparent in the present case, however. As a consequence, the latter is not obliged to allow the defendant to describe him as a maniac in public. The extraordinary appeal was therefore rejected.

Concerns: Comparison with Holocaust in an animal protection campaign

Supreme Court

12 October 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 6 Ob 321/04f

Principal facts and complaints

In 2004, an association for the protection of animals ran a travelling exhibition in Vienna under the topic "The holocaust on your plate". Seven diagrams were shown on which photographs from Nazi concentration camps were associated with pictures from large-scale animal husbandry and slaughter, followed by an accompanying text. The plaintiffs subsequently filed an action with the Vienna Commercial Court for "insult against honour" and violation of their personality rights. They requested the issue of an interim injunction prohibiting the defendant from publishing and/or distributing the said diagrams. The Vienna Commercial Court issued the injunction requested, whereas the Vienna Upper Regional Court rejected the defendant party's appeal. The defendants filed an appeal with the Supreme Court.

Findings of the court

According to the jurisprudence of the Supreme Court, the constitutionally guaranteed right to freedom of opinion comprises also (extreme) opinions of "outsiders", unconventional thinkers and even dilettantes as long as they do not exceed the limits of admissible criticism. These principles are quite compatible with the established case-law of the European Court of Human Rights, which applies a generous standard regarding the right to freedom of opinion and the interests of the public in the discussion of

questions of common public interest (26 February 2002, *Unabhängige Initiative Informationsvielfalt*, and *Dichand and others v. Austria*). The Supreme Court has already held that the reference to the holocaust in the form of a "standard of comparison" is admissible when pursuing the goal of animal protection (here: concerning a statement which described the keeping of pigs as a "concentration camp for pigs", cf. judgment of 27 May 1998, 6 Ob 93/98i). The admissibility of such a comparison is valid also for the present animal protection campaign. With respect to the expression of one's opinion, there does not exist a general ban with respect to references to the crimes and atrocities of the Nazi era for the purpose of comparison. The question whether a comparison capable of interfering with one's honour is justified (after weighing the conflicting interests against each other) essentially depends on the importance of the matter for the interests of the public compared to those of the injured party.

In the present case, the animal protection campaign brings about the additional – positive – effect of reminding the public of the National-Socialist genocide. On the other side, the interests of the plaintiffs as injured parties must be given due respect as well. Their personal concern, however, must be considered as reduced since the matter concerns a "collective insult". It must be added that the defendant party pursues a legitimate aim, namely to bring the animal protection campaign before the public with the help even of drastic means. Consequently, the plaintiffs cannot benefit from a weighing of the competing interests.

The Supreme Court is not unaware that the challenged campaign may well be considered as irreverent, tasteless, exaggerated and even immoral. The existence of an "evaluation excess", comparable to an abuse of law, could possibly be positively affirmed in that the aim pursued with the campaign was of small importance, implying that the means employed for its promotion were far out of proportion or the "standards of comparison differed in an unrealistic way. Both aspects can be ruled out here: the shocking impact of the photomontages is "predetermined on a large scale by the subject" (cruel mistreatment and suffering caused by other human beings). The drastic comparison serves a permissible purpose, namely to draw the attention to a matter within a society saturated by publicity. There is no doubt that the protection of animals is of weighty concern and constitutes a contentious and actual socio-political issue. For the reasons demonstrated, an excessive exercise of the defendant party's freedom of opinion must be denied. The latter's appeal must therefore be followed.

Concerns: Liability for comments in the "visitors' book" of a Web home page

Supreme Court

21 December 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 6 Ob 178/04a

Principal facts and complaints

The defendant party, the L.-Z. Tourism private limited company, operates a visitors' book on its home page. In Feb. 2004, a user under the pseudonym Chris C. published a comment under the e-mail-address "house-M@do-not-enter.at" where he warned the readers of Jürgen E., being the "worst host in Austria", and recommended all guests to avoid his house at all events. Subsequently, Jürgen E. requested the defendant party to remove the said commentary from its visitors' book within two hours. The latter agreed to the request immediately. On the same day, the plaintiff sent the defendant party a message in which he requested the removal of the entry of a certain Jürgen G. who had sent an approving message under "house-M@do-not-enter.at". The entry, however, was deleted on 18 March 2004 at the latest. On 11 March 2004, Jürgen E. took the case before the Bludenz district court and requested the issue of an interim injunction, namely to order the defendant party to refrain from publishing, in the visitors' book, the commentary of Chris C. and similar comments violating his honour. The Bludenz district court refused the request; but the Feldkirch Regional court issued the interim injunction requested. The defendant party filed an appeal with the Supreme Court.

Findings of the court

It would contravene para. 18 (1) of the E-Commerce-Act if the host-provider stood under a general "supervisory duty" in respect of contributions and messages admitted in the visitors' book. Such a procedure was capable of unduly restricting the free exchange of opinions. This, however, does not mean that the operator of an on-line visitors' book is not obliged to supervise the contents of a visitors' book and to delete contributions where they might infringe the

rights of others. The reason is that contributions on the Internet, unlike a live transmission on the radio or TV, remain accessible to the public.

In the present case, the defendant party complied with its obligation under para. 16 (1) No. 2 of the E-Commerce-Act insofar as it removed the challenged contribution of the user Chris C. immediately after the notification of the breach of the law and the request for deletion. Para. 18 (1) of the E-Commerce-Act, however, does not exclude that there exists, under special circumstances, a special supervisory duty on the part of the operator of an on-line visitors' book. Such a duty is appropriate, provided that the operator has been informed about one breach of the law at least so that there exists a risk of materialisation of further breaches of the law by individual users.

Such a risk must be answered in the affirmative here. The author of the challenged comments was neither identifiable nor accessible since he acted under a pseudonym. The plaintiff would have to expect further breaches of the law because the contribution of Chris C. (in which the latter made massive attacks against the plaintiff) invited other users to comment on it. Furthermore, the defendant was in a situation allowing him to supervise its visitors' book also in respect of selected breaches of the law, this with much less effort than in relation to the compliance with a general supervisory duty. He could be well expected to follow such a procedure, regard being had that a considerable breach of the law to the disadvantage of the plaintiff was ahead. The Supreme Court comes therefore to the conclusion that the defendant party violated its special supervisory duty by not immediately removing the entry of the user Jürgen G. (who confirmed the comments of Chris C.) in spite of the defendant party's request dated 5 March 2003 (it took the latter at least a week to delete the entry). The plaintiff's claim for the issue of an interim injunction is therefore justified. The appeal of the defendant party was rejected.

Article 14 of the Convention

Concerns: Right of succession to the lease of the surviving homosexual partner

Supreme Court

16 May 2006
Ref.: http://www.ris.bka.gv.at/jus/ – 5 Ob 70/06i

Principal facts and complaints

The defendant is the sole heir of W, who died in 2003 and was the tenant of a flat owned by the plaintiff. He had met W in 1999, the latter being, at the then time, nearly fifty years older than himself. Subsequently, a close relationship developed between the two men. In January or February 2000 the defendant moved into W's flat and rented a small – unheated – apartment in order to deposit his furniture and personal objects there. From October 2001 on W's state of health worsened rapidly, which incited the defendant to give up his job and to care for him until his death. He continued to live in the flat. On April 2004, the plaintiff filed an action against the deceased's estate with a view to terminating the lease contract on the grounds that following the tenant's death the flat served no pressing "housing need" of any person authorised by the law to succeed in the tenancy. The Vienna Inner City district court declared the termination of the lease lawful. It found that the right of succession to a lease contract under para. 14 (3) of the Tenancy Act had to be answered in the negative as no (lifetime) partnership was in issue. An appeal against this decision remained unsuccessful. The defendant then addressed to the Supreme Court.

Findings of the court

By starting from the wrong assumption that a pressing "housing need" was not in issue, the appellate court failed to discuss the question whether a life partnership existed between W. and the defendant, comparable to the relationship between man and woman in a marriage. This question should have been attributed to crucial importance for the following reasons: Under life partnership, the jurisprudence understands persons who life in common households similar to that in a marriage, at least when seen from an economic point of view. In the light of the judgment of the European Court of Human Rights in the case of *Karner v. Austria* of 24 July 2003, an interpretation of para. 14 (3) of the Tenancy Act requires, in order to be in conformity with the European Convention on Human Rights, the acknowledgment of a right of succession to the lease also with

respect to homosexual partners, provided that the other conditions are fulfilled.

However, a mere "living and economic community" (Wohn- und Wirtschaftsgemeinschaft) between homosexual persons does not suffice to bring them into the "circle" of persons authorised to succeed to the lease within the meaning of para. 14 (3) of the Tenancy Act. Although the existence of sexual relations is not required, there must nevertheless exist personal ties of a kind which come close to those developed in a partnership similar to a marriage.

The appellate court, however, did not tackle the defendant's "objection to evidence" (Beweisrüge), according to which between him and the deceased had existed a homosexual relationship, not lived out, though. In order to be definitely able to assess whether the relationship between W. and the defendant might be qualified as lifetime partnership, the "objection to evidence" must be settled. The Supreme Court draws attention to the fact that the existence of a certain physical-erotic attraction has not been clarified in a satisfactory manner, however. The allegation that the homosexual relationship between the two men has not been lived out does not rule out the existence of a (lifetime) partnership similar to a marriage. Not sufficient, however, would be the existence of a mere amicable relationship between W and the defendant. This point needs further clarification so that an annulment of the judgment of the appellate court is indispensable. The appeal is therefore justified.

Article 1 of Protocol No. 1 to the Convention

Concerns: Different assessment of estate and donation taxes between married and non-married partners

12 October 2006
Ref.: http://www.ris.bka.gv.at/vfgh/ – B 771/06

Findings of the court

The Constitutional Court has already stated the view (again in connection with the tax brackets of estate tax law) that, with regard to the essential differences between life partnerships and marriages, the lawmaker is not required to treat the two communities equally in every respect (Collection of decisions of the Constitutional Court No. 10.064/1984). It therefore maintains its then conclusion according to which the lawmaker (with respect to the fixing of estate tax, by enumerating spouses in tax bracket I (the lowest tax bracket) and classifying partners of a life companionship to be falling within tax bracket V (since the latter are not explicitly mentioned in tax brackets I-IV), takes into consideration, in a way deemed to be in conformity with the Constitution, the various differences existing between the two forms of partnership: The conclusion of a marriage is capable of establishing a "comprehensive marital life community" (entailing a bond of personal legal ties and duties) which may be dissolved only under certain circumstances. Members of a non-marital partnership are not subjected to such kind of duties under the current law; they are, above all, not bound to afford each other maintenance contributions and are free to dissolve the community at any time.

With regard to the law relating to the estate tax, which governs the tax assessment regarding the transfer of (property) assets, the lawmaker does not act in an improper manner when taking as a starting-point the formal criteria of family law (marriage, relatives, persons related by marriage), thereby declining to treat the transfer of (property) assets between the partners of "non-formalised life communities" in an equal manner compared to married couples, notwithstanding the fact that the former may be attributed a far higher importance than in the past. Consequently, the Constitutional Court sees no reason to undergo a constitutional review of the division into tax brackets laid down in para. 7 (1) of the 1955 Law relating to the assessment of estate and donation tax or even to apply tax bracket I to non-marital life partnerships. The complaint was therefore rejected.

Other case concerning the right to property:
Obligation for a building's proprietor to install pigeonholes accessible to providers of mail services

Constitutional Court, 25 April 2006, Ref.: http://www.ris.bka.gv.at/vfgh/ – G 100/05 u.a.

The obligation on the part of all proprietors to install pigeonholes at their own expense or to replace pre-existing ones which do not meet legal requirements is not in the general interest, but, on the contrary, in that of the competing providers of postal services.

Article 4 of Protocol No. 7 to the Convention

Concerns: Disciplinary measure imposed on a prisoner and principle of ne bis in idem

Administrative Court

19 December 2006
Ref.: *http://www.ris.bka.gv.at/vwgh/ – 2006/06/0037*

Principal facts and complaints

By criminal judgment of 31 January 2003, the director of a certain prison found the applicant guilty of having breached the general duties of prisoners pursuant to para. 107 (1) No. 10 in connection with para. 26 (2) of the Penitentiary Act (here: joint assault – Raufhandel) and imposed a fine on him of €30. A presentation of the facts was forwarded to the Vienna Regional Court for criminal matters which sentenced the applicant to imprisonment of six months for causing bodily harm under para. 83 (1) of the Criminal Code. By ruling of 21 August 2003, the "penitentiary chamber" within the Vienna Upper Regional Court rejected the applicant's complaint against the above-mentioned criminal judgment. It found that the disciplinary measure inflicted was not at variance with the principle of double jeopardy under Article 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR), since breaches against order in prisons should, in any case, be punished with a fine, independently from the existence of a final criminal sentence.

Findings of the court

In the present case, the applicant was sentenced to imprisonment of six months for causing bodily harm under para. 83 (1) of the Criminal Code and punished with a fine of €30 for having breached the general duties of prisoners pursuant to para. 07 (1) No. 10 in connection with para. 26 (2) of the Penitentiary Act.

The essential elements of the offences under comparison differ strongly in respect of the "circle of addressees". Para. 83 (1) of the Criminal Code applies to everyone and in general whereas para. 107 (1) No. 10 in connection with para. 26 (2) of the Penitentiary Act addresses exclusively prisoners and serves the special aim of maintenance of order and security in penal institutions. The elements of both offences are distinct also with regard to the conduct under sanction: para. 83 (1) of the Criminal Code makes the specific offence of causing bodily harm a punishable offence whereas para. 107 (1) No. 10 in connection with para. 26 (2) of the Penitentiary Act, in a way typical of disciplinary regulations, sanctions the endangerment of order and security in penal institutions. Furthermore, attention is drawn to the fact that the fine against the applicant had been imposed not for causing bodily harm, but, actually, for joint assault.

The offence of causing bodily harm does not completely "exhaust" the "content of wrong and guilt" of the present breach of law which is sanctioned by para. 107 (1) No. 10 of the Penitentiary Act (in the challenged ruling the respondent authority accused the applicant not of having caused bodily harm to a prison inmate, but of having endangered order and security in the prison whereby the events, namely joint assault with a prison inmate and its consequences, are indicated in the verdict in a describing manner). The reason is that the provisions governing the breaches of the law in penal institutions envisage the realisation of aims pursued with the detainment of criminals (reintegration of prisoners into society; maintenance of order and security in the prison; general duty on the part of prison inmates to "behave properly" – cf. para. 26 of the Penitentiary Act). Besides, the imposed penalty of €30 (the maximum sanction being €145) demonstrates that only the "disciplinary surplus" was sanctioned in fact.

In the present case, the elements of the offences in issue and the penalties imposed on the applicant differ, in their essence, in

such a way that the applicant has not been violated in his rights under Article 4 of Protocol No. 7 ECHR by imposing on him a fine and, additionally, a sentence for causing bodily harm. The complaint was rejected as unfounded.

Belgium/Belgique

Article 6 of the Convention

Concerns: Translation of the elements of a criminal file

Constitutional Court

11 January 2006
Ref.: 1/2006
http://
www.arbitrage.be

Findings of the court

When an accused does not understand the (official) language of a *procès-verbal*, of a declaration by a witness or plaintiff or of an expert report, he can under the conditions of Article 22 of the Law of 15 June 1935, request a free translation of the documents in an (official) language that he understands. Yet this provision denies an accused who does not understand the (official) language of the elements of the file the right to free translation of other documents in the file.

Article 6 §3 (a) of the European Convention on Human Rights (ECHR) requires that the notification of the accusation is done with utmost care.

The information to which the accused is entitled on this ground includes on the one hand the material facts of which he is accused and on which the accusation is based (the "cause" of the accusation); and on the other hand the legal qualification of these facts (the "nature" of the accusation). Precise and complete information about the accusation is an essential condition of a fair trial.

This information – the more or less detailed character of which depends on the circumstances of the case – should in any case contain sufficient elements to fully understand the accusation in order to allow the accused to adequately prepare his defence. In that respect the adequate character of the information has to be evaluated in the light of Article 6 §3 (b) ECHR (European Court of Human Rights, *Mattoccia v. Italy*, 25 July 2000, §§59-60; *Sadak and others v. Turkey*, 17 July 2001, §§48-50).

Article 6 §3 (a) does not impose any particular form of notification of the nature and grounds of the accusation (European Court of Human Rights, *Pélissier and Sassi v. France*, 25 March 1999, §53).

Taking into account the nexus between subparas (a) and (b) of Article 6 §3, the right to be informed about the nature and cause of the accusation should be seen in the light of right of the accused to prepare his defence (ibid., §54).

The rights of the defence, listed in non-exhaustively in this provision, aim in the first place at putting the prosecution and the defence as far as possible on an equal footing. The facilities that have to be granted to the accused are limited to those necessary for the preparation of a defence (European Court of Human Rights, *Mayzit v. Russia*, 20 Jan. 2005, §§78-79).

The right to free translation of the important elements of the file aims at guaranteeing respect of the defence rights of the accused, who will be able to understand what they really need to know. The rights of the defence entail moreover that accused persons can request, at their own expense, an official translation of all the documents drafted in a language other than that of the procedure. Moreover, Article 38 (10) of the Law of 15 June 1935 grants the accused the right to request, at his own expense, a translation of any procedural document not covered by the contested provision.

Finally, a person who does not dispose of sufficient income to cover such expenses can apply for legal assistance in order to obtain the services of a translator.

Concerns: Right to defend oneself

Court of Cassation

11 January 2006
Ref.: PO51544F
http://
www.cass.be
RCO61B2_2

Findings of the court

Accused persons do not renounce their right to defend themselves, by the fact of going into hiding. The rejection of an attorney's request to postpone the case in order to be able to study the file and exercise the right to defence, only on account of the fact that the accused is in hiding, is a denial of the person's right to a defence.

Note:
This judgment does not refer to Article 6 of the European Convention on Human Rights.

Concerns: Right of appeal in case of administrative sanctions on minors

Constitutional Court

18 January 2006
Ref.: 6/2006
http://
www.arbitrage.be

Findings of the court

There is a violation of Article 6 of the European Convention on Human Rights (in connection with Article 10 and 11 of the Constitution), in that provisions allowing local authorities to impose administrative sanctions on minors deprive minors of a right to appeal against the decision of the juvenile court replacing the administrative sanction in appeal with other measures, whereas in all other situations, an appeal is possible against measures imposed by the juvenile court.

Concerns: Judicial control of the regularity of the special investigation methods of observation and infiltration

Court of Cassation

24 January 2006
Ref.: P060082N
http://
www.cass.be
RC06103_5

Findings of the court

There is no violation of Article 6 of the European Convention on Human Rights in the fact that the judicial control of the regularity of the special investigation methods of observation and infiltration is mandatory only at the end of the investigation. Article 6 requires only that the legality of these measures be examined in the course of the procedure by an independent and impartial judge; it does not require that such control should happen whenever the suspect asks for it.

Concerns: Lie detector and presumption of innocence

Court of Cassation

15 February 2006
Ref.: P051583F
http://
www.cass.be
RC062F2_1

Findings of the court

The use of the polygraph ("lie detector") test does not violate the presumption of innocence (Article 14.3 (g) ICCPR), when the accused participates in it without any duress or pressure, after having been adequately informed by the investigators.

Concerns: Simultaneous prosecution before the same judge of all authors of an offence

Court of Cassation

5 April 2006
Ref.: P060098F
http://
www.cass.be
JC06455_6

Findings of the court

The right to a fair trial guaranteed by Article 6 §1 of the European Convention on Human Rights does not require the simultaneous prosecution before the same judge of all authors of a same offence or of related offences.

Concerns: Influence of attorney fees and costs on the right to a fair trial

Constitutional Court

19 april 2006
Ref.: 57/2006
http://www.arbitrage.be

Findings of the court

The absence of legal provisions allowing a court to impose on the plaintiff or on the civil party in a criminal case who is proved wrong in a civil liability case the payment of attorney's fees and costs of the other party violates Article 10 and 11 of the Constitution, in connection with Article 6 of the European Convention on Human Rights (ECHR).

Under current law, attorneys' fees and costs can be included in the damages to be paid in a civil liability case.

The right of access to a judge, however, includes both the freedom to initiate a procedure and the freedom to defend oneself.

Article 6 §1 ECHR guarantees the right to a fair trial, which may imply the assistance of counsel in order to appear before a court, when it appears from the circumstances that it is very unlikely that the person concerned is able to adequately defend his own case (European Court of Human Rights, *Airey v. Ireland*, 9 October 1979).

The right of access to a court and the principle of equality of arms moreover include the obligation to guarantee a balance between the parties in the procedure and to grant each party the opportunity to make its arguments in circumstances that do not constitute a manifest disadvantage compared to the other party (European Court of Human Rights, *Dombo v. the Netherlands*, 22 September 1993; *Öcalan v. Turkey*, 12 March 2003; *Yvon v. France*, 24 April 2003).

It is the role of the legislator to give concrete scope to the general principles, such as access to court and equality of arms, and to determine to what extent the possibility to recover attorney fees and costs can contribute to this. It is the responsibility of the Court to examine whether the parties in the trial are being treated in a discriminatory manner.

For the victim of a tort or a contractual wrong, it may be necessary to call in a judge when the person who caused the damage contests his or her liability, and to use the services of an attorney in order to defend his or her interests.

When, however, allegedly liable persons wish to contest their liability or the scope of the damages with serious arguments, the exercise of the right to a defence may also require assistance of an attorney.

The potential cost of a judicial procedure may affect the decision to initiate a procedure as well as the decision to defend oneself against a claim or accusation. The financial situation of different parties to the trial may be affected in the same manner by the fees and costs of an attorney.

The difference in treatment between the parties in the current state of the law is due to the absence of legal provisions allowing the judge to impose the payment of attorney fees and costs on the losing party. In order to end this discrimination, it is the task of the legislator to judge how and to what extent the recovery of attorney fees and costs is to be organised. Such recovery is the object of legal provisions in among others the Netherlands, France and Germany. Moreover, according to the Recommendation of the Committee of Ministers of the Council of Europe No. R (81) 7, the reasonable costs of the winning party (including attorney fees) should in principle be compensated by the losing party.

Concerns: Charge of costs of expert assistance in case of expropriation

Court of Cassation

5 May 2006
Ref.: C030068F
http://www.cass.be
JC06551_1

Findings of the court

It is not justifiable under the principle of equality of arms (Article 6 of the European Convention on Human Rights) to impose on the expropriating authority the payment of the costs and fees of expert assistance of the expropriated person. This principle requires only that both parties have a reasonable opportunity to make their cases cause in court in conditions that do not constitute a disadvantage compared to the other party. This equality is not mathematical. An imbalance between parties is unacceptable only when the party invoking it can shows that they do not have the possibility of making a useful defence of his interests. A financial imbalance between the parties does not violate the principle of equality of arms.

Other cases relating to Article 6:
Absence of appeal against the decision to reclaim unduly paid allowances

Constitutional Court, 15 February 2006.
Ref.: 26/2006, http://www.arbitrage.be

Concerns: House search at the office of an attorney

Court of Cassation, 18 May 2006. Ref.: D050015N, http://www.cass.be, RC065I3_1

Concerns: Mentions in a judgment by default

Court of Cassation, 21 June 2006. Ref.: P060606F, http://www.cass.be, C066L4_2

Concerns: Initiation of public action

28 June 2006
Ref.: P060427F
http://www.cass.be
JC066S4_1

Court of Cassation

Findings of the court

Article 6 §1 of the European Convention on Human Rights does not grant a party who claims to be the victim of an offence the right to initiate the public action against the alleged perpetrator.

Concerns: State liability for insufficient number of judges

Court of Cassation

28 June 2006
Ref.: C020570F
http://www.cass.be
JC069S1_6

Findings of the court

The Brussels Court of appeal had held the Belgian State liable for the structural violation of the right to trial within a reasonable time in Brussels, resulting from the insufficient number of francophone judges in the Brussels court of first instance.

A court, seized with a claim for reparation of damage caused by wrongful interference with a right enshrined in a higher norm imposing obligations on the State (in this case Article 6 §1 of the European Convention on Human Rights) has the power to check whether the legislative power has made adequate or sufficient legislation to allow the State to respect this obligation, even though the norm prescribing it leaves the legislator a margin of appreciation with respect to the means with which this respect is to be assured.

Concerns: Impartiality of judges

Court of Cassation

23 November 2006
Ref.: P061367F
http://www.cass.be
JC06BN4_2

Findings of the court

The refusal to remove a judge from the case who had written to the prosecutor that "the presumed author of the offence denies the facts", thereby seemingly expressing an opinion as to the guilt of the accused, violates the presumption of innocence (Article 6 §2 of the European Convention on Human Rights).

Articles 6 and 8 of the Convention

Concerns: Restrictions on access to all the elements of a file

25 January 2006
Ref.: 14/2006
http://www.arbitrage.be

Constitutional Court

Findings of the court

Article 5 §3 of the Law of 11 Dec. 1998 creating an appeal body with respect to security authorisations does not violate Article 6, 8 or 13 of the European Convention on Human Rights by restricting access to certain elements from a declaration of the member of the intelligence service in the investigation report or file.

The right to have access to all the elements of a file can be restricted when national security so requires. Yet the interference in the rights of the defence can only be justified if it is strictly proportionate to the interest of the goal to be achieved and when it is accompanied by a procedure allowing an independent and impartial judge to examine the legality of the procedure (European Court of Human Rights, *Edwards v. the United Kingdom* and *Lewis v. the United Kingdom*, 22 July 2003 and 27 October 2004).

The legislator has with these Laws of 1998 allowed the national security bodies to interfere in the exercise of the right to respect for private life, while at the same time offering procedural guarantees to the persons

affected. In order to guarantee national security, the competent authorities can be authorised to collect personal data in secret files in order to use those when the suitability of candidates for posts which are important from a security perspective has to be evaluated (European Court of Human Rights, *Leander v. Sweden*, 26 March 1987, §59).

In this case the legislator has submitted the procedure, including the partially secret character, to the supervision of the appeal body that can be considered to be an independent and impartial judge.

Since the interference with the rights of the defence is proportionate to the goal of national security and accompanied by a procedure granting supervision over the legality of the procedure to an impartial and independent judge who has access to all the elements of the procedure, there is no violation in this case.

Article 7 of the Convention

Concerns: Definition of "law" for the purpose of the principle of legality of penalties

Court of Cassation

Findings of the court

The "law" in the sense of Article 7 of the European Convention on Human Rights is not restricted to acts of Parliament. The principle of legality of the penalty is satisfied when it is possible for those to whom a penal provision applies to know on the basis of that provision which penalty may be applied to them, even if the legislator has only defined penalties for categories of offences, and has delegated to the Crown the power to determine the qualifications corresponding to the different categories.

8 March 2006
Ref.: P051556F
http://
www.cass.be
JC06386_1

Article 8 of the Convention

Concerns: Mentions to be included in a house search warrant

Court of Cassation

Findings of the court

A house search warrant has to be motivated. This implies that it has to mention the crime that is investigated as well as the place and object of the search. It is not necessary to provide a detailed report of the facts, nor to describe in detail the elements to be investigated. Yet it is necessary that the officer of the judicial police who performs the house search dispose of the necessary elements to allow him to know what crime is under investigation and which useful searches and confiscations he may perform in that respect without exceeding the limits of the investigation. These mentions should moreover give the person at whose premises the search is being performed sufficient information about the accusations at the basis of the action to allow him to verify its legality.

When the house search warrant only refers to "the present investigation" and the number of the file in the cabinet of the magistrate, it is not adequately motivated and hence it is null.

Note:
This judgment has to be situated in the wake of the judgment of the European Court of Human Rights in *Van Rossem v. Belgium*, 9 Dec. 2004.

11 January 2006
Ref.: P051371F
http://
www.cass.be
RC061B1_1

Concerns: Right for any affected person to intervene in a procedure that may have consequences for his family life

Constitutional Court

Findings of the court

In order to avoid a violation of Article 8 of the European Convention on Human Rights (ECHR), Article 37 of the French Community Decree of 4 March 1991 on juvenile assistance must be interpreted in such a way as to oblige a person who contests a decision of the juvenile assistance director concerning a minor to include the minor in the procedure.

Both parents and children enjoy the right to respect for private and family life. This right

1 March 2006
Ref.: 27/2006
http://
www.arbitrage.be

includes the right for any affected persons to intervene in a procedure that may have consequences for their family life. This right to intervention is included in the jurisdictional guarantees granted to all citizens and explicitly entrenched in Article 6 ECHR, when a case concerns a civil right such as the right to respect for family life.

The right to respect for private and family life moreover includes the right of a child to be asked to participate in a procedure concerning the decision of an authority that has consequences for his family life.

Concerns: Obligations imposed on foreigners whose residence has become illegal through their own action

Constitutional Court

22 march 2006
Ref.: 46/2006
http://www.arbitrage.be

Findings of the court

Article 8 of the European Convention on Human Rights is not violated by the obligation imposed on a non-EU foreigner, who remained in Belgium after the expiry of his passport and married a non-EU foreigner with legal residence status in Belgium, to submit the documents required for legal entry into Belgium or be obliged to return to his country of origin in order to obtain those.

By obliging foreigners whose residence has become illegal through their own action to return to their country of origin in order to apply for the relevant authorisation to be allowed entry into Belgian territory, the legislator aims to avoid that they might profit from from their violation of the rule.

The provisions contested do not stand in the way of the right to family reunification but rather determine its functioning.

These provisions do not constitute a disproportionate interference with the right to respect for family life. This interference is based on the law and can entail only a temporary removal with a view to obtaining the required authorisation, which does not imply rupturing the ties between the affected people.

It is up to the judges to evaluate whether a negative decision may violate legal provisions or whether an unreasonable delay of an authorisation decision restricts family life in an unjustified manner.

Concerns: Computer and protection of privacy

Brussels Labour Court of Appeal

3 May 2006
JTT 2006,
No. 950, 262

Findings of the court

Proof of "urgent reason" justifying dismissal – an act of unfair competition – is illegal on grounds of violation of Article 8 of the European Convention on Human Rights if it is obtained by presenting e-mails and personal documents that the employee has stored in the computer which the employer has given him to use, revealed when the employer has searched the computer without informing the employee and does not clarify the circumstances nor the goal of his "routine control".

Concerns: Contestation of paternity by a child

Ghent Court of appeal

29 June 2006
NJW 2007,
No. 155, 84

Findings of the court

A child born within marriage can contest the paternity of his father only within four years upon reaching the age of majority. This restriction in time does not violate Article 8 §1 of the European Convention on Human Rights. It is a justifiable interference with private and family life aimed at the protection of public order and of the interests of the child.

Concerns: Protection of minor aliens

Constitutional Court

20 September 2006
Ref.: 141/2006
http://www.arbitrage.be

Findings of the court

Respect for the right to protection of family life requires that an alien who is a minor, whose application for regularisation has been rejected, and for whom it is absolutely impossible on medical grounds to leave Belgian territory, can enjoy the presence of his parents as long as this absolute impossibility is a fact.

Articles 8, 6 and 13 of the Convention

Concerns: Authorities' discretion concerning data conservation

Constitutional Court

18 October 2006
Ref.: 151/2006
http://www.arbitrage.be

Findings of the court

Article 25 (3) of the Law of 11 Dec. 1998, concerning classification and security authorisations, violates Article 22 of the Constitution, read in the light of Article 8 of the European Convention on Human Rights (ECHR), because the law does not determine sufficiently clearly the scope of the authorities' discretion concerning the conservation of data. [The Court refers to *Leander v. Sweden*, 26 March 1987, §51, and *Amann v. Switzerland*, 16 February 2000, §80.]

Other challenges under Article 8 were not upheld:

– concerning the allegedly too broad criteria determining the opportunity of a security verification and the persons that may be subjected to it [The Court refers to *Maestri v. Italy*, 17 February 2004, §30; *Leander v. Sweden*, *loc. cit.*; *Luspa v. Romania*, 8 June 2006, §§33-34; *Rotaru v. Romania*, 4 May 2000, §55; *Segerstedt-Wiberg v. Sweden*, 6 June 2006, §76.];

– concerning the allegedly too broad discretionary powers of administrative authorities in the field of security advice. The Court referred to the obligation to motivate the decisions, and to the availability of an appeal procedure.

The fact that the appeal body (composed of three magistrates) is not part of the judiciary does not compromise its independence and impartiality. Neither does the fact that the members are not appointed for life, since they cannot be removed from their positions except for serious reasons.

Article 13 ECHR does not oblige the legislator to give suspensive effect to an appeal against an administrative decision except when this is necessary to avoid the execution of measures with potentially irreversible effect violating the ECHR (European Court of Human Rights, *Čonka v. Belgium*, 5 Feb. 2002, §79).

Articles 9 and 14 of the Convention

Concerns: Limitations on the freedom of expression

Council of State

15 June 2006
Ref.: 160.106,
http://www.raadvst-consetat.be

Principal facts and complaints

The Flemish arbitration board for radio and television has issued an admonition against the Flemish Radio and Television (VRT) on account of the broadcasting of a radio programme ridiculing the Catholic religious festival of Ascension, on the basis of their responsibility to guard the prohibition of discrimination.

Findings of the Council

An "excessive parody" may shock, disturb or hurt a group of listeners, yet this is not sufficient to consider that part of the programme to constitute an unacceptable form of free expression or to find that such a satire on a religious topic is a discriminatory intrusion in the freedom of religion. The right to manifest one's religion and the prohibition against discrimination on the ground of religion do not require that criticism, satire or parody concerning the core of a religion or world view are excluded.

Articles 10 and 6 of the Convention

Concerns: Restrictions on immunity of members of Parliament

Court of Cassation

1 June 2006
Ref.: C050494N
http://www.cass.be
RC0611_D

Principal facts and complaints

The Brussels Court of Appeal had held that the Belgian state was liable for damage caused by breaches of the duty of care in the work of a parliamentary commission of investigation into illegal practices of sects.

Findings of the court

The Court of Cassation holds that this appeal judgment violates Article 10 of the European Convention on Human Rights.

The rules on immunity of members of Parliament in the exercise of their functions are subject to restrictions. The Convention, as interpreted by the European Court of Human Rights, establishes the right to control the actions of Parliament and its members. Parliamentary immunity has a legitimate purpose: guaranteeing freedom of expression in Parliament and enforcing the separation of powers between the legislature and the judiciary. It is not a disproportionate infringement of the right of access to a court to decide that the court cannot judge whether an expression of a member of Parliament or a parliamentary commission gives rise to liability. This freedom of expression includes not only oral declarations of individual members of Parliament, but also their writings. It furthermore encompasses all parliamentary activities, including those of parliamentary commissions of investigation.

Articles 10 and 14 of the Convention

Concerns: Different period of prescription for defamation against public persons/authorities and against private persons

Constitutional Court

8 November 2006
Ref.: 168/2006
http://www.arbitrage.be

Findings of the court

There is no prohibited discrimination in the difference between the period of prescription of three months for defamation against public persons or authorities and the period of prescription of five years for defamation against private persons.

The authors of the rule could reasonably assume that the former category of legal claims could be submitted to a shorter period of prescription. Any doubts about the integrity of the persons concerned caused by the defamation should be removed as soon as possible, since it may compromise the administration of public affairs for which they are responsible. Furthermore, a longer term would put a threat on those who bring to light abuses committed by public officials that would not be compatible with the concern to allow their actions to be denounced.

Note:
The judgment does not refer to the European Convention on Human Rights, only to Article 10 and 11 of the Constitution.

Articles 10 and 8 of the Convention

Concerns: False information in a television programme

Court of Cassation

2 June 2006
Ref.: C030211F
http://www.cass.be
JC06622_1

Findings of the court

A judicial order prohibiting the broadcasting of a television programme because it risks damaging somebody's reputation and private life by the communication of false or non-objective information, does not violate Article 10 of the European Convention on Human Rights.

Articles 10, 8 and 2 of the Convention

Concerns: Protection of journalistic sources

Constitutional Court

7 June 2006
Ref.: 91/2006
http://www.arbitrage.be

Findings of the court

The right to confidentiality of journalistic sources is to be guaranteed, not so much for the protection of the interests of journalists as a professional group, but rather to enable the press to play its "watchdog" role and to inform the public on matters of general interest.

As a result, anyone who exercises journalistic activities can rely, on the basis of the relevant provisions of the Constitution and the European Convention, on a right to confidentiality of information sources.

Article 4 of the Law of 7 April 2005 allows a judge to oblige journalists to reveal their sources only if this allows the prevention of crimes constituting a serious threat for the physical integrity of one or several persons.

The fact that this does not allow an exception for serious crimes against one's reputation or privacy does not violate Article 8 ECHR. [The Court refers to *Handyside v. the United Kingdom*, 7 December 1976, §49; *Lehideux and Isorni v. France*, 23 September 1998, §55; *Öztürk v. Turkey*, 28 September 1999, §64; *De Haes and Gijsels v. Belgium*, 24 February 1997, §37; *Fressoz and Roire v. France*, 21 January 1994, §45; *Ernst and others v. Belgium*, 15 October 2003, §92.]

When the freedom of expression threatens to conflict with the right to respect for private and family life, a fair balance has to be found between those rights and freedoms. In that context it has to be taken into account that the right to confidentiality of journalistic sources is especially important for press freedom in a democratic society, and hence an interference in that right can only be justified by a "weighty concern of general interest". [The Court refers to *X and Y v. the Netherlands*, 26 March 1985, §23; *Stubbings and others v. the United Kingdom*, 22 October 1996, §62; *Botta v. Italy*, 24 February 1998, §33; *Ignaccolo-Zenide v. Romania*, 25 January 2000, §94; *Mikulic v. Croatia*, 7 February 2002, §57; *Craxi (No. 2) v. Italy*, 17 July 2003, §§73-75; *Surugiu v. Romania*, 20 April 2004, §68.]

The legislator was free to judge that, because of the seriousness and often irreparable character of crimes constituting a serious threat to physical integrity, the need to prevent these could justify the exception to the confidentiality of sources. It was a matter for the discretion of the legislator to decide whether this exception has to be extended to the prevention of crimes interfering with private and family life, which have neither the same seriousness, nor the same irreparable character. Moreover, the obligation to reveal the source of information concerning an interference with private and family life which has not yet been committed does not to the same extent prevent this interference as the release of information which allows the identification of those planning a crime threatening physical integrity.

It was also alleged that Article 4 violates the right to life, as the word "prevention" excludes the obligation to reveal sources in the context of the investigation into crimes that have already been committed. According to the case-law of the European Court of Human Rights, the States Parties have a positive obligation under Article 1 and 2 to investigate the circumstances of a murder or killing, even when the authors are not government officials (see, *i.a.*, *Ergi v. Turkey*, 28 July 1998, §82; *Tanrikulu v. Turkey*, 8 July 1999, §103; *Demiray v. Turkey*, 21 November 2000, §48).

The legislator was free to judge that, when the interference with the life or physical integrity happened, the interference with the fundamental right of free expression, of which the confidentiality of journalistic sources is a part, was not justified, since the judicial authorities dispose of sufficient other means to conduct the investigations.

When the physical integrity of a person has not yet been interfered with, the journalist who is in possession of information that may help to prevent this interference has a legal obligation to help a person in great danger, which is not the case when the interference has already taken place.

Article 12 of the Convention

Concerns: Prohibition of marriage between step-parents and stepchildren

Constitutional Court

18 October 2006
Ref.: 157/2006
http://www.arbitrage.be

Findings of the court

Article 12 of the European Convention on Human Rights is violated (in connection with Article 10 and 11 of the Constitution) by the absolute marriage prohibition between a step-parent and a stepchild. This prohibition has disproportionate consequences in that it prohibits in all cases the marriage of a step-parent and stepchild after the decease of the spouse who created the family relationship. [The Court quotes European Court of Human Rights, *Rees v. the United Kingdom*, 17 October 1986, §50.]

Article 1 of Protocol No. 1

Concerns: Property rights and environment protection

Constitutional Court

1 March 2006
Ref.: 31/2006
http://www.arbitrage.be

Findings of the court

Article 33*bis* of the Flemish Decree of 23 Jan. 1991 concerning the protection of the environment against pollution by fertilisers has to be considered as a measure "to control the use of property in accordance with the general interest" in the sense of the second para. of Article 1 of Protocol No. 1 to the European Convention on Human Rights.

Other case concerning property rights and environment protection:

Constitutional Court, 7 June 2006. Ref.: 92/2006, http://www.arbitrage.be

The provisions of the Decree of the Walloon Region of 10 Nov. 2004 to introduce a regulation for the commerce of greenhouse emission rights in the light of the Kyoto goals do not violate the property rights of steel producers on the installations they exploit.

Article 3 of Protocol No. 1

Concerns: Right to be elected

Constitutional Court, 28 July 2006. Ref.: 130/2006, http://www.arbitrage.be

In the Walloon Region, members of the Federal Parliament, the European Parliament, the Regional Parliament or the Community Parliament are not eligible to sit in the Provincial Council. This does not violate the right to be elected.

Czech Republic/République tchèque

Article 6 of the Convention

Concerns: Protection of the personal privacy of juveniles during criminal proceedings

Constitutional Court

8 November 2005
Sbírka zákonů České Republiky, 26 Jan. 2006, No. 20/2006 Coll., Part 10, pp. 224-230
Ref.: http://www.mvcr.cz/sbirka/2006/sb010-06.pdf
http://www.usoud.cz/ (in English)

Principal facts and complaints

In June 2004 the Constitutional Court received a petition from the District Court in Kladno requesting the annulment of §53 para. 1 and §54 of Act No. 218/2003 Coll., on Liability of Juveniles for Illegal Acts and on Juvenile Courts and Amending Certain Acts (the Act on Juvenile Courts), because, while deciding in the criminal matter of the defendant juvenile L.B. et al., who had been charged with committing the crime of theft under §247 para. 1 (b) (d) and para. 3 (b) of the Criminal Code and other crimes, it concluded that §54 para. 1 of the Act on Juvenile Courts was inconsistent with Article 96 para. 2 of the Constitution of the Czech Republic and with Article 38 para. 2 of the Charter of Fundamental Rights and Freedoms ("the Charter"); and that §53 and §54 paras 2 and 3 of the Act on Juvenile Courts were inconsistent with Article 17 paras 1, 4 and 5 of the Charter. In the petitioner's opinion, the Act on Juvenile Courts did not in the least adhere to "the principles of a democratic and law-based state, and denied and endangered" one of the fundamental constitutional safeguards, consisting of the public exercise of the judicial power.

The petition was dismissed, because the provisions *in abstracto* were not, according to the Constitutional Court, inconsistent with Article 96 §§1 and 2 of the Constitution, Article 38 §2 and Article 17 §§1, 4 and 5 of the Charter.

Findings of the court

The Constitutional Court stated that under the contested §54 para. 1 of the Act on Juvenile Courts, it was left to the minor whether to choose the alternative provided by the last sentence of §54 para. 1 of the Act on Juvenile Courts, i.e. to propose whether a trial or a public session be held in public, or not. The juvenile would be able – given the mandatory defence counsel in proceedings against him – to consult his defence counsel. The contested regulation did not permit the court to bar the public from a trial or public session without statutory grounds. The legislature began with the consideration that the requirement of protecting the personal privacy of juveniles during the entire proceedings also arose from the interest in protecting them from the damaging effects of the outside environment and publicity. This regulation had also found support, in relation to the contested §54 para. 1 of the Act on Juvenile Courts, in a number of international documents in the field of treatment of juvenile delinquents, e.g. the Convention on the Rights of the Child of 1989, in the so-called "Beijing Rules" – UN Resolution 40/33 "Standard Minimum Rules for the Administration of Juvenile Justice" of 1989 – and, not least, Recommendation Rec (2003) 20 of the Committee of Ministers to the member states of the Council of Europe concerning new methods of dealing with juvenile delinquency and the mission of juvenile justice. The negative effects of the limitation on freedom of speech to the benefit of this modification of the right to privacy did not appear to be significant, compared to the positive effects provided by the potential effects of the Act in suppressing the criminal careers of juvenile delinquents. In evaluating the constitutionality of the contested provisions §53 para. 1 and §54 paras 2 and 3 of the Act on Juvenile Courts, the Constitutional Court began – as regards the general legal philosophy view – with the same consideration as when evaluating the constitutionality of §54 para. 1 of the Act on Juvenile Courts.

According to the Constitutional Court, the contested provision of §54 para. 1 of the Act on Juvenile Courts was also consistent with Article 6 §1 of the Convention, which permits barring the public "during all or part of the trial […] if required in the interests of minors, or […] if, in view of special circumstances, a public trial could be contrary to the interests of justice".

Note:
The Constitutional Court referred to the case-law of the European Court of Human Rights: *T v. the*

United Kingdom and *V v. the United Kingdom*, both of 16 Dec. 1999.

Articles 6 of the Convention and 1 of Protocol No. 12

Concerns: Unequal position of participants in a trial concerning the burden of proof

Constitutional Court

26 April 2006
Sbírka zákonů České Republiky, 22 Aug. 2006, No. 419/2006 Coll., Part 134, pp. 5763-5775
Ref.: http://www.mvcr.cz/sbirka/2006/sb134-06.pdf
http://www.usoud.cz/ (in English)

Principal facts and complaints

The Regional Court in Ústí nad Labem requested in its petition the annulment of §133 (a) para. 2 of Act No. 99/1963 Coll., the Civil Procedure Code (CPC), as amended by later Acts, because, while deciding on an action for the protection of personal rights, it had concluded that the provision in question was inconsistent with the constitutional order of the Czech Republic, contravening the principle of equality of participants in proceedings. That violated the right of defendants to a fair trial, guaranteed by the Czech constitutional order and Article 6§1 of the European Convention on Human Rights.

According to §133 (a) CPC, unless proceedings prove the contrary:

– allegations of direct or indirect discrimination in labour disputes on grounds of sex, racial or ethnic origin, religion, faith, world outlook, disability, age or sexual orientation must be deemed to be proved by the court;

– allegations of direct or indirect discrimination on grounds of racial or ethnic origin in matters concerning the provision of health and social care, access to education and professional training, access to public tenders, membership of employee or employer organisations and of professional associations or interest groups and those concerning the sale of goods in shops or the provision of services, must be deemed to be proved by the court.

Findings of the court

The Constitutional Court dismissed the petition. In the reasoning of its decision, it stated that principles of equality of arms and of contradiction were an inherent part of the concept of fair trial and applied also to bringing the evidence. In real life, the equality was usually not absolute; it was a relative term as it was not possible to eliminate the different status of participants and especially their real position arising from their different chances. Such unequal position might be compensated to a certain extent by additional guarantees for the weakest party (so-called *favor defensionis*), for example by way of modification of the burden of proof. The principle of equality of arms implied that both parties must be afforded a reasonable opportunity to present their cases under conditions that did not place them at a substantial disadvantage *vis-à-vis* their opponent.

The Constitutional Court further stated that §133 (a) CPC was an exception to the general principles of giving evidence in the form of a rebuttable legal presumption. The regulation put the sued participant at a certain disadvantage, but not automatically and entirely. A person claiming to be a victim of discrimination must prove to be discriminated against, and allege that such treatment was motivated by his/her racial or ethnic origin. Only then is the sued participant obliged to prove the contrary, i.e. that the treatment to the disadvantage of the claimant was not motivated by the reasons given.

According to the Constitutional Court, this regulation was not discriminatory in the sense of Article 6 and 14 of the Convention. It followed a legitimate aim (the provision in question had become part of Czech legislation in connection with the duty of the Czech Republic to observe its obligations resulting from international law, in this case an EU Directive) and the relation between the chosen means and the aim was not disproportional.

Note:
The Constitutional Court referred to the case-law of the European Court of Human Rights: *Blücher v. the Czech Republic*, 2005; *Tiemann v. France and Germany*, 2000; *De Haes and Gijsels v. Belgium*, 1997; *Ankerl v. Switzerland*, 1996.

Articles 7 of the Convention and 3 of Protocol No. 4

Concerns: European Arrest Warrant alleged to be in conflict with the guarantee that no citizen can be forced to leave his homeland

Constitutional Court

3 May 2006
Sbírka zákonů České Republiky, 8 September 2006, No. 434/2006 Coll., Part 139, pp. 5964-6007
Ref.: http://www.mvcr.cz/sbirka/2006/sb139-06.pdf
http://www.usoud.cz/ (in English)

Principal facts and complaints

A group of Deputies and of a group of Senators proposed the annulment of §21 para. 2 of Act No. 140/1961 Coll., the Criminal Code, as amended by later regulations (hereinafter referred to as the "Criminal Code"), and the annulment of §403 para. 2, §411 para. 6 (e), §411 para. 7, and §412 para. 2 of Act No. 141/1961 Coll., on the Criminal Procedure Code, as amended by later regulations. By means of these amendments the "European Arrest Warrant" was implemented into the Czech legal order. According to the contested provisions, citizens of the Czech Republic could be surrendered to a foreign state (that is, to a European Union member state) for the purpose of their criminal prosecution. According to the petitioners, the contested provisions conflicted with Article 1 and 4 paras 2 and 39 of the Charter of Fundamental Rights and Basic Freedoms ("the Charter") and especially with Article 14 para. 4 of the Charter, according to which no citizen may be forced to leave his homeland. The prohibition laid down in this article of the Charter was, according to the petitioners, clear and unconditional.

Findings of the court

The Constitutional Court dismissed the petition. In the reasoning, it stated that the petitioners' assertion, that the adoption into domestic law of the European Arrest Warrant would disrupt the permanent relationship between citizen and state, was not grounded. A citizen who had been surrendered to an EU member state for criminal prosecution remained, even for the duration of these proceedings, under the Czech state's protection. The European Arrest Warrant merely permitted a citizen to be surrendered, for a limited time, for prosecution in an EU member state for a specifically defined act, and after the proceedings had been completed there was nothing preventing him from returning to Czech territory. The first sentence of Article 14 para. 4 of the Charter, which provides that every citizen had the right to freely enter the Republic, as well as its second sentence, which provides that no citizen may be forced to leave his homeland, made entirely clear that the Charter precluded the exclusion of a Czech citizen from the community of citizens of the Czech Republic, a democratic state to which he was bound by the ties of state citizenship. It was not, according to the Court, in harmony with the principle of the objective teleological interpretation, reflecting the contemporary reality of the EU (i.e., that it was founded on the high mobility of citizens in the framework of the entire Union area), for Article 14 para. 4 to be interpreted such that it did not even allow for the surrender of a citizen, for a limited time, to another member state for criminal proceedings concerning a criminal act that had been committed by this citizen in that state, as long as it was guaranteed that, following the conclusion of the criminal proceeding the citizen will, at his own request, be returned to the Czech Republic to serve any sentence imposed (see §411 para. 7 of the Criminal Procedure Code). Thus, the surrender of citizens for a limited time for criminal proceedings being held in another EU member state, conditional upon their subsequent return to their homeland, did not constitute forcing them to leave their homeland in the sense of Article 14 para. 4 of the Charter.

The Constitutional Court also did not concur with the petitioners' arguments asserting that §412 para. 2 of the Criminal Procedure Code is in conflict with Article 39 of the Charter, according to which only a law may designate the acts which constitute a crime and the penalties or other sanctions to rights or property that may be imposed for committing them. This provision in no way defined the criminal offences not requiring double criminality. The Constitutional Court proceeded from the fact that §412 of the Criminal Procedure Code was not a substantive law provision, but a procedural law one. A surrender pursuant to the European Arrest Warrant was still not the imposition of punishment in the sense of Article 39 and 40 of the Charter.

Article 1 of Protocol No. 1 to the Convention

Concerns: Balance between tenant and landlord' positions in lease contract

Constitutional Court

28 February 2006
Sbírka zákonů České Republiky, 2 June 2006, No. 252/2006 Coll., Part 80, pp. 3018-3037
Ref.: http://www.mvcr.cz/sbirka/2006/sb080-06.pdf
http://www.usoud.cz/ (in English)

Principal facts and complaints

The petitioner, the Municipal Court in Prague, requested the annulment of the special provisions on lease of an apartment in division four, chapter 7, part 8 (i.e. §§685-716) of Act No. 40/1964 Coll., the Civil Code, as amended by later regulations. In the petitioner's opinion the existing legal regulation of lease of an apartment, in the absence of an implementing regulation for §696 para. 1 of the Civil Code, was unbalanced and one-sidedly gave an advantage to the tenant's position. Therefore, it was inconsistent with the principle of equal protection of property rights (Article 11 para. 1, 2nd sentence, of the Charter of Fundamental Rights and Freedoms), as well as with the principle that forced limitation of property rights was possible in the public interest, on the basis of law, and for compensation (Article 11 para. 4 of the Charter). The petitioner also emphasised that it did not consider unconstitutional the content of the special provisions on lease of an apartment, but the gap in legislative activity consisting of the fact that neither by the deadline set by judgment No. 231/2000 Coll. or even in the following more than three years, the legal framework envisaged by §696 para. 1 of the Civil Code had not been passed.

Findings of the court

The Constitutional Court rejected the petition to annul §§685-695, §696, para. 2, and §§697-716 of the Civil Code, and stated that only the petition to annul §696 para. 1 of the Civil Code is related to the decision making activity of the Municipal Court in Prague. The petitioner was therefore not authorised to file a petition to annul the contested Civil Code provisions.

The petition to annul §696 para. 1 of the Civil Code was dismissed. The Constitutional Court concluded that the text itself of §696 para. 1 of the Civil Code, which merely expected the passage of new regulations, was not unconstitutional; what was unconstitutional was the long-term inactivity of the legislature, which had led to the constitutionally unacceptable inequality, and whose final result is the violation of constitutional principles.

The Constitutional Court therefore declared, that the long-term inactivity of the Parliament, consisting of failure to pass a special legal regulation defining cases in which a landlord was entitled to unilaterally increase rent, payment for services relating to use of an apartment, and to change other conditions of a lease agreement (§696 para. 1 of the Civil Code) was unconstitutional and violated Article 4 para. 3, Article 4 para. 4, and Article 11 of the Charter of Fundamental Rights and Freedoms and Article 1 para. 1 of Protocol No. 1 to the European Convention on Human Rights (verdict I).

The Constitutional Court emphasised that the absence of the envisaged regulation led to a situation where a change in the content of a lease (including the amount of rent) was, during the existence of the lease, a matter for agreement by the parties. If such agreement was not reached, there was no legal procedure available (as a result of the legislature's inactivity), through which it would be possible to implement changes by a unilateral expression of will by the landlord. The general courts, even despite the absence of the envisaged specific regulations, must fulfil their fundamental function, i.e. ensuring proportional protection of subjective rights and interests protected by law. They must therefore decide to increase rent, depending on local conditions, so as to prevent the above-mentioned discrimination. General courts erred if they refused to provide protection to the rights of natural persons and legal entities who had turned to them with a demand for justice, if they denied their complaints merely with a formalistic reasoning and reference to the inactivity of the legislature (the non-existence of the relevant legal regulations).

Note:
The Constitutional Court referred to the case-law of the European Court of Human Rights: *Hutten-Czapska v. Poland*.

Other case concerning the right to property:
Legal norm unfavourable to tenants renting more than one housing

Constitutional Court, 28 March 2006. Sbírka zákonù České Republiky, 9 June 2006 No. 280/2006 Coll., Part 87, pp. 3367-3382. Ref.: http://www.mvcr.cz/sbirka/2006/sb087-06.pdf, www.usoud.cz/ (in English)

Denmark/Danemark

Article 3 of the Convention

Concerns: Limited granting of residence permits on humanitarian grounds

High Court, 28 April 2006, Ref.: U.2006.2095/2H Danish Weekly Law Reports, http://www.thomson.dk

Supreme Court, 19 August 2005, Ref.: U.2005.3184H Danish Weekly Law Reports, http://www.thomson.dk

Article 4 of the Convention

Concerns: Notion of forced labour

Supreme Court

5 December 2005
Ref.: U.2006.770H, Danish Weekly Law Reports http://www.thomson.dk

Principal facts and complaints

In March 2000 the municipality K stopped paying social welfare benefits to A in accordance with the Act on active social politics, on the grounds that A did not participate in the proposed activation scheme for the unemployed. A did not again receive welfare benefits until August 2000 when he rejoined the activation scheme. A then instituted proceedings against the municipality (K) claiming the welfare benefits withheld for June and July 2000.

Findings of the court

According to the Supreme Court, the activation scheme was in compliance with the Act on active social politics section 13 (2), and A had for no legitimate reason refused to participate in the said scheme. K was therefore, under the Act, legitimately entitled to withhold A's welfare benefits.

The judgment was based on the following conclusions:

– there was no basis for considering the work that was part of the activation scheme as forced work/labour, within the meaning of Article 4 §2 of the European Convention on Human Rights;

– the concrete application of the Act was not in conflict with the obligation to abolish forced or imposed labour within the meaning of Article 1 (1), as stipulated in ILO Convention No. 29.

The court dismissed A's claims and K was acquitted.

Articles 4, 11 and 14 of the Convention

Concerns: Notion of forced labour

Supreme Court

26 April 2006
Ref.: U.2006.2083H, Danish Weekly Law Reports http://www.thomson.dk

Findings of the court

The Supreme Court concluded that the fact that A considered himself forced to undertake employment in the occupation offered in order continue receiving the daily subsistence allowance for the unemployed did not form grounds for considering the occupational work to be forced or compulsory labour in the meaning expressed in Article 4 §2 of the European Convention on Human Rights (ECHR) or the other articles relied upon.

Article 6 of the Convention

Concerns: Duration of procedure

Eastern High Court

2 June 2006
Ref.: U.2006.2766/2Ø, Danish Weekly Law Reports http://www.thomson.dk

Principal facts and complaints

In 1997 E1, E2, E3 and E4 were charged with extensive economic fraud committed between the years 1988 and 1992.

Findings of the court

The High Court found that a violation of the defendants' right to a fair trial within a reasonable time had occurred, according to Article 6 of the European Convention on Human Rights, which was considered in the determining the sentences of E1 and E2. E1-E4 hereafter claimed compensation according to the Administration of Justice Act, chapter 93 (a).

The public prosecutor rejected the claims of E1, while E2, E3 and E4 were offered economic compensation.

Other cases concerning length of procedure:

Western High Court, 5 October 2005. Ref.: U.2006.341V, Danish Weekly Law Reports, http://www.thomson.dk

High Court, 6 June 2005. Ref.: U.2005.3029Ø, Danish Weekly Law Reports, http://www.thomson.dk

Supreme Court, 1 February 2006. Ref.: U.2006.1120H, Danish Weekly Law Reports, http://www.thomson.dk

Concerns: Lawyers' rules of professional conduct

Supreme Court

1 February 2006
Ref.: U.2006.1396H, Danish Weekly Law Reports http://www.thomson.dk

Principal facts and complaints

A assisted K legally in connection with a real estate deal in which K withheld part of the purchase price in order to secure compensation claims due to defects in the building.

The vendor's "legal representative" filed a complaint with the Disciplinary Board of the Danish Bar and Law Society (M), who found that A had acted in conflict with lawyers' rule of professional conduct, and accordingly imposed a fine of 5 000 DKK on A. A brought the decision to the High Court, which upheld it.

Findings of the court

The Supreme Court upheld this decision. The Supreme Court furthermore found that M's decision was sufficiently reasoned, and that M's total time of seventeen months for (processing) the procedure had not violated A's rights as stipulated in Article 6 of the European Convention on Human Rights.

Other case concerning lawyers' rules of professional conduct

Western High Court, 21 February 2006. Ref.: U.2006.1657V, Danish Weekly Law Report, http://www.thomson.dk

Concerns: Tax fraud punishment

Eastern High Court

18 November 2005
Ref.: U.2006.725Ø, Danish Weekly Law Reports http://www.thomson.dk

Six defendants were sentenced to five years in prison, additional fines and deprivation of rights for extensive tax fraud under section 50 (2) of the Criminal Code in relation to the amount of the unpaid sum. Article 6 of the European Convention on Human Rights was not found to be violated.

Concerns: Council of Medical Examiners not obliged to make a statement in a compensation case

Supreme Court, 18 April 2006, Ref.: U.2006.2068H

Danish Weekly Law Reports, http://www.thomson.dk

Concerns: Illegal recordings used as evidence

High Court

Principal facts and complaints

During a City Court trial in a criminal case against T, the public prosecutor wished to show some video recordings made by the injured party in breach of the Act on the prohibition of television surveillance, etc. T appealed the decision and the City Court decided this should have a delaying effect until the High Court had decided on this matter, which was crucial to the case.

Findings of the court

The High Court upheld the decision of the city court despite the illegal character of the recordings and remarked that the European Convention on Human Rights could not lead to any other result.

31 March 2006
Ref.:
U.2006.1967Ø,
Danish Weekly Law Reports
http://www.thomson.dk

Concerns: Defence counsel refused access to telephone-tapping done by the Danish Security Intelligence Service

High Court

Principal facts and complaints

S1-S4 were charged with terrorism under the Criminal Code section 114 by Glostrup Police (P). The ground for charges was telephone-tapping carried out by the Danish Security Intelligence Service (PET), during some of their own investigations, which PET had then passed on to P. The council for for S1-S4, who had received copies of all the material which PET had passed on to P, filed a motion concerning inspection of documents regarding the court orders on which the tappings had been based, and which were included in the criminal case against S1-S4; e.g. the (Danish) Administration of Justice Act section 729 (a) (3).

Findings of the court

The High Court found that the information could not be considered to be of significance for the defence counsel. The counsel for the defendants could thus not require to gain access to the material in question, according to the Administration of Justice Act section 729 (a) (3).

17 February 2006
Ref.:
U.2006.1596Ø,
Danish Weekly Law Reports
http://www.thomson.dk

Concerns: Telephone inquiry directed by a judge during deliberation

High Court

Principal facts and complaints

During deliberation before lay magistrates in a City Court case regarding violation of, among other things, the Act on Tax Control, the presiding judge made an inquiry by telephone to the public prosecutor and a special consultant with Custom Tax in order to confirm which tax percentage should be used for the calculation of evaded tax. The defendant appealed the judgment, claiming adjournment for re-trial in correspondence with the (Danish) Administration of Justice Act section 963, cf. section 943. The judge could not be considered to disqualify himself according to the Danish Administration of Justice Act section 61.

Findings of the court

No infringement of the Act's section 214 or section 28 (2) was found to have occurred and no new evidence on which the parties were to have made statements had been brought forward. Since Article 6 of the European Convention on Human Rights had not been violated either, the defendant's claim for adjournment for retrial was rejected.

10 November 2005
Ref.:
U.2006.707/2Ø,
Danish Weekly Law Reports
http://www.thomson.dk

Article 8 of the Convention

Concerns: Rejection of an application for residence permit

Supreme Court

30 November 2005
Ref.: U.2006.639H, Danish Weekly Law Reports http://www.thomson.dk

Principal facts and complaints

Dismissal of the principal claim by A, a Pakistani citizen holding a Danish residence permit, against a decision by the Ministry of Integration that A's wife B should not continue to have a Danish residence permit since A could no longer provide for her. It was concluded by the Ministry of Integration that A's unemployment meant that he did not fulfil the requirements to provide for B.

Findings of the court

The Supreme Court found that the fact that A had lived in Denmark since his adolescence could not in itself lead to abolishment of the requirement for proof of his means of maintenance.

The Court found no breach of Article 8 of the European Convention on Human Rights, and since no other evidence was found that could set aside the Ministry of Integration's decision, the Supreme Court dismissed the appeal.

Concerns: Medical treatment of sexual offenders

Supreme Court

2 November 2005
Ref.: U.2006.427H, Danish Weekly Law Reports http://www.thomson.dk

Principal facts and complaints

From 1976 and onwards, A had several times been convicted of sexual offences in Greenland. In 1986 he was sentenced to secure detention for aggravated rape. In 1995 he was allowed out on probation on condition that he was to be subjected to anti-abuse treatment and treatment with medications to subdue his sexual instincts during the probation period. In 2003 A questioned the continuation of the conditions before the City Court, which decided that the requirement of treatment with medications was to be omitted, and the term of anti-abuse treatment should be commuted to a supervision order and treatment by the Probation and Aftercare Service for two years.

Findings of the court

The High Court stated that the period during which A had been subjected to secure detention from 1986 clearly exceeded the time of the imprisonment to which A would otherwise have been sentenced. According to existing medical information A still posed a significant danger, if he was not continually subject to anti-abuse treatment and medication. Upholding of the measures was therefore still necessary and not a violation of Article 8 of the European Convention on Human Rights. The Supreme Court therefore let the decision of the High Court stand.

Concerns: Expulsion of a convicted Iranian citizen

Supreme Court, 8 June 2005. Ref.: U.2005.2747H, Danish Weekly Law Reports, http://www.thomson.dk

Article 10 of the Convention

Concerns: Decision on possible criminal proceedings in the case of *Jyllands-Posten*'s article "The Face of Mohammed"

Decision by the Director of Public Prosecutions

15 March 2006
File No. RA-2006-41-0151.
The article can be found on the Web site http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf.

Principal facts

The article in *Jyllands-Posten* was published in the newspaper's Friday issue on 30 September 2005. The drawing was accompanied by text explaining that the newspaper had invited members of the Danish Newspaper Illustrators' Union to draw Mohammed as they see him; that twelve of about forty had responded to the invitation; and that the drawings are published under the illustrators' names. The article was entitled "The Face of Mohammed" and surrounded by twelve drawings. The introduction to the article was headed "Freedom of expression". The article cited several examples of what the culture editor perceived as self-censorship e.g. "An illustrator who is to portray the Prophet Mohammed in a children's book wishes to do so anonymously, as do the western European translators of a collection of essays critical of Islam. A leading art museum has removed a work of art for fear of reactions of Muslims."

The following section, appearing under the heading "Ridicule", is an extract from the article:

"Some Muslims reject modern, secular society. They demand a special position, insisting on special consideration of their own religious feelings. It is incompatible with secular democracy and freedom of expression, where on has to be ready to put up with scorn, mockery and ridicule.

It is therefore no coincidence that people living in totalitarian societies are sent off to jail for telling jokes or for critical depictions of dictators. As a rule, this is done with reference to the fact that it offends people's feelings. In Denmark, we have not yet reached this stage, but the cited examples show that we are on a slippery slope to a place where no one can predict what self-censorship will lead to."

In the last column of the article under the heading "Twelve illustrators", it says: "That is why *Morgenavisen Jyllands-Posten* has invited members of the Danish Newspaper Illustrators' Union to draw Mohammed as they see him." Furthermore, it says that twelve illustrators, whose names are mentioned, have responded to the invitation and that their drawings are published.

Not all of the twelve cartoons depicted the Prophet Mohammed; the one which was considered most offensive showed the face of a grim-looking bearded man with a turban shaped like an ignited bomb.

An extended discussion on the topic of freedom of speech *vis-à-vis* the protection of religious feelings and the protection of minorities has been a central part of the public debate in Denmark in 2006, especially after the torching of several Danish embassies in the Middle East and consumer boycott and mass demonstrations. The publication of the drawings caused a number of private associations to file a report with the police claiming that *Jyllands-Posten* had committed an offence under sections 140 (prohibition against blasphemy) and 266 (b) (prohibition against hate speech) of the Danish Criminal Code.

The Regional Public Prosecutor, referring to section 749 subsection2 of the Administration of Justice Act, decided to discontinue the investigation. According to this provision it may be decided to discontinue an investigation, if there is no reasonable suspicion that a criminal offence indictable by the state has been committed. Furthermore it was noted: "In his decision, the Regional Public Prosecutor also states that, when assessing what constitutes an offence under sections 140 and 266 (b), the right to freedom of speech must be taken into consideration; and that the right to freedom of speech must be exercised with the necessary respect for other human rights, including the right to protection against discrimination, insult and degradation. Based on an overall assessment of the article in *Jyllands-Posten*, including the twelve cartoons, the Regional Public Prosecutor does not find that there is a reasonable suspicion that a criminal offence indictable by the state has been committed.

In his decision the Regional Public Prosecutor states that he attaches importance to the fact that the article in question concerns a subject of public interest, which means that there is an extended access to make statements without these statements constituting a criminal offence. Furthermore, according to Danish

case-law, journalists enjoy extended editorial freedom when it comes to subjects of public interest. For these reasons the Regional Public Prosecutor finds no basis for concluding that the content of the article constitutes an offence under section 140 or 266 (b) of the Criminal Code. A possible complaint against the decision can be lodged with the office of the Director of Public Prosecutions."

A complaint against the decision of the Regional Public Prosecutor was lodged with the Office of the Director of Public Prosecutions, who came to a decision on 15 March 2006.

Findings of the Director

In his conclusion the Director of Public Prosecutions did not find any basis for changing the decision made by the Regional Public Prosecutor and agreed to discontinue the investigation with regard to section 140 of the Danish Criminal Code as well as section 266 (b). The Director of Public Prosecutions underlined that:

"The Danish Criminal Code – and also other criminal provisions, e.g. about defamation of character – contain a restriction on the freedom of expression. Section 140 of the Danish Criminal Code protects religious feelings against mockery and scorn, and section 266 (b) protects groups of persons against scorn and degradation on account of their religion and other reasons. To the extent that expressions made publicly fall within the scope of these rules there is, therefore, no free and unrestricted right to express opinions about religious subjects."

In relation to the application of the European Convention on Human Rights, the Director of Public Prosecutions stated:

"Article 10 of the European Convention on Human Rights (ECHR) does, however, protect formal as well as substantive freedom of expression. According to Article 10 §1 everyone has the right to freedom of expression. Article 10 §1 also covers forms of expression that may shock, offend or disturb. As the exercise of the freedom of expression carries duties and responsibilities, under Article 10 §2 it may be subject to restrictions and penalties as prescribed by law and which are necessary in a democratic society, as long as they are proportionate to the legitimate aim pursued.

The European Court of Human Rights (the Court) has held several times that freedom of expression is the foundation of a democratic society. In cases of conflicts between the right to freedom of expression and protection of other rights guaranteed by the European Convention on Human Rights, the freedom of expression of the press in particular carries great weight if it concerns a subject of general interest, inasmuch as the press fulfils a central function in a democratic society.

Consequently, the Court attaches decisive importance to the regard for the freedom of expression when assessing the justification of interference with expressions that may offend religious feelings. However, at the same time, the Court has stated that there is a duty as far as possible to avoid expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.

In cases concerning the balance between the right of freedom of expression and the protection of religious feelings, the Court, according to its practice, leaves a wider margin of appreciation to the individual state, because in this area the national authorities also act to safeguard freedom of religion, another fundamental principle of the Convention, cf. Article 9.

On the other hand, the Court has also stated that persons who exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

As the Court's assessment is always made relative to the a state's specific interference with the right to freedom of expression, and in the light of the contents of the expressions and the context in which they have been made, it is not possible from the case-law of the Court to infer a certain state of law regarding how the Court would weigh the regard for freedom of expression in relation to expressions that can offend religious feelings."

Since no interference in the freedom of expression was made, the Director of Public Prosecutions, while referring to Article 10 ECHR, did not find any reason for assessing whether a potential interference was necessary in a democratic society, i.e. whether the interference pursued a proportionate legitimate aim (Article 10 §2 ECHR).

Note:
In an appendix to the decision an analysis of the jurisprudence of European Court of Human Rights is found referring to the following judgments: *Otto Preminger-Institut v. Austria*, 20 September 1994; *Wingrove v. the United Kingdom*, 25 November 1996, *I.A. v. Turkey*, 13 September 2005.

Concerns: Jyllands-Posten's article "The Face of Mohammed"

Aarhus City Court

Principal facts and complaints

Under the prohibition against slander in the Criminal Code section 267, the newspaper *Jyllands-Posten* was sued by various Islamic organisations for the publication of twelve cartoons.

Findings of the court

The City Court concluded that the cartoons could not be considered to lower the esteem of Muslims in the eyes of fellow-citizens. Also, the court assessed, the cartoons could not be considered to be suitable for slander.

26 October 2006
Ref.: BS 5-851/2006
The article can be found on the Web site: http://www.rigsadvokaten.dk/media/bilag/afgorelse_engelsk.pdf

Concerns: Injury to reputation

Eastern High Court

Principal facts and complaints

A, who was the responsible editor of a Faeroese newspaper, had in the newspaper printed accusations from B against a Faeroese lawyer, L, claiming that L had stolen the proceeds from collected debts. L sued A for defamation under sections 268 and 267 of the Criminal Code. A, who had previously been convicted of slander, was convicted to fifteen "day-fines" of 500 DKK for having violated section 267 of the Criminal Code.

Findings of the court

The defamatory charges were declared null and void and L was awarded DKK 30 000 in compensation for injury to reputation.

7 April 2006
Ref.: U.2006.2178Ø, Danish Weekly Law Reports http://www.thomson.dk

Concerns: Breach of confidentiality by an agent of the Danish Defence Intelligence Service

Eastern High Court

Principal facts and complaints

T was found guilty of violating section 152 (2) of the Criminal Code in connection with his employment with the Danish Defence Intelligence Service, by having copied three risk assessment reports that were all classified confidential regarding Denmark's potential participation in military operations in Iraq.

Findings of the court

T's actions were not found to be justified on grounds of the public good according to section 152 No. 2 (dissenting opinion) of the Criminal Code. He was sentenced to four months' imprisonment.

23 September 2005
Ref.: U.2006.2178Ø, Danish Weekly Law Reports http://www.thomson.dk

Article 14 of the Convention

Concerns: Pension benefits of former UN employee not exempted from Danish taxation

Supreme Court, 8 February 2006.
Ref.: U.2006.1439H, Danish Weekly Law Reports, http://www.thomson.dk

Other case relating to Article 14

Social welfare child benefits for a child adopted by a single adopter

Supreme Court, 2 November 2006. Ref.: U.2007.341H, Danish Weekly Law Reports, http://www.thomson.dk

Finland/Finlande

Articles 5, 6 and 8 of the Convention

Concerns: Supervision of health-care professionals

Supreme Administrative Court

5 July 2006
Ref: Report No. 1717, 288/3/05, KHO 2006:43
http://www.finlex.fi

Principal facts and complaints

The National Authority for Medico-legal Affairs, responsible for the supervision of health-care professionals, found that it had good reason to presume that A, who was a foreign national and a physician licensed to practise his profession in Finland, was no longer capable of practising his profession, owing to reduced functional capacity and possible drug addiction. Based on the Act on Health-Care Professionals, the National Authority for Medico-legal Affairs ordered A to submit a medical report concerning his health and his ability to work and imposed on A a temporary prohibition on practising his profession. It also held that appeal against the decision was not possible, because this was a preparatory measure and not a final decision by which the issue would have been resolved or dismissed.

Nevertheless, A appealed against the decision, to the Supreme Administrative Court, claiming that this was an administrative decision directly concerning his rights and obligations. He argued that he had a right to appeal on the basis of the Act on Health-Care Professionals as well as on the basis of section 21 of the Constitution Act (protection under the law and access to court) and Article 6 of the European Convention on Human Rights. He also claimed that the decision amounted to discrimination and violated his right to privacy and personal liberty, protected under the Constitution Act and the Convention.

Findings of the court

The Supreme Administrative Court ruled that the decision was appealable, because the possibility of appeal was not specifically restricted in the Act on Health-Care Professionals. Moreover, the decision affected A's rights, obligations and interests to such an extent that he was entitled to submit the matter to the consideration of a court. Regarding the merits, the Court held, *i.a.*, that the National Authority for Medico-legal Affairs had previously issued several similar orders in cases where a physician had been suspected of drug addiction, and therefore the decision concerning A did not amount to discrimination on the basis of nationality. Also, the National Authority for Medico-legal Affairs has a right, based on the law, to use the assistance of experts and to submit to the experts information necessary for the performance of their task, confidentiality provisions notwithstanding. It could thus attach to its decision A's medical records and other information for the use of the expert who would assess A's health and ability to work. The decision was also not in violation of A's right to personal liberty, because it had a legitimate aim to guarantee patient security and because it was A's own choice whether he would undergo a medical examination or not. The decision did not mean that A would have been ordered to submit to involuntary treatment.

The Supreme Administrative Court concluded that the National Authority for Medico-legal Affairs had acted in accordance with its powers under the Act on Health-Care Professionals. A's appeal was dismissed.

Article 6 of the Convention

Concerns: Right of appeal against a city council's decision concerning a local master plan

Supreme Administrative Court

22 March 2006
Ref: Report No. 638, 2777/1/05, KHO 2006:12
http://www.finlex.fi

Principal facts and complaints

A city council had approved a local master plan drawn up to define land-use in a specified area. In the master plan, an area in the estate owned by A and B had been indicated as a residential area of single-family houses. On the appeal by certain other landowners, the Administrative Court revoked the city council's decision as far as the residential area of single-family houses in A's and B's estate was concerned.

Findings of the court

A and B appealed against the decision to the Supreme Administrative Court which dismissed the appeal on the ground that, according to the Land Use and Building Act, only local authorities are entitled to appeal against a decision of the Administrative Court revoking the local authority's decision to approve a land-use plan. It is held that land-use planning is at the discretion of the local authorities, and a private landowner has no right to request a local plan with a specific content.

Having dismissed the appeal, the Supreme Administrative Court considered the claim as an extraordinary appeal and an application for the annulment of a decision due to a procedural error. The Court held that the possibilities for using the land in the estate owned by A and B for building had been changed substantially by the decision of the Administrative Court.

The decision was therefore of particular significance to the estate owners A and B, whose views had not been heard by the court and who were not entitled to appeal against the court's decision considering the provisions of the Land-Use and Building Act. The Supreme Administrative Court referred to the Administrative Judicial Procedure Act and the duty of the appellate authority to review a matter and to obtain evidence on its own initiative in so far as the impartiality and fairness of the procedure and the nature of the case so require. It also referred to the preparatory works of the Act in which it is held, among other things, that in obtaining evidence the appellate authority should pay particular attention to a fair administration of justice, using Article 6 ECHR and the case-law under that article as guidelines to what is meant by a fair procedure.

With reference to the Administrative Judicial Procedure Act the Court concluded that, by revoking a part of the local master plan without giving the estate owners A and B the opportunity to be heard, the Administrative Court had committed a procedural error which may have had a relevant effect on the decision.

The Supreme Administrative Court annulled the decision of the Administrative Court as far as it concerned the land area in the estate owned by A and B and referred the matter back to the lower court for a new consideration.

Concerns: Length of proceedings

Supreme Court

1 February 2006
Ref: Report No. 211, R2004/281, KKO 2006:11, Decisions of the Supreme Court, 2006, vol. I, pp. 80-92

Principal facts and complaints

Three tax administration officials had been sentenced to a fine for having acted contrary to their official duty. They had used in a tax audit report information which had been obtained by the police from the authorities of a foreign country in the form of mutual assistance in criminal matters and which had been given on condition that it would not be used for fiscal purposes. The Supreme Court agreed with the lower courts' judgment. However, in assessing the punishment the Court also considered the length of the proceedings against the defendants. The offence had been committed in 1997. The defendants were questioned in 1998 and 1999, the proceedings before the first instance court started in 2000 and the court gave its decision in 2001.

Findings of the court

The decision of the appeal court was issued in 2004. The Supreme Court held that, considering the complexity of the case, the proceedings as a whole were not excessive to such an extent that the delay as such would have constituted a violation of the defendants' rights.

However, the Court noted that the act that led to charges against the defendants was committed while the defendants were carrying out a task incumbent on them as officials responsible for tax supervision. In the Court's view, the lengthy proceedings were likely to cause insecurity and inconvenience to the defendants in carrying out their duties. This could have been avoided had the proceedings been conducted more speedily. For this reason, the Court held that the delay was in violation of the defendants' right to have their case dealt with by a court within a reasonable time, as prescribed in section 21 of the Constitution Act and Article 6 of the European Convention on Human Rights. The Court also referred to the decisions of the European Court of Human Rights in the cases of *Kangasluoma v. Finland* (20 January 2004) and *Lehtinen v. Finland* (13 September 2005). With reference to the length of proceedings and to the Penal Code, the Court decided to waive the punishment.

Concerns: Length of proceedings

Supreme Court

18 April 2006
Ref: Report No. 855, R2004/449, KKO 2006:33, Decisions of the Supreme Court, 2006, vol. I, pp. 222-232

Principal facts and complaints

A court of appeal had sentenced X to conditional imprisonment and dismissal for aggravated abuse of public office. In addition, both X and Y were sentenced to a fine for negligence of official duties.

Findings of the court

Both defendants appealed to the Supreme Court, which upheld the appeal court's decision in part, but dismissed some of the charges because of the statute of limitations.

When assessing the punishment the Court also took into account the length of the proceedings against the defendants. The offences had been committed in 1996 and 1997. The investigation was initiated in 1997 and the defendants were questioned for the first time as suspects in 1999. Proceedings before the court of first instance started in 2002, and the court gave its decision in 2003. The appeal court's decision followed in 2004. X was suspended from office from 1997 until he was given notice in 2002. He found a new job but lost it because of the charges against him. Y was suspended in 1999 and he resigned in 2003. In its decision, the Supreme Court held that, considering the complexity and nature of the case, the proceedings as a whole were not excessive to such an extent that the delay would necessarily have constituted a violation of the defendants' rights.

However, in the Court's opinion, it must be taken into account that the defendants had lost their jobs because of the offences. Considering this, the excessive proceedings have been likely to create feelings of uncertainty about the future as well as inconvenience which could have been avoided, had the proceedings been carried out more speedily.

For this reason the Supreme Court found that the delay in the proceedings was in violation of the defendants' right to have their case dealt with by a court within a reasonable time, as prescribed in section 21 of the Constitution Act and Article 6 of the European Convention on Human Rights. The Court also referred to the decisions of the European Court of Human Rights in the cases of *Kangasluoma v. Finland*, (20 January 2004) and *Lehtinen v. Finland*, (13 September 2005). With reference to the length of proceedings and to the Penal Code, the Court decided to waive the fine imposed on the defendants. The sentence of conditional imprisonment and dismissal imposed on X was upheld.

Concerns: Length of proceedings

Supreme Court

31 January 2006
Ref: Report No. 229, R03/3864, He1H0 2006:5
http://www.finlex.fi

Principal facts and complaints

In a case concerning aggravated tax fraud, the court of first instance considered, as a preliminary question, the defendant's claim that the charges against him should be dismissed without considering the merits because of the excessive length of the proceedings.

Findings of the court

The court found that Finnish legislation or the case-law of the European Court of Human Rights do not say explicitly what the consequences before a national court should be in cases where the length of the proceedings has been excessive. The court held that the issue of excessive length of proceedings is not comparable to a situation where charges are dismissed because of non-compliance with substantial procedural requirements.

Moreover, in the court's view, it could not be deduced from the provisions concerning the statute of limitations that charges should be

dismissed once the reasonable length of proceedings had been exceeded. The court rejected the defendant's claim.

However, when considering the merits, the court took into account the length of the proceedings in assessing the punishment. At that time (2003) the case had been pending for almost nine years and, in the court's opinion, the pre-trial phase especially had taken an unnecessarily long time. The court referred to the case of Eckle (15 July 1982), in which the European Court of Human Rights had held that the mitigation of a sentence on the ground of the excessive length of proceedings might lead to a conclusion that the individual concerned has been afforded redress at the domestic level.

The court of appeal upheld the decision of the first instance court, both regarding the preliminary question and the merits. In its decision, the appeal court also noted that while there were no explicit domestic provisions, the dismissal of charges on account of the excessive length of proceedings might be possible on the basis of the European Convention on Human Rights in some exceptional cases, for example in a situation where the defendant's rights of defence have been completely ruined because of the length of the proceedings. However, that had not happened in this particular case.

Concerns: Assessing of "reasonable legal costs"

Supreme Court

29 November 2006
Ref: Report No. 2907, R2005/312, KKO 2006:9
http://www.finlex.fi

Principal facts and complaints

X was one of the defendants in a criminal case but was acquitted. Chapter 9, section 1 (a) of the Criminal Procedure Act prescribes that if the charge of the prosecutor is rejected, the state is liable for the reasonable legal costs of the defendant. However, section 1 (a) does not provide any methods for assessing "reasonable legal costs", and this was the issue before the Supreme Court in this case. In assessing the defendant's legal costs, the lower court instances had relied on the Decree on legal aid fee criteria.

Findings of the court

In the Supreme Court's view, however, the Decree was not applicable in this case, because the fees and reimbursements for attorneys within the state-funded legal aid system are much smaller than the regular fees that courts may order to be reimbursed in cases that fall outside the legal aid system. In the Court's opinion, the considerations that make it possible to reimburse lower fees within the legal aid system are not applicable to reimbursement of legal costs under chapter 9, section 1 (a) of the Criminal Procedure Act. The Supreme Court argued instead, on the basis of chapter 9, section 8, that the assessment of legal costs should be based on the principle of full compensation as prescribed in chapter 21 of the Code of Judicial Procedure concerning liability for legal costs in a civil case.

One partly dissenting justice of the Supreme Court argued that neither the Decree nor the Code of Judicial Procedure were applicable as a basis for assessment of legal costs in this case. In his opinion, both the wording and the preparatory works of section 1 (a) show that it is a special provision, only concerning state liability in charges brought by the public prosecutor. The assessment of reasonable legal costs is then made on a case-by-case basis, taking into account not only the amount and nature of the work carried out by the acquitted defendant's counsel but also the nature of the charges and the reasons for the criminal trial. The justice pointed out that there can be many reasons for acquittal, including the fact that, in a criminal procedure, the threshold for prosecution is different from the threshold for sentencing. Taking this feature into account when assessing liability for legal costs is, in the justice's view, not contrary to the presumption of innocence as prescribed in Article 6 of the European Convention on Human Rights concerning fair trial. In the justice's assessment of reasonable legal costs in this case the reimbursement sum was higher than the sum ordered by the lower courts but did not quite amount to full compensation.

Concerns: Case decided in the defendant's absence

Supreme Court

1 June 2006
Ref: Report No. 1294, R2005/88, KKO 2006:50, Decisions of the Supreme Court, 2006, vol. I, pp. 342-347

Principal facts and complaints

X was charged with negligence of official duties. In the pre-trial investigation, X denied the charges. The court of first instance had ordered a date for the main hearing and had informed X of the fact that the case may be heard and decided in his absence, in accordance with chapter 8, section 11 of the Criminal Procedure Act. X was not able to attend the hearing at that date and asked the court to set another date. The court held that X's excuse for non-attendance (namely, participation in a course) was not valid. The case was decided in X's absence, and he was sentenced to a fine.

Findings of the court

Both the Appeal court and the Supreme Court found that the case should not have been decided in the defendant's absence, mainly because X had denied the charges and because in the main hearing the court had heard several witnesses and received plenty of written evidence, including expert opinions. The charges were expressly concerning X's actions and possible negligence and the matter could not be decided without hearing the defendant personally. The case was returned to the first instance court for a rehearing. Both the Appeal court and the Supreme Court decided the case on the basis of the Criminal Procedure Act only.

However, one concurring justice of the Supreme Court also held that the procedure before the first instance court did not honour X's right to a fair trial as secured by section 21 of the Constitution Act as well as his right to examine or have examined witnesses as prescribed in Article 6 §3 of the European Convention on Human Rights.

Concerns: Impartiality of judges

Supreme Administrative Court

19 October 2006
Ref: Report No. 2728, 2839/3/05, KHO 2006:77 http://www.finlex.fi

Principal facts and complaints

The Directorate of Immigration had rejected as manifestly unfounded A's application for asylum and residence permit and decided that A should be refused entry and sent back to his home country.

Findings of the court

The Administrative Court rejected A's appeal. In his appeal to the Supreme Administrative Court, A claimed, among other things, that in making its decision on A's asylum application, the Administrative Court had not been impartial, because one of the judges, B, had at an earlier stage of the process decided on rejecting A's request for prohibition of enforcement of the decision on refusal of entry. The Supreme Administrative Court noted that prohibition of enforcement is not a decision on the main issue but a temporary measure, preceding that decision and providing legal protection while an appeal is pending. In its decision on prohibition of enforcement in A's case, the Administrative Court does not comment on the decision on asylum and residence permit by the Directorate of Immigration or the grounds for that decision. Also, in the Supreme Administrative Court's view, it had not been shown that judge B, because of his earlier decision on prohibition of enforcement or for any other reason, would have had a preconception of A's case when participating in the decision on the main issue, the asylum application.

In its decision, the Supreme Administrative Court refers to the provisions on the disqualification of judges in the Code of Judicial Procedure as well as section 21 of the Constitution Act and Article 6 of the European Convention on Human Rights.

Concerns: Impartiality of judges

Supreme Administrative Court

29 December 2006
Ref: Report No. 3617, 671/3/05, KHO 2006:103, http://www.finlex.fi

Principal facts and complaints

A, who had received his academic education in Sweden, appealed to the Administrative Court against a decision by the Finnish National Board of Education concerning the recognition of his professional qualifications in Finland. He then appealed to the Supreme Administrative Court, mainly on account of the lower court's decision concerning the compensation of his legal costs. In this latter appeal, A claimed that there was cause to doubt the impartiality of two of the Administrative Court judges, B and C, who had allegedly had preconceptions which had affected their decision. B had previously, as a member of the court of first instance, twice

inquired A about his qualifications to serve as counsel. As a judge of the same first instance court, C had twice denied A the right to appear in a case before the court. A also pointed out that B had in a newspaper interview commented on a Supreme Court decision concerning the qualifications of counsel. Moreover, A claimed that the fact that the same judges can serve both in the first instance court and the Administrative Court was in violation of the European Convention on Human Rights (ECHR).

Findings of the court

The Supreme Administrative Court pointed out that the case before the Administrative Court was concerning the compensation of A's legal costs in the above proceedings, whereas the previous occurrences before the first instance court were concerning A's right to serve as counsel. B and C had thus not been hearing the same matter before both courts and could not be regarded as disqualified on the basis of the relevant provisions of the Code of Judicial Procedure. The Court also found that there were no justifiable grounds to doubt B's impartiality because of the newspaper interview. Finally, the Court stated briefly that the decision of the administrative court was also not in violation of Article 6 ECHR.

Concerns: Powers of a shareholder of a deceased person's estate

Supreme Court

5 April 2006
Ref: Report No. 765, S2005/211, KKO 2006:29, Decisions of the Supreme Court, 2006, vol. I, pp. 203-208

Principal facts and complaints

The main issue in this case was whether a shareholder of a deceased person's estate has a right to bring an action against a third party to the benefit of the estate in a situation where the estate has been surrendered to an estate administrator and the administrator has assessed the matter and decided not to sue.

Findings of the court

The Supreme Court held that surrendering the administration and settlement of an estate to an estate administrator aims at an efficient and prompt settlement without unreasonably infringing on the shareholders' due process safeguards. As soon as the settlement of the estate has been carried out by the estate administrator, a shareholder is entitled to bring an action against a third party and may also claim damages from the administrator on account of the fact that the administrator has refused to sue, provided there exist sufficient grounds for liability for damage.

The Supreme Court also found that a shareholder's right to bring an action could not be derived from a person's right to have his/her case dealt with by a court of law under section 21 of the Constitution Act and Article 6 of the European Convention on Human Rights (ECHR). What was at issue in this case was a shareholder's right to bring an action to the benefit of the estate, not his/her right to have his/her own case dealt with by a court. In the Court's opinion, it could not be argued that section 21 of the Constitution Act and Article 6 ECHR would prevent an arrangement by which the right to sue on behalf of the estate belongs to the estate administrator alone until the settlement has been carried out and the administrator's task has been finished.

Two dissenting justices of the Supreme Court held that although a shareholder brings an action on behalf of the estate, he or she does not represent the estate in the same way as an estate administrator does. Also, a shareholder sues at his/her own risk or cost, not those of the estate. Therefore, the person can be regarded as protecting his/her own legitimate interests as a shareholder of the estate.

Concerns: Right of appeal against a bailiff's decision concerning the amount of a salary

Supreme Court, 6 April 2006, Ref.: Report No. 767, S2005/411, KKO 2006:30, Decisions of the Supreme Court, 2006, vol. I, pp. 208-212

Articles 6 and 8 of the Convention

Concerns: Confidentiality obligation of advocates

Supreme Court

14 August 2006
Ref: Report No. 1760, R2005/31, KKO 2006:61, http://www.finlex.fi

Principal facts and complaints

A and B were advocates and worked in the same law firm. They had both carried out tasks commissioned by the law firm's client, C. Later, C was suspected of an economic offence and B of aiding and abetting C. A was heard in the pre-trial investigation concerning B's alleged involvement in C's offence. At the investigation, A disclosed issues he had learned while undertaking commissions for C. C claimed that A had thus breached the obligation of confidentiality between an advocate and a client.

Findings of the court

Under the Advocates Act, an advocate shall not without due permission disclose the secrets of an individual or family or business or professional secrets which have come to his knowledge in the course of his professional activity. The Supreme Court recalled that this confidentiality obligation secures a client's right to privacy and is also a prerequisite for a fair trial, as found by the European Court of Human Rights in the case of Niemietz v. Germany (16 Dec. 1992). However, the Supreme Court pointed out that the client may choose to waive the confidentiality obligation. Moreover, in the Court's view the obligation is waived in cases where the client by his/her own actions endangers the advocate's legal position.

In this case, C had in the pre-trial investigation said things that threw suspicion on B's involvement in C's offence. Because A and B had together undertaken commissions for C, A had, in the Supreme Court's opinion, justified grounds to suspect that the information C had given might also incriminate A. Therefore, A had good cause to think that the confidentiality obligation no longer applied because his own legal position was at risk. Having studied the pre-trial investigation report, the Supreme Court noted that A had not disclosed confidential information more than was necessary in order to avert the risk he was exposed to. Finally, the Supreme Court also considered the matter in the light of Article 8 of the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights, giving the case of *Foxley v. the United Kingdom* (20 June 2000) as an example. In the Supreme Court's view, waiving the confidentiality obligation in this case was "necessary" under Article 8 §2 ECHR because of A's need to defend himself against the actions of C which had put A's legal position at risk.

The Supreme Court concluded that A had not disclosed confidential information in a way which would have constituted a secrecy offence under the Penal Code.

Articles 6, 8 and 10 of the Convention

Concerns: Limits to freedom of expression

Helsinki Court of Appeal

11 October 2005
Ref: Report No. 3242, R03/1733

Principal facts and complaints

X had told a small group of people, including Y, that she had been raped during a party at a hotel where a local sports team had been celebrating their national championships title. X also signed a written statement which she withdrew, however, the following day. She said repeatedly that she did not want to notify the police. Several months later, Y told journalist Z about the case which was then reported in a national weekly magazine. The report referred to the team in general without naming the alleged offender or offenders. The twelve players of the team sued Y, Z, the magazine and its editor-in-chief. The court of first instance sentenced the defendants to a fine for defamation and ordered them to pay damages.

Decision of the court

The Court of appeal upheld the decision. It discussed at length freedom of expression as prescribed in the Constitution Act and the European Convention on Human Rights. It also referred to several decisions of the European Court of Human Rights, *i.a.* the cases of *Bladet Tromsø and Stensaas v. Norway* (20 May 1999); *Bergens Tidende and others v. Norway*); *Karhuvaara and Iltalehti v. Finland* (16 November 2004); *Pedersen and*

Baadsgaard v. Denmark (17 December 2004); *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft mbH v. Austria* (14 November 2002).

Findings of the court

The court of appeal held that the report published in the magazine had incriminated all the players in the team and had violated their right to be presumed innocent until proven guilty by a court of law.

In the court's view, the role of the media as a public watchdog was not at issue in this case, despite the fact that the police had started to investigate the alleged rape only after the report had been published. It had not been shown that the police would have tried to keep the matter secret, as claimed by the defendants, or that the police would even have been notified. The alleged rape was not generally known among the local public before it was reported in the magazine with a nation-wide circulation. In the Court's view, the nature and seriousness of the alleged offence required specific accuracy in reporting the issue. However, Z and the editor-in-chief had not verified the accusations in order for the report to rely on a reliable factual basis.

The Court concluded that in this case restricting the defendants' freedom of expression was necessary in order to protect the players' honour and their right to be presumed innocent. In assessing the damages, the Court referred to the principle of proportionality and the decision of the European Court of Human Rights in the case of *Tolstoy Miloslavsky v. the United Kingdom* (13 July 1995). It found that the damages ordered by the first instance court were reasonable.

Articles 6 and 10 of the Convention

Concerns: Limits to freedom of expression

Vaasa Court of Appeal

25 April 2006
Ref: Report No. 571, R04/1366

Principal facts and complaints

A former tax administration officer X had published a book in which she claimed that tax inspector Y had, in a trial which was concerning tax fraud and in which X had acted as a witness for the defence, committed perjury by swearing to the correctness of a tax audit report which in X's opinion was based on false calculations. X also claimed that there was no risk that Y herself would face trial, because her husband was a district prosecutor working at the Office of the Prosecutor General. The court of first instance convicted X for aggravated defamation and ordered that the book be forfeited and the trial documentation kept secret for a period of fifteen years.

Decision of the court

X appealed to the court of appeal, which in its decision discussed at length freedom of expression as secured in Article 10 of the European Convention on Human Rights and the decisions of the European Court of Human Rights in the cases of *Selistö v. Finland* (16 November 2004); *Nikula v. Finland* (21 March 2002); *Lešník v. Slovakia* (11 March 2003); *Pedersen and Baadsgaard v. Denmark* (17 December 2004).

The court of appeal noted that the tax administration exercises significant public powers and that legal safeguards in taxation issues had for a long time been a subject of public debate. The Court saw X's book as a contribution to this debate. However, the Court pointed out that freedom of expression must not overstep certain bounds with respect to the rights and reputation of others, and that it carries with it duties and responsibilities which also apply to the media even in matters of great public concern.

In this case, criticism had been directed at an ordinary tax inspector, who was not in a leading position, and it was claimed that she had committed a serious offence. No grounds had been presented in support of the allegations, which had decreased Y's public credibility and violated her right to be presumed innocent. The Court agreed that, as a civil servant using public authority, Y was subject to wider limits of acceptable criticism than a private individual. However, it found that X's allegations exceeded the bounds for acceptable criticism, and that interference with X's freedom of expression was under the circumstances necessary and in accordance with the principle of proportionality.

The Court also ruled that there was no need to forfeit the book. Instead, the author and the printing house were ordered to remove from the book the lines which had caused X's conviction. The court also quashed the lower

court's decision regarding the secrecy of the trial documentation.

Finally, the court considered the length of the proceedings (6 years) in the light of the case-law of the European Court of Human Rights. It found that, though the proceedings had been excessive, the delay had not caused X harm to the extent that her punishment should be reduced on account of the length of proceedings.

Articles 8 and 10 of the Convention

Concerns: Limits to freedom of expression

Supreme Court

16 March 2006
Ref: Report No. 608, R2004/852, KKO 2006:20, Decisions of the Supreme Court, 2006, vol. I, pp. 150-156

Principal facts and complaints

A journalist had written a newspaper report in which it was told that district prosecutor A's wife was suspected of tax fraud. The names of the persons concerned were not mentioned. A claimed that the newspaper report violated his right to private life. The court of first instance dismissed the charges. It held, among other things, that A's position as a leading prosecutor specialising in economic offences makes the suspicions of tax fraud against his wife an issue of public concern. The court, however, found that the freedom of the press could be restricted in this case, on the grounds that the criminal proceedings against A's wife were still at a pre-trial phase at the time the newspaper report was published. The Court referred to the presumption of innocence and to the decision of the European Court of Human Rights in the case of *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft mbH v. Austria (No. 2)* of 14 Nov. 2002 (Reports of Judgments and Decisions 2002-X).

Findings of the court

The Supreme Court agreed with the first instance court. It noted that the information given in the report was as such correct. It was clear from the text that this was concerning a suspicion of a crime, not a conviction. In addition, it was especially mentioned that A himself was not suspected. The Court also pointed out that A was in a public position. As a district prosecutor specialising in economic offences, he had, among other things, brought charges and prosecuted for tax fraud offences. The news about his wife being suspected of tax fraud gave cause to pay attention to A's activities and to evaluate his possibilities to act impartially in matters concerning tax fraud. The Supreme Court further stated that in the news report, the persons concerned were not described in such detail so that it would have been possible to recognise them without previous knowledge or further inquiries. The Court held that because of the issues raised by the suspicions of tax fraud and pertaining to A's performance in his public position, it was justified to give information which made A recognisable to some readers, namely persons close to him or persons working for the police or the prosecution in A's district.

The Supreme Court concluded that the newspaper report was not in violation of A's right to private life. In its decision, it discussed, among other provisions, the protection of privacy under section 10 of the Constitution Act and Article 8 of the European Convention on Human Rights (ECHR) as well as freedom of expression as prescribed in section 12 of the Constitution Act and Article 10 ECHR, referring also to the decision of the European Court of Human Rights in the case of *Selistö v. Finland* (16 Nov. 2004).

Concerns: Notion of "false insinuation"

Supreme Court

30 August 2006
Ref: Report No. 1913, R2005/406

Principal facts and complaints

A newspaper had published A's survey of the events in the year 2000. In one section A discussed the holocaust and the new rise of the Extreme Right ideology. In this context, A quoted a statement by B in which the latter raised the fact that during the Second World War German SS-troops had participated in the battle on the eastern front, successfully impeding the progress of Soviet troops, and that this was "a heroic deed which we shall never forget". When this quotation was taken out of its original context, the reader could get the impression that by "a heroic deed" B actually meant the holocaust. B therefore claimed, among other things, that A was guilty of defamation for having spread a false insinuation.

Findings of the court

The Court pointed out that the notion of "false insinuation" in the Penal Code is open to interpretation and therefore problematic with regard to limitation of constitutional rights. This being the case, constitutional rights, human rights obligations and the case-law of the European Court of Human Rights must be taken into account when interpreting that provision. The Supreme Court referred, in particular, to the cases of *Jersild v. Denmark* (23 September 1994); *Prager and Oberschlick v. Austria* (26 April 1995); *De Haes and Gijsels v. Belgium* (24 February 1997); *Bladet Tromsø and Stensaas v. Norway* (20 May 1999); *Radio France and others v. France* (30 March 2004).

The Supreme Court noted that an exchange of views in matters of public interest lies at the core of freedom of expression. In carrying out its task, the media has a right to publish even biased and provocative views, and it must also be possible to criticise, even strongly, views presented in public. The Court found that both A's survey and the newspaper report written on the basis of B's press release were inaccurate and confusing to the reader. B's statement reflected understanding and appreciation for some phases in the history of the SS-troops, but it was not possible to assess his opinion on the activities of the SS-troops during the Second World War in general on the basis of the press release or the report. A's comprehensive survey combined and compared various, very different events and quotes. It did not contain exact arguments but was a collection of the author's personal views on society and events in the year 2000.

The Court continued that views, especially provocative, concerning the holocaust and SS-troops tend to raise public interest. Considering this, and considering also the style in A's survey and the contents in B's press release, the Supreme Court concluded that it could not be regarded that A's text would contain a false insinuation and that she would thus have committed defamation.

Two concurring justices of the Supreme Court decided the case in A's favour on the ground that both A's survey and B's statement, as originally published in the press release and the newspaper report, were open to interpretation. One partly dissenting justice found that A had deliberately used B's statement in a misleading manner and had thus spread a false insinuation. The character and style of A's text did not justify the deed.

Concerns: Right of correspondence of prisoners

Riihimäki Court of First Instance

18 May 2006
Ref: Report No. 06/350, R06/84

Principal facts and complaints

Prison governor B had stopped three letters sent by prisoner X. In B's view it was not appropriate to send the letters further, because while the letters were directed to various authorities supervising prisons, the envelopes were in fact addressed to the media. In addition, B held that X had no right to sign and send the letters on behalf of all the prisoners, because the prisoners had not officially formed a prisoners' union with rules and elected president.

Findings of the court

The court found that X had a right to sign and send the letters. Although the prisoners had not formed a union, X had been elected the prisoners' representative in a meeting in which the prison governor had also been present. The court then agreed that, according to law, a prison governor may stop a prisoner's letters if there is reason to suspect that the right of correspondence has been misused. Because both inviolability of correspondence and freedom of expression are protected by the Bill of Rights in the Constitution Act, the court held that the provisions concerning misuse of correspondence must be given a narrow interpretation. In this case the right of correspondence had not been misused and the governor had no right to stop the letters.

The court referred to the decisions of the European Court of Human Rights in the cases of *Silver and others* (25 March 1983) and *McCallum* (30 Aug. 1990).

Articles 9, 10 and 14 of the Convention

Concerns: Refusal to hire space for advertising in city buses

Supreme Administrative Court, 20 December 2006, Ref: Report No. 3494, 2823/1/05, KHO 2006:98, http://www.finlex.fi

Article 2 of Protocol No. 1 to the Convention

Concerns: School providing education based on Christian convictions under certain conditions

Supreme Administrative Court

29 December 2006
Ref: Report No. 3670, 1511/3/05

Principal facts and complaints

The government had authorised a Christian school association to provide education based on Christian convictions, on condition that the association would also adopt a curriculum for education covering the general national objectives of education as defined by the National Board of Education in accordance with the Basic Education Act. In the opinion of the association, the condition contained an obligation to provide basic education which was non-denominational.

The association appealed to the Supreme Administrative Court, claiming, *i.a.*, that the condition was in violation of freedom of religion and conviction.

Findings of the court

The Supreme Administrative Court noted that, according to the Basic Education Act, basic education shall be governed by a unified national core curriculum as determined by the government and the National Board of Education. Within its competence under the Act, the government may grant an authorisation on condition that the statutory-based national objectives are fulfilled. Such a condition is not in breach of the Basic Education Act, nor is it in violation of freedom of religion and right to education as prescribed in the Constitution Act and in the human rights conventions binding Finland, considering that, in accordance with the Decree on national objectives of education and distribution of lesson hours, when providing education according to a particular ideology, in addition to the national objectives of education, the pupils are also provided with knowledge and skills based on that ideology.

The Supreme Administrative Court also found that the Basic Education Act respects the right of the parents to ensure the religious education of their children in conformity with their own convictions, considering that the parents have a right to decide that their children receive religious education at home or that such education is provided by some other education provider than those defined in the Basic Education Act so that the children do not attend education referred to in the Act.

The Court concluded that the government's decision was not in violation of the right of the association to provide basic education according to a particular ideology and was also not in violation of constitutional rights or human rights. The appeal was dismissed.

Concerns: Refusal to a Christian school association to provide basic education

Supreme Administrative Court,
29 December 2006, Ref.: Report No. 3671, 1557/3/05

Iceland/Islande

Article 6 of the Convention

Concerns: Investigation into an alleged tax fraud. Competence of the National Commissioner of the Icelandic Police

Supreme Court

8 June 2006, Judgment No 248/2006
http://www.haestirettur.is/domar?nr=3972

Principal facts and complaints

X appealed the decision of the District Court allowing the continued investigation into his alleged tax fraud, based on Law No.75/1981 on Income Tax and Property Tax, cf. Law No. 90/2003, Law No. 4/1995 on Municipal

Taxes and Article 262 of Law No. 31/1990, the General Penal Code.

His alternative claim was that the National Commissioner of the Icelandic Police be made to withdraw from the investigation. X based his main claim on the right to a fair trial as set out in the European Convention on Human Rights, cf. Law No. 62/1994. Firstly, X claimed that particular public statements made by the Icelandic Prime Minister, on the one hand, and the Minister of Justice, on the other, had violated the principle of his right to be presumed innocent until proved guilty according to law. Secondly, X claimed that the investigation had been unduly prolonged in violation of the principle of reasonable time and, thirdly, the investigation concerned an issue he had already been charged with and which had already been adjudicated, in violation of the *ne bis in idem* principle set out in Article 4 §1 of Protocol No. 7 to the European Convention on Human Rights. X based his alternative claim on the fact that the statements of two former Ministers implied that the National Commissioner of the Icelandic Police, as a subordinate of the Minister of Justice, could not be considered competent to lead the investigation and should therefore withdraw.

Findings of the court

The Court found that as police matters do not fall under the domain of the Prime Minister his statements about X could not lead to disqualification of the National Commissioner. The Minister's statements did not result in an interference with X's right to be presumed innocent until proved guilty according to law. The Minister of Justice's statements, although unsparing, could not lead to the National Commissioner being incompetent to lead an official investigation into the tax returns of X as Article 5 of the Police Act, read in conjunction with the provisions of Chapter IX of Law No. 19/1991 on Procedure in Criminal Cases, entails that the Commissioner does not fall under the domain of the Minister of Justice when he carries out the investigation.

On these grounds the Court also rejected X's claim that the statement of the Minister of Justice had resulted in an infringement of his right to be presumed innocent until proved guilty according to law.

As regards the alleged violation of *ne bis in idem* the Court found that Article 4 of Protocol No. 7 to the European Convention on Human Rights calls for a final decision regarding punishment. The decision on punishment in question was not final and therefore the current investigation was in accordance with the article.

The Court found that although parts of the investigation may have been unduly prolonged the Court should not rule on whether the delay should affect the fate of the investigation since a substantive determination on the consequences of the delay would be made in the decision on the case if a formal charge is laid against the defendant. Thus the Court confirmed the decision appealed against.

Concerns: Right to defence through legal assistance

Supreme Court

23 November 2006
Judgment No. 596/2006, http://www.haestirettur.is/domar?nr=4213

Principal facts and complaints

X appealed the decision of a District Court not to appoint him defence counsel during a criminal investigation. He asked that the decision of the District Court be rescinded and that the District Court appoint him defence counsel during the investigation. He based his claim on Article 6 §3 (c) of the European Convention on Human Rights (ECHR), cf. Law No. 62/1994, and Article 7-3 of Regulation No. 395/1997.

Findings of the court

The Supreme Court found that, despite Article 6 §3 (c) ECHR, the nature of the alleged crime, investigation and other factors did not justify a court-appointed defence counsel.

The Court confirmed the decision appealed against.

Article 8 of the Convention

Concerns: Privacy of phone calls

Supreme Court

29 December 2006
Judgment
No. 670/2006,
http://www.haestirettur.is/domar?nr=4293

Principal facts and complaints

S demanded that O and S be made to disclose information on all phone numbers using a particular GSM transmitter during a certain ten-hour period as part of a criminal investigation into the causes of a fire at a fish-factory. O and S claimed that the demand did not fulfil criteria set out in Article 86 and 87 of Law No. 19/1991 as there was no evidence to support the claim that a particular phone or transmitter had been used for criminal purposes. In addition, O and S claimed that the information requested was so extensive as to infringe the right to respect for privacy as set out in Article 71 of the Icelandic Constitution.

Findings of the court

The Court ruled in their favour finding that the demand for disclosure went beyond the authorisation provided in Article 86 and 87 of Law No. 19/1991 and the claim was therefore denied.

Concerns: Limits to freedom of expression

Supreme Court

1 June 2006
Judgment
No. 541/2005,
http://www.haestirettur.is/domar?nr=3949

Principal facts and complaints

J asked that an injunction she had been granted to prevent P publishing, in the newspaper F or other media, information she claimed had been unlawfully obtained from her e-mail account be upheld. She also asked that the sheriff's decision to seize certain documents that P had in his possession be upheld. She did however not make any claim regarding the rights to be protected with the injunction nor that the aforementioned materials be handed over to her. Therefore J's claim was considered contrary to Article 36-2 of Law No. 31/1990 on Internment and Injunction.

Findings of the court

The Court found it could only rule on whether formal and material requirements were satisfied for the injunction to be upheld. The Court found that the claim was too vague and broad to be upheld and that J's claim regarding the sheriff's decision could not be considered as the court could not rule on that claim standing alone.

J also asked that K, the editor of F, be found guilty of defamation and violation of her right to respect for privacy in accordance with Article 228-2 and 229-2 of Law No. 19/1940, the General Penal Code, the Constitution of the Republic of Iceland and Article 8 of the European Convention on Human Rights (ECHR), cf. Law No. 62/1994. The Court dismissed the claim under Article 228-8 since a description of a punishable act under the article was lacking. The Court found that F's writing regarded F's private matters as set out in Article 229-2 but ruled that the subject matter was of public interest and related to an issue much debated in public fora. Although F had revealed information on J's financial matters it was considered so intricately linked with the news story that it was impossible to omit. The Court found in favour of P, ruling that the breach of J's privacy had not been more onerous than necessary in a public debate on an issue of public interest. The Court found that reporting based on the materials had been normal, in accordance with the standards of professional journalism, and the newspaper had a positive right to publish the materials protected by Article 73 of the Icelandic Constitution and Article 10 ECHR. In any case, if e-mails are considered private property, irrespective of whether they concern private matters or not, then letters J had sent should be considered the property of the person receiving them not hers, and the right to bring an action before the courts belonged to the recipient and not the sender.

Therefore there had been sufficient reasons to justify the publication of K's writing, in accordance with Article 228-2, and K was thus acquitted.

Articles 14 of the Convention and 1 of Protocol No. 1

Concerns: Compensation for disability due to a car accident

Findings of the court

The Court found that damages for disability of drivers could not be calculated differently from the other physical injuries.

Supreme Court, 15 June 2006, Judgment No. 19/ 2006 http:// www.haestirettur .is/domar? nr = 3993

Italy/Italie

Article 1 de la Convention

Concerne : Force exécutoire de la Convention européenne des Droits de l'Homme

Cour de Cassation, Assemblée plénière des chambres civiles

Conclusions de la cour

La Loi n° 848 du 4 août 1955, qui a ratifié et donné force exécutoire à la Convention européenne des Droits de l'Homme, a introduit dans le système normatif de l'Etat une série de droits fondamentaux d'application immédiate.

Les normes de la Convention créent des droits subjectifs des citoyens, en tant que destinataires directs. Par conséquent le juge interne doit s'abstenir d'appliquer la norme interne prévoyant un comportement non conforme.

La Convention a une incidence sur le droit interne en termes, également, d'interprétation des lois précédentes et successives

Le droit à une satisfaction équitable due au citoyen pour violation des principes du procès équitable trouve sa source à la fois dans les normes de la Convention et dans la loi nationale

Note :
La décision de l'assemblée plénière de la Cour de Cassation réaffirme sans équivoque la pré-éminence des normes de la Convention à l'égard du système juridique interne. Quelques auteurs ont déjà fait observer que le principe énoncé par l'Assemblée, pour la première fois d'une façon claire, ne manquera pas de produire des effets directs sur toute la gamme des droits garantis par la Convention dans ses divers aspects.

En même temps la Convention aura une fonction « d'aiguillon » (selon un auteur), stimulant la reconnaissance de certaines positions personnelles et collectives ayant une valeur sociale prééminente.

23 décembre 2005
arrêt n° 28507
Giurisprudenza italiana 2006 (octobre), p. 1902
Il Foro italiano, 2006, no 9, 1ère partie, p. 2314
Famiglia Diritto, 2006, n° 5, p. 46
Famiglia, 2006, nos 4-6, p. 931

Articles 1 de la Convention et 1 du Protocole n° 12

Concerne : Principe de l'égalité dans le bénéfice des services d'assistance sociale et sanitaire

Cour Constitutionnelle

Conclusions de la cour

En réservant la gratuité des transports collectifs aux personnes invalides de nationalité italienne, l'Article 8 de la loi n° 1 du 12 janvier 2002 de la région de Lombardie viole les Article 3, 32 et 117 de la Constitution, qui disposent que tous les citoyens sont égaux, sans distinction de conditions personnelles et sociales et que la santé est protégée en tant que droit fondamental de tout individu. Le décret législatif n° 28 du 25 juillet 1998, selon lequel les étrangers titulaires d'un permis de séjour sont assimilés aux citoyens pour ce qui concerne l'assistance sociale accordée aux invalides, a été violé.

2 décembre 2005
arrêt n° 432
I diritti dell'uomo, 2006, n° 1, pp. 69 et 109
Giurisprudenza costituzionale, 2005, n° 6, 1ère partie, p. 617
Giurisprudenza italiana, 2006, n° 12, p. 2252

L'exclusion de l'étranger est arbitraire et contraire à la logique de la solidarité sociale. Le droit d'une personne atteinte d'invalidité de bénéficier d'un service sanitaire doit être reconnu aux étrangers, même si leur présence sur le territoire de l'Etat est illégitime.

Note :

L'importance de l'arrêt réside dans l'affirmation que le principe de l'égalité de tous les citoyens, sans distinction de conditions personnelles et sociales, fait partie, pour ce qui concerne le service d'assistance sociale, d'un « noyau dur » intangible, qui s'étend aux personnes n'ayant pas la nationalité du pays. Le terme « noyau dur », forgé par la doctrine, est désormais devenu courant dans le monde judiciaire. Par conséquent, il est interdit au législateur régional, tout comme aux autorités étatiques d'appliquer une différence de traitement fondée sur l'origine nationale ou le droit de cité lorsqu'il s'agit de régler l'exercice d'un droit fondamental tel que le service d'assistance sociale.

Articles 2 et 8 de la Convention

Concerne : Changement du nom d'un enfant auquel a déjà été attribué celui de sa mère naturelle

Cour de Cassation

26 mai 2006
arrêt n° 12641
Giustizia civile, 2006, n° 9, p. 1698
Il foro italiano, 2006 n° 9, 1ère partie, p. 2314
Famiglia diritto, 2006, n° 5, p. 46
Famiglia, 2006, nos 4-6, p. 931

Conclusions de la cour

L'attribution tardive à un mineur du nom de son père naturel en substitution à celui de la mère, attribué par l'état-civil au moment de sa naissance, refuse tout automatisme, cause parfois des discriminations et la méconnaissance de valeurs ayant une importance fondamentale pour le futur de l'enfant.

Le juge saisi par le père naturel d'une demande d'attribution de son nom doit tenir compte de l'identité personnelle du mineur dans le milieu où il vit, prévoir les effets positifs ou négatifs du changement – d'ordre moral, économique et physique – en ayant recours à une évaluation des perspectives futures de l'enfant, sur la base de la situation présente. En revanche, l'enfant légitime prend le nom de son père. La loi adopte un automatisme auquel il ne peut être dérogé.

Le nom ne revêt pas seulement une fonction d'identification de la personne, mais constitue aussi l'expression de l'identité personnelle, l'appartenance à une famille – éléments distinctifs de la personnalité et auxquels on ne peut renoncer – et qui font l'objet d'un droit autonome, protégé par les Article 2 et 22 de la Constitution.

Le point de départ doit être la prise en considération de la volonté exprimée par les deux parents, en position d'égalité, même s'ils ne sont pas mariés.

Note :

L'arrêt de la Cour de Cassation constitue une expression typique du changement de la jurisprudence qui, depuis plusieurs années, a abandonné la conception patriarcale de la famille, ancrée dans la tradition, d'après laquelle l'enfant prend le nom de son père. L'Article 262 du Code civil affirme que dans l'hypothèse d'un mineur, c'est au juge de décider sur la requête de son père. La Cour complète l'interprétation en réaffirmant l'application des valeurs constitutionnelles de l'égalité morale et juridique et d'égale dignité des parents, même s'ils ne sont pas mariés. La Cour met aussi l'accent sur la considération que la protection du mineur est prédominante pour le juge, au-dessus des buts des parents, ce qui comporte le devoir d'éviter de créer des situations difficiles, nuisibles au développement de l'enfant.

Article 5 de la Convention

Concerne : Libération conditionnelle

Cour Constitutionnelle

4 Juillet 2006
arrêt n° 254
Diritto penale e processo, 2006, n° 10, p. 1231

Conclusions de la cour

L'Article l de la loi du 4 avril 2003 sur le bénéfice de la libération conditionnelle prévoit que le juge chargé de surveiller l'exécution des peines de détention doit concéder au détenu qui a purgé la moitié de la peine le sursis conditionnel du reste de la peine, pour une période de deux ans. Cette mesure est applicable à toutes les personnes condamnées, sans tenir compte de leur comportement. Si la personne condamnée a été admise à bénéficier d'une mesure alternative

à la détention, le bénéfice du sursis n'est pas applicable.

L'automatisme viole les Article 3 et 27 de la Constitution étant donné que le même traitement est réservé à des situation différentes et méconnaît le pouvoir discrétionnaire que la loi confie au juge de l'application des peines, ayant la tâche – en vertu d'un principe général auquel il ne peut être dérogé – de moduler l'application de la sanction en fonction de critères punitifs mais aussi de resocialisation et de reclassement, les deux étant applicables suivant un critère de proportionnalité et d'individualisation.

Note :
La jurisprudence de la Cour Constitutionnelle ne s'est jamais opposée à reconnaître le droit de la personne condamnée à l'octroi d'un bénéfice prévu par la loi, mais elle attire l'attention du législateur sur la fonction rééducative de la peine, énoncée par l'Article 27 de la Constitution. Ce but doit être poursuivi par le juge de l'application des peines, auquel la loi confie une tâche délicate, exigeant expérience et capacité d'évaluer les différentes situations.

Lorsqu'il s'agit d'octroyer un bénéfice, l'égalité de traitement risque de favoriser ceux qui ne sont pas susceptibles d'être rééduqués, donc de créer des inégalités de traitement. On dit couramment que la peine a une double fonction afflictive et répressive mais aussi rééducative et devant favoriser l'exigence de vivre dans le respect des autres citoyens.

Concerne : Durée de détention préventive supérieure à celle de la peine infligée

Cour de Cassation, Assemblée plénière des chambres pénales

19 juillet 2006
arrêt n° 25084
Diritto penale e processo, 2006, n° 10, p. 1212

Conclusions de la cour

L'Article 314, 1er et 3e alinéas, du Code de procédure pénale exclut le droit au dédommagement des personnes qui ont été soumises à une période de détention préventive pour une durée supérieure à la peine infligée par l'arrêt prononcé à la conclusion du procès. Le droit au dédommagement est reconnu seulement si l'inculpé est acquitté ou relaxé ou l'affaire classée.

La norme viole le principe de la rétribution et de l'individualisation de la peine, en vertu duquel la privation de la liberté personnelle doit être proportionnée à la gravité des violations constatées.

Le surplus est illégitime, quelle que soit la décision du juge à la clôture du procès, et viole les Article 3 et 24 de la Constitution, les engagements pris par l'adhésion aux conventions internationales, telles que la Convention européenne des Droits de l'Homme (Article 5) et l'Article 9 des Pactes internationaux relatifs aux droits de l'homme, aux termes desquels une réparation est due sans limitations en cas de détention ou arrestation illégitime.

Note :
Article 3 de la Constitution : Il appartient à la République d'éliminer les obstacles limitant la liberté et l'épanouissement de la personne.

Article 24 de la Constitution : La loi détermine les conditions et les modalités relatives à la réparation des erreurs judiciaires.

La décision de l'assemblée plénière de la Cour revêt une importance remarquable. La doctrine avait déjà relevé, plus d'une fois, le problème des peines prononcées d'une durée inférieure à la période passée en détention préventive.

La détention peut souvent influer négativement sur la personne sur le plan moral ou physique, ou rendre difficile la réinsertion dans la société. Il revient à la sagesse du juge d'en évaluer les conséquences et d'y remédier de façon adéquate.

Articles 5 et 6 de la Convention

Concerne : Protection des droits de la personne inculpée faisant l'objet d'une demande d'extradition

Cour de Cassation

26 septembre 2005
arrêt n° 34355
Giurisprudenza italiana, 2006, n° 1, p. 12
Cassazione penale, 2006, n° 10, p. 3145

Conclusions de la cour

Le juge italien, lorsqu'il est saisi par les autorités belges d'une demande de remise de l'auteur d'une infraction déjà frappé d'un mandat d'arrêt, doit vérifier non seulement la portée des accords qui lient l'Etat italien à la Belgique en vertu de la Convention européenne d'extradition et des accords de coopération intervenus dans le domaine de la Communauté européenne, mais également les indices de culpabilité qui justifient la privation de la liberté personnelle et la détention préventive à la lumière des principes énoncés par la Convention européenne des Droits de l'Homme, et particulièrement par son Article 5.

Il s'agit d'une évaluation « autonome », faisant abstraction des liens contractuels de l'Etat, en vertu desquels il faut tenir compte du contenu du dossier transmis par l'autorité requérante et de l'acte d'accusation formulé.

Il n'est pas nécessaire que les garanties en vigueur dans l'Etat requérant soient les mêmes qu'en Italie. Il suffit que le système juridique, dans son ensemble, assure une protection effective des droits de la personne inculpée, au même degré que celui prévu par la Convention.

Note :
La Cour de Cassation aborde pour la première fois, ex professo, le problème de l'application de la Convention européenne en matière d'extradition. L'arrêt a attiré l'attention d'un bon nombre d'auteurs, qui, au cours de l'année 2006, ont publié des articles sur le même sujet. L'arrêt de la Cour marque une nouvelle étape dans l'attention accrue portée par les juges, de fait et de droit, à la Convention chaque fois qu'il s'agit de vérifier l'incidence d'un droit énoncé par celle-ci sur une situation réglée par le droit interne ou sur les relations entre la Convention et les obligations internationales contractées par l'Etat.

Concerne : Coexistence d'un arrêt de la Cour européenne des Droits de l'Homme et d'un arrêt interne ayant acquis l'autorité de la chose jugée

Cour de Cassation

22 septembre 2005
arrêt n° 17208
La Giustizia penale, 2006, n° 4, p. 210
Cassazione penale, 2006, n° 10, p. 3145

Conclusions de la cour

Une fois que la Cour européenne des Droits de l'Homme a décidé que le juge national a violé l'Article 6 de la Convention – en l'espèce pour avoir condamné l'accusé après avoir estimé par erreur que son absence aux débats était injustifiée – l'accusé a le droit de saisir le juge compétent et de faire décider, aux termes de l'Article 5 de la Convention européenne des Droits de l'Homme, par un procédure en chambre de conseil, si l'exécution doit être confirmée ou suspendue, même si l'arrêt du juge national est devenu irrévocable.

Note :
La Cour de Cassation aborde ex professo, pour la première fois, le problème de la coexistence d'un arrêt de la Cour européenne et d'un arrêt du juge national ayant acquis l'autorité de la chose jugée. Désormais, il est incontestable que les normes de la Convention, introduites dans le système national, aient force de loi, en vertu de l'Article 696 du Code de procédure pénale, non susceptibles d'abrogation ou de modifications.

La Cour a reconnu le droit de l'accusé de faire valoir, en droit interne, la violation de son droit à la défense en faisant recours à un incident d'exécution au moment de recevoir le mandat d'arrêt décerné par le Ministère public.

Concerne : Critère de la double proportionnalité en matière de détention provisoire

Cour Constitutionnelle

5 juin 2006
arrêt n° 223
Diritto e Giustizia, 2006, n° 30, p. 51

Conclusions de la cour

Aux termes de l'Article 303 du Code de procédure pénale, la durée de la détention préventive est proportionnelle à la gravité de la violation imputée. En revanche, si le calcul de la durée est fait lors du déroulement de la procédure, le critère abstrait doit être remplacé par le calcul de la peine que le juge du premier ou second degré ont appliquée lorsque les débats ont permis d'obtenir une preuve plus sûre, sinon définitive, de la violation commise.

Le critère de la double proportionnalité s'inspire de l'exigence d'adapter la durée de la détention, autant que possible, à l'entité des faits constatés. Il s'agit d'une évaluation raisonnable, qui ne viole pas les principes de justice et de respect de la personnalité de l'accusé, mais également le droit de ne pas subir une détention dépassant les limites conseillées par la gravité des faits imputés, éléments indispensables pour un procès équitable, ancien Article 111 de la Constitution. Il faut, par conséquent, exclure une violation des Article 3 et 13 de la Constitution, aux termes desquels, selon l'interprétation de la jurisprudence, la durée doit être déterminée par l'exigence d'éviter, suivant les circonstances, que le laps de temps nécessaire à la définition de la procédure (i) puisse entraver le constat des faits imputés (ii) ou que les conséquences de la violation soient aggravées (iii) ou que l'accusé puisse commettre d'autres violations.

Articles 5 et 46 de la Convention

Concerne : Conséquences d'un arrêt de la Cour européenne des Droits de l'Homme reconnaissant une violation sur une décision interne ayant acquis l'autorité de la chose jugée

Cour de Cassation

3 octobre 2005
arrêt n° 35616
Giurisprudenza penale, octobre 2006, p. 1935
Cassazione penale, 2006, n° 10, p. 3171

Conclusions de la cour

La Cour européenne a déclaré que le juge italien avait violé l'Article 6 de la Convention européenne des Droits de l'Homme pour avoir méconnu le droit à la défense lors la phase d'appel.

L'accusé, détenu en vertu d'un mandat d'arrêt émis à la suite du rejet de l'appel et du pourvoi, a soulevé un incident d'exécution à la Cour d'appel de M., avançant l'illégitimité de la détention. Toutefois, la Cour a déclaré inadmissible le recours par une ordonnance adoptée de plano, en chambre de conseil, sans avoir convoqué l'intéressé, en considérant que l'arrêt par lequel il avait été condamné avait acquis l'autorité de la chose jugée.

La Cour casse l'ordonnance de rejet, étant donné que la détention était devenue illégitime à la suite de l'arrêt de la Cour européenne ; par conséquent, il avait le droit d'être convoqué et entendu avec la garantie de la contradiction. La violation des règles du procès équitable a une incidence directe sur le système interne, même si la décision qui a infligé la peine de détention a acquis l'autorité de la chose jugée. La Cour d'appel devait, par conséquent, décider en contradiction si le principe énoncé par la Cour de Strasbourg pouvait empêcher la continuation de la détention, comme requis par l'intéressé.

Note :

L'arrêt de la Cour de Cassation reconnaît que les décisions de la Cour européenne affirmant la violation d'un droit fondamental doivent avoir une incidence directe sur le système interne de l'Etat partie à la Convention, comme il est expressément dit à l'Article 46 de la Convention, lorsqu'il affirme que les Etats « s'engagent à se conformer aux arrêts définitifs de la Cour ».

L'attribution d'une somme à titre de satisfaction équitable est souvent un remède tout-à-fait subsidiaire pour une personne qui purge une longue peine restrictive de la liberté.

La Recommandation du Comité des Ministres adoptée en 2000 donne aux Etats parties la liberté de choisir les méthodes plus opportunes, en même temps qu'elle affirme que la réouverture de la procédure constitue parfois la meilleure manière d'assurer la restitutio in integrum. En l'état, en cas de décision irrévocable, la loi ne prévoit aucun recours qui déciderait si l'exécution doit être interrompue ou si l'on peut rouvrir la procédure.

Un projet présenté au Sénat prévoit la réouverture de la procédure si la satisfaction se révèle insuffisante.

Article 6 de la Convention

Concerne : Suppression de la phase préliminaire de l'action en recherche et reconnaissance de filiation naturelle

Cour Constitutionnelle

10 février 2006, arrêt n° 50
Giurisprudenza civile, 2006, n° 4-5, p. 763
Il Foro italiano, 2006, n° 4, 1ère partie, p. 966
Giurisprudenza costituzionale, 2006, n° 1, p. 446
Il diritto di famiglia e delle persone, 2006, n° 2, p. 449

Conclusions de la cour

Selon l'Article 274 du Code civil, l'action en recherche et reconnaissance de maternité ou de paternité naturelle ne peut être intentée sans qu'ait été obtenu, au préalable, un décret motivé d'admissibilité de l'action par le tribunal qui rendra, par la suite, la décision définitive. Une telle disposition viole les Article 3, 24 et 111 de la Constitution, lesquels affirment le droit de tout citoyen d'obtenir une décision judiciaire à l'issue d'une procédure contradictoire menée dans des conditions d'égalité et dans le respect du délai raisonnable, devant un juge impartial. La norme prévoit une procédure préliminaire ayant pour but d'obtenir l'acquisition des éléments de preuve favorables au demandeur – un fumus boni iuris – un commencement de preuve propre à justifier le passage à la deuxième phase, laquelle aboutit à un arrêt. Il s'agit d'une duplication injustifiée, étant donné que les progrès de la science permettent d'acquérir les éléments de preuve de la filiation naturelle dans un délai très bref.

De par son caractère sommaire, la phase préliminaire se prête à des manœuvres dilatoires visant à faire gagner du temps à ceux qui s'opposent à la demande, en violation du principe du délai raisonnable.

La suppression de la phase préliminaire n'empêche pas le tribunal de procéder à une enquête approfondie, assortie de toutes les garanties prévues par la défense.

Note :
La procédure préliminaire est un résidu des préventions à l'égard de la filiation hors mariage, une époque révolue, « une branche desséchée ».

L'expression employée par l'arrêt de la Cour Constitutionnelle suffit à rappeler qu'aux termes de l'Article 274 l'enquête préliminaire se déroule sans aucune publicité et le tribunal doit « garder le secret ». Le scrupule moral qui avait guidé le législateur du vingtième siècle a imposé une série de mesures de prudence, ancrées dans la tradition. Le Code civil édicté en 1942 avait conservé les vieilles caractéristiques, qui rendaient la procédure longue et complexe, alors que rien n'empêche que le tribunal qui sera compétent également pour la phase définitive ait recours à toutes les mesures à même de donner des certitudes du fait de l'évolution de la science.

Concerne : Action en désaveu de paternité et preuve de l'adultère

Cour Constitutionnelle

6 juillet 2006 arrêt n° 266
Giustizia civile, 2006, n° 9, p. 1672
Il Foro italiano, 2006, n° 7, 1ère partie,
« Nouveautés »
Famiglia Diritto, 2006, n° 5, p. 461
Corriere giuridico, 2006, n° 10, p. 1367

Conclusions de la cour

Aux termes de l'Article 235, al. 1, du Code civil, l'action en désaveu de paternité est admise uniquement après que la preuve de l'adultère de la femme ait été acquise. L'action peut également être intentée par l'enfant qui a atteint la majorité.

Par conséquent, même si une enquête génétique ou hématologique accomplie a démontré le bien fondé de la demande de l'auteur de la demande, le juge ne peut passer à l'examen de l'action en désaveu.

La norme viole les Article 3, 24 et 111 de la Constitution (justiciabilité de l'égalité des droits, charge pour l'Etat d'éliminer les obstacles limitant l'égalité) étant donné qu'en vertu des progrès de la médecine les deux enquêtes sont à même, à elles seules, de donner des certitudes qui rendent inutile la preuve de l'adultère. La norme n'indique aucune autre solution pour obtenir un prononcé de désaveu ; la recherche préventive de la preuve de l'adultère constitue seulement un empêchement ou un délai au droit de saisir la justice pour faire déclarer un déni de paternité, sanctionnés par l'Article 24 de la Constitution.

Note :
La Cour Constitutionnelle, une nouvelle fois, annule un norme qui appartient au passé; lorsque la science ne disposait pas des moyens techniques à même de donner des certitudes sur la filiation. La Cour de Cassation, il y a vingt ans, sans doute consciente de la situation, avait affirmé que le résultat d'un expertise constituait « un élément de conviction ».

Plus d'un auteur, déjà avant la fin des années 90, avaient souligné l'opportunité d'abandonner une règle qui n'était plus adaptée à notre époque, mais la classe politique n'avait pris aucune initiative. La première section civile de la Cour de Cassation a enfin soulevé la question de la légitimité de l'Article 235 du Code civil, défini comme une « hérédité déraisonnable de la tradition ».

Concerne : Evaluation du dommage dû aux proches d'une personne tuée à la suite d'un acte criminel

Cour de Cassation

15 juillet 2006
arrêt n° 15022
Il Foro italiano, 2006, n° 5, 1ère partie, p. 1344

Conclusions de la cour

La mort d'une personne tuée par un acte criminel pose depuis longtemps des problèmes d'évaluation du dédommagement dû aux parents proches. La jurisprudence a évolué, prenant en compte l'importance progressive attribuée aux valeurs « morales » de la personne humaine, dans la société moderne.

Le dommage subi peut causer un préjudice patrimonial, mais très souvent il touche les liens affectifs découlant de la solidarité familiale et de l'activité déployée au sein du groupe social dans lequel vivait la victime.

L'évaluation du montant du dommage comporte également un examen des perspectives d'avenir de la partie lésée, perturbée par la perte du parent proche, éléments qui font souvent abstraction des considérations patrimoniales et rentrent dans la catégorie des dommages « existentiels », avec des conséquences sur les différents aspects de la personne comme les habitudes quotidiennes, les exigences de vie, les chances de succès dans le milieu où elle vit. L'évaluation de cet ensemble d'éléments est confiée à la prudence et à la perspicacité du juge saisi, qui fait nécessairement usage de son pouvoir discrétionnaire.

Note :
Un certain nombre d'articles de la Constitution italienne, de la Convention européenne des Droits de l'Homme et des Pactes internationaux relatifs aux droits de l'homme ont mis l'accent sur l'importance des valeurs morales des personnes ayant fortement influencé la jurisprudence nationale. Ainsi, est reconnue l'existence du dommage existentiel, qui, faisant abstraction de la perte patrimoniale, tient compte des souffrances causées par des événements qui touchent la sphère affective dans ses différents aspects, la possibilité de cultiver des relations, de poursuivre un train de vie auquel on était habitué, parfois d'entretenir et faire instruire ses enfants, de jouir d'une parité morale et juridique dans les sphères sociales où s'exerce la personnalité.

L'arrêt de la Cour de Cassation confirme la tendance à valoriser la perte de certaines valeurs qui ont une grande importance pour pouvoir mener une vie normale dans la société moderne.

Concerne : Droit de la partie civile d'attaquer les décisions au seul effet de la responsabilité civile

Cour de Cassation

4 juillet 2006
arrêt n° 22924
Diritto e Giustizia, 2006, n° 33, p. 61

Conclusions de la cour

Aux termes de l'Article 576 du Code de procédure pénale, édicté en 1988, la partie civile a le droit d'attaquer les jugements dans le but de voir affirmé son droit au dédommagement refusé pour ce qui concerne l'action civile.

La loi n° 46/2006, qui a apporté une série de modifications, confirme le droit du prévenu et du ministère public d'attaquer le jugement sans se référer à la partie civile. Le vide législatif ne rend pas inapplicable le principe énoncé par l'Article 576 (non modifié par la nouvelle loi) qui, sans se référer explicitement au moyen de recours, affirme le droit de la partie civile d'attaquer les décisions « au seul, effet de la responsabilité civile », en ayant recours aux mêmes moyens que ceux mis à la disposition du Ministère public.

En vertu du principe général énoncé par les Article 24 et 111 de la Constitution, il est reconnu à chacun le droit d'ester en justice pour faire valoir ses droits, donc de présenter un recours contre les décisions qui causent un préjudice.

L'absence de mention du droit de la partie civile de faire appel ou de se pourvoir, non accompagnée de l'interprétation extensive de l'Article 176, méconnaîtrait une garantie fondamentale, sans justification raisonnable.

Note :
Plus d'un auteur avait remarqué le vide laissé par le législateur. La Cour de Cassation, gardienne de la légalité, a eu recours à une interprétation qui sera certainement appréciée dans le monde des juristes. Un principe fondamental pour les droits de la partie civile, qui concourt à réaliser un procès équitable a été rétabli. L'interprétation des principes énoncés par la Constitution peut remplir un vide laissé par le législateur.

Concerne : Prorogation de la phase de l'enquête préliminaire en cas de coupables non identifiés

Cour de Cassation, Assemblée plénière des chambres pénales

12 avril 2006
arrêt n° 13040
Diritto penale e processo, 2006, n° 10, 1ère partie, p. 1240
Cassazione penale, 2006, n° 7-8, p. 2357

Conclusions de la cour

Le juge des enquêtes préliminaires a le pouvoir d'autoriser, aux termes de l'Article 406 du Code de procédure pénale, une prorogation de la phase des recherches préliminaires quand le coupable a été identifié.

Rien n'est prévu pour les coupables non identifiés, mais la même règle doit être considérée comme applicable étant donné que l'Article 415 du Code de procédure régissant les recherches à l'égard des coupables inconnus énonce le principe général d'après lequel les règles dictées pour les coupables sont applicables « autant que possible » à toutes le procédures. On peut en déduire que les recherches préliminaires, quelle que soit la situation, peuvent être prorogées par le juge des enquêtes préliminaires qui aura le pouvoir de contrôler le déroulement des poursuites jusqu'à la phase du jugement.

Note :

L'interprétation de l'assemblée plénière de la Cour revêt une importance pratique remarquable pour l'accélération de la marche de la justice pénale.

Jusqu'à présent, en raison du silence de la loi, les prorogations étaient autorisées pour une période indéfinie et restaient sans contrôle. Conséquence inévitable : des milliers d'affaires pendantes pour des longues périodes, des délais excessifs, un encombrement des bureaux judiciaires, l'impossibilité pour les juges des enquêtes préliminaires d'exercer un contrôle effectif.

Les bénéfices concrets devraient apparaître dans un proche futur. Certains juges ont déjà exprimé une opinion concordante lors d'un colloque qui s'est tenu au mois d'octobre 2006 à Bologne.

Concerne : Transfert des actes de la procédure à un autre juge

Cour Constitutionnelle

21 avril 2006
arrêt n° 168
La Giustizia penale, 2006, n° 7, 1ère partie, p. 211
Cassazione penale, 2006, n° 2, p. 3190
Giurisprudenza costituzionale, 2006, vol. 2, p. 1489

Conclusions de la cour

Aux termes de l'Article 45 du Code de procédure pénale, la Cour de Cassation, sur requête du Procureur général, peut décider, à titre exceptionnel, le transfert d'un procès au juge d'un autre ressort s'il y a un danger de trouble à la sécurité publique à cause d'une situation perturbée ou d'une menace à la liberté d'expression de ceux qui participent aux débats.

La partie civile n'est pas autorisée à présenter une telle demande, en raison de sa position marginale dans le procès.

La norme ne viole pas les Articles 3 et 24 de la Constitution, aux termes desquels tous les citoyens sont égaux devant la loi et il est reconnu à tous le droit d'ester en justice pour la défense de ses droits.

Le législateur a justifié la « translatio judicii » à titre d'exception dérogeant au principe général énoncé par l'Article 25 de la Constitution – « nul ne peut être soustrait au juge désigné par la loi » – compte tenu de la position différente des acteurs de la procédure.

Note :

La Cour affirme la légitimité de l'Article 45 du Code de procédure pénale, après avoir considéré le rôle joué par la partie civile en tant que partie « non nécessaire » du procès. Sans doute le législateur a-t-il le pouvoir d'établir une mise en balance des situations et de donner priorité au juge dans le but de le rendre libre de toute influence négative. Cependant, selon l'avis d'une partie de la doctrine, il semble indéniable que la personne qui a subi un préjudice corporel, financier ou moral, a un intérêt direct et actuel à profiter du déclenchement de l'action pénale. Souvent la mise en mouvement de l'action publique peut revêtir une importance remarquable même sur le plan social. La partie civile ne joue pas toujours un rôle secondaire.

Concerne : Droit du défenseur de collecter des éléments de preuve en faveur de son client

Cour de Cassation, Assemblée plénière des chambres pénales

27 juin 2006
arrêt n° 32009
Diritto e Giustizia, 2006, n° 37, p. 44

Conclusions de la cour

Pendant la phase des enquêtes préliminaires, le défenseur est autorisé à interroger un témoin et verbaliser ses déclarations, ce qui lui permet de collecter des éléments de preuve qui acquièrent la même valeur probatoire que les actes du Ministère public. Une fois dressé et signé par le défenseur, le procès verbal devient un « acte public », qui fait foi de son contenu. Dans la rédaction du document, le défenseur exerce la fonction d'« officier public »

Les déclarations collectées peuvent être utilisées dans la phase préliminaire de la poursuite ou lors des débats contradictoires pour compléter la preuve, contester la déposition d'un témoin ou le contenu des pièces à conviction jointes aux actes de la procédure.

Le défenseur n'est pas obligé de faire usage du document, mais s'il décide de s'en servir, il pourra être accusé de faux intellectuel au cas où le document ne reproduirait pas fidèlement les déclarations faites.

L'exigence de protéger tous les acteurs de la procédure impose une garantie d'authenticité et d'impartialité. Une violation quelconque de la véridicité de la verbalisation peut mettre en danger le caractère équitable, élément essentiel de tout procès pénal.

Note :
L'assemblée plénière de la Cour de Cassation aborde, pour la première fois, ex professo, dans un langage concis et efficace, les problèmes posés par le droit du défenseur de collecter des éléments de preuve en faveur de son client, comme cela est prévu dans les systèmes anglo-saxons.

La délicatesse et l'importance de la fonction imposent une garantie absolue de véracité. La motivation de la Cour est, clairement, de mettre en évidence trois points essentiels pour que soient menées correctement les activités de défenseur : (i) la gravité des conséquences d'un faux pour les parties au procès, qui doivent être protégées ; (ii) la mise en danger du caractère équitable du procès, auquel on ne peut déroger ; (iii) la possibilité d'une incrimination pour le défenseur. Ces trois éclaircissements sur la bonne application de la loi constituent trois avertissements.

Concerne : Limitation des droits de la défense devant la chambre du conseil de la Cour de Cassation

Cour de Cassation

27 mai 2005
ordonnance
n° 11315
Il Foro italiano, 2006, n° 2, 1ère partie, p. 504

Conclusions de la cour

L'Article 375 du Code de procédure civile exclut le droit des défenseurs d'être entendus à l'audience qui a lieu en chambre du conseil devant la Cour de Cassation pour la détermination du juge qui sera compétent pour décider sur une controverse.

La norme ne viole pas les droits de la défense compris dans le principe du procès équitable énoncé par les Article 111 de la Constitution et 6 de la Convention européenne des Droits de l'Homme étant donné que les défenseurs, après avoir été informés de la date de l'audience et des requêtes du ministère public, ont toujours un laps de temps suffisant pour échanger leurs mémoires respectifs et répliquer avant l'audience.

Le législateur poursuit le but de favoriser la rapidité de la procédure et la possibilité de présenter des mémoires et de répliquer, sauvegardant ainsi le respect du droit de la défense à la contradiction.

Note :
Dans cet arrêt, la Cour limite le droit à la contradiction et à la défense orale, amplement admis par la jurisprudence, sans aucune exception.

Une partie de la doctrine a manifesté son approbation, mais une autre partie, en revanche, a objecté que la défense a le droit d'être entendue jusqu'au moment de la décision, car de nouveaux éléments peuvent résulter de la contradiction jusqu'au moment de la décision.

Il a été fait observé que la partie pourra, en tout cas, attaquer la décision lorsqu'elle lui sera notifiée, mais il semble indéniable que la possibilité de décider en chambre du conseil peut éviter un prolongement de la procédure, donc son alourdissement, toujours source de frais et dépens ultérieurs et d'un état d'incertitude contraire au principe du délai raisonnable.

Tôt ou tard la Cour sera à nouveau saisie de la question et un débat plus approfondi sur le sujet reprendra certainement.

Concerne : Exception d'incompétence ratione loci soulevée par un litisconsort en désaccord avec les autres litis

Cour Constitutionnelle

8 février 2006
arrêt n° 41
Giurisprudenza costituzionale, 2006, n° 1, p. 333
Rivista di diritto processuale, 2006, n° 3, p. 1083

Conclusions de la cour

Aux termes des Articles 38 et 102 du Code de procédure civile, le défenseur litisconsort dans un litige qui a pour objet que la procédure soit transférée ratione loci à un autre juge indiqué in abstracto par la loi comme compétent a le droit d'obtenir une décision sur le fondement de son exception déclinatoire de la compétence du juge saisi, même si les autres parties ne sont pas d'accord avec la requête.

C'est ainsi qu'il faut interpréter la loi. Au cours du XX^e^ siècle, l'exigence d'éviter deux décisions sur la même question a prévalu afin d'éviter le risque d'une pluralité de décisions. Par conséquent, les Codes de procédure qui se sont succédés ont prévu la non-recevabilité de l'exception du litisconsort une fois qu'un juge a été saisi, avec pour conséquence le sacrifice de l'intérêt de la partie qui est seule à soulever l'exception, contre l'avis des autres. Ceci entraîne une violation des droits de la défense et du droit de ne pas être soustrait au juge naturel désigné par la loi *in abstracto*, énoncés, respectivement, par les Article 24 et 25 de la Constitution.

Dans les litiges de nature civile, sauf si la loi impose exceptionnellement une compétence indérogeable d'ordre public, au for conventionnel, il peut être dérogé au for prévu in abstracto par la loi si toutes les parties intervenant dans la procédure se mettent d'accord ; sinon, on doit reconnaître le droit de la partie de faire vérifier si la compétence établie par la loi est fondée.

Note :
L'arrêt de la Cour sanctionne indirectement des hypothèses qui peuvent donner lieu à des abus, par exemple lorsque les parties se sont mises d'accord pour saisir un juge d'une ville plus proche ou d'accès plus facile, raisons qui ne sont pas toujours de simple opportunité.

La règle générale du *simultaneous processus* pour la même question impose sans doute le sacrifice des intérêts de certaines parties au procès, mais il est aussi indéniable que suivant un principe fondamental affirmé par l'Article 25 de la Constitution « nul ne peut être soustrait au juge naturel désigné par la loi ».

La compétence ratione loci, quand on ne peut y renoncer, peut souffrir des dérogations, mais il relève de la prudence et de la sagesse du juge saisi de décider sur les déclinatoires et de vérifier l'opportunité de se conformer ou de déroger à la règle du *simultaneous processus*.

Le simple refus d'évaluer la requête de la partie qui soulève l'exception constitue, aux yeux de la Cour, une violation de la Constitution.

Concerne : Reconnaissance des arrêts étrangers de divorce

Cour de Cassation

25 juillet 2006
ordonnance n° 16978
Il Foro italiano, 2006, n° 10, p. 2699
Il Corriere giuridico, 2006, n° 10, p. 1349

Conclusions de la cour

La contestation sur la possibilité de reconnaître un arrêt étranger de divorce, déféré à la Cour d'appel compétente ratione loci après son inscription dans les registres de l'état-civil, comprend un examen des conditions de légitimité de la décision, énoncées par l'Article 64 de la Loi n° 218 315/-1995 sur le système de droit international privé. L'arrêt étranger ne peut être considéré contraire à l'ordre public dans le cas où les modalités de notification ou de communication de l'acte introductif d'instance ne sont pas conformes aux modalités prévues par la loi italienne, à condition que les règles en vigueur dans le lieu où la procédure s'est déroulée et les règles concernant la contradiction aient été respectées.

Dans l'hypothèse d'un divorce par consentement mutuel, il faut avoir la preuve que les époux ont exprimé leur libre volonté de la dissolution du lien. Ceci exclut la violation du principe du respect de l'ordre public interne – condition essentielle pour accorder l'exequatur. De même, l'ordre public n'est pas violé si la décision de divorce a été précédée par une séparation de corps, comme la loi l'a prévu dans certains Etats américains, ou si ont été respectés les principes du procès équitable, en particulier la contradiction, le caractère irrémédiable de la rupture du lien conjugal et le constat que la décision n'est pas le fruit d'une collusion.

Note :
L'arrêt étranger de divorce, en vertu de la Convention de Bruxelles I, modifiée par la suite, prévoit que la décision doit être enregistrée dans les actes de l'état-civil compétent ratione loci, sic et simpliciter.

Toutefois s'il y a contestation de la part de l'une des parties intéressées, le juge saisi, aux termes de la loi n° 218 du 18 mai 1995, doit vérifier la réunion des conditions énoncées par la loi et rejeter l'opposition ou ordonner l'apposition de la formule exécutoire sur l'arrêt étranger.

La Cour ne méconnaît pas l'automatisme imposé par la convention internationale, mais si elle est saisie pour une divergence entre les parties intéressées, elle interprète l'expression de la loi italienne « respect des droits essentiels de la défense » à la lumière des principes énoncés par la Convention européenne des Droits de l'Homme : « contradiction », « procès équitable », « ordre public interne ».

D'autre part, une fois saisi, le juge italien ne pourra renoncer à appliquer les principes en vigueur dans son système juridique. La Convention de Bruxelles ne dit rien sur la procédure qui se déroule à la suite d'une opposition.

Concerne : Principe de légalité dans l'application des mesures de contrôle

Cour de Cassation, Assemblée plénière des chambres pénales

30 mai 2006
arrêt n° 29907
Diritto e Giustizia, 2006, n° 36, p. 51

Conclusions de la cour

L'application des mesures de contrôle judiciaire est soumise au principe de la légalité, en vertu duquel le juge ne peut ordonner que des mesures figurant dans l'énumération contenue dans la loi.

Par conséquent, au-delà des hypothèses exceptionnelles qui prévoient le cumul de deux mesures pour l'inculpé qui a violé les obligations imposées par le juge, la loi n'admet que la substitution d'une mesure par une autre moins grave, ou l'inverse, mais jamais l'application d'une mesure non expressément prévue par la loi, même si elle est compatible avec la situation sur le plan conceptuel. La discrétion du juge est limitée, comme il est de rigueur dans la justice pénale, au choix des mesures prévues par les Article 275-276 et 307 du Code de procédure pénale.

En particulier, l'Article 275 du Code donne au juge la possibilité de choisir la mesure la plus adaptée parmi les hypothèses prévues par la loi, en tenant compte de la gravité de infractions commises ou de l'exigence de maintenir sous contrôle le comportement de l'inculpé, ou encore d'éviter qu'il se rende responsable d'autres violations, ou qu'il prenne la fuite.

Note :
Une partie de la jurisprudence avait estimé que le juge pouvait appliquer en même temps plus d'une mesure, mais la Cour de Cassation a réagi à cette tendance par une motivation qui réaffirme une interprétation restrictive, considérant que le pouvoir d'initiative du juge d'adopter une mesure non prévue par la loi, ou un cumul, entraîne la violation du principe de légalité, le seul applicable au pénal. Ceci signifie que la liberté d'adopter une mesure non prévue par la loi n'est pas admise.

Articles 6, 8 et 18 de la Convention et 2 du Protocole n° 1

Concerne : Expulsion d'un étranger ayant des enfants mineurs

Cour de Cassation

11 janvier 2006
arrêt n° 396
Immigrazione e Cittadinanza, 2006, n° 2, p. 155

Conclusions de la cour

Une personne, provenant d'un pays de l'Europe de l'Est, dépourvue de permis de séjour, demande de prolonger sa résidence dans le territoire de l'Etat pour un temps déterminé dans le but de permettre à ses deux enfants de suivre leur scolarité et de leur éviter le traumatisme de l'éloignement d'un milieu où ils ont leurs intérêts culturels.

Le juge doit peser les intérêts des mineurs et les liens affectifs qui les lient aux parents. En particulier, pour ce qui concerne le mineur, il faut prendre en considération son développement psychique et physique par rapport à son âge, ses conditions de santé et l'opportunité de prolonger sa résidence. La possibilité d'achever un cycle de cours revêt, elle aussi, une importance décisive pourvu qu'elle soit limitée à une période strictement nécessaire, étant donné que la loi n'admet un prolongement de séjour que dans des situations « graves et exceptionnelles », que le juge doit « apprécier prudemment » (Article 31 du Décret législatif n° 286/1998 sur l'immigration).

Note :
Ce cas n'est qu'un exemple des nombreuses affaires que les tribunaux pour enfants et les sections pour les mineurs des cours d'appel sont appelés à trancher chaque année concernant la difficile situation des familles originaires de l'Afrique ou de l'Europe

de l'Est. Le juge doit procéder à un mise en balance, souvent délicate, entre le respect de la loi, l'exigence d'éviter à un mineur un éloignement traumatique, l'assistance des proches parents, le respect, autant que possible, de l'unité familiale, situations que la loi mentionne (Article 31).

Les décisions évoquent souvent la Convention de l'ONU du 20 novembre 1989 sur les droits des enfants, ratifiée par l'Italie.

Articles 6 de la Convention et 1 du Protocole n° 1

Concerne : Indemnisation en cas d'expropriation pour cause d'utilité publique

Cour de Cassation

20 mai 2006
ordonnance n° 11887/2006
I Diritti dell'Uomo, 2006, vol. 2, pp. 69 et 96
Diritto e Giustizia, 2006, n° 40, p. 82

Conclusions de la cour

Aux termes de la loi sur l'expropriation pour cause d'utilité publique, le citoyen qui a été contraint à céder à l'Administration un fonds a droit à une indemnité équivalente à 30 % de la valeur courante du bien exproprié, réduite du montant de l'impôt.

Le sacrifice économique peut sembler raisonnable s'il ne dépasse pas une certaine limite et si l'Administration satisfait à un intérêt public. Dans une telle situation, un juste équilibre entre intérêts opposés semble légitime. Le droit de propriété peut être subordonné à l'intérêt primaire de l'utilité publique. En revanche, si l'Administration prend possession du bien sans une décision préventive qui déclare l'utilité publique, elle commet un acte illégitime, en violation du principe de la légalité et du juste dédommagement à la suite duquel le citoyen acquiert le droit à une indemnisation équivalente à la valeur courante du bien.

Il semble indéniable que la violation du principe de l'égalité de tous les citoyens devant la loi, énoncé par les Articles 3 et 111 de la Constitution et l'Article 1 du Protocole n° 1 à la Convention européenne des Droits de l'Homme (CEDH), interprété à la lumière du principe du procès équitable garanti par l'Article 6 de ladite Convention.

Le tout se fonde également sur la considération qu'aux termes de l'Article 6 CEDH, les Hautes Parties contractantes se sont engagés à se conformer aux arrêts de la Cour européenne.

Par conséquent, la procédure est suspendue et les actes renvoyés à la Cour Constitutionnelle pour examen de la légitimité de la norme (Article 3 de la Loi du 23 décembre 1996, n° 662, sur l'expropriation).

Note :
La Cour de Cassation aborde le problème des relations entre le droit interne et la jurisprudence de la Cour européenne des Droits de l'Homme. La position de la Convention européenne des Droits de l'Homme dans la hiérarchie des sources du droit interne n'a été jamais explicitée et l'arrêt de la Cour Constitutionnelle devra sans doute éliminer des doutes sur l'hypothèse de conflit avec les arrêts de la Cour, qui s'inspirent d'une conception libérale du droit de propriété.

Articles 6 de la Convention et 4 du Protocole n° 7

Concerne : Principe ne bis in idem

Cour de Cassation, Assemblée plénière des chambres civiles

28 septembre 2005, arrêt n° 34655
L'Indice penale, 2006, n° 2, p. 735
Diritto e Giustizia, 2006, n° 40, p. 82

Conclusions de la cour

Si deux poursuites pénales ont été entamées contre une personne pour le même fait, la poursuite intentée en second doit être conclue par une ordonnance de non-lieu au cas où la première ne l'aurait pas été par une décision irrévocable. L'Article 649 du Code de procédure pénale prévoit la conclusion par un non lieu pour la seule hypothèse où l'accusé a été acquitté ou relaxé par une décision devenue irrévocable, mais la règle peut également être appliquée dans le cas où la première poursuite n'a pas été conclue par un arrêt irrévocable, à condition que la poursuite ait été déclenchée par le même parquet, devant les juges du même ressort. Ceci découle du principe général ne bis in idem, d'application immédiate dans le système de la justice pénale.

Des exigences incontestables d'ordre logique amènent à affirmer que le même Parquet ne peut mettre en mouvement les rouages de la

justice une deuxième fois contre la même personne pour le même fait.

Par l'expression « même fait », il faut entendre la même identité « historique-naturaliste de la violation » (sic l'arrêt), identifiée par ses éléments constitutifs, conditions de la répression, c'est-à-dire le comportement incriminé, son résultat, l'élément intentionnel.

Note :

Ayant pris acte de la limitation posée par l'Article 649 du Code de procédure pénale, la Cour a estimé que la norme justifie l'application de la même règle aux décisions non irrévocables, se fondant sur la considération que le principe ne bis in idem est « pleinement opérationnel » en vertu de l'Article 4 du Protocole n° 7 à la Convention européenne des Droits de l'Homme (CEDH) et applicable directement en droit interne. Le principe est expressément énoncé dans plus d'une convention sur la validité internationale des jugements répressifs (par ex. la Convention sur les stupéfiants) et par l'Accord de Schengen, qui consacre quatre articles à ce sujet. L'interprétation de la Cour vise aussi à éviter des longues attentes pour la définition de la première poursuite, lesquelles entraînent souvent la violation du délai raisonnable, sanctionnée par la CEDH et par l'Article 111 de la Constitution italienne.

Article 8 de la Convention

Concerne : Droit de reconnaître un enfant naturel

Cour de Cassation, 11 janvier 2006

Conclusions de la cour

Toute personne a le droit de reconnaître son enfant naturel, même en ayant recours à une action en justice en cas d'opposition de l'autre parent ou d'un tiers. Ce droit peut être méconnu seulement en présence d'une situation propre à compromettre gravement le développement psychique ou physique de l'enfant. Il est garanti par l'Article 30 de la Constitution, aux termes duquel les parents ont le devoir et le droit d'entretenir, instruire et élever leurs enfants, même s'ils sont nés hors du mariage.

L'intérêt à créer un lien familial même sans la participation ou avec l'opposition de l'autre parent, constitue l'expression d'un sentiment qui mérite respect et protection. Le rejet d'une demande de reconnaissance doit être dûment motivé par le juge, lequel, loin de limiter l'enquête aux simples avantages économiques, doit évaluer les exigences et les perspectives de vie de l'enfant et les conséquences de la reconnaissance. L'audition du mineur est expressément prévue par la loi, éventuellement en contradiction avec la partie qui s'oppose.

Arrêt n° 395
Il Foro italiano, 2006, n° 9, 1ère partie, p. 2156

Note :

L'arrêt rappelle, dans un style incisif, les normes du Code civil – remaniées après la guerre – consacrées à la reconnaissance d'un enfant naturel ou issu d'un inceste et met l'accent sur la portée de l'Article 30 de la Constitution. La séparation de corps et les divorces tendent à augmenter dans la société moderne et l'exigence d'éviter autant que possible que les enfants soient privés d'une ambiance familiale impose le respect du droit à assurer un lien affectif. Par conséquent, ils doivent être interrogés, même en contradiction avec le parent qui s'oppose.

En l'espèce, il était question des droits des parents énoncés par l'Article 8 de la Convention européenne des Droits de l'Homme, mais la jurisprudence a plus d'une fois examiné les controverses à la lumière du principe de l'interdiction de toute discrimination énoncé par l'Article 14 de ladite Convention.

Concerne : Garde des enfants – critère de la résidence habituelle du mineur

Cour de Cassation, 31 janvier 2006

Conclusions de la cour

La compétence de décider des différends concernant l'exercice de l'autorité parentale sur le mineur et sa garde appartient au tribunal pour enfants du lieu de résidence effective et habituelle, tandis que les déplacements temporaires ou les enregistrements effectuées dans les actes de l'état-civil n'ont pas une valeur probatoire décisive. Le lieu où l'enfant fréquente l'école maternelle ou primaire est souvent décisif pour déterminer la compétence territoriale.

Il s'agit d'une compétence à laquelle il ne peut être dérogé, excluant toute autre règle,

Arrêt n° 2171
Diritto e Giustizia, 2006, n° 9, p. 20

y compris le critère général de la résidence du défendeur (ex-art. 18 du Code de procédure pénale).

Le tribunal doit prendre en considération exclusivement l'intérêt du mineur, prioritaire par rapport à celui de ses parents.

Note :
Le Code de procédure civile énonce comme critère général de compétence territoriale le lieu où le défendeur réside habituellement.

A son tour la Loi n° 184/1983, réglant la garde des mineurs et l'adoption, n'énonce aucun critère pour déterminer la compétence territoriale en matière d'adoption et de garde des mineurs. En l'absence d'une règle spécifique, la Cour a plus d'une fois réaffirmé la compétence du lieu de résidence habituelle de l'enfant en considération de la spécialité de la matière et de l'opportunité de donner au Tribunal pour enfants la possibilité d'enquêter dans un lieu où le mineur vit, si nécessaire aussi parmi les personnes avec lesquelles il a des relations. Ceci permet d'acquérir plus facilement les éléments de preuve utiles pour décider et assurer une efficace protection cognita causa.

La tendance actuelle, un peu partout en Europe, est d'accroître la protection des mineurs et les efforts pour assurer un milieu familial et un lien affectif. La Cour se montre sensible à une telle tendance. De temps en temps, certains tribunaux ont des positions divergentes, mais si la Cour réaffirme son interprétation, ayant comme point de départ la spécialité de la matière.

Concerne : Droit de la personne adoptée de connaître l'identité de sa mère naturelle

Cour Constitutionnelle

25 novembre 2005
arrêt n° 425
Famiglia, 2006, n° 1, p. 155
Diritto della famiglia, 2006 n° 2, 1ère partie, p. 441
Giurisprudenza costituzionale, 2006, vol. 6, p. 4585

Conclusions de la cour

Aux termes de l'Article 28 de la Loi n° 184 du 4 mars 1983, modifié par l'Article 177 du Code en matière de données personnelles, la personne adoptée, une fois sa majorité atteinte, acquiert le droit de connaître ses origines, sauf si la mère naturelle a fait insérer dans les actes de l'état-civil, au moment de la naissance, sa volonté de ne pas être identifiée.

La norme ne viole pas les Article 2 et 32 de la Constitution, étant donné que le législateur s'est efforcé de mettre en balance les intérêts. Il a estimé opportun de protéger la femme enceinte, qui peut se trouver dans une situation personnelle difficile sur le plan moral, économique et social, lui donnant la possibilité de se faire hospitaliser et de garder, en même temps, l'anonymat. Ceci peut la dissuader de prendre une décision grave et irréparable pour l'enfant à naître.

La norme constitue l'expression d'une appréciation comparative des droits inviolables de la personne.

Note :
L'adoption a toujours comporté l'exigence de garantir le secret sur l'identité des parents par le sang, en particulier le secret sur la partie de l'acte de l'état-civil qui mentionne l'identité de la mère naturelle.

L'adoption d'un mineur représente souvent un événement traumatique pour les protagonistes, source de conflits. C'est pour cela qu'on a cherché à éviter les rapprochements et les contacts entre adopté et famille d'origine.

Une fois qu'il a atteint sa majorité, l'enfant adopté aspire souvent à entamer des recherches sur son origine.

La Cour, bien loin de méconnaître la valeur morale d'un sentiment souvent irrépressible, inhérent à la nature humaine, choisit la mise en balance, souhaitée même par la jurisprudence de la Cour européenne. Sociologues et psychologues ont récemment mis l'accent sur la possibilité pour le juge de demander à la mère si elle veut garder le secret aussi longtemps après l'accouchement, mais la proposition a été repoussée en considération de la possibilité que l'accomplissement des formalités nécessaires puisse permettre à l'intéressé de découvrir l'identité de sa mère.

Concerne : Expulsion d'un étranger ayant un lien affectif avec une citoyenne nationale

Cour Constitutionnelle

Conclusions de la cour

Le juge de paix de Gênes a douté de la légitimité de l'Article 19 du Décret législatif n° 86 du 25 juillet 1998 régissant l'immigration et le traitement de l'immigré, en ce qu'il prévoit l'expulsion de l'étranger extra-communautaire, auquel le permis de séjour a été refusé, ayant un lien affectif avec une citoyenne italienne enceinte, situation qui peut priver la femme et l'enfant à naître d'une assistance morale et matérielle, en violation des Article 2, 30 et 32 de la Constitution (La République garantit les droits fondamentaux de l'homme et protège la santé de tout individu).

La norme ne viole pas la Constitution étant donné que l'expulsion est seulement différée jusqu'à six mois après la naissance de l'enfant, en faveur d'un mari cohabitant avec sa femme enceinte. Le délai est fondé sur la certitude acquise que l'étranger vit en communauté de ménage à la suite d'un mariage. En revanche, s'il s'agit d'un simple lien affectif, l'intérêt du requérant ne peut prévaloir sur les limitations en vigueur. Le décret législatif a été édicté dans le but d'assurer la sûreté publique, l'ordre et la prévention des infractions, pénales, intérêts d'importance fondamentale.

11 mai 2006 arrêt n° 192 Immigrazione e Cittadinanza, 2006, n° 2, 1ère partie, p. 142

Concerne : Limites à la liberté d'expression

Cour de Cassation

Conclusions de la cour

Les personnes qui décident de décrire un événement de leur vie au cours d'une transmission télévisée doivent admettre que les informations données et leur comportement pendant la transmission peuvent faire l'objet de commentaires et critiques, les deux fruits de la liberté d'expression octroyée à toute personne, dans la limite de la modération.

Note :

L'arrêt a été rendu par la Cour de Cassation dans une affaire qui a intéressé le grand public et à laquelle la presse a consacré de longs commentaires. Un bon nombre de lois ont été édictées récemment sur la liberté d'expression, la protection du droit à la vie privée, les limitations à la diffusion des informations, le contrôle exercé par l'autorité garante de la radiodiffusion, la défense de bonnes mœurs, l'interprétation du droit d'expression des chroniqueurs énoncé par l'Article 21 de la Constitution. Des opinions non concordantes ont été exprimées, souvent à la suite de vifs débats.

Les journaux et la presse spécialisée ont signalé quelques dizaines de décisions de juges du fond et de la Cour de Cassation qui s'efforcent d'indiquer les bornes de la légitimité, des opinions parfois sévères, parfois plutôt libérales. L'arrêt en constitue un exemple typique.

11 août 2005, arrêt n° 30879 Diritto e Giustizia, 2005, n° 42, p. 52

Concerne : Prises de vue par la télévision dans un espace privé

Cour de Cassation, Assemblée plénière des chambres pénales

Conclusions de la cour

Les prises de vue par une chaîne de télévision sont, en principe, légitimes si elles sont effectuées dans un lieu auquel quiconque peut accéder librement. En revanche, s'il s'agit d'un domicile privé ou d'un lieu auquel l'accès est interdit, pour des raisons de confidentialité ou d'intimité, sans le consentement de ceux qui ont le droit à la protection de l'inviolabilité du domicile, la prise de vue est légitime sous réserve d'une autorisation du juge des enquêtes préliminaires ou du Ministère public justifiant les raisons du sacrifice fait à la limitation de la liberté du domicile, garantie par les Article 13 et 14 de la Constitution.

Si la prise de vue est effectuée sans aucune autorisation dans un lieu privé, elle est illégitime et ne peut pas être utilisée dans le procès comme élément de preuve.

La question des prises de vue n'est pas réglée par la loi ; en particulier, aucune norme n'explique si, et dans quelle mesure, la protection d'un lieu peut être sacrifiée. L'Article 188 du Code de procédure pénale se limite à prévoir que le juge requis d'ordonner l'acquisition d'un élément de preuve peut l'autoriser si la liberté de la personne qui bénéficie de la protection n'est pas préjugé. Rien n'est expliqué sur les possibilités de sacrifier l'inviolabilité du domicile.

28 mars 2006 arrêt n° 26795 Diritto e Giustizia, 2006, n° 34, p. 46

Toutefois, en vertu des principes énoncés par la Constitution et par l'Article 8 § 2 de la Convention européenne des Droits de l'Homme, on peut conclure que le respect dû à la vie privée peut être sacrifié par une mesure dûment motivée, nécessaire à la découverte d'une infraction pénale.

Note :
Ces dernières années, les tribunaux et cours d'appel se sont trouvés en difficulté, à plusieurs reprises, en raison de l'absence de réglementation spécifique, jugée nécessaire en considération du fait qu'une prise de vue par une chaîne de télévision constitue souvent le seul moyen pour découvrir la preuve d'un délit.

L'assemblée plénière, dans son long arrêt, cite un certain nombre de décisions qui s'inspirent des différents principes.

Le recours aux principes énoncés par la Constitution et la Convention européenne des Droits de l'Homme a, enfin, indiqué la voie à suivre qui soit à même de satisfaire à une exigence à laquelle la justice ne peut renoncer, même dans un système démocratique. La doctrine souhaitait que la matière soit réglée par une loi à même de « défaire le nœud » des prises de vue et des interceptions par les chaînes de télévision.

Articles 8 et 14 de la Convention

Concerne : Attribution du nom de famille

Cour Constitutionnelle

16 février 2006
arrêt n° 61
Famiglia, 2006, n° 4-5, p. 931
Studium Juris, 2006, n° 9, p. 1075

Conclusions de la cour

Le Code civil prescrit que l'enfant, après sa naissance, acquiert le nom de son père, même si les parents ont manifesté, d'un commun accord, une volonté contraire.

L'attribution du nom de la mère n'est pas autorisée. La Cour estime que l'évolution de la sensibilité sociale et la nécessité de respecter les conventions internationales ratifiées par l'Italie imposerait de reconsidérer la matière à la lumière, également, des Article 2, 3 et 29 de la Constitution, en vertu desquels les principes de la parité morale et juridique des époux et de leur égale dignité sociale justifierait la possibilité d'attribuer à l'enfant le nom de sa mère. Il s'agit d'une norme ancrée dans la tradition, qui réalise une discrimination contraire aux principes énoncés par les Article 143 et 147 du Code civil, aux termes desquels les époux acquièrent les mêmes droits et devoirs à l'égard de leurs enfants. Cependant, une décision sur la légitimité irait au-delà des pouvoirs de la Cour, étant donné qu'aucune autre norme ne règle l'attribution du nom et un vide législatif s'en suivrait, avec pour conséquence inévitable un impact négatif sur la possibilité de rendre justice en cas de controverse entre époux.

Note :
La Cour dit explicitement que la limitation imposée par la loi appartient au passé et évoque la tradition, les Recommandations 1271 (1995) et 1362 (1998) du Conseil de l'Europe mais aussi la Résolution 37 (1998) concernant la pleine réalisation de l'égalité entre mère et père dans l'attribution du nom à leur enfant. En outre, une série de trois décisions de la Cour européenne des Droits de l'Homme affirme la nécessité d'éliminer toute forme de discrimination entre époux fondée sur le sexe.

Trois projets de loi ont été présentés, mais n'ont pas encore été pris en considération, en l'état, par les commissions législatives du Parlement.

Articles 8 de la Convention et 2 du Protocole n° 1

Concerne : Devoir d'enquête du juge pour déclarer un enfant en état d'abandon

Cour de Cassation

10 août 2006
arrêt n° 18113
Diritto e Giustizia, 2006, n° 40, p. 33

Conclusions de la cour

Le mineur a le droit d'être éduqué dans la famille par le sang, sauf si celle-ci n'est pas à même de lui apporter les soins nécessaires et de l'entretenir.

L'état d'abandon doit être déclaré non seulement quand les parents n'assurent pas les soins nécessaires, mais aussi lorsque les liens affectifs manquent totalement, portant atteinte au développement de la personnalité de l'enfant.

Les liens affectifs constituent l'un des éléments essentiels pour un enfant et la loi confie au juge la délicate tâche d'apprécier la

situation en prenant en compte le milieu où il vit, son caractère, son développement mental et psycho-physique.

L'enquête doit être poussée, s'il est nécessaire, jusqu'à la vérification des relations qui lient ses parents, devoir auquel le juge ne peut se soustraire. Un éventuel climat conflictuel entre eux peut exercer une influence prépondérante sur la vie de l'enfant tandis qu'une ambiance familiale tranquille favorisera un développement équilibré.

Note :
L'arrêt n'apporte pas d'éléments nouveaux mais il est utile de faire remarquer que les controverses en matière d'adoption, en progressive augmentation depuis quelques années, engagent les tribunaux pour enfants à des longues et délicates enquêtes, soumises souvent à l'examen de la Cour de Cassation, qui réaffirme la tâche délicate qui incombe au juge et son devoir de veiller efficacement sur les perspectives de vie des enfants.

La jurisprudence qui s'est formée sur l'Article 8 de la Convention européenne des Droits de l'Homme et sur certains aspects de l'Article 2 du Protocole, grâce aux décisions de la Cour européenne des droits de l'Homme, constitue un guide pour l'application correcte des principes.

Article 10 de la Convention

Concerne : Interception de communications téléphoniques

Cour de Cassation, assemblée plénière des chambres pénales

24 janvier 2006
arrêt n° 2737
Archivio della nuova procedura penale, 2006, 2e vol., p. 152
Il Corriere del merito, 2006, n° 3, p. 361

Conclusions de la cour

Aux termes de l'Article 268, 3e alinéa, du Code de procédure pénale, les interceptions de conversations ou communications sont autorisées pour une série de violations expressément prévues par l'Article 266 du Code. Normalement réalisées dans les sièges des Parquets, elles peuvent, exceptionnellement, être autorisées en ayant recours à d'autres installations, sur autorisation du Procureur de la République, qui décide par décret motivé sur la dérogation et sur l'urgence de procéder à l'interception sans avoir recours aux équipements des Parquets.

L'autorisation doit être conforme au principe énoncé à l'Article 15 de la Constitution, aux termes duquel les limitations de liberté ne sont admises que par des actes motivés du Procureur de la République, dans le respect des garanties fixées par la loi et en excluant toute possibilité d'intervention du juge des enquêtes préliminaires.

Note :
L'arrêt de l'Assemblée plénière de la Cour représente un aspect de la lutte de l'Etat contre la criminalité organisée.

Pendant longtemps, les interceptions de conversations ou communications pouvaient avoir lieu sur simple autorisation du juge des enquêtes préliminaires. La Cour, prenant acte de l'importance d'une activité limitant gravement la liberté personnelle, a interprété la loi dans le sens que les Parquets ont une compétence exclusive à autoriser l'interception, soit dans leurs sièges, soit dans d'autres lieux. De plus, les décisions doivent toujours être préventives et dûment motivées de façon à permettre un contrôle sur leur légitimité et sur les recours à des modalités techniques correctes. La doctrine a remarqué un changement radical, qui donne un caractère de sévérité aux interceptions et poursuit le but de parvenir à une lutte plus efficace contre la délinquance organisée, notamment le commerce de stupéfiants.

Concerne : Secret de la correspondance des détenus

Cour de Cassation

13 juin 2006
arrêt n° 20228
Diritto e Giustizia, 2006, n° 33, p. 38

Conclusions de la cour

Le versement de la correspondance épistolaire d'un détenu aux actes d'un procès pénal, en exécution d'un décret non motivé du Procureur de la République, viole soit l'Article 15 de la Constitution (aux termes duquel le droit à la liberté et au secret de la correspondance et à toute formes de communication est inviolable) soit l'Article 8 de la Convention européenne des Droits de l'Homme, tel qu'il est interprété par la jurisprudence de la Cour européenne. Un décret de saisie de la correspondance d'un détenu, dans le but d'acquérir des éléments de preuve, doit être dûment motivé par l'autorité en charge de l'affaire – juge des enquêtes préliminaires, tribunal, juge chargé de surveiller l'exécution de la peine de détention – , quelle que soit la phase de la procédure, même à l'occasion de l'application d'une mesure de sûreté.

La motivation du décret constitue une garantie à laquelle on ne peut déroger : la violation d'un telle règle rend inutilisable la correspondance et cette nullité doit être prononcée d'office par le juge saisi.

Note :

L'arrêt prend en considération le versement de la correspondance aux actes du dossier dans le but de collecter des éléments de preuve utiles à la décision. Le régime ordinaire de contrôle de la correspondance des détenus est contenu dans la loi sur l'organisation pénitentiaire. L'Article 15 de la Constitution affirme que la limitation à la liberté et au secret de la correspondance « ne peut se produire que par des actes motivés de l'autorité judiciaire, avec les garanties énoncés par la loi ».

Article 14 de la Convention

Concerne : Relations patrimoniales entre époux de nationalités différentes

Cour Constitutionnelle

4 juillet 2006
arrêt n° 254
Il Foro italiano, 2006, n° 7-8, p. 4, partie « Nouveautés »

Conclusions de la cour

L'Article 19 des dispositions préliminaires du Code civil prévoit que les relations patrimoniales entre époux de nationalités différentes sont régies par la loi applicable au mari en vigueur au moment de la célébration du mariage. La norme poursuit le but d'éliminer toute possibilité de conflit entre lois qui appliquent des principes non concordants.

La norme constitue une discrimination à l'égard de la femme, fondée exclusivement sur le sexe, en violation des Article 3, 1er alinéa, et 29, 2e alinéa, de la Constitution, aux termes desquels, respectivement, tous les citoyens sont égaux devant la loi, sans distinction de sexe, le mariage reposant sur la parité morale et juridique des époux.

Note :

1.La norme soumise à l'examen de la Cour constitutionnelle par la Cour de Cassation ne prévoit aucune possibilité de dérogation.

2. Le but poursuivi est de couper court à toute possibilité de contestation, mais la discrimination semble évidente.

3.Depuis longtemps la doctrine mettait en évidence la discrimination à l'encontre de la femme, même si le législateur poursuivait le but pratique d'éliminer des doutes et controverses.

4.La norme, insérée dans le Code civil en 1942, était restée ancrée à une tradition remontant au 19e siècle.

Article 1 du Protocole n° 12 à la Convention

Concerne : Exclusion des citoyens extra-communautaires d'emplois dans une administration publique

Cour de Cassation

13 novembre 2006
arrêt n° 24170
Guida al Diritto, 2006, n° 46, p. 40

Conclusions de la cour

Aux termes de l'Article 70 du Décret législatif n° 165 du 30 mars 2001 sur l'accès au travail, les personnes n'ayant pas la qualité de citoyens italiens ne peuvent pas accéder à un emploi dans l'administration publique centrale ou territoriale, sauf s'il s'agit de citoyens provenant d'un Etat de la Communauté européenne. Par conséquent, un extra-communautaire, même s'il est inscrit sur la liste des personnes inaptes aux travaux manuels, ne peut être admis dans une administration publique, en l'espèce la province de Sienne. L'Article 4 de la Constitution reconnaît le droit au travail « à tous les citoyens » et crée les conditions qui le rend effectif ; l'Article 51 ajoute que tous « les citoyens peuvent accéder aux emplois publics ». Les lois réglant l'accès aux services de l'administration confirment, à leur tour, que la nationalité italienne est « requise ». Les structures spécifiquement créées pour favoriser l'acceptation des travailleurs étrangers ne se réfèrent pas aux emplois dans les administrations.

La Convention de New York sur les droits de l'homme ne prévoit pas non plus une égalité de traitement en matière d'accès aux « emplois publics ».

On peut déduire de l'ensemble des normes en matière d'emploi que le droit au travail peut trouver des limites en présence d'un intérêt public prioritaire général. La limitation instaurée par le Décret n'est donc pas illégitime.

Note :
La Cour de Cassation examine pour la première fois la possibilité d'embaucher un citoyen extracommunautaire pour un emploi dans l'administration publique.

Les opinions contraires à la solution de la Cour n'ont pas manqué et le problème fera sans doute l'objet de discussions et d'interprétations non concordantes dans un futur proche.

Luxembourg

Article 6 de la Convention

Concerne : Droits de la défense

Cour d'appel

4 janvier 2006
Réf : 1/06 X

Principaux faits et griefs

L'un des prévenus, se rapportant aux plaidoiries présentées en première instance, fait plaider que l'Article 190-1, alinéa 3, du Code d'instruction criminelle serait contraire aux dispositions de l'Article 6 §§ 2 et 3 de la Convention européenne des Droits de l'Homme (CEDH) en ce que le procureur d'Etat requerrait après la présentation des éléments et moyens de défense du prévenu.

L'un des autres prévenus relève encore que, plus spécialement en l'espèce, en raison de la pluralité des prévenus, il aurait été impossible de déterminer quels faits et quelles infractions le ministère public reproche à chacun des prévenus, ce qui léserait leurs droits de la défense.

Le représentant du ministère public requiert la confirmation du jugement attaqué en faisant valoir que le droit à un procès équitable et le respect des droits de la défense doivent être considérés globalement, et non sur une période restreinte du déroulement du procès. La place des réquisitions du ministère public, déterminée par l'Article 190-1, alinéa 3, s'expliquerait par le fait que le prévenu serait informé des faits et infractions qui lui sont imputés par l'ordonnance de renvoi de la chambre du conseil ou la citation du ministère public. Tout prévenu ayant, en vertu dudit article, le droit de prendre la parole en dernier, et donc de répliquer à tout ce qui a été débattu à l'audience, les droits de la défense seraient garantis.

Conclusions de la cour

L'Article 190-1, alinéa 3, du Code d'instruction criminelle organise l'ordre de parole des acteurs au procès et le fait que le ministère public requière après la présentation des éléments et moyens de défense s'inscrit dans le cadre du déroulement de la procédure pénale, dès lors que le prévenu reçoit la notification de l'ordonnance de renvoi ou de la citation à prévenu ainsi que la communication du dossier répressif et est, ainsi, à même de connaître les faits dont il a à répondre devant la juridiction répressive.

Les plaidoiries de la défense développant la position du prévenu donnent ensuite au ministère public la possibilité de prendre ses réquisitions à bon escient, dans l'intérêt d'une bonne administration de la justice et d'une juste application de la loi, réquisitions par rapport auxquelles le prévenu ou son défenseur peuvent répliquer.

L'ordre dans lequel il y a lieu d'accomplir diverses formalités prévues à l'Article 190-1 du Code d'instruction criminelle n'est pas prescrit à peine de nullité, du moment qu'il n'est pas porté atteinte aux droits de la défense.

L'Article 6 §§2 et 3 CEDH exige, quant au déroulement de la procédure à l'audience, que les principes de la présomption d'innocence, du contradictoire et de l'égalité des armes soient respectés.

Tant la présomption d'innocence que le principe du contradictoire et d'égalité des armes sont assurés à l'audience par la possibilité de faire citer des témoins, de recourir au ministère d'un avocat, le cas échéant d'être assisté d'un interprète et par le droit de réfuter tous les moyens et éléments présentés par le ministère public, droit qui est respecté par l'obligation de donner la parole en dernier au prévenu ou à son représentant.

Dans la mesure où l'Article 190-1, alinéa 3, dispose qu'après le résumé de l'affaire et les conclusions du procureur d'Etat, le prévenu et les personnes civilement responsables peuvent répliquer, et doivent donc avoir la parole en dernier, il n'est pas contraire à

l'Article 6 §§ 2 et 3 CEDH, dès lors qu'il garantit le droit à un procès équitable, s'inscrivant, par ailleurs, dans les principes généraux des droits de la défense qui dominent tout procès pénal.

Autre affaire concernant les droits de la défense :

Tribunal d'arrondissement de Luxembourg, 10 janvier 2006. Réf. : 7/06

Résumé

Le fait, à lui seul, qu'une partie dispose de témoins et l'autre non n'est pas constitutive d'une violation des droits de la défense et n'équivaut pas automatiquement à une rupture de l'égalité des armes au procès.

Concerne : Indépendance et impartialité des Conseils disciplinaires

Conseil de Discipline du Collège Médical

17 mai 2006

Principaux faits et griefs

La personne citée demande au Conseil de Discipline de dire que l'Article 17 de la Loi du 8 juin 1999 relative au Collège Médical et instituant un Conseil de Discipline viole l'Article 6 de la Convention européenne des Droits de l'Homme (CEDH).

Selon l'intéressé, l'Article 17 de la Loi, en créant un organisme susceptible de prendre des décisions ayant autorité de chose jugée sur les personnes déférées à sa juridiction, sans que cet organisme présente, par sa structure organisationnelle même, les garanties d'indépendance et l'impartialité requises, violerait l'Article 6 § 1 CEDH, alors que le simple doute, aussi peu justifié soit-il, suffit à altérer l'impartialité du tribunal. En effet, ledit article, en stipulant que le Conseil de Discipline se compose, pour chaque affaire qui lui est soumise à l'égard d'un médecin-dentiste, du président du tribunal d'arrondissement et de deux médecins-dentistes n'assurerait pas le caractère d'indépendance et l'impartialité auquel la personne citée aurait droit. Cette dernière fait valoir que l'organisation du Conseil de Discipline est en contradiction avec le critère objectif déterminé par la Cour européenne des Droits de l'Homme, qui vise à vérifier si le juge offre des garanties suffisantes pour exclure tout doute légitime à son égard.

Tel serait le cas en l'espèce, les structures de la présente juridiction n'offrant aucune garantie d'indépendance et d'impartialité, alors qu'elle est composée d'un magistrat et de deux médecins-dentistes, membres de la même profession que celle exercée par la personne citée, et leur seule présence en tant que membres du Conseil de Discipline ne permet pas d'exclure un doute légitime de partialité.

Subsidiairement, la personne citée fait plaider que l'Article 17 sus-cité viole les Article 84 et 86 de la Constitution, dès lors que le Conseil de Discipline du Collège Médical qu'il instaure ne constitue pas un tribunal au sens des Article 84 et 86 de la Constitution.

Conclusions du Conseil de Discipline

Les procédures disciplinaires, et a fortiori les Conseils de Discipline appelés à sanctionner les membres d'une profession déterminée, doivent présenter pour les justiciables les mêmes garanties d'indépendance et d'impartialité que les juridictions de l'ordre judiciaire. Outre ces critères, les Conseils de Discipline des juridictions disciplinaires doivent être institués par la loi et assurer la publicité des débats.

En ce qui concerne la qualification de « tribunal » au sens de l'Article 6 CEDH, la Cour Supérieure de Justice (arrêt n° 2 du 11 juillet 1985, et 3 du 4 décembre 1986), tout comme la Cour européenne des Droits de l'Homme, a admis que pour qu'un tribunal puisse être admis comme tel, il n'est pas nécessaire qu'il possède une nature juridictionnelle stricto sensu, mais qu'il ait pour fonction de se prononcer sur les points litigieux, en se basant sur des règles de droit qui peuvent atteindre les justiciables dans leur sphère juridique (Jean-Claude Wiwinius, L'application de l'Article 6 § 1 de la Convention européenne des Droits de l'Homme et des libertés fondamentales par les juridictions luxembourgeoises; Pas. : 31, p. 215).

Le Conseil de Discipline du Collège Médical remplit le critère de juridiction, alors qu'il a été créé par la Loi du 8 juin 1999 précitée, de même que le critère d'indépendance, les assesseurs médecins-dentistes n'étant pas membres de la partie poursuivante. Le critère d'impartialité, qui, d'après la personne citée, ne serait pas objectivement rempli par les assesseurs non magistrats, alors qu'ils seraient membres de la même profession que ce dernier, ne saurait être retenu.

La personne citée reste, par ailleurs, en défaut de préciser en quoi la présence de membres exerçant la même profession que lui pourrait lui être préjudiciable et justifierait son opinion que l'instance diligentée à son encontre pourrait éventuellement constituer un procès non équitable. La présence d'assesseurs exerçant la même profession constitue une garantie supplémentaire pour la personne citée afin que son cas soit examiné en tenant compte des particularités et difficultés de la profession.

La jurisprudence citée par l'intéressé (*Langborger c. Suède*) ne s'applique pas au Conseil de Discipline : dans cette affaire, les assesseurs avaient été recommandés par des associations avec lesquelles ils entretenaient des liens étroits et opposés aux intérêts du requérant. Tel n'est pas le cas en l'espèce, les assesseurs n'ayant pas de lien avec le Collège Médical et étant proposés l'un par le président du Conseil de Discipline et l'autre par l'association la plus représentative des intérêts de la profession. Le moyen n'est, partant, pas fondé.

Quant au moyen soulevé à titre subsidiaire, le Conseil de Discipline relève qu'est qualifié de tribunal tout organe dont la fonction juridictionnelle consiste à trancher, sur les bases de normes de droit, à l'issue d'une procédure organisée, toute question relevant de sa compétence (Cour européenne des Droits de l'Homme, *Srameck c. Autriche*, 22 octobre 1984). Or, comme cela vient d'être spécifié relativement à la conformité du Conseil de Discipline à l'Article 6 CEDH, ledit Conseil constitue un tribunal au sens large du terme et exerce les mêmes fonctions inhérentes à un tel organe, dans le respect de ses obligations d'impartialité et d'indépendance tant objectives que subjectives.

Concerne : Impartialité du commissaire du gouvernement dans une procédure disciplinaire

Tribunal administratif

29 juin 2006
Réf. : n° 19199 du rôle

Principaux faits et griefs

Le demandeur conclut à une violation de l'Article 6 de la Convention européenne des Droits de l'Homme (CEDH) dans le cadre d'un recours en réformation d'une décision du Commissaire du Gouvernement chargé de l'instruction disciplinaire et de la décision confirmative du ministre de l'Education nationale portant suspension de l'exercice de ses fonctions de professeur de lycée pendant tout le cours de la procédure disciplinaire ordonnée contre lui jusqu'à la décision définitive.

Il existerait dans le chef du Commissaire du Gouvernement une partialité objective, en ce qu'en suspendant le fonctionnaire concerné il aurait préjugé nécessairement de sa décision future quant au fond, ayant dû le suspecter d'avoir commis une faute susceptible d'entraîner une sanction disciplinaire grave. Il conclut à une partialité subjective dans le chef des Commissaire de Gouvernement et ministre en ce que malgré le caractère pertinent de ses propres arguments développés devant le premier des deux personnes suscitées et les éléments objectifs du dossier produits à sa décharge, les décisions de suspension déférées auraient été prises pendant les vacances scolaires de Noël.

Conclusions du tribunal

Les décisions de suspension déférées ne constituent pas une sanction, de sorte que ni les principes avancés par l'Article 6 CEDH, dont notamment l'exigence d'un juge impartial, pût-elle être invoquée à l'encontre du Commissaire du Gouvernement, ni ceux ressortant de la jurisprudence de la Cour européenne des Droits de l'Homme ne sont applicables en l'espèce (cf. trib. adm. 12 juillet 1999, confirmé par Cour adm. 21 décembre 1999. Pas. adm. 2004, V Fonction publique, n° 152, p. 325).

Concerne : Autonomie du droit disciplinaire

Tribunal administratif

4 octobre 2006
Réf. : n° 21217 du rôle

Principaux faits et griefs

Dans le cadre d'un recours en annulation d'une décision relative à la durée du placement en régime cellulaire strict, du fait de son rôle primordial lors d'un incendie volontaire au Centre pénitentiaire de Luxembourg, le demandeur allègue que la question de sa participation intentionnelle à l'incendie n'est pas encore tranchée par les magistrats du siège et que cette façon de procéder viole le principe de la présomption d'innocence.

Conclusions du tribunal

En relation avec la prétendue violation du principe de la présomption d'innocence, tel que consacré par l'Article 6 de la Convention européenne des Droits de l'Homme, c'est à juste titre que le délégué du gouvernement a relevé qu'une action disciplinaire et une action pénale peuvent se dérouler parallèlement sur base des mêmes faits répréhensibles, sans interférence du pénal sur le disciplinaire. En effet, l'autonomie du droit disciplinaire et les caractères propres à la faute disciplinaire font que celle-ci est déterminée selon des critères qui sont différents de ceux qui permettent de définir l'infraction pénale. Cette indépendance se manifeste, notamment, en ce qu'un même fait peut s'analyser à la fois en une faute pénale et en une faute disciplinaire, entraînant les deux formes de poursuites, ce qui revient à dire que la règle « non bis in idem » ne s'applique pas dans les rapports du droit pénal et du droit disciplinaire (cf. trib. adm., 11 juin 2001, n° 12473 du rôle, confirmé par Cour adm. 11 décembre 2001, n° 13705C du rôle, Pas adm. 2005, V Fonction publique, n° 105).

En l'espèce, la sanction disciplinaire prononcée à l'encontre de Mr X l'a été dans l'intérêt du respect des règles de sécurité interne au Centre pénitentiaire, tandis que la répression pénale vise exclusivement l'intérêt de la société. Il s'ensuit que c'est à tort que le demandeur soutient que la sanction disciplinaire prononcée à son encontre serait constitutive d'une « punition anticipative déguisée ».

Article 8 de la Convention

Concerne : Droit au respect de la vie familiale

Cour administrative

7 novembre 2006
Réf. : n° 21680 C

Principaux faits et griefs

La partie appelante reproche aux juges de première instance une appréciation erronée des éléments de la cause : leur décision porterait atteinte à son droit au respect de sa vie privée et familiale et le fait qu'il vivrait avec sa famille – son ex-épouse et leurs trois enfants communs – emporterait le droit à l'octroi d'une autorisation de séjour pour regroupement familial.

Conclusions de la cour

S'il est de principe, en droit international, que les Etats ont le pouvoir souverain de contrôler l'entrée, le séjour et l'éloignement des étrangers, il n'en reste pas moins que ceux qui ont ratifié la Convention européenne des Droits de l'Homme (CEDH) ont accepté de limiter le libre exercice de cette prérogative dans la mesure des dispositions de la Convention.

Il y a, dès lors, lieu d'examiner en l'espèce s'il existe une vie privée et familiale entre X et son ex-épouse Y ainsi que ses trois enfants, au sens de l'Article 8 § 1 CEDH, de nature à leur attribuer un droit à en exiger la protection par le biais dudit article – qui constitue une disposition de droit international de nature à tenir en échec la législation nationale – et si la décision contestée constitue une ingérence illégale dans l'exercice de ce droit.

En ce qui concerne l'existence d'une vie familiale effective entre les personnes concernées, il y a lieu de retenir que X et Y étaient mariés et parents de trois enfants issus de leur union. Suite à leur divorce, Y s'est remariée au Luxembourg, au mois de janvier 1998, avec un dénommé Z, qui est décédé le 31 décembre 1999. Y affirme avoir rejoint son ex-épouse et ses trois enfants en 2001 à Esch-sur-Alzette et a déposé six certificats de témoignages destinés à attester d'une vie familiale effective depuis cette date.

La Cour constate, au vu de ces certificats, que X et Y ont mené – et mènent toujours, au moins depuis l'année 2001 – une vie familiale effective au Grand-Duché de Luxembourg. Il s'ensuit que X possède des attaches importantes et effectives au Grand-Duché de Luxembourg depuis plusieurs années. La décision du ministre de la Justice de lui refuser l'entrée et le séjour dans le pays constitue une ingérence dans sa vie familiale, ayant pour conséquence une séparation des deux concubins et de leurs trois enfants communs.

S'il est vrai, par ailleurs, qu'il ne ressort d'aucun élément du dossier que X ait insisté sur sa situation familiale par rapport à Y et par rapport à ses enfants communs et qu'on ne saurait que difficilement reprocher au ministre de la Justice de ne pas avoir pris cet élément en considération, il n'en reste pas moins que le juge administratif apprécie la légalité d'une décision administrative en considération de la situation de droit et de fait au jour où elle a été prise.

Dans le cadre de ce contrôle de légalité, la Cour tiendra compte des faits non communiqués expressément au ministre de la Justice mais ayant existé au moment où celui-ci a pris la décision incriminée. En l'espèce, la situation de fait a manifestement existé à la date à laquelle la décision a été prise, de sorte qu'il y a lieu de la prendre en considération.

C'est donc à tort que le ministre des Affaires étrangères et de l'Immigration a refusé à X l'entrée et le séjour dans le pays.

Concerne : Droit au respect de la vie familiale

Cour administrative

9 novembre 2006
Réf. : nº 21632 C

Principaux faits et griefs

Les appelants estiment que le refus d'autorisation de séjour constitue une ingérence injustifiée et disproportionnée dans leur vie familiale, laquelle serait certaine et ininterrompue. Ils n'auraient pas d'expectatives dans leur pays d'origine, ne constitueraient pas un poids financier pour l'Etat luxembourgeois dès lors que les membres de leur famille régulièrement établis au Luxembourg auraient signé des déclarations de prise en charge à leur bénéfice et se seraient engagés à leur fournir un logement ; de même, Mr X., maçon de formation, pourrait rapidement s'adonner à une activité salariée, et aucune autre raison ne justifierait leur éloignement du Luxembourg.

Conclusions de la cour

Il est établi que la ratification de la Convention européenne des Droits de l'Homme (CEDH) implique l'acceptation des Etats de limiter le libre exercice de leur pouvoir souverain de contrôler l'entrée, le séjour et l'éloignement des étrangers, dans la mesure des dispositions qu'elle prévoit.

Il s'ensuit que dans chaque cas d'espèce l'autorité publique est appelée, sous le contrôle du juge, à examiner si la vie privée et familiale dont les intéressés font état pour conclure à l'existence d'un droit à la protection d'une vie familiale rentre effectivement dans les prévisions de ladite disposition de droit international, laquelle est, le cas échéant, de nature à tenir en échec la législation nationale.

En l'espèce, comme les premiers juges l'ont retenu à juste titre, l'existence d'une vie familiale effective avant l'immigration au Luxembourg des époux X avec leurs enfants, ainsi que la continuation de rapports familiaux, tant après le départ de la fille A et son installation au Luxembourg, qu'après les mariages et installations des filles B et C au Luxembourg et le départ pour les Pays-Bas des époux X et de leurs trois autres enfants sont patentes. La volonté des grands-parents d'avoir des contacts réguliers avec leurs petits enfants est, en outre, des plus légitimes.

Ceci étant, la garantie du respect de la vie privée et familiale comporte des limites et elle ne comporte pas le droit de choisir l'implantation géographique de la vie familiale, de sorte que le choix délibéré d'un ou de plusieurs membres d'une famille de quitter leur pays d'origine et d'immigrer dans un autre pays ne saurait, à lui seul, obliger l'Etat d'accueil à laisser accéder l'ensemble de la famille dudit étranger sur son territoire. Il se dégage, en effet, de la jurisprudence de la Cour européenne des Droits de l'Homme que concernant le cas de figure de personnes adultes désireuses de venir rejoindre des membres de leur famille dans leur pays d'accueil, elles ne sauraient être admises au bénéfice de la protection de l'Article 8 que lorsqu'il existe des éléments supplémentaires de dépendance, autres que les liens affectifs normaux.

Or, en l'espèce, si l'existence de liens affectifs entre les époux X et leurs enfants A, B et C, d'une part, et avec leurs proches parents établis au Luxembourg, de l'autre, sont indéniables, il n'en reste pas moins que ces liens s'analysent en des liens affectifs normaux et il ne se dégage pas des éléments d'information produits qu'en cas de retour dans leur pays d'origine – l'Etat de Serbie et Monténégro – les conditions d'existence des époux X et de leurs enfants A, B et C seraient inacceptables. De même, une vie familiale avec les membres de la famille s'étant, de leur plein gré, installés au Luxembourg reste possible. En outre, il n'apparaît pas que l'ensemble de la famille X ne pourrait, en principe, pas exercer pleinement son droit à une vie privée et familiale dans son pays d'origine.

Dans ces conditions, les liens affectifs normaux existant entre les époux X et leurs enfants A, B et C, d'une part, et avec leurs proches parents établis au Luxembourg, d'autre part, apparaissent être insuffisants pour justifier l'admission au bénéfice de la protection prévue par l'Article 8 CEDH. Le refus de délivrer une autorisation de séjour ne constitue pas une ingérence dans leur droit au respect de leur vie privée et familiale.

Concerne : Droit au respect de la vie familiale

Tribunal administratif

21 novembre 2006
Réf. : n^os 21211 et 21214 du rôle

Principaux faits et griefs

Dans le cadre d'un recours en annulation d'une décision ministérielle refusant à la demanderesse une autorisation de séjour à son profit et à celui de ses enfants mineurs, l'intéressée invoque une violation de l'Article 8 de la Convention européenne des Droits de l'Homme (CEDH).

Conclusions du tribunal

Il y a lieu d'examiner si la vie privée et familiale dont font état les demandeurs pour conclure dans leur chef à l'existence d'un droit à la protection d'une vie familiale par le biais des dispositions de l'Article 8 CEDH rentre, effectivement, dans les prévisions de ladite disposition de droit international, qui est de nature à tenir en échec la législation nationale.

Le tribunal constate, cependant, que le ministre a accepté, dans le cadre du présent recours, de compléter ses décisions et de porter son examen sur la question de l'applicabilité de l'Article 8 CEDH, en contestant toute vie familiale, de façon à permettre au tribunal une analyse de cette question sur la base des arguments échangés de part et d'autre, consistant à vérifier si le refus du ministre violerait ledit article en ce qu'il aurait pour effet que l'Etat s'immiscie d'une manière disproportionnée dans la vie privée et familiale des demandeurs et qu'il causerait un déséquilibre manifeste entre les intérêts en cause.

La notion de vie familiale au sens de la CEDH ne présuppose pas nécessairement l'existence d'un mariage, étant donné qu'aucun traitement différencié n'est concevable entre famille légitime et famille naturelle en ce qui concerne le droit fondamental de cohabiter dont bénéficient indubitablement tant les relations et familles nées du mariage que celles issues d'un simple concubinage (voir trib. adm. 24 janvier 2005, n° 18063, http://www.ja.etat.lu/), de manière à couvrir, le cas échéant, également la situation familiale des concubins X. Néanmoins, il y a lieu de vérifier d'abord si les demandeurs peuvent se prévaloir d'une vie familiale préexistante et effective, caractérisée par des relations réelles et suffisamment étroites, et, dans l'affirmative, si la décision de refus de délivrance d'une autorisation de séjour a porté une atteinte injustifiée à cette vie familiale.

Le tribunal est, cependant, amené à constater à ce sujet qu'au-delà de l'affirmation d'une vie familiale perdurant sans discontinuité depuis 2000 ou 2001, les demandeurs ne versent aucune pièce ou document attestant non seulement de la durée de la vie familiale alléguée, mais encore de l'existence effective d'une telle vie familiale, de sorte que celle-ci doit être considérée comme n'étant pas établie en l'état actuel du dossier.

Par ailleurs, même à supposer qu'une telle vie familiale aurait débuté en 2000, il importe de relever que l'Article 8 CEDH ne confère pas directement aux étrangers un droit de séjour dans un pays précis et que les consorts X, lorsqu'ils ont noué leur relation amoureuse alléguée, n'étaient pas sans ignorer la précarité de la situation de la demanderesse en tant qu'étrangère n'étant pas admise à séjourner sur le territoire luxembourgeois. Il importe, en effet, de relever que le caractère précaire de la présence de M^me X sur le territoire n'est pas sans pertinence dans l'analyse de la conformité de la mesure restrictive avec, notamment, la condition de proportionnalité inscrite au second paragraphe de l'Article 8. La Cour européenne des Droits de l'Homme n'accorde, en effet, qu'une faible importance aux événements de la vie d'immigrants qui se produisent durant une période où leur présence sur le territoire est contraire à la loi nationale, voire couverte par un statut de séjour précaire (Revue trimestrielle des droits de l'homme, 60/2004, p. 926).

En l'espèce, compte tenu du caractère non établi de la relation des consorts X ainsi que du fait que M^me X a uniquement séjourné à titre précaire, voire illégal dans le pays, un non-respect du principe de proportionnalité entre la mesure de refus de délivrance d'une autorisation de séjour et la situation familiale des demandeurs ne peut être déduit des éléments de fait soumis au tribunal.

En outre, eu égard à la situation personnelle et familiale des demandeurs, les éléments en cause ne dénotent pas un usage par le ministre du pouvoir d'appréciation que lui confère la Loi du 28 mars 1972 qui ne serait pas en conformité avec les finalités de celle-ci.

Cette conclusion n'est pas tempérée par les moyens relatifs à l'intégration des enfants de M^me X, cet élément n'étant pas de nature à faire naître un droit au séjour dans leur chef. Par ailleurs, force est de constater que ces enfants vivaient encore en août 2001 – date d'établissement de leurs passeports – en Equateur, de sorte qu'il faut considérer, con-

trairement à ce qui est allégué par les demandeurs, qu'ils ont passé la majeure partie de leur jeune vie (étant nés, respectivement, en 1990 et 1992) en-dehors du Luxembourg et qu'un retour en Equateur ne devrait pas constituer un déracinement insurmontable.

Concerne : Droit au respect de la vie familiale

Tribunal administratif

21 décembre 2006
Réf. : n° 21482 du rôle

Principaux faits et griefs

Dans le cadre d'une demande en annulation d'une décision portant refus, dans le chef des époux B,. de la délivrance d'une autorisation de séjour, les intéressés invoquent, à l'appui de leur demande, une violation de l'Article 8 de la Convention européenne des Droits de l'Homme (CEDH).

Conclusions du tribunal

Sans remettre en cause la compétence de principe de chaque Etat de prendre des mesures en matière d'entrée, de séjour et d'éloignement des étrangers, l'Article 8 CEDH implique que l'autorité étatique nantie du pouvoir de décision en la matière n'est pas investie d'un pouvoir discrétionnaire, mais qu'en exerçant ledit pouvoir, elle doit tenir compte du droit au respect de la vie privée et familiale des personnes concernées.

Il y a, dès lors, lieu d'examiner en l'espèce si la vie privée et familiale dont font état les demandeurs pour conclure dans leur chef à l'existence d'un droit à la protection d'une vie familiale par le biais des dispositions de l'Article 8 CEDH rentre effectivement dans les prévisions de ladite disposition de droit international, qui est de nature à tenir en échec la législation nationale.

A cet égard, il ressort des pièces et éléments du dossier, et plus particulièrement d'une attestation émise par le bureau d'aides sociales de Sjenica, que M. B. et son épouse, nés respectivement en 1933 et en 1937, ont vécu seuls dans la localité de Trijebine au cours des dix années précédant l'émission de ladite attestation et qu'il s'agit de personnes « âgées et impuissantes », qui « ont besoin d'un soin permanent de leurs fils ». Les demandeurs ne sont, par ailleurs, pas contredits dans leur présentation des faits, suivant laquelle M. et M^{me} B ne possèdent plus aucune proche famille dans leur pays d'origine et que tous leurs fils habitent à l'étranger, à savoir pour trois d'entre eux au Grand-Duché de Luxembourg et pour le quatrième en France, dans une région frontalière du Grand-Duché (avec des durées de validité de leurs cartes d'identité d'étranger expirant, respectivement, en 2009, 2006, 2009 et 2012).

N'ayant pas d'autres enfants ou proches parents dans leur pays d'origine qui pourraient s'occuper d'eux, les époux B. font à bon droit valoir leur droit à obtenir leur regroupement familial avec celui de leurs enfants le plus apte à les prendre en charge. A défaut d'éléments concrets soumis par l'Etat permettant de conclure qu'ils auraient davantage intérêt à être pris en charge par leur fils résidant en France et à défaut de tout autre élément soumis en cause quant aux capacités par leurs fils de les prendre en charge, il appartient aux époux B, avec leurs fils, de décider auprès duquel d'entre eux ils souhaitent vivre. Il convient encore de constater que les époux B ont choisi d'habiter auprès de l'un de leurs fils résidant au Grand-Duché, où résident, par ailleurs, deux autres de leurs fils, partant dans une localité dans laquelle la majeure partie de leur plus proche famille est domiciliée légalement. L'Etat est donc particulièrement malvenu d'estimer, d'une manière absolument arbitraire, que les époux B. auraient le choix d'habiter auprès de leur fils résidant en France, aucun élément du dossier ne permettant de conclure qu'ils seraient mieux pris en charge par ledit fils. Cette argumentation présentée par l'Etat doit être rejetée comme étant non fondée.

Il convient encore de rappeler que des parents qui, en raison de leur âge, ne peuvent plus s'adonner à un travail rémunéré leur permettant de subvenir à leurs propres besoins, ont le droit d'être pris en charge et, le cas échéant, d'habiter auprès de l'un de leurs descendants, sur la base, notamment, de l'Article 8 CEDH. Toutefois, ce droit ne leur permet de s'installer auprès de l'un de leurs descendants résidant dans un autre Etat que celui dont ils sont originaires qu'à partir du moment où, dans leur pays d'origine, il n'existe aucun descendant ou proche parent qui soit en mesure de les prendre en charge en leur fournissant, notamment, un logement approprié.

Sur base de l'attestation de l'office social de Sjenica, dont l'authenticité n'est pas contestée, il faut constater que les époux B ne peuvent pas exercer dans leur pays d'origine leur droit à une vie privée et familiale telle que protégée par l'Article 8 CEDH. Dans ces conditions, le refus de leur délivrer une autorisation de séjour constitue une ingérence

illégale dans leur droit au respect de leur vie privée et familiale, qui ne saurait, par ailleurs, être justifiée par l'une des hypothèses visées au § 2 de l'Article 8 CEDH. Le Ministre des Affaires étrangères et de l'Immigration ayant commis une erreur manifeste d'appréciation des faits, il y a lieu d'annuler la décision de refus d'autorisations de séjour.

Articles 8 et 6 de la Convention

Concerne : Droit au respect du domicile. Droits de la défense

Cour d'appel

10 octobre 2006
Réf : 462/06 V

Principaux faits et griefs

Le prévenu fait valoir qu'une visite domiciliaire du médecin vétérinaire, assisté par des policiers du commissariat de proximité, a été effectuée en violation des Article 8 – garantissant la protection du domicile – et 6 § 1 – garantissant les droits de la défense – de la Convention européenne des Droits de l'Homme (CEDH), de sorte que l'instruction préliminaire ainsi que toute la procédure ayant suivi cette visite domiciliaire serait à annuler.

Il résulte du procès-verbal du commissariat de police que les agents de police avaient été priés, le jour en question, par le médecin vétérinaire-inspecteur voulant procéder à la visite des installations du prévenu et trouvant les lieux fermés de lui prêter main-forte. Arrivés sur les lieux et devant le refus du prévenu de leur ouvrir, les agents du commissariat ont requis deux ouvriers communaux pour forcer l'ouverture des étables. Le prévenu ayant refusé l'entrée aux personnes présentes, les agents s'étaient alors saisis de lui, l'avaient menotté et attaché à un engin agricole à l'extérieur des étables, puis avaient procédé à la visite des lieux avec le médecin vétérinaire, pris des photos et dressé leur procès verbal ensemble avec ce dernier.

Conclusions de la cour

En ce qui concerne le reproche basé sur une prétendue violation de l'Article 8 CEDH, il convient d'emblée de remarquer que la Convention admet, en son alinéa 2, que l'inviolabilité du domicile n'est pas absolue et que la loi peut prévoir l'ingérence de l'autorité publique du moment qu'elle s'avère nécessaire, notamment pour prévenir des infractions pénales.

Ainsi l'Article 23 de la Loi du 15 mars 1983 ayant pour objet d'assurer la protection de la vie et du bien-être des animaux (ci-après : la Loi de 1983) autorise les agents habilités à constater les infractions à cette Loi à accéder, même non munis d'un mandat de perquisition établi par un juge d'instruction, entre le lever et le coucher du soleil, à tous les fonds bâtis ou non, pour autant qu'ils ne servent pas à l'habitation humaine. Les infractions à la Loi de 1983, et plus particulièrement celles reprochées en l'espèce, constituant des infractions continues, peuvent toujours, dès lors qu'elles sont caractérisées, faire l'objet d'une enquête de flagrance, conformément aux dispositions du Code d'instruction criminelle dont il est question ci-après. L'agent de l'Administration des services vétérinaires, porteur d'un ordre de mission, ainsi que les agents de la police, étaient donc habilités, conformément aux dispositions de l'Article 23 de la Loi de 1983, à procéder à la visite domiciliaire dans les étables du prévenu. Il faut préciser que l'on s'accorde à considérer le lieu de travail, et par conséquent également les étables exploitées par le prévenu, comme domicile au sens de l'Article 8 CEDH (voir, entre autres : Trav.parl. 46.476, avis du Conseil d'Etat).

La Loi de 1983 ne précisant pas les conditions concomitantes à l'exécution de la mission des agents habilités à procéder à une visite domiciliaire, et plus particulièrement le formalisme d'authentification destiné à conférer à la recherche et à la découverte d'indices une authenticité indiscutable, il convient de se conformer plus spécialement aux formalités énoncées aux Article 30 ss. du Code d'instruction criminelle et, d'une façon plus générale, aux principes concernant les droits de la défense inscrits à l'Article 6 CEDH.

Pareille visite, qui constitue une mesure coercitive dès lors qu'elle est opérée généralement, comme en l'espèce d'ailleurs, sans le consentement de la personne au domicile de laquelle elle a lieu, doit, cependant, s'opérer en la présence de cette dernière ou, en cas d'impossibilité de celle-ci, de son représentant, ou, à défaut, de deux témoins requis par l'officier de police judiciaire, qui les choisira en-dehors des personnes soumises à son autorité. L'impossibilité pour la personne concernée d'assister elle-même à la perquisition est à apprécier strictement (Cass. crim. fr. 27 sept. 1984; Bull crim. n° 275; 23 février

1988, Bull. crim n° 91 ; 5 mars 1998, Bull. crim n° 89).

Il est établi que les agents avaient procédé à la visite des étables en-dehors de la présence du prévenu. Celui-ci n'avait été libéré des menottes qu'après l'inspection des lieux, non sans avoir fait savoir, à sa manière, que celle-ci avait eu lieu sans son approbation. Le fait, sans autres explications circonstanciées, que le prévenu s'était opposé à l'entrée des agents, ne constitue pas, faute d'autres éléments, une impossibilité d'assister à la visite de ses étables. Le procès-verbal pour rébellion dressé contre le prévenu le même jour a été classé sans suites par le représentant du procureur d'Etat.

S'il est vrai – et la Cour a pu s'en rendre compte à l'occasion d'une visite des lieux – que le prévenu, pour le moins en présence de représentants de l'autorité publique, n'est pas d'une amabilité exemplaire et que l'idée d'« être de bonne composition » ne l'effleure même pas, il ne résulte pas des éléments auxquels la Cour peut avoir égard si, après l'ouverture des portes, et pour le cas où l'intervention « musclée » des agents s'était avérée indispensable, le prévenu avait été invité, par la suite, à désigner un représentant pour assister à la visite de ses étables et si, à défaut, deux témoins avaient été requis par l'officier de police judiciaire pour suppléer l'absence d'un représentant. Ne peuvent, d'ailleurs, être témoins ni d'autres policiers, ni des personnes requises par l'officier de police judiciaire comme aides, telles que les serruriers (JCP, Procédure pénale, crimes et délits flagrants, Articles 53-73 fasc. 20 n° 172). Enfin, le procès-verbal de la visite domiciliaire n'a pas été signé par le prévenu et ne contient pas non plus la mention que celui-ci avait été, pour le moins, invité à le signer (Article 33 (5) du Code d'instruction criminelle).

La Cour estime, dans ces conditions, que la visite domiciliaire a été exécutée en violation des droits de la défense du prévenu et doit donc être annulée. Toute méconnaissance des prescriptions de fond ou de forme des perquisitions est susceptible d'en entraîner la nullité et celle des actes subséquents, dans la mesure où ils constituent une suite nécessaire de l'acte annulé. Tel est le cas en l'espèce dès lors que sa condamnation prononcée en première instance est basée sur les constatations faites par les agents et le médecin-vétérinaire à l'occasion de la visite de contrôle.

L'annulation du procès-verbal entraîne l'annulation des poursuites engagées sur base de cet acte à l'encontre du prévenu, de sorte qu'il doit être acquitté des infractions libellées contre lui.

Article 12 de la Convention

Concerne : Droit au mariage

Tribunal administratif

21 décembre 2006
Réf : 21987 du rôle

Principaux faits et griefs

Dans le cadre d'un recours en annulation d'une décision de refus d'entrée et de séjour, le demandeur allègue une violation de l'Article 12 de la Convention européenne des Droits de l'Homme.

Conclusions du tribunal

Si l'exécution de la décision litigieuse entraîne, en fait, l'impossibilité pour le demandeur de se marier au Luxembourg, elle ne met cependant pas en cause son droit de se marier tel que consacré par l'Article 12 de la Convention, le demandeur restant libre de contracter mariage, le cas échéant, dans son pays d'origine.

Spain/Espagne

Article 1 of the Convention

Concerns: European Convention on Human Rights and the guarantee of protection of the constitutional rights of citizens

Constitutional Court

5 June 2006
Judgment
No. 177/2006
Rec. amparo
No. 5933/2005
http://
www.tribunalconstitucional.es

Findings of the court

The Constitutional Court points out that the non-execution of the requirement of reciprocity may only be considered as cause to refuse the extradition in the event that by doing so it harms the fundamental rights of the citizen to be handed over. To that one adds that extradition in the environment of the signatory countries of the European Convention on Human Rights cannot raise generic suspicions of breaches on the part of its authorities of the duty of protection of the constitutional rights of its citizens, given the specific commitment to that undertaken by the States participating in the Convention, together with their voluntary submission to the jurisdiction of the European Court of Human Rights, ultimate guarantor of the fundamental rights of all, regardless of the different legal cultures of the signatory countries.

Concerns: Right to effective judicial protection

Constitutional Court

16 January and
27 March 2006
Judgments Nos. 4
and 85/2006,
Rec. amparo Nos.
6196 and 2938/
2001
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court relies on the jurisprudence of the European Court of Human Rights to affirm that the right to effective judicial protection is not only harmed when a claim does not obtain an answer but also when the judicial organ fails to consider a fundamental allegation raised in due form by the parties (9 Dec. 1994, *Hiro Balani v. Spain* and *Ruiz Torija v. Spain*).

In that sense it is indicated that although that right cannot be understood to have been harmed by the mere fact that the judge does not give an explicit answer despite detailed allegations being made, Article 24.1 of the Constitution requires the consideration at least from those that support the reasoning of the parties, even where a generic answer is included or the answer is omitted regarding the other considerations. That is to say, that when the question contains the facts or basic arguments that support the claim, it should be treated specifically or, in turn, considered at least implicit by the judgment, because otherwise the defence is disregarded leading to a failure of justice.

Lastly, the Court points out that the omitted incongruity will have constitutional relevance if the question left unanswered has been outlined precisely before the judge at the correct procedural moment and if the omission refers to questions that, having been considered in the decision, it would have been able to determine a failure different from the indicated one.

Article 3 of the Convention

Concerns: Expulsion submitting to a risk of torture or degrading treatment

Supreme Court

24 July 2006
Judgment
No. 832/2006,
Rec. No. 653/
2005

Findings of the court

The Supreme Court recalls that its doctrine concerning the interpretation of Article 89 of the Criminal Code has a constitutional context. The possibility exists that this article affects the person's fundamental rights, whether immigrant or not, included both in the Constitution and in the international treaties signed by Spain. According to Article 10.2 of the Constitution, these treaties are not only integrated in domestic law, but also constitute an interpretive approach in the matter. In that sense it attaches great importance to the interpretation that the

European Court of Human Rights makes of the European Convention on Human Rights, which is considered as the most important jurisprudential reference as regards human rights for all the European courts.

In short, the Supreme Court recalls that, already in connection with the Organic Law of Reform of the Criminal Code, the General Council of the Judicial Power indicated the omission of the reference to the specific circumstances of convicted persons when deciding whether or not to proceed with their expulsion. It was noted how the European Court valued circumstances like the origins of convicted persons, which could be extended to the protection of the family, or the risks they might face, either to life or of being exposed to torture or degrading treatment contrary to Article 3 of the European Convention on Human Rights. These were elements to bear in mind when considering expulsion.

Everything leads to the Supreme Court concluding that the safeguard of fundamental superior rights, in principle, for public order or for a certain political criminal, requires that the expulsion exception be widened, including an hearing process for convicted individuals in connection with the examination of their specific circumstances – roots, family situation, etc. In addition, the expulsion decision should be motivated.

Article 6 of the Convention

Concerns: Right to interrogate prosecution witness

Constitutional Court

Findings of the court

3 July 2006
Judgment
No. 198/2006
Rec. amparo No.
6672/2002
http://
www.tribunalcons
titucional.es

The Constitutional Court rules in this case regarding the right to interrogate or to have interrogated witnesses for the prosecution, included in Article 6 §3 (d) of the European Convention on Human Rights. This article concerns the adversarial principle, giving the accused the possibility of objecting to the testimonies against him. In that sense one remembers that what is protected in connection with the adversarial principle is not that this should take place in an effective way, but rather that it should be possible, including the requirement that all the parties that can be affected by the co-defendant's declarations be summoned to the interrogation. For that reason the adversarial principle is not violated if the reasons for that not occurring are not related to a judicial performance constitutionally impeachable. As a consequence, the refusal of the co-defendants to respond, regarding what is not attributable to the judge, does not harm the adversarial principle, which in an essential way implies the possibility of the accused interrogating those giving evidence against him to undermine their credibility and testimony, but does not include necessarily obtaining an answer if the person invokes their constitutional right not to answer, as in this case.

The Court points out that the refusal of some of the co-defendants to respond to the questions of the defence would not have prevented the establishing of sufficient proof to weaken the presumption of innocence (Article 24.2 of the Constitution). To that is added that the exercise of the right to silence by the co-defendants does not bear the lack of validity of their declarations, leaving it to the judge to definitively rule on the demonstrable effectiveness of those declarations regarding the presumption of innocence, valuing the evidence freely. On the other hand the doctrine of the Constitutional Court has been establishing a series of preventions so that the co-defendant's declaration acquires demonstrable effectiveness, among which the demand for a consistent demonstrable bonus is included in the need for a minimum corroboration of the same.

Concerns: Right to legal aid

Constitutional Court

Findings of the court

30 January 2006
Judgments Nos.
18 and 20/2006
Rec. amparo
Nos. 455 and
6436/2002
http://
www.tribunalcons
titucional.es

The Constitutional Court relies on the case-law of the European Court of Human Rights (cases *Airey*, 9 October 1979, and *Pakelli*, 25 April 1983), to point out that the right to legal aid, considered as one of the guarantees that constitute the right to a fair trial included in Article 24.2 of the Constitution, cannot be alleged as having been harmed by those who have caused that situation due to their lack of diligence. In addition, this lack of protection should be real, and the situation generated by the lack of technical defence should not turn out to be a direct conse-

quence of the party's conduct. And the litigant's self-defence should also have been revealed as insufficient and harmful, preventing him from articulating an appropriate protection of his rights and legitimate interests in the process. In short, it is true that real and effective damage of his right to defence has taken place.

Concerns: Right not to self-incriminate

Constitutional Court

13 March 2006
Judgment No. 68/2006
Rec. amparo No. 5786/2001
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court cites the case-law of the European Court of Human Rights, which warns that, although it is not expressly included in Article 6 of the European Convention on Human Rights (ECHR), the right to keep silent and the protection against self-incrimination are international norms that are generally recognised as forming an intrinsic part of the notion of a fair trial.

The Constitutional Court recalls the statement of the European Court, according to which the right not to incriminate oneself provides the accused with protection against undue coercion on the part of the authorities, so helping to avoid judicial errors and to achieve the aims of Article 6; to which is added the presumption of innocence included in Article 6 §2 ECHR (*J.B. v. Switzerland*, 3 May 2001; *John Murray v. the United Kingdom*, 8 Feb. 1996; *Saunders v. the United Kingdom*, 17 Dec. 1996; *Serves v. France*, 20 Oct. 1997; *Heaney and McGuinness v. Ireland*, 21 Dec. 2000; *Quinn v. Ireland*, 3 May 2001; *Weh v. Austria*, 8 April 2004).

Nevertheless, the Constitutional Court recalls that, contrary to the European Convention on Human Rights, Article 24.2 of the Constitution specifically includes the right not to incriminate oneself and not to admit one's guilt, which, like the Constitutional Court itself has indicated, are guarantees or instrumental rights of the right to a defence, which exist also as a passive manifestation, that is, that exercised in the form of inactivity on the part of the accused, who can opt to use in the trial the most convenient form of defence for his interests. To that is added that the rights mentioned are linked to the right to the presumption of innocence, which lays on the prosecution the burden of proof. The accused should not be obliged to furnish elements of proof that represent self-incrimination.

Concerns: Guarantees of publicity and contradiction

Constitutional Court

13 March 2006
Judgment No. 74/2006
Rec. amparo No. 1474/2003,
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court recalls that in its judgment 167/2002 it adapted the specified guarantees of publicity and contradiction in the valuation of the tests in the second penal instance to the requirements of Article 6 §1 of the European Convention on Human Rights interpreted by the European Court of Human Rights. In that judgment it laid down that the full jurisdiction that Article 795 of the Law of Criminal Prosecution attributes to the judge *ad quem* in the appeal, including the revision and correction of the valuation of the test for the judge *ad quo* or the modification of proven facts, should respect the guarantees of Article 24.2 of the Constitution: publicity, immediacy and contradiction being required in the new valuation of the test in the second instance, which does not necessarily imply new tests or public hearings in all the cases, but depends on the circumstances of the case and the nature of the questions to judge.

The Court has considered in this way the right to a fair trial violated when a not-guilty verdict in the first instance is substituted by another condemnatory one in the appeal, after a new valuation of the credibility of the testimonies in which the condemnatory conclusion was based, means that, for their personal character, could not be valued again without immediacy, contradiction and publicity, this is, without the direct and personal exam of the accused or the witness, in a public debate in which the possibility of contradiction is respected.

However, the Court has also expressly affirmed that, regarding the documental test that it is possible to hold the valuation in the second instance without the need of reproduction of the procedural debate, because, given its nature, it does not specify immediacy. The Constitutional Court recalls that the doctrine for STC 167/2002 is not applicable when the nucleus of the discrepancy between the not-guilty verdict and the condemnatory one is a strictly artificial ques-

tion, on the basis of some facts that the judgment also considered credited for whose resolution it is not necessary to hear the accused in a public trial, but rather the Court can decide appropriately on the basis of that acted. In this respect one is reminded that it has not done anything except follow the judgment of the European Court, that no violation exists of the right to a fair trial when it does not reproduce the public debate with immediacy in the appeal in the suppositions in that it does not consider any question in fact or of right that cannot be solved appropriately on the basis of the orders (European Court of Human Rights, *Jan-Åke Andersson v. Sweden* and *Fedje v. Sweden*, 29 October 1991, specifying their doctrine in connection with the judgment in the case *Ekbatani v. Sweden*, 26 May 1988).

Concerns: Guarantee of contradiction

Constitutional Court

16 January 2006
Judgment No. 1/2006
Rec. amparo No. 1888/2000
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court points out that the linking of the criminal judicial organs only to the tests practised during the oral trial (Article 741 of the Law of Criminal Prosecution), since only in that case do the tests undergo the adversarial procedure before the judge, they cannot lead to denying all the demonstrable effectiveness of the judicial and summary diligences practised with the formalities that the Constitution and the procedural classification lay down, whenever they can be verified under conditions that allow the accused's defence to subject them to contradiction. This statement is especially useful in cases in which, for the volatility of the sources of the tests or for their difficult or impossible reproduction in the oral trial, it should be endowed to the act of summary investigation practised with all the guarantees the value of premature test or pre-constituted, being able for the judge to form his conviction in such acts without the need for them to be reproduced in the oral trial.

The Constitutional Court admits that possibility whenever the content of the test practised in the summary reproduces well in the oral trial by means of the reading of the records in which it was documented or with the introduction of its content in the interrogations, so that before the rectification or retraction of the testimony at once of the oral trial or in the face of the material impossibility of its reproduction, the test satisfies the public procedural debate before the Court, completing the triple constitutional demand of publicity, immediacy and contradiction. However, the verification of the summary diligences in the trial should be made under conditions to allow the accused's defence to subject the summary performances at once to an effective contradiction of the view.

The transcendency of the contradiction principle for the guarantee of the right to defence has been shown in connection with the tests that testify them during the instruction phase and incorporated later on in the oral opinion, counting on the support of the international instruments, especially of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights which, according to Article 10.2 of the Constitution, serves as an interpretive approach in the application of the relative constitutional precepts to representation of the fundamental rights. In that sense the European Court points out that the incorporation in the process of declarations carried out during the instruction phase does not harm the rights included in Article 6 §§1 and 3d of the Convention, if a legitimate cause that impedes the declaration in the oral trial exists and the rights of the accused's defence have been respected, giving him appropriate and sufficient opportunity to answer those testimonies and interrogate their author, either when they are presented or later on (*Kostovski*, 20 November 1989; *Lüdi*, 15 June 1992; *Van Mechelen and others*, 23 April 1997; *Lucà*, 27 Feb. 2001).

Concerns: Principle of equality

Constitutional Court

13 February 2006
Judgment No. 41/2006
Rec. amparo No. 5038/2003
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court recalls that Article 14 of the Constitution includes both a general relative clause at the beginning of equality like a list, not closed, of specifically mentioned discrimination reasons that refer to very ingrained historical differences and that they have been established, both for the action of the public powers and for the social practice, for sectors of the population in positions, not only unfavourable, but contrary to a person's dignity that Article 10.1 of the Constitution recognises. In that sense one notes that homosexuality, although not specifically mentioned in Article 14, is unquestionably included in the residual clause referring to any other condition or personal or social circumstance. Both the notorious inequality and the social marginalisation that historically those people have suffered have placed them in unfavourable positions and contrary to a person's dignity, like an exam of the normative, which, according to Article 10.2 of the Constitution, should serve as an interpretive source for Article 14.

In this sense one mentions the interpretation given by the European Court of Human Rights to Article 14 of the European Convention on Human Rights, including in it the sexual orientation when considering the list included in that article as merely indicative and not limitative (*Salgueiro da Silva Mouta v. Portugal*, 21 December 1999). To which the European Court adds that regarding the concept covered in Article 14 of the Convention, the differences based on the sexual orientation, and those based on sex, demand special reasons to be justified (*L and V v. Austria* and *S.L. v. Austria*, 9 Jan. 2003; *Karner v. Austria*, 24 July 2003; *B.B. v. the United Kingdom*, 10 February 2004; *Woditschka and Wilfing v. Austria*, 21 October 2004; *Ladner v. Austria*, 3 February 2005; *Wolfmeyer v. Austria*, 26 May 2005; *H.G. and G.B. v. Austria*, 2 June 2005)

Concerns: Guarantee of adversarial procedure

Supreme Court

6 July 2006
Judgment
No. 756/2006
Rec. No. 1819/2005

Findings of the court

The Supreme Court notes that the adversarial process is one in which the right to speak is recognised for the parties in conditions of equality on the matters which are object of the decision. The aim is to ensure that a real possibility is offered to make an objective examination of the statements subject to proof, for those who can be affected by them. It also adds that the adversarial principle is part of the right to a defence, experience having shown that the adversarial and dialogue method is that which is most appropriate to decide about the truth of any assertion; because, to put it colloquially, it is well-known and generally accepted that "out of the discussion, comes the light".

To reinforce their conclusion, it makes use of the interpretation given by the European Court of Human Rights to Article 6 §3 (d) of the European Convention on Human Rights in the sense of recognising for every accused person the right "to examine or to have examined witnesses against him", recalling that Article 14.3.e of the International Covenant on Civil and Political rights is couched in similar terms. In that sense the European Court points out that it is necessary "that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage" (*A.M. v. Italy*, 14 December 1999; *Saïdi v. France*, 20 September 1993; *Delta v. France*, 19 December 1990).

On the other hand, the Supreme Court recalls the doctrine of the Constitutional Court and his own in which it stresses the effectiveness of the right to interrogate the witness as "essence of the right to contradiction whose exercise is forced when the accused does not have [that] opportunity"; so that "not even incriminating statements made by the witness before the instruction judge can be awarded demonstrable effectiveness when they are brought to the plenary by means of their reading (as provided for by Article 730 of the Law of Criminal Prosecution), if in that judicial diligence the accused's defence has not had the occasion to contradict those manifestations by interrogating the witness".

The Supreme Court concludes that the right to reference is clearly only satisfied by means of the recognition of the real possibility of the accused's direct examination (usually through his defence) of the prosecution witnesses at the points in the procedure when they were interrogated: essentially, during the trial. But, as it is reasonable to admit that

the observance of this rule is subject to review, the generality of the legislations, and among them ours, they understand that when this cannot be arranged in ideal circumstances, it would be necessary, at least for the accused's defence to have been able to interrogate directly the source of the accusation, at least once in the course of the case.

Concerns: Limitations on the right to access to a court

Supreme Court

11 October 2006
Rec. No. 10099/2003

Findings of the court

The Supreme Court recalls that the interpretation given by the European Court of Human Rights to the right to a fair trial (Article 6 of the European Convention on Human Rights) in the sense of requiring that the judicial organs examine the causes of being inadmissible respecting the proportionality principle among the limitations imposed to the right to access a Court to examine in depth the appeal and the consequences of their application (European Court of Human Rights, *Saenz Maeso v. Spain*, 9 Nov. 2004). To that one adds the condition of the Agreement and the case-law of the European Court as a prevailing source of the right to effective judicial representation before the judicial organs, in accordance with Article 10.2 of the Constitution.

With the support of the European Court in that doctrine, the Supreme Court affirms that the modification in a restrictive sense of Article 86.2.b of Law 29/1988, regulating the contentious-administrative jurisdiction of the Contentious-Administrative Chamber of the Supreme Court warns in the Orders of the First Section of 10 Feb. 2005 and 3 March 2005 in connection with the sanctions imposed by the Court of Defence of Competition, does not cause, however, their application with retroactive character to the present performances to examine in depth the appeal and consequences of their application.

Concerns: Place and term of presentation of appeals

Supreme Court

7 March and 24 October 2006
Rec. Nos. 6245/2003, 98/2004 and 3300/2003

Findings of the court

The Supreme Court points out that the interpretation and application of the norms regarding the place and the term of presentation of the appeals is a question of ordinary legality that alone acquires constitutional dimension if the inadmissibility is based on a patent error, in an apparent irrational act or in an arbitrary act. In this way it counts on the European Court to point out that, in connection with Article 6 §1 of the European Convention on Human Rights (ECHR), the judicial decision of inadmissibility of the appeals does not reach that constitutional dimension if, even presented in places different to those foreseen and outside of term, exceptional circumstances converge and negligence does not exist, the exceptional nature should be determined and the diligence case-by-case depending on the circumstances (European Court of Human Rights, *Pérez de Rada Cavanilles v. Spain*, 28 October 1998, *Rodríguez Valín v. Spain*, 11 October 2001).

The Court identifies different criteria that should not be considered in any way as appraised, including: (a) to interpose the appeal within the term but in a different registration public to the competent judicial organ (like the post) that allows one to be able to check the date (and, on occasions, time) of presentation of the writing; (b) the distance between the headquarters of the judicial organ where the appeal should be presented and the home of the person making the appeal; (c) the extension of the term for the interference of the appeal in connection with the degree of technical complexity for its foundation; and (d) the performance or otherwise in the context of legal representation.

In judging whether the appeal is conducted in accordance with the right to effective judicial representation (Article 24.1 of the Constitution), the Supreme Court bases its decision on the fact that the essential content of this right is to obtain from the judicial organs a reasoned resolution based on law regarding the claims appropriately deduced by the parties, imposing on the judge a reasonable and non-arbitrary interpretation of the procedural clauses that do not require a rigorous application, excessively formal, or disproportionate in connection with the ends that the process has. In that way the inadmissibility can only be founded, like in this supposition, on the concurrence of an obstacle based on an expressed precept of the Law that in turn is respectful of the essential content of the fundamental right, adopted in

the observance of these constitutional hermeneutic foundations.

Finally the Supreme Court points out that the right to an fair trial guaranteed by Article 6 §1 ECHR, which constitutes a prevailing interpretive source of the right to effective judicial representation, in accordance with Article 10.2 of the Constitution, demands that the judicial organs, when examining the inadmissible causes, respect the proportionality principle among the limitations imposed on the right to access a Court so that it examines the appeal in depth and the consequences of its application (European Court of Human Rights, *Geouffre de la Pradelle v. France*, 16 December 1992, *Sáez Maeso v. Spain*, 9 November 2004).

Concerns: Right of appeal

Supreme Court

23 June 2006
Judgment
No. 679/2006
Rec. No. 1544/2005

Findings of the court

The Supreme Court relies on the recent case-law of the Constitutional Court which concludes that the right to appeal against convictions, which forms part of the right to a trial with all the guarantees of Article 24.2 of the Constitution, should be interpreted, according to Article 14.5 of the International Covenant of Civil and Political Rights together with the case-law on Article 6 §1 of the European Convention on Human Rights and 2 of its Protocol No. 7 (*Krombach v. France*, 13 Feb. 2001; *Papon v. France*, 25 July 2002), not as constituting the right to a second procedure with the repetition of the entire trial, but as the right to a superior court examining the correct nature of the trial carried out in first instance, reviewing the correct application of the rules that led to a guilty verdict and the imposition of a punishment in the specific case. And the freedom of configuration on the part of the internal legislator which this superior Court is a part of and how it submits him to the condemnatory failure and the harm specifically recognised by the aforementioned Article 14.5, which allows one to conclude that inside the classification, and for the crimes for whose prosecution the legislator has been foreseen this way, it is the criminal cassation the appeal that provides the convict in this instance with access to a superior Court.

Concerns: Right to defend oneself

Supreme Court

14 June 2006
Judgment
No. 669/2006,
Rec. No. 1682/2005

Findings of the court

The Supreme Court establishes the content of the right to defend oneself (Article 24.2 of the Constitution) counting on the interpretation that the European Court of Human Rights makes of Article 6 §3 (c) of the European Convention on Human Rights, by which three rights are guaranteed for the accused: to defend oneself, to be defended by means of legal representation of his choice and, under certain conditions, to receive free legal representation (European Court of Human Rights, case of *Pakelli*, 25 Apr. 1983).

On the other hand the Supreme Court recalls that its recent mention of that right to defence includes the right to defend oneself personally, guaranteed by the European Convention on Human Rights and in the International Pact on Civil and Political Rights, in the measure regulated by the procedural laws of each country regulators of the law. For all that it concludes that the right to defend oneself is not limited to an alternative right to the right to technical defence but rather has a relatively autonomous content, regarding the expression of character, in certain ways, dual of the penal defence, usually integrated by the concurrence of two procedural subjects, the imputed and his defending lawyer, regardless of the unequal protagonism of both.

Concerns: Right to a process without undue delay

Constitutional Court

13 March 2006
Judgment No. 82/2006
Rec. amparo
No. 5634/2004
http://www.tribunalconstitucional.es

Findings of the court

In this judgment the Constitutional Court, relying on the International Covenant on Civil and Political Rights and the European Convention on Human Rights (ECHR), states that the right to a trial without undue delays (Article 24.2 of the Constitution) has no relationship to the global length of the case with the non-fulfilment of the procedural terms, but rather it implies that the system of the procedures before the courts should be moved forward in a reasonable

time. The lack of accuracy that results from that conception requires one to bear in mind the circumstances of each specific case to check if a delay has existed and, in turn, if this is justified.

To do so the Constitutional Court follows the interpretation given by the European Court to Article 6 §1 of the European Convention on Human Rights, considered as the minimum standard guaranteed in Article 24.2 of the Constitution, to conclude that determining the undue character of the delay in a certain case consists in applying certain objective approaches specified throughout its jurisprudence, including: the complexity of the litigation, the ordinary margins of duration of the litigations of the same type, the interest that the plaintiff takes in that risk, his procedural behaviour and the behaviour of the authorities.

Concerns: Right to a trial without undue delay

Supreme Court

3 July 2006
Judgment
No. 702/2006
Rec. No. 1784/
2005

Findings of the court

The Supreme Court recalls that the right to a trial without undue delays (Article 24.2 of the Constitution), according to the interpretation of the European Court of Human Rights of Article 6 of the European Convention on Human Rights, supposes that everybody is entitled to have their case heard in a reasonable time. The factors that must be borne in mind for their estimation in each specific case are the following: the complexity of the process, the ordinary margins of duration of the processes of the same nature in the same time period, the interest that anyone risks who invokes the undue delay, its procedural behaviour and that of the jurisdictional organs in connection with the available means (*Dorian González Durán de Quiroga v. Spain*, *López Sole y Martin de Vargas v. Spain*, 28 October 2003).

Also it recalls that the European Court has indicated, in the second of the judgments mentioned, that the period to be taken into consideration under Article 6 §1 of the Convention begins from the moment in which a person is formally accused or when the suspicions of those that are an object have important repercussions in their situation, because of the measures adopted by the authorities in charge of pursuing the crimes.

Concerns: Judge's impartiality

Constitutional Court

24 January 2006
Order No. 18/
2006, Rec.
amparo
No. 7703/2005,
http://
www.tribunalcons
titucional.es

Findings of the court

The Constitutional Court recalls that those who promote the challenge of a judge must base their reasons for doing so in some of the legally foreseen cases besides expressing the specific facts on which it is founded and that the same constitute those that configure the invoked cause. To that one adds that, to separate a judge from the knowledge of a specific matter, objectively justified suspicion should exist, that is to say external and supported by objective data that justify the claim that the judge is not independent of the case when carrying out, or having carried out, work that corresponds to the parties or to having expressed in advance taking one side or against the parties in litigation, or that they allow one to fear that, for any artificial relationship or in fact with the specific case, he will not use as criteria for the trial that foreseen by the law, but other considerations independent of the legal classification that can influence him when ruling on the matter in hand.

In that sense one mentions some identified causes as susceptible to challenge in the jurisprudence of the European Court of Human Rights, such as: membership of the members of the jury of a political party of an ideology contrary to that of the accused (case of *Holm*, 25 Nov. 1993); membership of the chamber that should judge a critical journalistic article against certain of its members that make up the judicial organ (case of *Demicoli*, 27 August 1991); or previously held racist ideas (cases of *Remli*, 23 April 1996, and *Gregory*, 25 February 1997).

Nevertheless, the presumption of the judge's personal impartiality unless demonstrated to the contrary also means that the existence of doubts or suspicion in the mind of he who impeaches is not enough, but rather the same must reach such a consistency that allows one to affirm that they are objective and rightfully justified (case of De Cubber, 26 Oct. 1984, and those cited above).

Concerns: Judge's impartiality

Constitutional Cour

8 May 2006
Judgment
No. 143/2006
Rec. amparo
No. 5697/2003
http://
www.tribunalconstitucional.es

Findings of the court

The Constitutional Court points out that the judge's impartiality, besides being stated expressly in Article 6 §1 of the European Convention on Human Rights, is implicit in the right to a trial with all the guarantees (Article 24.2 of the Constitution), constituting the first of all them, up to the point that without an impartial judge there is not, properly, a judicial process. The impartiality supposes the judge's condition as a third party, remaining distant from the interests in litigation and only submitting to the juridical classification as the criteria of the trial. In this way, the evident dimension related to the absence of the judge's relationship with the parties that can raise a previous interest in favouring them or harming them, an objective angle is added that consists of that the judge coming closer to the cause without prejudice that could have been formed by some previous contact with the object of the process, such as: the carrying out of instruction acts, the adoption of previous decisions that represent a preconceived notion of guilt, an intervention in a previous instance of the same proceedings or, rather in general, a pronouncement on the facts debated in a previous case. Each case must be analysed according to the specific circumstances and leaving aside the presumption of the judge's impartiality, should prove the data that can objectively put in question his suitability. So that this does not take place by the mere fact that the judge has had a previous participation in the prosecution in question, but rather it is necessary to analyse the circumstances of the specific case.

The Constitutional Court applies that doctrine in relation to the instruction and prosecution abilities, taking as a basis that which allows us in each case to consider objectively justified the doubts about the judge's impartiality. It is not so much the type of his performances that could be derived from the same but the confirmation that the judge's previous intervention has supposed the adoption of a decision regarding questions substantially identical or very similar to those that should be the object of pronouncement in the prosecution in question, showing therefore a premature pronouncement in this respect.

The Constitutional Court reminds on this point that same position has been assumed by the European Court in the judgment of 2 March 2000, in the case of *Garrido Guerrero v. Spain* that completed their pronouncement in the matter *Castillo Algar* in the sense of considering that violation of the Convention had not taken place since the Court had specified the limits of the prosecution so that it did not prejudice the result of the litigation, the qualification of the facts nor the guilt of the accused.

In conclusion, although the previous realisation of the functions of investigation, supervision or inspection of the investigation can justify the fear about the impartiality of the judge that should solve the matter, this partiality could only be appreciated if the questioned activity represented assuming part or auxiliary positions to the parts in the exercise of his functions.

Concerns: Right to a fair trial

Supreme Court

21 February 2006
Rec Nos. 3754/
2003 and 5695/
2003

Findings of the court

The Supreme Court specifies the meaning, content and scope from the right to a sanction procedure with all the guarantees according to the doctrine of the European Court of Human Rights, of the Constitutional Court and of the Supreme Court itself. In that sense it points out that the sanctioning power of the Administration is limited in its exercise by the respect of the principle of legality of the infractions and administrative sanctions that is projected in the recognition, linked to the right to effective judicial representation, and of the right to a process with all the guarantees (Article 24 of the Constitution), of the subjective right that nobody can be sanctioned except where prescribed by the law and by the administrative authorities that have the sanctioning power attributed by law and through a procedure in which the right to defence, to being informed of the accusation and to the presumption of innocence are fully respected.

The right to a sanctioning procedure with all the defence guarantees, fundamental right of the citizen to a fair and equal trial in front of the coercive powers of the Administration in which the defence rights are respected with

interdiction not being protected, in a systematic interpretation of Article 24 and 25 of the Constitution and of Article 6 §1 of the European Convention on Human Rights, includes, as stated in the doctrine of the Constitutional Court and of the European Court, among other guarantees, the right not to be punished without being heard and to exercise the allegation abilities with contradiction in all the phases of the procedure, the right to public proceedings, the right to be informed of the accusation, so that the imputed facts are known without restriction which imposes that correlation exists between these facts and the sanctioning resolution, the right to use the pertinent test means for the defence that excludes the admissibility and appreciation of illicit tests, and the right to the presumption of innocence that welcomes the right to not being sanctioned without a legitimate and valid test that sustains the sanctioning resolution.

Concerns: Presumption of innocence

Supreme Court

1 February 2006
Judgment No. 192/2006
Rec. No. 1087/2004

Findings of the court

The Supreme Court rejects the violation claim from the right to the presumption of innocence counting on the indirect test when the direct one was viable in the calculation of expenses for the effects of Income Tax. In that sense we are reminded that the indirect test or by indications does not only have an accessory or subsidiary value, but rather in fact is the only one with the one that is used in the suppositions of crediting of subjective facts, as relevant as the test of deceit in its double meaning as test of knowledge and test of intention. In conclusion it is affirmed that the test of circumstantial proof is able to guarantee the right to the presumption of innocence and justify the dictation of a condemnatory sentence.

The Supreme Court supports its conclusion, among other bases, on the case-law of the European Court of Human Rights that, when valuing the test, it has applied the criteria of the test beyond any reasonable doubt. However, the European Court reminds us that such a test can be obtained from the coexistence of sufficiently consistent, clear and concordant inferences or of similar presumptions in fact not rebutted (*Ireland v. the United Kingdom*, 18 January 1978; *Salman v. Turkey*, 27 June 2000; *Tanli v. Turkey*, 10 April 2001; *Tahsin v. Turkey*, 8 April 2004).

Based on everything the Supreme Court concludes that the indirect test probably includes more guarantees than the direct test, since the motivation bonus that seeks to clarify and to motivate the inference trial reached to get to the credited fact-base, to the fact-consequence, acts in fact as a guarantee bonus that allows a better control of the reasoning from the Court *a quo* when the Superior Court knows of the item via appeal, with which there is a better and complete control of the interdiction of the arbitrary nature than in relation to the direct test that becomes a test of impossible inspection for anybody who had not attended the trial due to the immediacy or even in an excuse or alibi to be exempted from the duty of motivating it or reducing it to a purely formal entity.

Article 8 of the Convention

Concerns: Secrecy of communications

Constitutional Court

30 January 2006
Judgment No. 26/2006
Rec. amparo Nos. 1311, 623 and 958/2004
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court recalls that its doctrine, inspired by the case-law of the European Court (*Valenzuela v. Spain*, 30 July 1998, and *Prado Bugallo v. Spain*, 18 February 2003), about the inadequacy of Article 579 of the Law of Criminal Prosecution, both in its previous writing and in that of the effective Organic Law 4/1988 for the protection of the right to the secrecy of communications just as is included in Article 18.3 of the Constitution, interpreted, as established in Article 10.2 of the Constitution, by agreement with Article 8 §§1 and 2 of the European Convention on Human Rights (ECHR).

Nevertheless, in this case the Constitutional Court notes that, contrary to the previous ones, the performances took place once both in the Supreme Court, and in the Order of 18 June 1992 and in the Constitutional Court itself, in judgment 49/1999, they had integrated their pronouncements in the resulting demands of the ECHR. The conclusion is that at this time the Spanish Law

respects the demands of Article 8 of the Convention, obliging the Constitutional Court itself to replace the possible inadequacies of the same until the legislator's intervention takes place.

Concerns: Secrecy of communications

Constitutional Court

30 January 2006
Judgment No. 26/2006
Rec. amparo No. 1311, 623 and 958/2004
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court affirms that so that it can be understood that an order of phone intervention is founded, suspicion cannot be based merely on psychological grounds, but rather must be supported by objective data. So that it takes place, that data must be accessible to a third, without which it would not be susceptible to control, and must provide a real basis from which it can be inferred that a crime has been committed or will be, without it consisting of personal judgments about the person.

The Constitutional Court points out that it is the criteria followed by the European Court when requiring the existence of "good reasons or strong presumptions" that the infractions are about to be made (*Klass*, 6 September 1978; *Lüdi*, 15 June 1992). Those requirements are incorporated in Spanish Law in Article 579 of the Law of Criminal Prosecution that demands the concurrence of indications from obtaining by these means the discovery or the confirmation of some fact or important circumstance of the cause or of indications of criminal responsibility. In conclusion it is indicated that the secrecy of the communications cannot be revealed to give satisfaction to a generic necessity of preventing or discovering crimes or clearing the suspicions without an objective base that arises from those in charge of the investigation. To that one adds that, although it is advisable that the judicial resolution states expressly the existence of objective indications that justify the intervention, this resolution can be sufficient motivation, even jointly taken with the police application, containing the necessary elements to satisfy the requirements to be able to later deliberate the restriction of the fundamental rights that the proportionality of the measure bears.

Concerns: Conflict between transparency of the judicial processes and the right to privacy

Constitutional Court

5 April 2006
Judgment
No. 114/2006
Rec. amparo
No. 24/2002
http://www.tribunalconstitucional.es

Findings of the court

The possible exceptions to the constitutional demand of maximum diffusion and publicity of the entire content of its resolutions are analysed in this case, which may be either of the possibility included in Article 120.1 of the Constitution when enunciating the principle of publicity of judicial proceedings, or the prevalence of other fundamental rights with which that principle enters into conflict.

An exception possibility was included recently in Article 266.1 of the Organic Law of the Judicial Power in connection with the right to the privacy, to the rights of people that require special guidance or to the guarantee of the anonymity of the victims or harmed person, when it proceeds, as well as, of a general character, to avoid that the judgments can be used with ends contrary to the law. Although the Constitutional Court is only subjected to the Constitution and its own Organic Law, Article 266.1, taken together with Article 80 of the Organic Law of the Constitutional Court, is applicable in a subsidiary and indirect way to be compatible with the specific demand of maximum diffusion of the jurisdictional resolutions of this Court. In this respect one notes that the decision on the restriction of the publicity of the intervening parts in the constitutional process should be reached after an individual reflection of the constitutional interests with those that the principle of publicity could enter in conflict with, particularly the right to the privacy, the rights of those who require special protection, the guarantee of anonymity, when it proceeds, of the victims and harmed, and the guarantee that this data cannot be used with ends contrary to the law.

The Constitutional Court recalls that this practice is habitual also in other superior courts, both national and international, such as the European Court of Human Rights, pointing out in this respect both Article 47.3 of its Regulation procedure that came into effect in December 2005, and the judgment of 25 February 1997 in the case of *Z v. Finland*, in which the existence of a general interest in guaranteeing the transparency of the judicial processes was declared to pre-

serve the public trust in the justice whose relevance implies that it should not necessarily give in the event of entering into conflict with the right to privacy, even in connection with such a sensitive aspect as the protection of the confidentiality of medical data.

Other case concerning the right to privacy:
Concerns: Principle of proportionality between telephone surveillance and the gravity of the investigated facts

Phone interventions are proportional when the objective is to investigate a serious punishable infraction. The smuggling of tobacco can be qualified as such given its incidence does not only have more than enough the financial interests of the public tax system but also for the sanitary costs that it generates, to be a harmful product for health.

Constitutional Court, 3 April 2006, judgment No. 104/2006. Rec. amparo No. 7224/2002, http://www.tribunalconstitucional.es

Article 10 of the Convention

Concerns: Limits to freedom of expression

Constitutional Court

Findings of the court

The Constitutional Court clarifies the possible interaction between the right to honour and freedom of speech (Article 18.1 and 20.1 of the Constitution). To that end it reiterates that although the right to honour, as any other constitutional right, also has limits – especially the aspect that supposes the right to inform and to express oneself freely – that does not mean that Article 20.1 includes a right to insult. For that it goes to the consideration that the European Court makes of other people's reputation, summarised in Article 10 §2 of the European Convention on Human Rights, as a limit on freedom of speech and of the right to inform (cases of *Lingens*, 8 July 1986; *Barfod*, 22 February 1989; *Castells*, 23 April 1992; *Thorgeir Thorgeirson*, 25 June 1992; *Schwabe*, 28 August 1992; *Bladet Tromsø and Stensaas*, 20 May 1999).

Everything leads the Constitutional Court to conclude that the condition of the right to honour as an unavoidable limit imposed by the Constitution (Article 20.4) to freedom of speech when prohibiting that nobody refers to a person in an insulting or injurious way, or attempting to do so unjustifiably against their reputation undeservedly before other people's opinion.

3 July 2006 Judgment No. 216/2006 Rec. amparo No. 7131/2003 http://www.tribunalconstitucional.es

Concerns: Freedom of speech in the Army

Supreme Court

Findings of the court

The Supreme Court points out that the right to freedom of speech, whose essence is the free manifestation and by any means of the thoughts, ideas and opinions, also applies to the military although it finds in this case certain limits, arising as a consequence of the characteristic functions of the military that add to the limitations of that right with a general character, derived from that prepared in Article 20.4 of the Constitution.

The Court states that those specific limits are essential to preserve the values and essential principles of the military organisation, that is to say, the discipline, the hierarchical relationship, the unit and the internal cohesion that in turn are necessary to safeguard to guarantee the functionality of the armed forces and the execution of their missions, just as it is included in Article 8.1 of the Constitution, 15.1 of the Organic Law of National Defence and 10 of the Real Ordinances for the Armed Forces. However, those limits are not able, in any case, to reduce the members of the armed forces to pure and simple silence.

The Supreme Court points out that that doctrine is also enunciated by the European Court of Human Rights when it interprets Article 10 §2 of the European Convention on Human Rights in the sense of allowing that freedom of speech may be subjected to certain restrictions that constitute necessary measures in a democratic society for national security, territorial integrity or public security.

17 July 2006 Rec. No. 26/2006

In short, in reference to the application of that right to the military, the European Court, after affirming the application of freedom of speech to service personnel, reminds us that the effective operation of an army is scarcely possible without rules dedicated to preventing the undermining of military discipline, in particular by means of writing (cases of *Engel*, 8 June 1976; *Barthold*, 25 March 1985; *Grigoriades*, 25 November 1997, among others).

Concerns: Right to honour and freedom of expression

Constitutional Court

18 Jan. and 27 Feb. 2006
Order No. 16/2006 and Judgment No. 53/2006
Rec. amparo Nos. 5795/2003 and 2760/2000
http://www.tribunalconstitucional.es

Findings of the court

The Constitutional Court recalls that its widespread jurisprudence in connection with the conflict among the right to the honour and the right to the freedom of information (Article 18.1 and 20.1 (d) of the Constitution) is coincident with that of the European Court when interpreting Article 10 §1 of the European Convention on Human Rights. This doctrine points out that freedom of information occupies a special place in the Spanish classification, since not only does it protect an individual interest but rather its guarantee, and consequently the existence of a free public opinion, is indissolubly together with the political pluralism characteristic of the democratic state. That does not, however, imply its pre-eminence over other fundamental rights, by which the constitutional protection of freedom of information is conditioned so that the information refers to facts with public relevance, in the noticeable sense, and that this information is truthful.

Concerns: Submitting television broadcasting companies to previous authorisation

Supreme Court

18 July 2006
Rec. No. 1374/2004

Findings of the court

The Supreme Court reiterates the doctrine laid down by the Constitutional Court in relation to the regime of previous authorisation to which broadcasting activities are subjected in Spain is perfectly compatible in respect of that included in Article 10 §1 of the European Convention on Human Rights, which points out that freedom of speech, opinion and reception of information or ideas do not prevent states from subjecting television broadcasting companies to a regime of previous authorisation.

Therefore the technique of the concession for the indirect administration of the public service of sound broadcasting is a variant of previous authorisation that is not forbidden either by the Constitution or by the European Convention.

Articles 10 and 46 of the Convention

Concerns: Right to effective judicial protection in connection with freedom of speech

Constitutional Court

3 July 2006
Judgment No. 197/2006
Rec. amparo No. 119/2002
http://www.tribunalconstitucional.es

Findings of the court

In this case is considered the infringement of the right to effective judicial protection, in connection with freedom of speech (Articles 24.1 and 20.1 of the Constitution), as a consequence of the rejection by the Supreme Court of an appeal for a revision of a judgment of a lower court that declared the dismissal of the appellant reasonable, basing that revision appeal on the existence of a judgment of the European Court of Human Rights that declared this dismissal as a violation of freedom of speech.

The Constitutional Court points out that the failure by the appellant to present a reinstatement appeal against the decision of the lower court before the revision resource does not mean that all the judicial resources have not been exhausted. In that sense it points out that the objective of making the arrangement possible by judicial means, respecting the subsidiary character of the application for the protection of basic liberties, would have been completed by the opportunity for resolution before the Supreme Court; nevertheless, the notorious uncertainty of the actionable favoured by a judgment of the

European Court regarding the procedural route to make the internal effects of this worthwhile in the event of the violation of his rights persisting is added.

On the other hand the Constitutional Court reminds that the considerations included in its judgment 245/1991 have not been affected by the reform operated by Protocol No. 11 to the European Convention on Human rights (ECHR). By which it reiterates the declarative character of the resolutions of the European Court whose execution is the responsibility of the Committee of Ministers, as well as that not introduced in the internal order any supranational control mechanism of the national judicial or administrative decisions, nor does it impose on states any specific measure of annulment to guarantee the repair of the violation of the Agreement indicated by the Court. Nevertheless, the Constitutional Court remembers that the indirect executability of the resolutions of the European Court does not imply an absolute lack of internal juridical effects, so that the integration of the ECHR in the Spanish Law (Article 96.1 of the Constitution) and the condition of interpretive norm of the rights and freedoms included in the Constitution, attribute to the Constitutional Court the obligation of prosecuting if the violation declared by the European Court also constitutes a current violation of a right included in the Constitution.

In this case the Constitutional Court considers that the current character of the violation of the freedom of speech indicated by the European Court cannot be sustained, since on the one hand the violation which took place as a consequence of the dismissal does not continue at present, without the derived effects of the loss of the work position, as a consequence of the dismissal, mean the maintenance of the infringement of the referred fundamental right, and on the other because the damages of this infringement were already resolved by the European Court by means of the satisfaction for the economic and moral damage caused. Also, the Constitutional Court recalls that the Supreme Court has not refused access to the revision resource but rather it has rejected this resource when not fitting any of the reasons of the same according to Article 1796 of the Law of Civil Prosecution of 1881, the current Article 510 of the Law of Civil Prosecution of 2000.

The Constitutional Court confirms the posture of the Supreme Court that a judgment of the European Court cannot be considered a new document to these effects, reminding that it is a reason that contemplates the case of the obtaining or recovery of decisive documents for the case that already existed when the judgment was being dictated that it wants to revise. To that one adds the rejection of an extensive interpretation of the reasons of the revision appeal since the European Court itself has already granted the appellant the protection requested again, when granting an economic solution for the infringement of freedom of speech.

All things considered, the Constitutional Court concludes that the refuted judgment fully satisfies the right to effective judicial protection according to Article 24.1 of the Constitution being a motivated resolution that includes the elements that make it possible to recognise the juridical foundations of the same, and founded in Law, since it is not groundless or arbitrary nor does it incur in patent error.

Also, one notes the non-applicable nature of judgment 240/2005 of the Constitutional Court itself that considered that the inadmissibility of a revision appeal based on a judgment of the European Court could not be qualified as a new fact demonstrating the accused's innocence (Article 954.4 of the Law of Criminal Prosecution), and violates Article 24.1 of the Constitution due to the disproportion between the end of the juridical security characteristic of the inadmissibility causes and the sacrificed interest, which in that case was the right to the presumption of innocence (Article 24.2 of the Constitution). That reasoning is not valid now since the Supreme Court does not declare inadmissible the revision appeal but rather rejects it when considering that a judgment of the European Court of 29 Feb. 2000, cannot be considered as a recovered document. To everything, the Constitutional Court adds that the consideration of a judgment of the European Court as a cause of a revision appeal would only be possible through a legislative reform that introduces a new reason *ad hoc*.

The judgment is accompanied by the personal vote of one of the judges that points out that the simple fact that the judgment of the European Court was totally executed to the satisfaction of the compensation included should have implied the rejection of the appeal, regardless of any other consideration. One also notes the existence of a certain contradiction when pointing out that while on the one hand the lack of legal or

constitutional responsibility is recognised to execute the judgments of the European Court, on the other the Constitutional Court notes that the non-existence of mechanisms of direct execution of the decisions of any international body for guaranteeing rights, excluding the European Union, is complementary with the obligation of the Court knowing of the violation of rights included in the Constitution verified by the European Court. That contradiction is good to point out that the mention of Article 10.2 of the Constitution only serves to underline the value of the European Convention on Human Rights as an interpretive approach of the rights included in the Constitution, but not as a base of responsibilities for the execution of the judgments of the European Court that require an expressed attribution of responsibility for the legislator that has not taken place, in spite of the favourable judgment of the Constitutional Court itself. To that is added that the execution of a judgment of the European Court would almost always be similar to ignoring the value of the judged thing of the decisions of the Constitutional Court itself that would have solved the matter to which the judgment of the Court of Strasbourg refers rejecting it in most cases and to counteract that effect of judged thing a legal base would also be necessary which is nonexistent today.

Article 14 of the Convention

Concerns: Admissible difference of treatment

Constitutional Court

22 May 2006
Judgment
No. 197/2006
Rec. amparo
No. 119/2002
http://
www.tribunalconstitucional.es

Findings of the court

The principle of equality of all Spaniards before the law (Article 14 of the Constitution) does not imply, following the interpretation of the European Court of that same principle, that any unequal treatment regarding the regulation in a certain matter supposes violation of this principle, that infringement not existing when it offers an objective and reasonable justification of the reason. Neither is the difference in treatment unconstitutional when its consequences are provided for the pursued purpose, of luck that excessively grievous or limitless results are avoided.

The Constitutional Court adds that the list of discrimination reasons included in the constitutional text is not a closed enumeration of the same, but is an expressed prohibition of a series of ingrained historical differences and that they have been established, both by the action of the public authorities and social practice, on sectors of the population in positions, not only unfavourable, but contrary to the person's dignity recognised by Article 10.1 of the Constitution. In that sense, the Constitutional Court itself has been framing, inside the non-discrimination for reasons of birth, equality of the different member classes that you should understand each other absolutely equipped. For that reason it is indicated that any legislative option that does not take into account the obligation of the public authorities to assure the complete protection of the children regardless of their membership, and that of the parents of providing assistance of all types to the children there are inside or outside of the marriage, incurs from birth a discrimination for reason specifically forbidden by Article 14 of the Constitution, since the membership does not admit intermediate juridical categories.

Concerns: Non-discrimination between adopted and biological children

Supreme Court

29 September
2006
Judgment
No. 902/2006
Rec. No. 4317/
1999

Findings of the court

The Supreme Court recalls the value of the case-law of the European Court of Human Rights, not only for the ratification by Spain of the European Convention on Human Rights, but also of the condition of the international instruments in the matter as rules to guide the interpretation of the fundamental rights collected in Article 10 of the Constitution. In this way the judgment of that Court of 14 July 2004 that considered included in the non-discrimination principle the concept of adoptive children that are in the same artificial situation as biological children to all effects, relationships and consequences linked with their family life and derived patrimonial rights. For all that, declares that the probate clause should be

interpreted and applied many years after the death of the testator after deep changes both in the social context and economic and juridical, of such luck that the judge cannot ignore these new realities and should confer to the probate disposition the sense most appropriate with the internal right and with the Convention.

Article 46 of the Convention

Concerns: Internal execution of the judgments of the European Court of Human Rights

Constitutional Court

24 April 2006
Judgment
No. 116/2006
Rec. amparo
No. 73/2002
http://
www.tribunalconstitucional.es

Findings of the court

The Constitutional Court recalls its lack of power to rule on the internal execution of the resolutions of the competent international organisms as regards human rights, especially of the judgments of the European Court and of the verdicts of the Committee of the United Nations. For that reason its function must be checked if the refuted judicial resolutions have harmed fundamental rights recognised in the Constitution.

That does not prevent it from pointing out, as it has done from its first judgments, the important interpretive function of the international texts in the matter to determine the content of the fundamental rights. In that sense it recalls that although the verdicts of the Committee are not comparable with the judgments of the European Court, for not being judicial resolutions and lacking internal force, it does not imply that they do not have any effectiveness in the internal stage, since they declare the infraction of a right recognised in the International Covenant of civil and political rights that not only form part of Spanish law, according to Article 96.1 of the Constitution, but rather serve as an interpretive rule of the fundamental rights and of the public freedoms collected in the constitutional text, according to Article 10 §2 of the Constitution.

Switzerland/Suisse

Article 5 de la Convention

Concerne : Motifs à la base de la détention

Tribunal fédéral

23 février 2005
Réf. : Pra. 1/ 2006, p. 1, Die Praxis des Bundesgerichts, 2006, pp. 1-8

Conclusions du tribunal

Soupçon important de culpabilité comme motif de détention : exposé insuffisant, par le juge de la détention, de l'état de fait prétendument délictuel.

Danger de collusion comme motif de détention. Un simple danger d'obscurcissement est insuffisant. Indices parlant en faveur d'un danger de collusion concret.

Maintien de la détention préventive malgré un exposé insuffisant des motifs de la détention. Le juge de la détention n'apparaît pas déjà partial du seul fait que, dans la même affaire, il s'est déjà prononcé sur l'existence de motifs de détention par rapport à des co-accusés.

Concerne : Délais durant lesquels il ne peut être fait de demandes de libération

Tribunal fédéral

10 octobre 2005
Réf. : Pra. 5/ 2006, p. 355, Die Praxis des Bundesgerichts, 2006, pp. 355-361

Conclusions du tribunal

L'Article 31 al. 4 de la Constitution fédérale (Cst. féd.) et l'Article 5 § 4 de la Convention européenne des Droits de l'Homme donnent au détenu des droits procéduraux, notamment celui de faire appel en tout temps à un juge pour que celui-ci examine la légalité de la détention.

Des limitations aux droits garantis par ces dispositions sont admissibles si elles sont fondées sur une base légale, si elle visent un intérêt public et si elles sont proportionnées.

Le Tribunal fédéral examine avec pleine cognition si les droits procéduraux du détenu ont été violés par l'application de la procédure pénale cantonale.

Selon la jurisprudence du Tribunal fédéral et de la Cour européenne des Droits de l'Homme, la question de savoir quel intervalle entre deux contrôles judiciaire est raisonnable est résolue d'après les circonstances du cas d'espèce. La jurisprudence admet que la mise en place d'une durée d'exclusion des demandes de libération d'un mois est admissible. Des durées de un à trois mois ne sont, en revanche, admises qu'exceptionnellement.

La durée pendant laquelle les demandes de libération sont exclues doit être prévisible pour le détenu. Dans le cas d'espèce, une limitation d'une durée indéterminée (liée à la remise d'un rapport d'expertise psychiatrique dont le délai est indéterminé) s'avère contraire à la Constitution, puisqu'elle limite la voie de droit qu'offre l'Article 31 al. 4 Cst. féd. au détenu pour une durée indéterminée.

Concerne : Notion de privation de liberté

Tribunal fédéral

30 novembre 2005
Réf. : Pra. 8/ 2006, p.615, Die Praxis des Bundesgerichts, 2006, pp. 615-619

Conclusions du tribunal

Ne constitue pas encore une privation de liberté la seule arrestation ou détention temporaire ou la limitation de la liberté. Pour qu'il y ait privation de liberté, il faut une atteinte d'une certaine intensité.

L'interrogatoire consensuel, les mesures d'identification officielles et l'attente au poste de police qui s'ensuit de la décision du juge d'instruction sur la suite de la procédure (l'ensemble de ces mesures n'ayant duré que de 8 h 28 à 14 h 55) ne constituent pas une privation de liberté.

Article 6 de la Convention

Concerne : Renonciation au droit de répliquer sur une détermination d'une instance inférieure

Tribunal fédéral

22 novembre 2005
Réf. : ATF 132 I 142
Recueil des arrêts du Tribunal fédéral, 132/2006, pp. 42-48

Conclusions du tribunal

La jurisprudence, tant du Tribunal fédéral que des organes de la Convention européenne des Droits de l'Homme (CEDH), reconnaît qu'il est possible de renoncer à une procédure publique. De même, la jurisprudence de la Cour européenne des Droits de l'Homme admet qu'il est possible, en principe, de renoncer au droit à une procédure contradictoire. Il doit en aller de même du droit de répliquer sur une détermination d'une instance inférieure. Pour que la renonciation soit valide, il faut qu'elle soit univoque et que les garanties minimales soient respectées. D'après la jurisprudence de la Cour européenne sur l'Article 6 § 1 CEDH, il appartient à la partie concernée d'évaluer si une détermination contient de nouveaux arguments et exige une prise de position. La partie concernée doit avoir la possibilité de se prononcer sur la nécessité d'une telle détermination. Ces exigences sont violées si le tribunal communique la détermination mais rejette, par une décision incidente, une demande de répliquer. Il est également inadmissible d'écarter la détermination spontanée du recourant dans le cadre de la décision finale.

Analyse de la jurisprudence de la Cour européenne des Droits de l'Homme à ce sujet. Mise en oeuvre de l'Article 6 § 1 CEDH en cas de communication de la réponse au

recourant pour information : renonciation effective dans le cas d'espèce puisque le recourant, alors même qu'il savait qu'il pouvait, de manière spontanée, se déterminer sur la position de l'autorité inférieure, n'a pas utilisé le temps écoulé pour faire parvenir au tribunal une détermination.

Concerne : Procès équitable

Cour de cassation du canton de Zurich

13 janvier 2006
Blätter für sürcherische Rechtsprechung, 2006, pp. 150-153

Conclusions de la cour

1. Dans les cas de défense nécessaire, la défense suffisante (efficace) ne doit pas échouer en raison d'une panne informatique subie par le défenseur peu de temps avant l'échéance d'un délai (en l'espèce le délai pour déposer la motivation d'un recours). Dans un tel cas, afin de sauvegarder le droit à une défense suffisante, il convient de restituer le délai.

2. La loi prévoit, dans plusieurs cas, le jugement par un jury constitué. L'assermentation des jurés constitue une partie de cette constitution et non de la procédure dans le cas d'espèce. Il n'y a aucune obligation d'orienter les parties ou leurs représentants au sujet de la date de cette occupation.

3. L'indication du droit général de l'accusé de refuser de déposer doit avoir lieu une seule fois pendant la procédure. Cette indication rend superflue l'indication complémentaire d'un éventuel droit de refuser de témoigner au sens de l'Article 129 du Code de procédure pénale du canton de Zurich. Du point de vue des déclarations informelles et spontanées de l'accusé, il n'y a aucune obligation d'indication, même si le destinataire utilise par la suite cette déclaration dans la procédure.

Concerne : Témoignages anonymes

Tribunal fédéral

25 avril 2006
Réf. : ATF 132 I 127
Recueil des arrêts du Tribunal fédéral, 132/2006, pp. 127-134

Conclusions du tribunal

L'admissibilité de témoignages anonymes implique d'évaluer l'ensemble des circonstances pour déterminer si la restriction des droits de la défense qu'elle constitue est légitimée par un intérêt digne de protection et, dans l'affirmative, si l'inculpé n'a, malgré cela, pas été privé d'un procès équitable.

En l'espèce, l'atteinte aux droits de la défense a été insuffisamment compensée, ni l'inculpé ni le défenseur n'ayant eu l'occasion d'interroger le témoin, ne serait-ce que par le biais d'une confrontation indirecte.

En l'espèce, le tribunal s'est fondé en partie sur le témoignage d'un témoin anonyme qui n'a pas pu être interrogé par la défense. Un tel témoignage n'étant pas admissible, l'arrêt du Tribunal cantonal doit être cassé et la cause renvoyée à cette autorité pour nouveau jugement, dans le cadre duquel le tribunal devra examiner si une condamnation est possible sur la base du seul témoignage admissible.

Concerne : Sûretés exigées de la partie demanderesse en garantie des dépens de l'autre partie

Tribunal fédéral

4 mai 2006
Réf. : ATF 132 I 134
Recueil des arrêts du tribunal fédéral, 132/2006, pp. 134-140

Conclusions du tribunal

La garantie du droit d'accès aux tribunaux n'exclut pas d'exiger des sûretés destinées à couvrir indistinctement les frais futurs de la partie défenderesse et ceux que cette partie a déjà subis dans le procès. Les sûretés peuvent aussi couvrir les frais résultant de l'exception de compensation de la partie défenderesse.

En l'espèce, le fait d'exiger des sûretés à hauteur de CHF 400.000 ne viole pas le droit d'accéder au tribunaux, puisqu'il se révèle proportionné non seulement à la valeur litigieuse, mais également aux difficultés inhérentes à un débat judiciaire portant sur des question de droit étranger et aux moyens juridiques invoqués par les parties.

Concerne : Charge des frais de la procédure dans le cas d'un classement de la procédure

Tribunal fédéral

14 juillet 2005
Réf. : Pra 3/2006, p. 177, Die Praxis des Bundesgerichts, 2006, pp. 177-183

Conclusions du tribunal

Il faut se prévaloir du droit à une procédure judiciaire déjà au stade de la procédure cantonale. Dans le cas contraire, il est admis que le recourant a renoncé à se prévaloir de cet argument. Il en va de même des motifs de récusation du juge, qui doivent être soulevés au plus vite. En l'espèce, le recourant n'a pas, au stade de la procédure cantonale, argué de la violation de l'Article 30, al. 1, de la Constitution. Son droit de se prévaloir de cette disposition est donc périmé.

Le Tribunal fédéral peut, lorsque la motivation de l'instance cantonale est déficiente, la compléter si nécessaire. En l'espèce, l'instance cantonale a mis les frais à la charge de l'accusé non condamné, sans démontrer en quoi il avait, par son comportement, porté atteinte à l'ordre juridique. Or, le Tribunal fédéral considère que par son comportement, l'accusé non condamné a, en l'espèce, violé le principe de « neminem laedere », consacré comme principe de l'ordre juridique.

Dès lors, il se justifiait de mettre à sa charge les frais de la procédure, bien qu'il n'ait pas été condamné.

Concerne : Assistance judiciaire

Tribunal fédéral

28 mars 2005
Réf. : Pra 1/2006 p. 9, Die Praxis des Bundesgerichts, 2006, pp. 9-13

Conclusions du tribunal

La question juridique de savoir si un comportement doit être qualifié de violation simple ou grave des règles de la circulation – ici en relation avec l'accusation d'homicide involontaire et avec le risque d'une peine privative de liberté de plus de six mois – présente des difficultés extraordinaires, de telle sorte que l'accusé, disposant d'une formation scolaire adéquate, ne peut pas répondre par lui-même. En outre, le principe de l'égalité des armes exige que lorsque la partie lésée, qui peut – et va probablement – s'exprimer au sujet de la culpabilité est représentée d'office, l'accusé bénéficie également de la défense d'un avocat.

Concerne : Durée de la procédure

Tribunal fédéral

21 septembre 2005
Réf. : Pra 5/2006 p. 353, Die Praxis des Bundesgerichts, 2006, pp. 353-354

Conclusions du tribunal

Une inactivité des autorités de poursuites pénales pendant plusieurs années constitue une raison pour une atténuation importante de la peine.

Concerne : Indépendance du juge

Tribunal fédéral

5 novembre 2005
Réf. : Pra 7/2006 p. 525, Die Praxis des Bundesgerichts, 2006, pp. 525-529

Conclusions du tribunal

Si le tribunal, dans le cadre d'une appréciation anticipée des preuves, est parti de l'idée que l'administration de preuves supplémentaires est inutile et si cette manière de voir est considérée comme arbitraire dans la procédure de recours qui s'ensuit, il existe des indices importants que le résultat de la procédure ne puisse plus être considéré comme ouvert, dans la mesure où, par la suite, la cause est renvoyée aux mêmes juges que ceux qui ont traité de l'affaire à l'instance inférieure et qui ont affirmé être convaincus de la culpabilité de l'accusé.

Concerne : Droit d'être entendu en procédure de récusation

Tribunal administratif du canton de Berne

10 août 2006
Die neue Steuerpraxis, 5 + 6/2006, pp. 70-78

Conclusions du tribunal

De l'Article 29, al. 2, de la Constitution fédérale découle le droit des parties de s'exprimer sur tous les faits pertinents pour la prise d'une décision. L'Article 6 § 1 de la Convention européenne des Droits de l'Homme donne aux parties le droit d'être informées de l'ensemble des déclarations et déterminations adressées au Tribunal et de s'exprimer à ce sujet, si celles-ci portent sur des points importants.

Concerne : Droit d'être entendu par le juge même en charge d'un affaire. Faute intentionnelle

Tribunal fédéral

Conclusions du tribunal

1. La Convention européenne des Droits de l'Homme ne permet pas de conclure qu'un juge en charge d'une affaire est tenu de procéder personnellement à une audition du prévenu dans le cadre de la procédure d'administration des preuves. En l'espèce, la délégation de l'audition de l'intéressé à un secrétaire juridique était fondée sur l'Article 13, al. 2, de la Loi bernoise sur les commissions de recours en matière fiscale et admissible juridiquement.

2. L'intention est réputée établie lorsqu'il apparaît avec suffisamment de certitude que le contribuable avait conscience que les renseignements fournis étaient inexacts ou incomplets. On parle de négligence lorsqu'une personne n'a pas réfléchi aux conséquences de ses actes ou n'en a pas tenu compte. Les informations des formulaires de déclaration de revenus et du guide qui s'y rapporte sont supposées connues. Quiconque s'occupe d'affaires boursières depuis des années et est abonné à divers journaux économiques à cet effet ne peut pas sincèrement prétendre qu'il ne savait pas qu'il devait déclarer ses titres dans sa déclaration d'impôt, ni comment il devait les déclarer. La peine varie en fonction du degré de culpabilité, compte tenu des circonstances particulières à chaque cas.

L'absence de regret et de discernement n'est pas un facteur aggravant. Par contre, une précédente condamnation pour soustraction d'impôt en est un.

24 mars 2006
Réf. : Pra 7/2006 871, Die Praxis des Bundesgerichts, 2006, pp. 871-873

Concerne : Autorité judiciaire en matière fiscale

Tribunal fédéral

Conclusions du tribunal

Les Articles 6 § 1 de la Convention européenne des Droits de l'Homme et 30 de la Constitution fédérale n'imposent pas l'existence d'une autorité judiciaire en matière fiscale. Si l'obligation fiscale est réglée par un contrat de droit administratif, il est néanmoins arbitraire que l'une des parties contractantes puisse se prononcer sur sa portée de façon contraignante en tant que pouvoir public, sans que l'autre partie dispose d'une voie de droit autre que le recours de droit public au Tribunal fédéral.

Transmission du dossier aux autorités cantonales afin qu'elles comblent la lacune.

8 mai 2006
Réf. : ATF 132 I 140, Recueil des arrêts du Tribunal fédéral, 132/2006, pp. 140-152

Concerne : Base légale pour la restriction de libertés fondamentales

Tribunal fédéral

Conclusions du tribunal

Une prise de position d'un département fédéral rendant opposable aux avoirs d'une personne un blocage ordonné par le Conseil fédéral sur la base de l'Article 184, al. 3, de la Constitution fédérale (Cst. féd.) constitue une décision au sens de l'Article 5 de la Loi fédérale sur la procédure administrative, portant sur des droits et obligations de caractère civil au sens de l'Article 6 § 1 de la Convention européenne des Droits de l'Homme, attaquable par un recours de droit administratif.

Du fait qu'elle paralyse l'exécution par l'autorité compétente à cet effet – en l'occurrence l'Office des poursuites – d'un jugement entré en force, une décision ne viole pas le droit à un tribunal indépendant ni le principe de la séparation des pouvoirs.

Lorsqu'elle satisfait aux conditions de l'Article 184, al. 3, Cst. féd., une mesure fondée sur cette disposition constitue une base légale suffisante pour la restriction des libertés fondamentales, pour autant que ces restrictions soient, par ailleurs, justifiées par un intérêt public et proportionnées au but visé.

En l'espèce, le blocage contesté, en tant qu'il s'applique à des avoirs revendiqués sur la base d'un jugement entré en force, ne serait-ce que par sa durée excessive, viole le principe de la proportionnalité.

26 avril 2006
Réf. : ATF 132 I 229, Recueil des arrêts du Tribunal fédéral, 132/2006, pp. 229-248

Concerne : Exigences relatives au contenu de l'arrêt de renvoi

Tribunal cantonal valaisan

31 mai 2006 Revue valaisanne de jurisprudence, 2006, pp. 332-337

Conclusions du tribunal

Distinction entre le simple mensonge écrit et sa forme qualifiée.

Des décomptes de salaires incomplets transmis aux assurances sociales ne constituent pas des faux dans les titres ; la punissabilité de tels comportements relève exclusivement des dispositions pénales du droit des assurances sociales.

Principe accusatoire. Exigences concernant le contenu de l'arrêt de renvoi ainsi que la modification ou l'extension des charges selon le principe accusatoire. Mesure dans laquelle l'instance d'appel est liée par l'accusation, lorsque seul l'accusé a fait appel.

Concerne : Champ d'application de l'Article 6 de la Convention européenne des Droits de l'Homme

Tribunal fédéral des assurances

28 décembre 2005. Réf. : ATF 132 V 6 Recueil des arrêts du Tribunal fédéral des assurances, 132/2006, pp. 6-18

Résumé

Le recours de droit administratif n'est pas ouvert contre une décision négative du Conseil fédéral en matière de liste des hôpitaux. Le refus d'inclure un hôpital dans la liste des hôpitaux cantonaux n'entre pas dans le champ d'application de l'Article 6 § 1 de la Convention européenne des Droits de l'Homme.

Autres affaires concernant le champ d'application de l'Article 6

Tribunal fédéral des assurances

6 mars 2006. Réf. : ATF 132 V 299, Recueil des arrêts du Tribunal fédéral des assurances, 132/2006, pp. 299-302. Concerne : Recours contre la fixation des tarifs hospitaliers.

Tribunal fédéral des assurances

11 août 2005. Réf. :ZBGR 87, 2006, p. 221, Schweizerische Zeitschrift für Beurkundungs- und Grundbuchrecht, 2006, pp. 221-225. Concerne : Contestations relatives aux prétentions en dédommagement des notaires patentés du canton des Grisons.

Tribunal cantonal de l'Etat de Fribourg

22 mars 2006. Revue fribourgeoise de jurisprudence, 2006, pp. 185-187. Concerne : Organe compétent pour trancher des contestations relatives aux honoraires et débours de l'avocat portant sur des affaires pénales qui, jusqu'au terme du mandat de ce dernier, ont été traitées uniquement par le juge d'instruction.

Tribunal administratif du canton de Berne

3 octobre 2005 Jurisprudence administrative bernoise, 2006, pp. 218-223

Résumé

Les propriétaires d'immeubles voisins qui ne sont pas directement touchés par un plan de quartier peuvent se prévaloir de l'Article 6 § 1 de la Convention européenne des Droits de l'Homme s'ils invoquent la violation des normes visant (aussi) la protection du voisinage. En font également partie les prescriptions sur la protection des monuments historiques.

Article 8 de la Convention

Concerne : Choix du nom de famille

Tribunal fédéral

24 mai 2005 Réf. : JdT 2006I67 Journal des Tribunaux, 2006, pp. 67-74

Conclusions du tribunal

Lorsqu'une personne réclame l'application de l'Article 30 du Code civil (CC) après avoir demandé que son nom soit soumis à son droit national, conformément à l'Article 37, al. 3, de la Loi fédérale sur le droit international privé (LDIP), elle supprime l'effet de sa première demande.

La requête de changement de nom de l'Article 30, al. 2, CC par laquelle les fiancés indiquent vouloir porter le nom de la femme

comme nom de famille doit être soumise à l'Article 38 LDIP, donc au Droit suisse.

Même s'il a déjà été admis que la réglementation du nom des époux pouvait être contraire au principe d'égalité tel que voulu par la Constitution, le Tribunal fédéral se doit de respecter la volonté claire du législateur.

Le principe d'unité de la famille consacré par les Article 160, al. 1, CC et 30,al. 2, CC ne semble pas contraire à la Convention européenne des Droits de l'Homme. Il implique que seul puisse être porté comme nom de famille le nom d'un des époux.

Concerne : Regroupement familial

Tribunal administratif du canton de Vaud

Conclusions du tribunal

Dans le cas d'une demande de regroupement familial en faveur de l'enfant d'une Equatorienne mariée à un ressortissant italien titulaire du permis C, l'Article 8 de la Convention européenne des Droits de l'Homme est applicable car la mère bénéficie, en tant qu'épouse d'un titulaire d'un permis d'établissement, d'un droit de présence assuré en Suisse. En revanche, ni l'Article 3, Annexe I, de l'Accord sur la libre circulation des personnes (faute pour l'enfant de séjourner légalement dans un Etat CE/AELE), ni l'Article 17, al. 2, 3e phrase, de la Loi fédérale sur le séjour et l'établissement des étrangers (la mère ne disposant que d'une autorisation de séjour) ne sont applicables en l'espèce.

L'enfant, âgée de dix-sept ans et huit mois, a vécu la plus grande partie de sa vie avec sa mère, qui a présenté la demande quelques jours après avoir elle-même obtenu une autorisation de séjour. Le seul fait que celle-ci souhaite que l'enfant poursuive des études ne signifie pas qu'un tel désir, en soi légitime, constitue le but premier de la requête.

22 février 2006
Revue de droit administratif et de droit fiscal, 2006, pp. 184-191

Article 9 de la Convention

Concerne : Refus d'une naturalisation en raison de l'appartenance religieuse

Tribunal fédéral

Conclusions du tribunal

Les Article 15 de la Constitution fédérale (Cst. féd.) et 9 de la Convention européenne des Droits de l'Homme n'ont pas de portée indépendante par rapport au grief selon lequel la naturalisation aurait été refusée pour des motifs discriminatoires liés à l'appartenance religieuse.

En raison de l'intégration insuffisante de la requérante, le refus de naturalisation ne viole pas l'Article 8, al. 2, Cst. féd.

10 mai 2006
Réf. : ATF 132 I 167
Recueil des arrêts du Tribunal fédéral, 132/2006, pp. 167-174

Article 10 de la Convention

Concerne : Protection dessources des journalistes dans une procédure pénale

Tribunal fédéral

Conclusions du tribunal

Le droit de protéger ses sources est un droit du journaliste découlant des Article 10 de la Convention européenne des Droits de l'Homme et 17, al. 3, de la Constitution fédérale.

Ce droit n'est pas absolu, mais il doit exister un intérêt prépondérant pour qu'il soit limité.

En l'espèce, l'intérêt d'élucider l'homicide qui était en question n'était pas suffisamment prépondérant pour permettre de contraindre le journaliste à révéler ses sources d'informations.

11 mai 2006
Réf. : ATF 132 I 181
Recueil des arrêts du Tribunal fédéral, 132/2006, pp. 181-195

Article 11 de la Convention

Concerne : Refus d'autoriser une manifestation

Tribunal fédéral

4 septembre 2006
Réf. : ATF 132 I 256, Recueil des arrêts du Tribunal fédéral, 132/2006, pp. 256-269

Conclusions du tribunal

Concernant la liberté d'opinion et de réunion en matière de manifestation sur le domaine public, les droits garantis par les Article 10 et 11 de la Convention européenne des Droits de l'Homme ne vont pas au-delà des droits garantis par les Article 16 et 22 de la Constitution fédérale.

L'affaire concerne les mesures de protection prises par les autorités pour prévenir les risques liés à une contre-manifestation : au vu des circonstances du cas d'espèce, le refus d'autoriser la manifestation est conforme à la Constitution.

Article 13 de la Convention

Concerne : Droit à un recours contre un ordre d'intervention de la police lors d'une manifestation non autorisée

Tribunal administratif du canton de Berne

24 juillet 2006
Jurisprudence administrative bernoise, 2006, pp. 481-490

Conclusions du tribunal

La requête du Conseil communal de Thoune demandant le soutien de la police cantonale lors d'une manifestation non autorisée constitue un ordre d'intervention. Il ne s'adresse pas aux citoyens et aux citoyennes, ne décrit, notamment, pas leurs droits individuels et ne peut, dès lors, être considéré comme une décision soumise à un recours administratif.

L'ordre d'intervention constitue un acte concret, contre lequel une possibilité de recours effectif, conformément à l'Article 13 de la Convention européenne des Droits de l'Homme (CEDH), doit être donnée. Le recours prévu à l'Article 13 CEDH n'est pas forcément un recours à une autorité judiciaire : un recours administratif à une autorité indépendante peut être suffisant, s'il garantit les droits fondamentaux du recourant. En l'espèce, le recours en matière communale répond aux critères d'un recours effectif au sens de l'Article 13 CEDH. La décision attaquée s'avère donc contraire au Droit, dans la mesure où elle refuse d'entrer en matière sur le recours en matière communale.

United Kingdom/Royaume-Uni

Article 5 of the Convention

Concerns: Trial within a reasonable time or release pending trial

House of Lords

26 July 2006
R. v.Crown Court at Harrow, Re O (habeas corpus), [2006] UKHL 42

Findings of the court

This case concerned the compatibility of national statutory provisions on custody and bail of accused persons and the requirements of Article 5 §3 of the European Convention on Human Rights for trial within a reasonable time or to be released pending trial.

Section 25 of the Criminal Justice and Public Order Act 1994 stipulates that a person charged with certain offences who had been previously convicted of such offence "shall be granted bail … only if the court … considering the grant of bail is satisfied that there are exceptional circumstances which justify it". The Prosecution of Offences Act 1985 provides for custody time limits which could be extended by a court but was not to do so unless satisfied that the prosecution had acted "with all due diligence and expedition". The facts leading to this case were that originally the defendant had been refused bail under section 25 of the 1994 Act. After delays in the trial taking place, the prosecu-

tion applied for an extension to the defendant being held in custody under the 1985 Act but this was refused on the ground that the prosecution had not acted with all due diligence and expedition. The defendant then reapplied for bail but this was again refused under the terms of the 1994 Act. The defendant applied for judicial review and a writ of habeas corpus on the ground that the custody extension was unlawful and that in the circumstances bail could not be refused without violating Article 5 §3 of the Convention which guaranteed trial within a reasonable time or release pending trial.

The court found no incompatibility between domestic law and the Convention, and dismissed the appeal. In reaching its conclusion, the court was able "to apply the technique of reading down" the domestic provisions, so far as it is possible to do so, as provided for in section 3 of the Human Rights Act 1998, in order to avoid a breach of the accused's Convention rights (see paras 12 and 30). A failure in meeting the "due diligence" provision in the 1985 Act should not be equated with violation of the "reasonable time" guarantee in Article 5 §3.

As regards evidential burdens or presumptions pointing to bail being refused, the court stated that the two key requirements of Article 5 §3 were first that the prosecution must bear the overall burden of justifying a remand in custody, and second that the judge in a case must be entitled to take account of all relevant considerations. The court emphasised that the operation of section 25 of the 1994 Act involved a judge exercising a judgment or evaluation. Where any uncertainty exists in the operation of that provision, a presumption in favour of release existed. As Lord Brown stated (at para. 35), "Just occasionally the court will be left unsure as to whether the defendant should be released on bail – the only situation in which the burden of proof assumes any relevance – and in my judgment bail would then have to be granted. That must be the default position. Section 25 should be read down to make that plain."

Articles 5 and 8 of the Convention

Concerns: Statutory police powers of stop and search

House of Lords

8 March 2006
R v.Metropolitan Police commissioner and another, [2006] UKHL 12

Findings of the court

The two claimants in this case, *R (on the application of Gillan and another) v. Metropolitan Police Commissioner and another*, asked the court to declare the statutory police powers of stop and search under section 44 of the Terrorism Act 2000 incompatible with the European Convention on Human Rights. The court is empowered to make such declarations of incompatibility under section 4 of the Human Rights Act 1998.

The claimants argued they had been victims of human rights violations when they were separately detained and searched on 9 September 2003 while on their way to a public protest being held in east London against an arms fair. In both cases, nothing incriminating was found as a result of the searches.

The stop and search power judicially reviewed by the court arises whenever an authorisation is given by a senior police officer under the Terrorism Act 2000. This authorisation may only be given "if the person giving it considers it expedient for the prevention of acts of terrorism" (sections 44 (3) and 44 (4)). It must be stated to apply to a specified area; and it will lapse at the end of twenty-eight days of coming into force. A police constable is thereby authorised "to stop a vehicle … and to search (a) the vehicle; (b) the driver of the vehicle; (c) a passenger in the vehicle; (d) anything in or on the vehicle or carried by the driver or a passenger" (section 44 (1)). The Metropolitan Police commissioner had given repeated authorisations for this power to be exercised in London, confirmed by the Home Secretary. Under section 45, the power of stop and search may be exercised "only for the purpose of searching for articles of a kind which could be used in connection with terrorism", but "may be exercised whether or not the constable has grounds for suspecting the presence of articles of that kind". To enable the search, the Act empowers a police constable to "detain the person or vehicle for such time as it reasonably required to permit the search to be carried out at or near the place where the person or vehicle is stopped" (section 45 (4)).

The claimants argued that the authorisations were unlawful and in violation of the guarantee of personal liberty of Article 5 of the

European Convention on Human Rights since the decision-maker did not have reasonable grounds for believing the powers of stop and search across the whole of central London were necessary for the prevention of terrorism. They argued their right to private life, and their freedom of expression and assembly, had been violated by the stop and search power, since it was insufficiently justified and failed to meet the Convention's requirements of lawfulness.

The court rejected the claimants' arguments, upholding the lawfulness of the authorisations and powers. The pre-condition of an authorisation being "expedient" in the Terrorism Act did not mean it had to be "necessary". The authorisation could be given if the decision-maker considered it likely that the power would be of "significant practical value and utility" in seeking to achieve the prevention of acts of terrorism (per Lord Bingham, para. 15). The geographical coverage of the authorisation was justified on the bases of it being impracticable to differentiate between some parts of London and others, and considered and informed evaluations of terrorist threat available to the police.

The degree of detention involved in a person being stopped and searched was insufficiently significant to constitute a deprivation of personal liberty within the meaning of Article 5 of the Convention, the court stated (see para. 25). Similarly, a superficial search under the Act could not be viewed as a violation of a person's private life under Article 8 of the Convention, any more than the security checks to which a passenger uncomplainingly submits at an airport (para. 28). In the court's view, there were effective constraints in the Terrorism Act to ensure the powers in dispute would not be utilised in an arbitrary manner. These included the requirements for a senior police offer to give the authorisation, for the Home Secretary to confirm an authorisation, for an authorisation to expire after twenty-eight days, and for reports on the working of the Act to be reported to Parliament every year. The levels of interference arising from the powers in the Terrorism Act were proportionate and in accordance with law, the court held.

Article 6 of the Convention

Concerns: Jurisdiction of English courts to hear civil legal proceedings against a foreign state for torture

House of Lords

14 June 2006
Jones v. Ministry of Interior of the Kingdom of Saudi Arabia and another, Mitchell and others v. Al-Dali and others
[2006] UKHL 26

Findings of the court

This case raised the issue whether an English court had jurisdiction to hear civil legal proceedings against a foreign state and its officials for torture.

The claimants sought compensation by way of aggravated damages for systematic torture and other acts alleged to have been inflicted on them by officials in the Kingdom of Saudi Arabia. However, their applications to serve proceedings were refused by the court on grounds of state immunity under the State Immunity Act 1978. In its appeal to the House of Lords, the claimants argued that the Act was incompatible with their fundamental right of access to the court guaranteed by the right to a fair trial in Article 6 of the European Convention on Human Rights. It was argued that the restriction which state immunity imposed upon their right of access to a court was not directed to a legitimate objective and was disproportionate. It was further argued that the proscription of torture by international law precludes the grant of immunity to states or individuals from being sued for acts of torture, and torture cannot constitute governmental acts of exercises of state authority.

In rejecting the claimant's case, the House of Lords accepted that Article 6 was engaged by the grant of immunity to the Kingdom of Saudi Arabia and its officials, relying on the decision of the European Court of Human Rights in *Al-Adsani v. the United Kingdom* (2001) 12 BHRC 88. Nonetheless, some difficulty was expressed in accepting this point, with Lord Bingham expressing the view, "I do not understand how a state can be said to deny access to its court if it has no access to give" (para. 14). The reasons given by the House of Lords included that a civil legal action such as this raised categorically different legal issues to those involved in criminal proceedings. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, to which both the United Kingdom and the Kingdom of Saudi Arabia were par-

ties, did not provide for a universal civil legal jurisdiction. No exception currently existed in the case of alleged torture: "it may very well be that the claimants' contention will come to represent the law of nations, but it cannot be said to do so now" (per Lord Bingham, para. 26). Since this was so, and the rule on immunity was well understood and established, in the court's view the 1978 Act on state immunity was not disproportionate and did not infringe the applicants' Convention rights.

Articles 9 of the Convention and 2 of Protocol No. 1

Concerns: Religious dress and right to education

House of Lords

22 March 2006
R v. Head Teacher and Governors of Denbigh High School [2006] UKHL 14

Findings of the court

This case concerned a young Muslim girl's belief on religious grounds in wearing a particular form of dress which did not conform to her school's uniform dress code. She claimed the school's refusal to allow her to attend school unless she changed her clothing so as to comply with its uniform code was a breach of her freedom to manifest her religious belief under Article 9 of the European Convention on Human Rights and her right to education under Article 2 of Protocol No. 1.

In deciding the case, the House of Lords expressed the view that Article 9 of the Convention did not require that one should be allowed to manifest one's religion at any time and place of one's choosing (see dicta of Lord Hoffman, para. 50). Whether or not a violation of Article 9 takes place depends on the facts of each case. Any limitation or interference under Article 9 §2 will be justified if it is prescribed by law and necessary in a democratic society, meaning "it must be directed to a legitimate purpose and proportionate in scope and effect" (per Lord Bingham, para. 26). The court stressed that this case concerned a particular pupil and a particular school in a particular place at a particular time. In other words, the court was not ruling on the appropriateness of any form of religious dress in general. As Lord Bingham put it, the court "is not, and could not be, invited to rule whether Islamic dress, or any feature of Islamic dress, should or should not be permitted in the schools of this country" (para. 2).

At the school in question, around 80% of schoolchildren were Muslim. A school policy on uniform had been formulated after careful consultation with parents, students, staff and the Imams of the three local mosques, and this was explained in advance to prospective parents of the school. These uniform rules had been designed towards, and were acceptable in, mainstream Moslem opinion. Three uniform options were offered to pupils, one of which was the shalwr kameeze which the claimant wore at the school for two years until she and her family decided a different garment known as a jilbab was appropriate now she was older. The school believed "a school uniform played an integral part in securing high standards, serving the needs of a diverse community, promoting a positive sense of communal identity and avoiding manifest disparities of wealth and style" (para. 6). In these circumstances, the court held that there had been no violation of Article 6, and the school's interference with the claimant's freedom to manifest her religious beliefs had been proportionate. The court held that the school had been fully justified in requiring compliance with the school's uniform dress code as a condition of the claimant's attendance at the school.

The court also held that the school had not violated the claimant's human right of access to an education; it had simply insisted she wear a school uniform which it was entitled to do. Furthermore, the school in question was outside the catchment area for where the claimant lived, and there were other schools the claimant could have attended where the jilbab dress her particular religious beliefs required was allowed. Article 2 of Protocol No. 1 did not confer a right to go to any particular school of a person's choosing; "it is infringed only if the claimant is unable to obtain education from the system as a whole" (per Lord Hoffman, para. 69).

Article 10 of the Convention

Concerns: Libel in relation to the press

House of Lords

11 October 2006
Jameel and another v. Wall Street Journal Europe [2006] UKHL 44

Findings of the court

The case required the House of Lords to review the national law of libel in relation to the press. This involved its consideration of the defence of qualified privilege and the scope and application of the ruling in the earlier leading case of *Reynolds v. Times Newspapers Ltd* [2001] 2 AC 12. The issues involved were of importance to the working of the press and freedom of expression under Article 10 of the Convention. As Lord Bingham said, "Freedom to publish free of unjustifiable restraint must indeed be recognised as a distinguishing feature of the sort of society which the Convention seeks to promote" (para. 18).

The case arose out of a newspaper article published five months after the 2001 terrorist attacks on America, as a result of which serious attempts were being made by the US government and United Nations Security Council to cut off sources of funding to terrorist organisations. The article suggested that the two Saudi Arabian claimants, a commercial company and its president/general manager, were involved in the monitoring of bank accounts associated with prominent businessmen to prevent them being used, wittingly or unwittingly, for the funnelling of funds to terrorist organisations. The claimants brought libel proceedings against the publisher of the newspaper, objecting to the suggestions that they were involved or might be under suspicion of involvement. At the original trial of the case, the judge pointed out that the defendant had offered no plea of justification, and the jury found the article to have been defamatory. However, the House of Lords allowed the appeal of the defendant publisher and dismissed the action.

There were two central issues to be decided by the court. The first was the procedural question whether a company could bring an action for libel without pleading or showing special damage, as had been settled law for over a century since *South Hetton Coal Co. Ltd v. North-Eastern News Association Ltd* [1894] 1 QB 133. The court noted that since the decision in *Derbyshire CC v. Times Newspapers Ltd* [1993] AC 534 local and central government authorities could not sue in defamation. It also noted that the Faulks Committee's Report of the Committee on Defamation in 1975 had recommended that trading companies should only be entitled to bring defamation proceedings if they could establish special damage or likelihood of pecuniary loss. However, although two of the judges heading the appeal (Lord Hoffman and Baroness Hale) believed the earlier judicial decision putting companies on the same footing as individuals in the law of libel should be overruled, a majority of three judges held a company could continue to bring proceedings.

The second issue addressed by the court was clarification of the defence of qualified privilege available to the press. The court held that there were essentially two stages in approaching this matter. First, it must be determined whether the subject matter of the article was a matter of public interest. As Baroness Hale said, "There must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information which interests the public." (para. 147). This is a question in each case to be determined by the judge. On the particular facts of this case, the court believed the subject matter to be of considerable public interest. The House of Lords said that it was then to determine whether publication was justifiable. The essential test for this was whether the journalist and publisher had conducted themselves in a "responsible and fair" manner in collecting and publishing the information. The court emphasised that the ten matters listed in the judgment of Lord Nicholls in the *Reynolds* case were not tests or hurdles to pass but a non-exhaustive set of factors a court may wish to take into account in determining whether a publisher had acted responsibly or not. In this particular case, the court held that the article published bore all the hallmarks of responsible journalism.

Articles 10 and 11 of the Convention

Concerns: Political protest

House of Lords

13 December 2006
R v. Chief Constable of Gloucestershire [2006] UKHL 55

Findings of the court

This leading case before the Appellate Committee of the House of Lords concerned the fundamental right and freedom of political protest.

The events out of which the case arose involved an anti-war demonstration in early 2003 at the Royal Air Force base in Fairford, from which operational sorties by American B52 bombers were to take place against Iraq. On 22 March three coaches with one-hundred and twenty passengers on board were travelling from London to Fairford to join in the demonstration. The passengers comprised a diverse group of people of varying ages and affiliations. Five kilometres outside Fairford, the coaches were stopped and its passengers searched by police, acting under a statutory stop and search authorisation under section 60 of the Criminal Justice and Public Order Act 1994 issued in respect of the whole area around Fairford. The search revealed eight of the passengers to be members of a hard core activist anarchist group, together with a number of articles that were then confiscated including masks, crash helmets, hoods, spray paint, scissors, and a safety flare. The passengers reboarded the coaches, thinking they were to proceed to Fairford, but instead the coaches and its passengers were directed by the police to return to London. The passengers were forcibly prevented from disembarking, and police motorcycle outriders escorted the coaches back to London where no stops for refreshments or toilet facilities were permitted. The police explained these measures as authorised under their common law powers to prevent a breach of the peace.

Judicial review proceedings were brought by one of the coaches' passengers, Jane Laporte, challenging the lawfulness of the police decisions and actions that prevented her from travelling to the demonstration at Fairford, compelling her to leave the area, forcibly returning her to London, and keeping her on the coach and preventing her from leaving it until she had reached London. The court upheld these complaints, holding the Chief Constable's actions to have been unlawful and a violation of her right to freedom of expression and freedom of association under Article 10 and 11 of the European Convention on Human Rights, as incorporated into national law by the Human Rights Act 1998 (see especially paras 55 and 90).

In reaching its decision, the court emphasised the fundamental importance of political protest. It viewed freedom of assembly under Article 11 of the Convention as an important means of an individual's freedom of expression under Article 10. It referred to the description given by the European Court of Human Rights in *Steel v. the United Kingdom* (1998) 28 EHRR 603 of the right to freedom of expression as "an essential foundation of democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".

It was recognised that the claimant's human rights were not absolute and were qualified in the terms set out in Article 10 §2 and 11 §2. Any legitimate restrictions imposed on these rights must be strictly "in accordance with law" and "necessary in a democratic society", such as in this case for the protection of public order. However, the court stated that, "any prior restraint on freedom of expression calls for the most careful scrutiny" (per Lord Bingham, para. 37), and "prior restraint (pre-emptive action) needs the fullest justification" (per Lord Brown, para. 114).

The court considered at length the English concept of breach of the peace and the ambit of police powers to take action to prevent any such breach (see especially paras 27-33 and 110-111). In this case, "no breach of the peace was or could reasonably be apprehended to be 'imminent'" (per Lord Mance, para. 142). There was no disorder among the passengers, nothing to suggest the claimant would be other than peaceful in her political protest, and those among the coaches' passengers who might prove disruptive at the demonstration at Fairford could have been dealt with by the extensive police surveillance and presence there (see ibid.). Even if a breach of the peace had been imminent, the court held, the actions taken by the police failed to satisfy the test of proportionality in balancing the rights of the claimant against what were the exigencies of the situation. Indeed, "it was wholly disproportionate to restrict her exercise of her rights under Articles 10 and 11 because she was in the

company of others some of whom might, at some time in the future, breach the peace" (per Lord Bingham, para. 55). Consequently, the restrictions on the claimant had neither been "in accordance with law" nor had they been "necessary in a democratic society."

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