

EMD-bulletin

– nytt fra menneskerettsdomstolen i Strasbourg

Nr. 1 År 2016 Dato 11. januar Utgiver Norsk senter for menneskerettigheter

I desember ble det avsagt tre kategori 1-avgjørelser, mot Russland, Tyskland og Polen. Det ble avsagt én avgjørelse mot Norge i desember.

Månedens utvalgte: **Kristiansen v. Norway**

Date: 17/12/2015 **Application no.:** 1176/10

Articles: 6; 6-1; 41

Conclusion: Violation of Article 6 – Right to a fair trial (Article 6 – Criminal proceedings Article 6-1 – Impartial tribunal); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

Fakta:

Klageren er en norsk statsborger, som i september 2008 ble dømt i tingretten blant annet for forsøk på voldtekt. Klageren anket til lagmannsretten, som ble satt med jury. I lagmannsretten ble klageren igjen dømt for blant annet forsøk på voldtekt. I løpet av den muntlige behandlingen i lagmannsretten, ble det klart at et av jurymedlemmene tidligere hadde hatt kontakt med fornærmede. Klagerens forsvarer krevde at jurymedlemmet skulle erklæres inhabilt, og ikke delta i den videre behandlingen av saken, men lagmannsretten kom til at jurymedlemmet ikke skulle fjernes. Jurymedlemmet deltok derfor på behandlingen i lagmannsretten, både under juryens rådslagning, og straffutmålingen. Klageren anket til Høyesterett over avgjørelsen om å la jurymedlemmet fortsette, men Høyesterett tok ikke klagen til følge, med en dissens på tre mot to stemmer.

Anførsler:

Klageren anførte at hans rett til en rettferdig rettergang for en upartisk domstol etter artikkel 6 (1) hadde blitt krenket, ettersom jurymedlemmet ikke hadde blitt fjernet.

Staten imøtegikk klagerens anførsler.



Norsk senter for menneskerettigheter

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Domstolens vurderinger:

Domstolen bemerket først at saken omhandlet kravet om upartiskhet ('impartiality'). Ved vurderingen av spørsmålet om upartiskhet må det foretas to tester. Den første testen er en subjektiv test, som krever at man vurderer den personlige upartiskheten til en bestemt dommer i en gitt sak. Den andre testen er en objektiv test, hvor det må vurderes om dommeren på en tilstrekkelig måte godtgjør at det ikke er berettiget å trekke upartiskheten hans i tvil. I denne saken hadde jurymedlemmet hatt kontakt med fornærmede gjennom at jurymedlemmets fosterbarn hadde gått i samme klasse som fornærmede. Domstolen fant at kontakten mellom jurymedlemmet og fornærmede i seg selv ikke var nok til å gjøre jurymedlemmet inhabil. Det var derimot problematisk at jurymedlemmet hadde beskrevet fornærmede som en stille og rolig person. Domstolen fant at jurymedlemmet hadde gitt uttrykk for en forutinntatt mening om fornærmedes personlige karakter. Selv om innholdet av uttalelsen og betydningen for upartiskheten kunne tolkes på flere måter, var den klart ikke negativ. Uttalelsen kunne med rimelighet oppfattes som å gi uttrykk for positive konnotasjoner knyttet til fornærmede, og at jurymedlemmet var mottakelig for å vurdere saken eller påvirke juryen i klagerens disfavør. Denne muligheten ble forsterket av at jurymedlemmet ga sin uttalelse på et tidspunkt hvor det kunne tolkes som en kommentar på fornærmedes og klagerens vitneavhør. Det var videre av betydning at spørsmålet om lagmannsretten skulle stole på fornærmedes eller klagerens fremstilling av hendelsene var avgjørende for bestemmelsen av skyldspørsmålet. I denne sammenheng fant Domstolen at klageren hadde rimelig grunn til å tro at jurymedlemmet hadde forutinntatte meninger som var i stand til å påvirke skyldspørsmålet. Jurymedlemmet deltok i lagmannsrettens behandling, både juryens rådslagning og straffutmålingen, uten at lagmannsretten hadde instruert juryen i å se bort fra alt som ikke hadde blitt fremlagt i saken. Sett i sammenheng var innholdet i uttalelsen, tidspunktet uttalelsen ble avgitt,

§ Article 6 – Right to a fair trial

- 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
- 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
- 3. Everyone charged with a criminal offence has the following minimum rights:*
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - b. to have adequate time and facilities for the preparation of his defence;*
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not a sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

avgjørelsen om å ikke fjerne jurymedlemmet og den manglende veiledningen av juryen egnet til å gi rimelig grunn til å tvile på lagmannsrettens upartiskhet. Domstolen konkluderte derfor enstemmig med at det forelå en krenkelse av artikkel 6 (1).

Norsk sammendrag på [Lovdata.no](http://lovdata.no)

Kategori 1-avgjørelser fra EMD: Desember

ROMAN ZAKHAROV v. RUSSIA

Date: 04/12/2015 **Application no.:** 47143/06

Articles: 8; 8-1; 8-2; 34; 35; 35-1; 41

Conclusion: Preliminary objection joined to merits and dismissed (Article 34 – Actio popularis Victim); Preliminary objection joined to merits and dismissed (Article 35-1 – Exhaustion of domestic remedies); Violation of Article 8 – Right to respect for private and family life (Article 8-1 – Respect for correspondence Respect for private life); Non-pecuniary damage – finding of violation sufficient (Article 41 – Non-pecuniary damage Just satisfaction)

The case concerned the system of secret interception of mobile telephone communications in Russia. The applicant, an editor-in-chief of a publishing company, complained in particular that mobile network operators in Russia were required by law to install equipment enabling law enforcement agencies to carry out operational-search activities and that, without sufficient safeguards under Russian law, this permitted blanket interception of communications.

The Court found that Mr Zakharov was entitled to claim to be a victim of a violation of the European Convention, even though he was unable to allege that he had been the subject of a concrete measure of surveillance. Given the lack of remedies available at national level, as well as the secret nature of the surveillance measures and the fact that they affected all users of mobile telephone communications, the Court considered it justified to have examined the relevant legislation not from the point of view of a specific instance of surveillance of which Mr Zakharov had been the victim, but in the abstract. Furthermore, the Court considered that Mr Zakharov did not have to prove that he was even at risk of having his communications intercepted. Indeed, given that the domestic system did not provide an effective remedy to the person who suspected that he or she was subject to secret surveillance, the very existence of the contested legislation amounted in itself to an interference with Mr Zakharov's rights under Article 8.

The Court noted that interception of communications pursued the legitimate aims of the protection of national security and public safety, the prevention of crime and the protection of the economic well-being of the country. However, in view of the risk that a system of secret surveillance set up to protect national security might undermine or even destroy democracy under the cloak of defending it, the Court had to be satisfied that there were adequate and effective guarantees against abuse.

The Court concluded that the Russian legal provisions governing interception of communications did not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which was inherent in any system of secret surveillance, and which was particularly high in a system such as

in Russia where the secret services and the police had direct access, by technical means, to all mobile telephone communications.

In particular, the Court found shortcomings in the legal framework in the following areas: the circumstances in which public authorities in Russia are empowered to resort to secret surveillance measures; the duration of such measures, notably the circumstances in which they should be discontinued; the procedures for authorising interception as well as for storing and destroying the intercepted data; the supervision of the interception. Moreover, the effectiveness of the remedies available to challenge interception of communications was undermined by the fact that they were available only to persons who were able to submit proof of interception and that obtaining such proof was impossible in the absence of any notification system or possibility of access to information about interception.

Norsk sammendrag på Lovdata.no

SCHATSCHASCHWILI v. GERMANY

Date: 15/12/2015 **Application no.:** 9154/10

Articles: 6; 6+6-3-d; 6-1; 6-3-d; 35; 41

Conclusion: Violation of Article 6+6-3-d – Right to a fair trial (Article 6 – Criminal proceedings Article 6-1 – Fair hearing)(Article 6 – Right to a fair trial Article 6-3-d – Examination of witnesses); Just satisfaction dismissed (out of time)(Article 41 – Just satisfaction)

The case concerned the complaint by a man convicted of aggravated robbery and extortion, who maintained that his trial had been unfair, as neither he nor his counsel had had an opportunity at any stage of the proceedings to question the only direct witnesses to one of the crimes allegedly committed.

The Court found that, in view of the importance of the statements of the only eyewitnesses to one of the offences of which Mr Schatschaschwili had been convicted, the counterbalancing measures taken by the trial court had been insufficient to permit a fair and proper assessment of the reliability of the untested evidence. In particular, although under German law the prosecution authorities could have appointed a lawyer for him at the investigation stage and that lawyer would have had the right to be present at the hearing of the witnesses before the investigating judge, those safeguards had not been used.

Norsk sammendrag på Lovdata.no

SZAFRAŃSKI v. POLAND

Date: 15/12/2015 **Application no.:** 17249/12

Articles: 3; 8; 35; 41

Conclusion: No violation of Article 3 – Prohibition of torture (Article 3 – Degrading treatment) (Substantive aspect); Violation of Article 8 – Right to respect for private and family life (Article 8 – Positive obligations); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

In his application to the European Court the applicant complained that his condition of detention in Wronki Prison were inadequate. In particular, he complained that in seven of the ten cells where he was detained the sanitary facilities were separated from the rest of the cell only by a 1.20 metre-high fibreboard partition and had no doors.

In previous cases where insufficient partitioning between sanitary facilities and the rest of the cell had been at issue, the Court had found a violation of Article 3 only where other aggravating factors were present and as a result of their cumulative effect. However, in the present case the only hardship the applicant had had to bear was the insufficient separation of the sanitary facilities from the rest of the cell. Apart from that, the cells were properly lit, heated and ventilated and he had access to various activities outside the cells. Therefore, the overall circumstances of his detention could not be found to have caused distress and hardship which exceeded the unavoidable level of suffering inherent in detention or went beyond the threshold of severity under Article 3.

Under the Court's case-law the domestic authorities had a positive obligation to provide access to sanitary facilities separated from the rest of the prison cell in such a way as to ensure a minimum of privacy, in accordance with Article 8. According to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), a sanitary annex which was only partially separated off was not acceptable in a cell occupied by more than one detainee. In addition, the CPT had recommended that a full partition in all the in-cell sanitary annexes be installed. Despite this, the applicant had been placed in cells in which the sanitary facilities were not fully separated off, and had had to use the toilet in the presence of other inmates. The domestic authorities had thus failed to discharge their positive obligation of ensuring a minimum level of privacy for the applicant.



Har du kommentarer eller spørsmål? Send mail til: c.b.astrup@nchr.uio.no

Norsk sammendrag på Lovdata.no

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Andre avgjørelser mot Norge: Desember

Det ble ikke avsagt flere avgjørelser mot Norge i desember.

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