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Kategori 1-avgjørelser fra EMD: Mars

§ 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.

Norsk senter for menneskerettigheter
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THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS v. THE UNITED KINGDOM

Date: 04/03/2014 **Application no.:** 7552/09

Articles: 9; 9-1; 9-2; 14; 14+9-1; 35

Conclusion: Remainder inadmissible; No violation of Article 14+9-1 - Prohibition of discrimination (Article 14 - Discrimination) (Article 9 - Freedom of thought conscience and religion; Article 9-1 - Freedom of religion; Article 9-2 - Necessary in a democratic society)

The applicant organisation, the Church of Jesus Christ of Latter-Day Saints, is a religious organisation, registered as a private unlimited company in the United Kingdom. It is part of the worldwide Mormon Church. The case concerned its complaint of being denied an exemption from local property taxes. In 2001 the church applied to have its temple in Preston, Lancashire, removed from a list of premises liable to pay business tax, on the grounds that it was a "place of public religious worship" which was entitled to exemption from that tax.

According to the Court, it was open to doubt whether the refusal to accord an exemption in respect of the applicant Church's temple in Preston gave rise to any difference of treatment of comparable groups, given that the tax law in question applied in the same way to, and produced the same result in relation to, all religious organisations, including the Church of England in respect of its private chapels. Nor was the Court convinced that the applicant Church was in a significantly different position from other churches because of its doctrine concerning worship in its temples, since other faiths likewise did not allow access of the public to certain of their places of worship for doctrinal reasons. In the Court's view, any prejudice caused to the applicant Church by the operation of the tax law was reasonably and objectively justified.

Norsk sammendrag på Lovdata.no

GRANDE STEVENS AND OTHERS v. ITALY

Date: 04/03/2014 **Application no.:** 18640/10; 18647/10; 18663/10; 18668/10; 18698/10

Articles: 6; 6-1; 6-3; 6-3-a; 6-3-c; 41; 46; 46-2; 57; P1-1; P1-1-1; P1-1-2; P7-4

Conclusion: Violation of Article 6 - Right to a fair trial (Article 6 - Criminal proceedings; Article 6-1 - Public hearing); No violation of Article 6 - Right to a fair trial (Article 6-3 - Rights of defence; Article 6-3-a - Information on nature and cause of accusation); No violation of Article 6 - Right to a fair trial (Article 6-3 - Rights of defence; Article 6-3-c - Defence in person; Defence through legal assistance); No violation of Article 1 of Protocol No. 1 - Protection of property (Article 1 para. 1 of Protocol No. 1 - Deprivation of property); Violation of Article 4 of Protocol No. 7 - Right not to be tried or punished twice-{general} (Article 4 of Protocol No. 7 - Right not to be tried or punished twice); Respondent State to take individual measures (Article 46 - Individual measures; Article 46-2 - Execution of judgment); Pecuniary damage - claim dismissed; Non-pecuniary damage - award

The case concerned the applicants' appeal against the administrative penalty imposed on them by the Italian Companies and Stock Exchange Commission (hereafter "Consob") and the criminal

proceedings to which they are currently subject after having been accused of market manipulation in the context of a financial operation involving the car manufacturer FIAT.

According to the Court, although the procedure before Consob had not fully satisfied the requirements of fairness and impartiality, the applicants had nonetheless benefited from subsequent review by a judicial body with full jurisdiction. However, the latter court had not held a public hearing, which would have been necessary in this case. For his part, Mr Grande Stevens had been informed in good time of the accusation against him and had had adequate time to prepare his own defence or to be represented by a lawyer of his own choosing. Moreover, although they were severe, the sanctions imposed on the applicants pursued an aim that was in the general interest – namely guaranteeing the integrity of the financial markets and maintaining public confidence in the security of transactions – and did not appear disproportionate to the conduct with which they were charged. However, the new criminal proceedings against Mr Gabietti and Mr Grande Stevens concerned offences involving identical facts to those for which they had been finally convicted, and ought consequently to be closed as rapidly as possible.

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FAZLI ASLANER v. TURKEY

Date: 04/03/2014 **Application no.:** 36073/04

Articles: 6; 6-1; 35; 41

Conclusion: Remainder inadmissible; Violation of Article 6 - Right to a fair trial (Article 6 - Administrative proceedings; Article 6-1 - Impartial tribunal); Pecuniary damage - claim dismissed; Non-pecuniary damage - award

The case concerned administrative proceedings in which certain judges at the Turkish Supreme Administrative Court were involved on more than one occasion, in the context of successive appeals on points of law.

The European Court of Human Rights found that the general assembly of the Administrative Proceedings Divisions of the Supreme Administrative Court, as it had been composed in this case, could not be considered impartial, given that certain judges had previously taken a position on the issue to be decided.

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ABDU v. BULGARIA

Date: 11/03/2014 **Application no.:** 26827/08

Articles: 3; 14; 14+3; 35; 35-1; 41

Conclusion: Preliminary objection joined to merits (Article 35-1 - Exhaustion of domestic remedies); Preliminary objection dismissed (Article 35-1 - Exhaustion of domestic remedies); Remainder inadmissible; Violation of Article 3 - Prohibition of torture (Article 3 - Effective investigation)

(Procedural aspect); Violation of Article 14+3 - Prohibition of discrimination (Article 14 Discrimination) (Article 3 - Prohibition of torture; Effective investigation); Non-pecuniary damage - award

The applicant in this case complained of the authorities' failure to conduct an investigation into the potentially racist nature of an attack on him.

The Court considered that, despite having plausible evidence that Mr Abdu had been attacked because of his ethnic origin, the authorities had not expressly questioned the witness or the perpetrators with a view to determining whether there had in fact been a racist motive for the attack.

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KURIĆ AND OTHERS v. SLOVENIA

Date: 12/03/2014 **Application no.:** 26828/06

Articles: 41; 46; 46-2

Conclusion: Damage - claim dismissed (Article 41 - Pecuniary damage); Damage - award (Article 41 - Pecuniary damage)

The applicants belong to a group of persons known as the "erased", who on 26 February 1992 lost their status as permanent residents following Slovenia's declaration of independence in 1991.

In its Grand Chamber judgment on the merits of 26 June 2012, the Court had found that there had been violations of Article 8 (right to respect for private or family life or both); of Article 13 (right to an effective remedy) in conjunction with Article 8; and, of Article 14 (prohibition of discrimination) in conjunction with Article 8 of the European Convention on Human Rights. The Court also decided to apply the pilot-judgment procedure, holding that the Government should, within one year, set up a compensation scheme for the "erased" in Slovenia.

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ÖCALAN v. TURKEY (No. 2)

Date: 18/03/2014 **Application no.:** 24069/03; 197/04; 6201/06; 10464/07

Articles: 3; 7; 7-1; 8; 8-1; 8-2; 35; 41

Conclusion: Remainder inadmissible; Violation of Article 3 - Prohibition of torture (Article 3 - Inhuman treatment) (Substantive aspect); No violation of Article 3 - Prohibition of torture (Article 3 - Inhuman treatment) (Substantive aspect); No violation of Article 8 - Right to respect for private and family life (Article 8-1 - Respect for family life); No violation of Article 7 - No punishment without law (Article 7-1 - Nulla poena sine lege); Violation of Article 3 - Prohibition of torture (Article 3 - Degrading punishment; Inhuman punishment) (Substantive aspect); Pecuniary and non-pecuniary damage - finding of violation sufficent

Mr Öcalan, the founder of the PKK (Kurdistan Workers' Party), an illegal organisation, complained mainly about the irreducible nature of his sentence to life imprisonment, and about the conditions of

his detention (in particular his social isolation and the restrictions on his communication with members of his family and his lawyers).

In view of a certain number of aspects, such as the lack of communication facilities that would have overcome Mr Öcalan's social isolation, together with the persisting major difficulties for his visitors to gain access to the prison, the Court found that the conditions of detention imposed on the applicant up to 17 November 2009 constituted inhuman treatment. Having regard in particular to the arrival of other detainees at the İmralı prison and to the increased frequency of visits, it came to the opposite conclusion as regards his detention subsequent to that date. In addition, it took the view that in the absence of any review mechanism, the life prison sentence imposed on Mr Öcalan constituted an "irreducible" sentence that also amounted to inhuman treatment. It considered, however, that in view of the Government's legitimate fear that Mr Öcalan might use communications with the outside world to contact members of the PKK, the restrictions on his right to respect for private and family life did not exceed what was necessary for the prevention of disorder or crime. Lastly, the Court rejected Mr Öcalan's argument to the effect that his sentence, after having been commuted, was in practice harsher than that which he had initially received.

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VUČKOVIĆ AND OTHERS v. SERBIA

Date: 25/03/2014 **Application no.:** 17153/11; 17157/11; 17160/11; 17163/11; 17168/11; 17173/11; 17178/11; 17181/11; 17182/11; 17186/11; 17343/11; 17344/11; 17362/11; 17364/11; 17367/11; 17370/11; 17372/11; 17377/11; 17380/11; 17382/11; 17386/11; 17421/11; 17424/11; 17428/11; 17431/11; 17435/11; 17438/11; 17439/11; 17440/11; 17443/11

Articles: 35; 35-1

Conclusion: Preliminary objection allowed (Article 35-1 - Effective domestic remedy)

The Grand Chamber recalled that it can examine issues relating to the admissibility of an application and, even at the merits stage, may reconsider a previous decision to declare an application admissible. It also recalled that a fundamental feature underpinning the entire Convention system is that it is subsidiary to the national system safeguarding human rights. In other words, States do not have to answer to an international body before they have had an opportunity to put matters right through their own legal system. Those who wish to complain to the European Court against a State therefore have to first use remedies provided for by the national legal system. In the applicants' case, the Grand Chamber found that, although they had turned to the civil courts for redress, they had done so improperly, and had further not raised the discrimination complaint before the Constitutional Court, either expressly or in substance. Therefore, although the civil and constitutional remedies had been sufficient and available to provide redress in respect of the applicants' discrimination complaint, they had failed to exhaust national remedies with the result that the Serbian courts had not been given an opportunity to fulfil their fundamental role in the Convention protection system. The Grand Chamber thus upheld the Government's preliminary objection concerning the applicants' failure to exhaust national remedies and held that it could not consider the merits of the applicants' complaint.

There are almost 5,500 similar applications, which are currently still pending before the Court.

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VISTIŅŠ AND PEREPJOLKINS v. LATVIA

Date: 25/03/2014 **Application no.:** 71243/01 **Articles:** 41

Conclusion: Pecuniary damage - award (Article 41 - Pecuniary damage); Non-pecuniary damage - award (Article 41 - Non-pecuniary damage)

The case concerned the expropriation of plots of land in the 1990s in connection with the enlargement of the Free Port of Riga.

The Court reiterated that the violation previously found had stemmed from the highly disproportionate relationship between the official value of the properties for land-tax purposes and the compensation paid to the applicants, rather than because the expropriation had been intrinsically unlawful.

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Månedens utvalgte: Fazli Aslaner v. Turkey

Fakta:

Klageren var en tyrkisk statsborger født i 1963. Mens han jobbet som kontorist for domstolene (court registrar), besto klageren en eksamen som ledd i en konkurranse om stillingen som sjefskontorist (head registrar) ved sikkerhetsdomstolen i Ankara. Siden han etter rangeringen i konkurransen ikke fikk stillingen, ble klageren satt på en reserveliste. Han søkte deretter justisdepartementet om å bli utnevnt til sjefskontorist i et annet distrikt. Da myndighetene avslo søknaden, begjærte klageren avgjørelsen overprøvet av den administrative domstolen i Ankara. Klageren fikk medhold under henvisning til at kandidater som hadde prestert dårligere enn klageren i konkurransen, hadde blitt utnevnt til sjefskontorister i andre domsdistrikter. Myndighetenes avslag hadde derfor ikke rettslig grunnlag. Justisdepartementet fremmet anke over lovanvendelsen for den øverste administrative domstolen, som opphevet førsteinstansens avgjørelse. Opphevelsen ble begrunnet med at konkurransen kun gjaldt stillingen som sjefskontorist ved sikkerhetsdomstolen i Ankara, og at

justisdepartementet derfor ikke var pålagt å utnevne klageren til noen annen stilling. Avgjørelsen ble fattet av en avdeling bestående av fem dommere. I 2002 besluttet den administrative domstolen i Ankara å opprettholde sin opprinnelige posisjon, og justisdepartementet fremmet en ny anke over lovanvendelsen. I 2003 opphevet generalforsamlingen for avdelingen for administrative prosesser i den øverste administrative domstolen (heretter generalforsamlingen) avgjørelsen med 22 stemmer mot ni. Tre av dommerne i avdelingen som hadde avgjort den første anken satt i generalforsamlingen, og én av de aktuelle dommerne ledet diskusjonen under deliberasjonene.

Anførsler:

Klageren anførte blant annet krenkelse av artikkel 6 (retten til adgang til en domstol), under henvisning til at noen av dommerne som deltok i behandlingen av den første anken også satt i generalforsamlingen som behandlet den andre anken, og at generalforsamlingen på denne bakgrunn ikke var upartisk.

Staten imøtegikk klagerens anførsler.

Domstolens vurderinger:

Domstolen minnet innledningsvis om at vurderingen av upartiskhet i en kollegial domstol må bero på om det uavhengig av enkeltdommernes personlige holdninger foreligger påviselige fakta som kan reise tvil om domstolens upartiskhet. I denne sammenheng kan også det ytre skinn være av betydning. For å fastslå om det i et gitt tilfelle er legitim grunn til å frykte partiskhet, vil de berørte parters syn tas i betraktning. Det avgjørende er likevel om det objektivt sett har vært grunn til bekymring. Domstolen bemerket at det faktum at en dommer også har truffet avgjørelser i forkant av rettssaken, ikke alene vil være nok til å rettferdiggjøre tvil om hans eller hennes upartiskhet. Det avgjørende er omfanget av de tiltak som er truffet av dommeren før rettsaken. At en dommer har grundig kjennskap til saken, er ikke til hinder for at han kan anses upartisk ved avgjørelsen. Endelig påpekte Domstolen at en dommers foreløpige vurdering av de tilgjengelige fakta ikke kan anses å foregripe sluttvurderingen.

På bakgrunn av disse prinsippene måtte Domstolen vurdere om de tre dommerne det her var snakk om, hadde vært eller kunne ha fremstått som partiske i avgjørelsen av saken. Dette ville være tilfellet dersom de spørsmål dommerne behandlet i de to ankesakene hadde vært analoge, eller dersom forskjellen mellom dem var ubetydelig.

Domstolen påpekte at det spørsmål generalforsamlingen i den foreliggende sak skulle ta stilling til, ikke var hvorvidt den administrative domstolen var berettiget til å opprettholde sin avgjørelse fra 1998. At den administrative domstolen hadde en slik rett, var ikke omstridt. Spørsmålet for generalforsamlingen var således ikke lovligheten av den administrative domstolens andre avgjørelse fra 2002, men i stedet lovligheten av den første avgjørelsen som den administrative domstolen hadde besluttet å opprettholde. Spørsmålet var med andre ord på ny hvorvidt den administrative domstolens rettsanvendelse var riktig når denne hadde lagt til grunn at justisdepartementet var bundet av rangeringen i konkurransen selv ved tilsetting i andre jurisdiksjoner.

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Domstolen bemerket at de tre av generalforsamlingens 31 dommere som hadde hatt sete i avdelingen som behandlet den første anken, allerede hadde tatt del i en avgjørelse av det samme spørsmålet generalforsamlingen skulle vurdere. De kunne følgelig rettmessig fremstå som partiske i den andre ankesaken. Domstolen anså det likevel slik at dette ikke alene var tilstrekkelig til at upartiskheten til generalforsamlingen som sådan var påvirket i den foreliggende sak. Etter tidligere rettspraksis måtte Domstolen i denne typen situasjon også ta i betraktning andre faktorer, slik som antallet berørte dommere og deres rolle. Domstolen bemerket at liknende klager tidligere har blitt avvist på grunnlag av den lave andelen av berørte dommere i kollegiale domstoler der avgjørelser fattes ved flertall. På den annen side har Domstolen konkludert med krenkelse av retten til en upartisk domstol på bakgrunn av at det har vært en høy andel berørte dommere eller der disse har hatt en ledende rolle.

I den foreliggende sak anså Domstolen at den lave andelen dommere som var berørt av upartiskhetsproblematikken ikke var avgjørende. Slike kvantitative betraktninger kunne ikke ha betydning, idet ingen tungtveiende grunner gjorde det tvingende nødvendig at de tre aktuelle dommerne deltok i stemmegivningen. Til dette kom at én av de tre berørte dommerne, i kraft av sin stilling som visepresident for den øverste administrative domstolen, hadde ledet diskusjonen under deliberasjonene. På bakgrunn av disse to forholdene måtte klagerens tvil om generalforsamlingens upartiskhet kunne anses som objektivt rettferdiggjort.

Domstolens flertall konkluderte etter dette med 4 mot 3 stemmer med at det forelå en krenkelse av artikkel 6(1).

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