EMD-bulletin
– nytt fra menneskerettsdomstolen i Strasbourg

Nr. **4** År **2016** Dato **3. mai** Utgiver **Norsk senter for menneskerettigheter**

I mars ble det avsagt ni kategori 1-avgjørelser, mot Russland, Aserbajdsjan, Sverige, Hellas, Ukraina, Sveits og Storbritannia. Avgjørelsen mot Hellas ble avsagt kun på fransk. Det ble ikke avsagt noen avgjørelser mot Norge i mars.

Månedens utvalgte: **F.G. v. Sweden**

Date: 23/03/2016 **Application no.:** 43611/11

Articles: 2; 3; 35; 37; 37-1; 37-1-c; 41

Conclusion: Remainder inadmissible; No violation of Article 2 – Right to life (Article 2 – Expulsion)(Conditional)(Iran); No violation of Article 3 – Prohibition of torture (Article 3 – Expulsion)(Conditional)(Iran); Violation of Article 2 – Right to life (Article 2 – Expulsion)(Conditional)(Iran); Violation of Article 3 – Prohibition of torture (Article 3 – Expulsion)(Conditional)(Iran); Pecuniary damage – claim dismissed (Article 41 – Pecuniary damage Just satisfaction)

Saken omhandler:

Saken reiser spørsmål om hvorvidt utvisning av en iransk statsborger krenker artikkel 2 og 3.

Fakta:

Klageren er en iransk statsborger som i november 2009 kom til Sverige og søkte politisk asyl. Utlendingsmyndighetene intervjuet klageren i mars 2010. Klageren la frem dokumentasjon på at han hadde konvertert til kristendommen etter ankomst i Sverige, men han ønsket ikke å påberope seg dette som grunnlag for asyl, da han mente det var et privat anliggende. Klageren redegjorde for sin politiske fortid. Han jobbet sammen med regimekritikere og opprettet ulike nettsider. Han ble arrestert i Iran i april 2007, i juni 2009 og igjen i september 2009. I november 2009 ble klageren innkalt til å møte for revolusjonsdomstolen i Iran. Han fikk hjelp til å komme seg ut av landet. Utlendingsmyndighetene i Sverige avslo klagerens asylsøknad, blant annet under henvisning til at klagerens politiske engasjement var begrenset og ikke medførte risiko for forfølgelse eller mishandling ved retur til hjemlandet. Klageren anket til migrasjonsdomstolen og viste til politiske og religiøse grunnlag for asyl, men anken førte ikke frem. Klageren henvendte seg til ankedomstolen, men anken ble avvist og vedtaket om utvisning ble rettskraftig. Klageren anmodet om utsettelse av utvisningen, og viste til at han hadde konvertert fra islam til kristendommen. Myndighetene reiste spørsmål ved at klageren ikke tidligere hadde påberopt seg religiøse grunner for asyl og mente at konverteringen ikke kunne anses som en ny omstendighet i saken. Anken til migrasjonsdomstolen

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førte heller ikke frem. Migrasjonsdomstolen pekte på at myndighetene allerede kjente til at klageren hadde konvertert før vedtaket om utvisning ble fattet.

Klageren brakte saken inn for Domstolen 12. juli 2011. Utvisningen ble utsatt etter beslutning om midlertidig forføyning 25. oktober 2011. I dom 16. januar 2014, avsagt i kammer, konkluderte Domstolen med at det ikke forelå krenkelse av artikkel 2 eller 3. Saken ble 2. juni 2014 besluttet henvist til avgjørelse i storkammer, etter anmodning fra klageren.

Anførsler:

Klageren anførte at utvisning innebar en risiko for behandling i strid med artikkel 2 og 3 grunnet hans politiske fortid og konversjon.

Staten imøtegikk klagerens anførsler og anførte i tillegg at saken måtte strykes fra sakslisten og at klageren ikke hadde status som offer.

Domstolens vurderinger:

Domstolen behandlet først statens preliminære innsigelser. Staten anførte at vedtaket om utvisning var foreldet og ikke kunne håndheves. Domstolen slo fast at klageren på nytt kunne søke om asyl og at han derfor ikke hadde mistet sin status som offer etter konvensjonen. Domstolen uttalte også at saken reiser viktige spørsmål angående statens plikter i asylsaker og la til grunn at respekten for menneskerettighetene som definert i konvensjonen og dens protokoller krevde en fortsatt behandlingen av klagen.

Domstolen gikk over til å behandle anførselen om krenkelse av artikkel 2 og 3. Domstolen minnet om at utvisning av et individ kan stride mot artikkel 3. Domstolen uttalte videre at konkrete argumenter må tale for at individet risikerer behandling i strid med artikkel 3. Domstolen bemerket også at mishandlingen klageren risikerer må oppfylle et visst minstenivå av alvorlighet. Den generelle situasjonen i landet samt klagerens personlige situasjon og omstendighetene må vurderes, og Domstolen understreket at ikke enhver voldelig situasjon vil medføre en risiko som krenker artikkel 3. Domstolen anvendte disse generelle prinsippene i den konkrete saken og behandlet først klagerens politiske aktiviteter i hjemlandet. Domstolen bemerket at det generelle voldsnivået i et land kan ha en slik alvorlighetsgrad at det faller innenfor artikkel 3, men dette gjelder kun i de mest ekstreme situasjoner, og det var ikke tilfellet i denne saken. Domstolen vurderte deretter klagernes individuelle situasjon. Utlendingsmyndighetene vurderte klagerens politiske engasjement som vagt og udetaljert. Etter 2009 hadde klageren heller ikke mottatt nye stevninger fra revolusjonsdomstolen og familien hans i Iran hadde ikke blitt gjenstand for represalier. Domstolen

> **§ Article 2 – Right to life**
>
> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
> *a. in defence of any person from unlawful violence;*
> *b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *c. in action lawfully taken for the purpose of quelling a riot or insurrection.*

fant etter dette at utvisning ikke ville krenke artikkel 2 og 3 når det gjaldt klagerens politiske aktivisme. Domstolen gikk over til å vurdere klagerens konvertering til kristendommen. Domstolen konstaterte at klageren snakket godt engelsk og hadde erfaring med data og internett. I tillegg var han regimekritisk, og Domstolen betvilte at klageren ikke kjente til risikoen for konvertitter i hjemlandet. Domstolen fant heller ikke grunn til å tro at klageren ikke hadde fått juridisk bistand til å forstå denne risikoen. Når det gjaldt statens forpliktelser uttalte Domstolen at myndighetene ble klar over at klageren hadde konvertert og dermed tilhørte en gruppe som potensielt kunne utsettes for behandling i strid med artikkel 2 og 3 ved utvisning. Til tross for dette foretok ikke myndighetene en grundig vurdering av klagerens konversjon eller utøvelsen av hans religiøse tro. Konverteringen ble heller ikke ansett som en ny omstendighet i saken. Domstolen uttalte at artikkel 2 og 3 er absolutte, og klageren skal ikke gi avkall på beskyttelsen som bestemmelsene gir. Domstolen minnet om at statlige myndigheter er forpliktet til vurderer all tilgjengelig informasjon før de fatter vedtak om utvisning, uavhengig av klagerens opptreden. Domstolen la til grunn at statlige myndigheter må vurdere sakens materielle side, utviklingen i den generelle situasjonen i Iran samt særlige omstendigheten knyttet til klageren situasjon. Domstolen konkluderte etter dette med at det ville være en krenkelse av artikkel 2 og 3 dersom klageren utvises uten en vurdering av konsekvensene av at klageren har konvertert.

Norsk sammendrag på Lovdata.no

Andre kategori 1-avgjørelser fra EMD: Mars

NOVRUK and OTHERS v. RUSSIA

Date: 15/03/2016 **Application no.:** 31039/11, 48511/11, 76810/12, 14618/13, 13817/14

Articles: 8; 8-1; 14; 14+8; 34; 41; 46

Conclusion: Violation of Article 14+8 – Prohibition of discrimination (Article 14 – Discrimination)(Article 8-1 – Respect for family life Respect for private life Article 8 – Right to respect for private and family life); No violation of Article 34 – Individual applications (Article 34 – Hinder the exercise of the right of petition); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

The case concerned the entry and residence rights of HIV-positive non-Russian nationals.

The Court reiterated that the right to enter or settle in a particular country was not guaranteed by the European Convention. A State had to, however, exercise its immigration policies in a manner which was compatible with a foreign national's human rights, in particular the right to respect for his or her private or family life and the right not to be discriminated against.

The Court notably found that the legislation aimed at preventing HIV transmission, which was used in the present case to exclude the applicants from entry or residence, had been based on an unwarranted assumption that they would engage in unsafe behaviour, without carrying out a balancing exercise involving an individualised assessment in each case. Given the overwhelming European and international consensus geared towards abolishing any outstanding restrictions on entry, stay and residence of people living with HIV, who constitute a particularly vulnerable group,

Russia had not advanced compelling reasons or any objective justification for their differential treatment for health reasons. The applicants had therefore been victims of discrimination on account of their health status.

The Court also found that the defective legislation which gave rise to the proceedings in the applicants' case amounted to a structural problem which could generate further repetitive applications. Noting, however, that legislative reform was currently under way in Russia, the Court decided at this stage not to formulate any general measures about the proper implementation of its present judgment.

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RAZUL JAFAROV v. ABERBAIJAN

Date: 17/03/2016 **Application no.:** 69981/14

Articles: 5; 5-1; 5-1-c; 5-4; 18; 18+5-1-c; 34; 41

Conclusion: Violation of Article 5 – Right to liberty and security (Article 5-1 – Lawful arrest or detention); Violation of Article 5 – Right to liberty and security (Article 5-4 – Review of lawfulness of detention); Violation of Article 18+5-1-c – Limitation on use of restrictions on rights (Article 18 – Restrictions for unauthorised purposes)(Article 5-1-c – Reasonable suspicion Article – Right to liberty and security); Violation of Article 34 – Individual applications (Article 34 – Hinder the exercise of the right of petition); Pecuniary and non-pecuniary damage – award (Article 41 – Pecuniary damage Just satisfaction)

The case concerned the complaint by a well-known human rights defender that his arrest and pretrial detention had been unjustified.

The Court considered that a combination of factors supported the argument that the actual purpose of the measures against Mr Jafarov had been to silence and to punish him for his activities as a human rights defender: his arrest and detention in 2014 had occurred in the general context of an increasingly harsh and restrictive legislative regulation of NGO activity; there had been numerous statements by high-ranking officials and articles published in pro-Government media which had accused local NGOs and their leaders, including Mr Jafarov, of being traitors and foreign agents; and several other notable human rights activists, who had also cooperated with international organisations protecting human rights, had similarly been arrested and charged.

Norsk sammendrag på Lovdata.no

BLOKHIN v. RUSSIA

Date: 23/03/2016 **Application no.:** 47152/06

Articles: 3; 5; 5-1; 5-1-d; 6; 6+6-3-c; 6+6-3-d; 6-1; 6-3-c; 6-3-d; 35; 35-1; 41

Conclusion: Preliminary objections dismissed (Article 35-1 - Exhaustion of domestic remedies Six month period); Violation of Article 3 - Prohibition of torture (Article 3 - Degrading treatment Inhuman treatment) (Substantive aspect); Violation of Article 5 - Right to liberty and security (Article 5-1 - Deprivation of liberty Article 5-1-d - Minors); Violation of Article 6+6-3-c - Right to a fair trial

(Article 6 - Criminal proceedings Article 6-1 - Fair hearing) (Article 6 - Right to a fair trial Article 6-3-c - Defence through legal assistance); 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 - Obtain attendance of witnesses); Non-pecuniary damage - award (Article 41 - Non-pecuniary damage Just satisfaction)

The case concerned the detention for 30 days of a 12-year old boy, who was suffering from a mental and neurobehavioural disorder, in a temporary detention centre for juvenile offenders.

The Court found that the boy had not received adequate medical care for his condition at the temporary detention centre, in violation of Article 3. His placement in the centre could not be justified under Article 5 § 1 (d), as "detention of a minor by lawful order for the purpose of educational supervision", since it had not served an educational purpose. Instead, the domestic courts deciding on his placement had referred to "behaviour correction" and the need to prevent the boy from committing further delinquent acts, neither of which was a valid ground covered by Article 5 § 1 (d).

The Court agreed with the Chamber judgment in the case that the proceedings concerning the boy's placement in the temporary detention centre were to be considered criminal proceedings for the purpose of Article 6, although they had not been classified as criminal under Russian law. In particular, the domestic courts had referred to the fact that the boy had committed a delinquent act as the main reason for his placement in the detention centre. His defence rights had been violated because he had been questioned by the police without legal assistance and the statements of two witnesses whom he was unable to question had served as a basis for his placement in temporary detention.

Furthermore the Court underlined that it was essential for adequate procedural safeguards to be in place to protect the best interest and well-being of a child when his or her liberty was at stake. Children with disabilities might moreover require additional safeguards to ensure that they were sufficiently protected.

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KORNEYKOVA AND KORNEYKOV v. UKRAINE

Date: 24/03/2016 **Application no.:** 56660/12

Articles: 3; 41

Conclusion: Violation of Article 3 – Prohibition of torture (Article 3 – Degrading treatment Inhuman treatment) (Substantive aspect); Violation of Article 3 – Prohibition of torture (Article 3 – Degrading treatment Inhuman treatment) (Substantive aspect); Violation of Article 3 – Prohibition of torture (Article 3 – Degrading treatment) (Substantive aspect); Violation of Article 3 – Prohibition of torture (Article 3 – Degrading treatment) (Substantive aspect); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

The case concerned a pregnant detainee, who alleged that she had been shackled in the maternity hospital where she had given birth and that she and her newborn son had subsequently been held in very poor conditions in a pre-trial detention centre, without adequate medical care.

The Court held, unanimously, that there had been four violations of Article 3, as concerned: Ms Korneykova's shackling in the maternity hospital; the physical conditions of Ms Korneykova and her newborn son in pre-trial detention; the inadequate medical care provided to Ms Korneykova's newborn son in detention; and, Ms Korneykova's placement in a metal cage during court hearings on her case.

The Court found in particular that shackling Ms Korneykova when she was suffering labour pains and immediately after her baby's delivery, as well as the cumulative effect – during the ensuing six months of her pre-trial detention – of her malnutrition as a breastfeeding mother, inadequate sanitary and hygiene arrangements for her and her newborn son and insufficient outdoor walks had amounted to inhuman and degrading treatment.

Norsk sammendrag på Lovdata.no

SAKIR v. GREECE

Date: 24/03/2016 **Application no.:** 48475/09

Articles: 2; 2-1; 3; 13; 35; 35-1

Conclusion: Violation of Article 3 – Prohibition of torture (Article 3 – Degrading treatment Inhuman treatment) (Substantive aspect); Violation of Article 3 – Prohibition of torture (Article 3 – Effective investigation)(Procedural aspect); Violation of Article 13 – Right to an effective remedy (Article 13 – Effective remedy)

The case concerned an assault against Rafi Sakir in 2009 in the centre of Athens which led to his hospitalisation, and also the conditions in which he was detained in a police station after his release from hospital.

The Court found in particular that the police had not sought to ascertain from the hospital whether Mr Sakir's state of health allowed him to be placed in detention. It noted that, in spite of specific instructions from his doctors, there had been shortcomings in the manner in which his medical condition and state of vulnerability were taken into account.

The Court also found a violation of Article 13 of the Convention on account of the lack of an effective remedy to complain about the conditions of detention.

Furthermore, the Court noted shortcomings in the investigation conducted following the assault, with regard to the gathering of evidence and the questioning of witnesses. In particular, it queried the authorities' failure to shed light on whether or not A.S.'s statement was truthful and on the circumstances surrounding his statements. Finally, it noted that the authorities had failed to assess the case in the particular context of the racist incidents which frequently occurred in Athens.

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BÉDAT v. SWITZERLAND

Date: 29/03/2016 **Application no.:** 56925/08

Articles: 6; 6-1; 6-2; 8; 8-1; 10; 10-1; 10-2

Conclusion: No violation of Article 10 – Freedom of expression –{General}(Article 10-1 – Freedom to impart information Freedom to receive information)

The case concerned the fining of a journalist for having published documents covered by investigative secrecy in a criminal case.

The Court found in particular that the publication of an article slanted in the way it had been at a time when the investigation was still ongoing comprised the inherent risk of influencing the conduct of proceedings which had in itself justified the adoption by the domestic authorities of deterrent measures, such as a ban on disclosing confidential information. While accepting that the accused could have had recourse to civil-law remedies to complain of interference in his private life, the Court nevertheless held that the existence in domestic law of remedies to which the accused could have had recourse did not dispense the State from its positive obligation to protect the private life of all persons charged in criminal proceedings. Finally, the Court found that the penalty imposed on the journalist for violation of secrecy, geared to protecting the proper functioning of justice and the accused's rights to a fair trial and respect for his private life, had not amounted to disproportionate interference in the exercise of his right to freedom of expression.

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KOCHEROV AND SERGEYEVA v. RUSSIA

Date: 29/03/2016 **Application no.:** 16889/13

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

Conclusion: Violation of Article 8 – Right to respect for private and family life (Article 8-1 – Respect for family life); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

The first applicant, who had a mild intellectual disability, lived in a care home between 1983 and 2012. In 2007 he and another resident of the care home had a daughter, the second applicant. A week after her birth the child was placed in public care, where, with the first applicant's consent, she remained for several years. In 2012 the first applicant was discharged from the care home and expressed his intention to take the second applicant into his care. However, the domestic courts restricted his parental authority over the child. The second applicant thus remained in public care although the first applicant was allowed to maintain regular contact with her. In 2013 he managed to have the restriction of his parental authority lifted and the second applicant went to live with him.

In their application to the European Court the applicants complained that, as a result of the restriction of the first applicant's parental authority, their reunification had been postponed for a year, in breach of Article 8 of the Convention.

The Court noted at the outset that although the restriction of the first applicant's parental authority over his child had not resulted in the applicants' separation from one another or had any impact on the first applicant's visiting rights and had been of a temporary nature, it had nevertheless interfered with their family life.

The domestic courts' decision was based on a number of reasons: alleged communication difficulties between the child and her parents; the first applicant's prolonged residence in an institution and his

alleged lack of skills in child rearing; his mental disability; the fact that the child's mother had no legal capacity; and the first applicant's financial situation. Although these considerations appeared relevant for the purpose of striking a balance between the conflicting interests at stake, the Court doubted that they were based on sufficient evidence.

There had been conflicting evidence before the domestic courts relating to the domestic courts alleged communication difficulties. Faced with such an obviously conflicting body of evidence, the domestic courts could have ordered an independent comprehensive psychological expert examination of the child with a view to establishing her psychological and emotional state and attitude towards her father, but had failed to do so. The Court was thus not persuaded that the domestic courts had convincingly demonstrated that the girl's transfer into her father's care would have been stressful to the extent of making it necessary for her to remain in public care for another year.

As to the first applicant's alleged lack of child rearing skills, this could hardly in itself be regarded as a legitimate ground for restricting parental authority or keeping a child in public care. Furthermore, the psychiatric examination report and certificates from the care home confirmed that the first applicant had demonstrated that he was independent and fully able to care for himself and his child. For their part, the domestic courts did not appear to have tried to analyse the first applicant's emotional and mental maturity and ability to care for his daughter.

As to the first applicant's mental disability, it appeared from a report submitted to the domestic authorities that his state of health allowed him fully to exercise his parental authority. However, the domestic court had disregarded that evidence.

Further, although the question whether the mother posed a danger to the child was directly relevant when it came to striking a balance between the child's interests and those of her father, the domestic courts had based their fears for the second applicant's safety on a mere reference to the fact that the mother had no legal capacity, without demonstrating that her behaviour had or might put the second applicant at risk. Their reference to the mother's legal status was thus not a sufficient ground for restricting the first applicant's parental authority.

Finally, the first applicant's alleged financial difficulties could not in themselves be regarded as sufficient grounds for refusing him custody, in the absence of any other valid reasons.

In the light of the foregoing, the reasons relied on by the domestic courts to restrict the first applicant's parental authority over the second applicant were insufficient to justify that interference, which was therefore disproportionate to the legitimate aim pursued.

Norsk sammendrag på Lovdata.no

ARMANI DA SILVA v. THE UNITED KINGDOM

Date: 30/03/2016 **Application no.:** 5878/08

Articles: 2; 2-1; 35

Conclusion: Remainder inadmissible; No violation of Article 2 – Right to life (Article 2-1 – Effective investigation)(Procedural aspect)

The case concerned the fatal shooting of Jean Charles de Menezes, a Brazilian national mistakenly identified by the police as a suicide bomber. Ms Armani Da Silva, who is Mr de Menezes' cousin, complained that the State had not fulfilled its duty to ensure the accountability of its agents for his death because the ensuing investigation had not led to the prosecution of any individual police officer.

Having regard to the proceedings as a whole, the Court found that the UK authorities had not failed in their obligations under Article 2 of the Convention to conduct an effective investigation into the shooting of Mr de Menezes which was capable of identifying and – if appropriate – punishing those responsible.

In particular, the Court considered that all aspects of the authorities' responsibility for the fatal shooting had been thoroughly investigated. Both the individual responsibility of the police officers involved and the institutional responsibility of the police authority had been considered in depth by the Independent Police Complaints Commission (IPCC), the Crown Prosecution Service (CPS), the criminal court and the Coroner and jury during the Inquest. The decision not to prosecute any individual officer was not due to any failings in the investigation or the State's tolerance of or collusion in unlawful acts; rather, it was due to the fact that, following a thorough investigation, a prosecutor had considered all the facts of the case and concluded that there was insufficient evidence against any individual officer to prosecute.

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Avgjørelser mot Norge: Mars

Det ble ikke avsagt noen avgjørelser mot Norge i mars.

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