EMD-bulletin
– nytt fra menneskerettsdomstolen i Strasbourg

Nr. **7** År **2016** Dato **1. september** Utgiver **Norsk senter for menneskerettigheter**

I juli ble det avsagt tre kategori 1-avgjørelser, mot Hellas, Latvia og Moldova. Avgjørelsen mot Hellas ble avsagt kun på fransk. Det ble ikke avsagt noen avgjørelser mot Norge i juli.

Månedens utvalgte: **Case of BUZADJI v. THE REPUBLIC OF MOLDOVA**

Date: 05/07/2016 **Application no.:** 23755/07

Articles: 5; 5-1; 5-1c; 5-3; 34; 35; 35-1; 41; P4-2; P4-2-1

Conclusion: Preliminary objection dismissed (Article 35-1 - Exhaustion of domestic remedies) Preliminary objection joined to merits and dismissed (Article 34 - Victim) Violation of Article 5 - Right to liberty and security (Article 5-3 - Reasonableness of pre-trial detention) Non-pecuniary damage - award (Article 41 - Non-pecuniary damage Just satisfaction)

Fakta:

I forbindelse med etterforskning av import av flytende naturgass, ble klageren siktet for bedrageri. Han ble satt i varetekt, og deretter husarrest. Varetektsfengslingen og husarresten ble forlenget i flere omganger. Til sammen satt klageren i varetekt og husarrest i over ti måneder.

Klageren brakte saken inn for Domstolen 29. mai 2007. I dom 16. desember 2014 [no. 23755/07], avsagt i kammer, konkluderte Domstolen under dissens med at det forelå krenkelse av artikkel 5(3). Saken ble 20. april 2015 besluttet henvist til avgjørelse i storkammer, etter anmodning fra staten.

Anførsler:

Staten imøtegikk klagerens anførsler og anførte i tillegg at klageren verken hadde uttømt nasjonale rettsmidler eller hadde status som offer.

Domstolens vurderinger:

Domstolen behandlet først statens anførsel om at klageren ikke hadde uttømt nasjonale rettsmidler, fordi han ikke hadde anket avgjørelsene om husarrest. Domstolen bemerket at staten først hadde kommet med denne anførselen overfor Storkammeret. Domstolen behandlet deretter statens argument om at den ikke hadde kunnet komme med anførselen på et tidligere tidspunkt, fordi den tidligere rettsprosessen, og redegjørelsen for faktum, hadde knyttet seg til perioden før den første avgjørelsen om husarrest. Statens anførsel ble avvist.

Domstolen behandlet deretter statens subsidiære anførsel om at klageren ikke hadde status som «offer», i henhold til artikkel 34, jf. artikkel 5(3). Argumentet var at siden klageren selv hadde tatt

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initiativ til å bli satt i husarrest, så var han ikke å regne som «offer», og at han derfor hadde gitt avkall på sin rett til frihet. Domstolen viste til tidligere rettspraksis hvor Domstolen uttalte at retten til frihet var for viktig i et demokratisk samfunn for at en person skulle kunne miste beskyttelsen til konvensjonen fordi han selv hadde overgitt seg til varetekt. Siden det i denne konkrete saken forelå et klart tvangselement, og oppførselen hans var forståelig, med hensyn til helsesituasjonen m.m, aksepterte ikke Domstolen at klageren hadde gitt avkall på sin rett til frihet. Anførselen ble derfor avvist.

Domstolen behandlet så problemstillingen om det forelå «relevante» og «tilstrekkelige» grunner for varetektsfengsling og husarrest i denne konkrete saken. Domstolen tok utgangspunkt i «Letellier-prinsippene», og viste til at rimelig mistanke om flukt er en forutsetning for gyldighet av fortsatt varetektsfengsling, men at det ikke rettferdiggjør forlengelse av varetekt «etter en viss tid». Deretter gjennomgikk Domstolen de ulike vedtakene som hadde blitt gjort i saken. Domstolen pekte på at domstolsavgjørelsen i første omgang bygget på risikoen for konspirasjon med den siktedes sønner, som også var under etterforskning i saken. I ankesaken anførte klageren at en slik risiko egentlig ikke hadde blitt påberopt av aktor, og at det uansett ikke forelå noen reell risiko, siden klageren i teorien hadde hatt anledning til å konspirere med sine sønner allerede fra juli 2006, da etterforskningen begynte. Det forelå, ifølge klageren, heller ingen reell sjanse for at han skulle rømme, på grunn av helsetilstanden hans. Ifølge Domstolen lykkes ikke ankeinstansen å svare på anførslene, som gjaldt viktige momenter, fra klageren. I senere avgjørelser hadde domstolen lagt til grunn, og gjentatt fra tidligere avgjørelser, andre grunner for fortsatt husarrest, som for eksempel risikoen for å unngå å møte opp til varetektsfengsling, eller rømming, påvirkning av vitner eller tukling med bevis. Men siden disse grunnene tidligere også var blitt avvist av andre instanser, bemerket Domstolen at det ikke forelå tilstrekkelig forklaring for hvorfor de senere ble relevante og tilstrekkelige grunner for videre varetekt. I flere domsavgjørelser opprettholdt domstolene vedtakene selv om den avviste statens argumenter for varetekten. I det siste vedtaket fant Domstolen at det ikke forelå andre grunner som støttet husarrest enn alvorlighetsgraden til saken. Domstolen fant også at grunnene som var gitt for forlenget varetekt og husarrest var overforenklede, abstrakte og ikke i tilstrekkelig grad rettet mot den konkrete saken. Det medførte at Domstolen kom til at det ikke forelå relevante og tilstrekkelige grunner for å vedta og forlenge klagerens varetektsfengsling. Domstolen fant derfor at det forelå krenkelse av artikkel 5(3).

§ Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[…]

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

[…]

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Norsk sammendrag på Lovdata.no

Andre kategori 1-avgjørelser fra EMD: Juli

Case of MAMATAS and OTHERS v. HELLAS

Date: 21/07/2016 **Application no.:** 63066/14, 64297/14, 66106/14

Articles: 14; 14 + P1-1-1; 35; P1-1; P1-1-1

Conclusion: Remainder inadmissible
No violation of Article 1 of Protocol No. 1 - Protection of property (Article 1 para. 1 of Protocol No. 1 - Deprivation of property Peaceful enjoyment of possessions)
No violation of Article 14+P1-1-1 - Prohibition of discrimination (Article 14 - Discrimination) (Article 1 para. 1 of Protocol No. 1 - Peaceful enjoyment of possessions Article 1 of Protocol No. 1 - Protection of property)

The case concerned the forcible participation by the applicants, who are private individuals holding Greek State bonds, in the effort to reduce the Greek public debt by exchanging their bonds for other debt instruments of lesser value. In 2012 a new law amended the conditions governing the bonds by dint of Collective Action Clauses enabling bond-holders to conclude a collective agreement with the State, deciding by an enhanced majority. That majority having been obtained thanks, in particular, to the participation of the institutional investors (banks and credit organisations), the new conditions came into force in respect of all bond-holders, including the applicants, despite the latter's refusal. Their bonds were cancelled and replaced by new securities worth 53.5% less in terms of nominal value.

This forcible participation amounted to an interference with the applicants' right to respect for their property for the purposes of Article 1 of Protocol No. 1 to the Convention. Nevertheless, that interference pursued a public-interest aim, that is to say preserving economic stability and restructuring the national debt, at a time when Greece was engulfed in a serious economic crisis. The Court therefore held that the applicants had not suffered any special or excessive burden, in view, particularly, of the States' wide margin of appreciation in that sphere and of the reduction of the commercial value of the bonds, which had already been affected by the reduced solvency of the State, which would probably have been unable to honour its obligations under the clauses included in the old bonds before the entry into force of the new Law. The Court also considered that the collective action clauses and the restructuring of the public debt had represented an appropriate and necessary means of reducing the public debt and saving the State from bankruptcy, that investing in bonds was never risk-free and that the applicants should have been aware of the vagaries of the financial market and the risk of a possible drop in the value of their bonds, considering the Greek deficit and the country's large debt, even before the 2009 crisis.

The Court also found that the bond exchange procedure had not been discriminatory, in particular because of the difficulty of locating bond-holders on such a volatile market, the difficulty of establishing precise criteria for differentiating between bond-holders, the risk of jeopardising the whole operation, with disastrous consequences for the economy, and the need to act rapidly in

order to restructure the debt.

The European Court of Human Rights held, unanimously, that there had been: no violation of Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights; no violation of Article 14 (prohibition of discrimination) of the Convention, in conjunction with Article 1 of Protocol No. 1 to the Convention.

Norsk sammendrag på Lovdata.no

Case of JERONOVICS v. LATVIA

Date: 05/07/2016 **Application no.:** 44898/10

Articles: 3; 34; 35; 35-1; 35-3; 37; 37-1; 41

Conclusion: Preliminary objections joined to merits and dismissed (Article 34 - Victim) Violation of Article 3 - Prohibition of torture (Article 3 - Effective investigation) (Procedural aspect) Non-pecuniary damage - award (Article 41 - Non-pecuniary damage Just satisfaction)

In 1998 the applicant instituted criminal proceedings concerning his alleged ill-treatment by police officers. Those proceedings were ultimately discontinued. In 2001 the applicant lodged an application (no. 547/02) with the European Court complaining, inter alia, about the ill-treatment and the lack of an effective investigation. In respect of that complaint the Government submitted a unilateral declaration acknowledging a breach of Article 3 and awarding the applicant compensation. On 10 February 2009 the application was consequently struck out of the list in so far as it concerned the complaints referred to in the unilateral declaration. In 2010, the authorities refused a request by the applicant to have the criminal proceedings reopened.

The applicant complained that, despite the acknowledgment by the Government of the breach of his rights under Article 3 of the Convention, the State authorities had failed to properly investigate his ill-treatment by the police officers. On 3 February 2015 a Chamber of the Court decided to relinquish jurisdiction in favour of the Grand Chamber (see Information Note 182).

Law – Article 3: (a) Court's case-law and practice on unilateral declarations – The considerations to be taken into account when deciding whether to strike out a case, or part thereof, under Article 37 § 1 (c) of the Convention on the basis of a unilateral declaration are: (i) the nature of the complaints made, the nature and scope of any measures taken by the respondent Government in the context of the execution of judgments delivered by the Court in any such previous cases and the impact of these measures on the case at issue; (ii) the nature of the concessions contained in the unilateral declaration, in particular the acknowledgment of a violation of the Convention and the payment of adequate compensation for such violation; (iii) the existence of relevant or "clear and extensive" case-law in that respect, in other words, whether the issues raised are comparable to issues already determined by the Court in previous cases; and (iv) the manner in which the Government intend to provide redress to the applicant and whether this makes it possible to eliminate the effects of an alleged violation. If the Court is satisfied with the answers to the above questions, it then verifies whether it is no longer justified to continue the examination of the application, or the part in

question, and that respect for human rights does not require it to continue its examination. If these conditions are met it then decides to strike the case, or the relevant part, out of its list.

Even after it has accepted a unilateral declaration and decided to strike an application (or part thereof) out of its list of cases, the Court reserves the right to restore that application (or part of it) to its list. In exercising such power, the Court carries out a thorough examination of the scope and extent of the various undertakings referred to in the Government's declaration as accepted in the strike-out decision, and anticipates the possibility of verifying the Government's compliance with their undertakings. A Government's unilateral declaration may thus be submitted twice to the Court's scrutiny. Firstly, before the decision is taken to strike a case out of its list of cases, the Court examines the nature of the concessions contained in the unilateral declaration, the adequacy of the compensation and whether respect for human rights requires it to continue its examination of the case according to the criteria mentioned above. Secondly, after the strike-out decision the Court may be called upon to supervise the implementation of the Government's undertakings and to examine whether there are any "exceptional circumstances" which justify the restoration of the application (or part thereof) to its list of cases. In supervising the implementation of the Government's undertakings the Court has the power to interpret the terms of both the unilateral declaration and its own strike-out decision.

(b) Merits – In its strike-out decision the Court did not expressly indicate to the Government whether they remained under an obligation to conduct an effective investigation or whether such obligation was extinguished by the acknowledgment of a breach and the payment of compensation. The Court had therefore to examine whether such an obligation could arise from the Government's undertaking contained in their unilateral declaration and from the Court's decision striking out the applicant's complaint, or whether the refusal in question disclosed a failure to comply with any procedural obligation that continued to exist after that strike-out decision.

The Court found no exceptional circumstances that could justify restoring to its list of cases the part of application no. 547/02 that it struck out on 10 February 2009. However, it considered particularly relevant the reference, in its 2009 decision, to the fact that the applicant retained the possibility to exercise "any other available remedies in order to obtain redress" as a pre-condition of the Court's decision to strike the relevant part of the application out of its list of cases. Such possibility had to be accompanied by a corresponding obligation on the part of the respondent Government to provide him with a remedy in the form of a procedure for investigating his ill-treatment at the hands of State agents. The payment of compensation could not suffice, having regard to the State's obligation under Article 3 to conduct an effective investigation in cases of wilful ill-treatment by agents of the State. The unilateral declaration procedure was an exceptional one and was not intended either to circumvent the applicant's opposition to a friendly settlement or to allow the Government to escape their responsibility for the breaches of the most fundamental rights contained in the Convention. Accordingly, by paying compensation and by acknowledging a violation of the various Convention provisions, the respondent State had not discharged the continuing procedural obligation incumbent on it under Article 3 of the Convention.

Under the domestic law the applicant could request the reopening of the investigation on the grounds of newly disclosed circumstances, and he had availed himself of this possibility. His request was however dismissed on the ground that the Government's unilateral declaration was not considered as a newly disclosed circumstance for the purposes of the domestic law at issue. Although

the Convention did not in principle guarantee a right to have a terminated case reopened, the Court could nevertheless review whether the manner in which the Latvian authorities had dealt with the applicant's request produced effects that were incompatible with their continuing obligation to carry out an effective investigation. In this regard, it found that national legal obstacles could not exempt States to comply with such obligation. Otherwise the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible. This would make it possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and would render the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, ineffective in practice. It followed that the applicant had not had the benefit of an effective investigation as required by Article 3 of the Convention.

Conclusion: violation (ten votes to seven).

Norsk sammendrag på Lovdata.no

+ Nyttige lenker

- Hudoc: EMDs database over egne avgjørelser
- Lovdata: EMD-sammendrag på norsk
- Informasjon om klage til EMD
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Avgjørelser mot Norge: Juli

Det ble ikke avsagt noen avgjørelser mot Norge i juli.

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