EMD-bulletin
– nytt fra menneskerettsdomstolen i Strasbourg

Nr. **1** År **2017** Dato **21. februar** Utgiver **Norsk senter for menneskerettigheter**

I januar ble det avsagt fire kategori 1-avgjørelser, mot Storbritannia, Østerrike, Russland og Italia. Det ble avsagt én kategori 3-avgjørelse mot Norge i januar.

Månedens utvalgte: **Khamtokhu and Aksenchik v. Russia**

Date: 24/01/2017 **Application no.:** 60367/08, 961/11

Articles: 5; 5-1; 14; 14+5

Conclusion: No violation of Article 14+5 – Prohibition of discrimination (Article 14 – Discrimination) (Article 5 - Right to liberty and security Article 5-1 - Deprivation of liberty); No violation of Article 14+5 – Prohibition of discrimination (Article 14 – Discrimination) (Article 5 – Right to liberty and security Article 5-1 - Deprivation of liberty)

Saken omhandler:

Saken gjaldt spørsmålet om en dom for livsvarig fengsel utgjorde diskriminering på grunnlag av kjønn og alder, og dermed en krenkelse av artikkel 14 sammenholdt med artikkel 5.

Fakta:

Klagerne er to russiske statsborgere. Førsteklageren er Aslan Bachmizovich Khamtokhu og andreklageren er Artyom Aleksandrovich Askenchik, henholdsvis født i 1970 og 1985. Klagerne ble begge dømt til livsvarig fengsel i Yamalo-Nenetskiy-regionen i Russland. Førsteklageren ble dømt på bakgrunn av rømningsforsøk fra fengsel, forsøk på drap av polititjenestemenn og offentlige tjenestemenn, og ulovlig oppbevaring av våpen, og andreklageren ble dømt for tre drap.

Klagerne brakte saken inn for Domstolen den 22. oktober 2008 og den 11. februar 2011. Kammeret avsto jurisdiksjon til fordel for storkammeret den 1. desember 2015.

Tredjepartsintervensjon fra Equal Rights Trust.

Anførsler:

Klagerne anførte at artikkel 14, sammenholdt med artikkel 5, var krenket ettersom de i henhold til russisk lov ved straffeutmålingen hadde blitt behandlet strengere enn personer under 18 år og over 65 år. Klagerne hevdet at forskjellsbehandlingen på grunnlag av alder i alle tilfeller var i strid med artikkel 14, sammenholdt med artikkel 5, under henvisning til at den aktuelle aldergrensen var vilkårlig. Videre anførte de at artikkel 14, sammenholdt med artikkel 5, var krenket fordi de også hadde blitt behandlet strengere enn kvinner, uavhengig av alder. Klagerne hevdet at

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forskjellsbehandlingen av menn og kvinner manglet en objektiv og tilfredsstillende begrunnelse, og at den ikke var forholdsmessig. De hevdet også at den aktuelle lovbestemmelsen ikke forfulgte et legitimt formål.

Staten imøtegikk klagernes anførsler.

Domstolens vurderinger:

Domstolen behandlet først spørsmålet om artikkel 14 kunne sammenholdes med artikkel 5 i den foreliggende saken. Domstolen påpekte at artikkel 14 ikke har noen selvstendig eksistens, men kun har betydning i relasjon til de rettigheter og friheter som er vernet ved de øvrige bestemmelsene i konvensjonen. Krenkelse av en materiell bestemmelse er imidlertid ikke et vilkår for anvendelsen av artikkel 14. Det som kreves er at sakens omstendigheter faller inn under en av de øvrige bestemmelsene i konvensjonen. Domstolen understrekte at vurderingen av hva som anses som passende straffeutmåling i utgangspunktet faller utenfor rekkevidden til artikkel 5, bortsett fra når straffeutmålingen beror på nasjonal lovgivning som fritar visse kategorier straffedømte fra livsvarig fengsel basert på alder og kjønn. Retten påpekte videre at artikkel 14 ikke omfatter alle former for forskjellsbehandling, men kun forskjellsbehandling basert på identifiserbare, objektive eller personlige karakteristikker, eller «status», som skiller individer eller grupper av individer fra hverandre, herunder forskjellsbehandling basert på alder og kjønn. Artikkel 14 kunne derfor sammenholdes med artikkel 5.

§ Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status

Deretter gjorde Domstolen en konkret vurdering om artikkel 14 var krenket, sammenholdt med artikkel 5. Domstolen uttalte generelt at artikkel 14 gjelder usaklig forskjellsbehandling, det vil si forskjellsbehandling som er uforholdsmessig eller som ikke forfølger et legitimt formål, av personer i tilsvarende eller relativt sammenliknbare situasjoner. Artikkel 14 omfatter også de tilfeller der forskjellsbehandlingen gjelder mer gunstige rettigheter enn det konvensjonen verner. Statene tilkjennes en skjønnsmargin i vurderingen, men skjønnet må utøves slik at det fremmer konsistens og harmoni i konvensjonsreglene. Domstolen bemerket at forskjellsbehandling basert på kjønn krever særlig alvorlige grunner, og at henvisninger til tradisjon, generelle antagelser eller gjeldende sosiale holdninger i et land ikke anses som tilstrekkelig. I den foreliggende saken kunne klagernes situasjon sammenliknes med andre personer dømt for liknende eller sammenliknbare forhold. Domstolen var enig med staten i at forskjellsbehandling med det formål å fremme rettferdighet og humanitet var legitim, og var ikke enig med klagerne i at straffeutmålingen fremstod som vilkårlig eller urimelig. Domstolen fant at fritaket fra livsvarig fengsel for personer under 18 år og over 65 år var tilstrekkelig saklig begrunnet. Det generelle fritaket for kvinner var begrunnet i legitime offentlige interesser. Domstolen fant det vanskelig å kritisere staten for å frita visse grupper av personer fra livsvarig fengsel, da fritaket alt i alt utgjorde et sosialt og kriminalpolitisk fremskritt. Domstolen konkluderte på denne bakgrunn med at forskjellsbehandlingen på grunnlag av alder og kjønn ikke utgjorde ulovlig diskriminering etter artikkel 14 sammenholdt med artikkel 5.

Norsk sammendrag på Lovdata.no

Andre kategori 1-avgjørelser fra EMD: Januar

HUTCHINSON v. THE UNITED KINGDOM

Date: 17/01/2017 **Application no.:** 57592/08

Articles: 3

Conclusion: No violation of Article 3 – Prohibition of torture (Article 3 – Degrading punishment Inhuman punishment) (Substantive aspect)

The case concerned the complaint by a man serving a whole life sentence for the murder of three members of a family and the rape of another that his sentence amounted to inhuman and degrading treatment as he had no hope of release.

The Court reiterated that the European Convention did not prohibit the imposition of a life sentence on those convicted of especially serious crimes, such as murder. However, to be compatible with the Convention there had to be both a prospect of release for the prisoner and a possibility of review of their sentence.

The Court considered that the UK courts had dispelled the lack of clarity in the domestic law on the review of life sentences. The discrepancy identified in a previous ECtHR judgment between the law and the published official UK policy had notably been resolved by the UK Court of Appeal in a ruling affirming the statutory duty of the Secretary of State for Justice to exercise the power of release for life prisoners in such a way that it was compatible with the European Convention. In addition, the Court of Appeal had brought clarification as regards the scope and grounds of the review by the Secretary of State, the manner in which it should be conducted, as well as the duty of the Secretary of State to release a whole life prisoner where continued detention could no longer be justified. The European Court highlighted the important role of the Human Rights Act, pointing out that any criticism of the domestic system on the review of whole life sentences was countered by the HRA as it required that the power of release be exercised and that the relevant legislation be interpreted and applied in a Convention-compliant way. The Court therefore concluded that whole life sentences in the United Kingdom could now be regarded as compatible with Article 3 of the European Convention.

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J. AND OTHERS v. AUSTRIA

Date: 17/01/2017 **Application no.:** 58216/12

Articles: 3; 4; 4-1; 3-5; 35; 35-1

Conclusion: Remainder inadmissible; No violation of Article 4 – Prohibition of slavery and forced labour (Article 4 – Positive obligations Article 4-1 – Trafficking in human beings); No violation of Article 3 – Prohibition of torture (Article 3 – Effective investigation) (Procedural aspect)

The case concerned the Austrian authorities' investigation into an allegation of human trafficking. In particular, two Filipino nationals, who had gone to work as maids or au pairs the United Arab Emirates, alleged that their employers had taken their passports away from them and exploited them. They claimed that this treatment had continued during a short stay in Vienna where their employers had taken them and where they had eventually managed to escape. Following a criminal complaint filed by the applicants against their employers in Austria, the authorities found that they did not have jurisdiction over the alleged offences committed abroad and decided to discontinue the investigation into the applicants' case concerning the events in Austria. In their complaint before the European Court, they argued in particular that what had happened to them in Austria could not be viewed in isolation, and that the Austrian authorities had a duty under international law to investigate also those events which had occurred abroad.

The Court notably found that there had been no obligation under the European Convention to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates, as States are not required under Article 4 of the Convention to provide for universal jurisdiction over trafficking offences committed abroad.

Turning to the events in Austria, the Court concluded that the authorities had taken all steps which could have reasonably been expected in the situation. The applicants, supported by a government-funded NGO, had been interviewed by specially trained police officers, had been granted residence and work permits in order to regularise their stay in Austria, and a personal data disclosure ban had been imposed for their protection. Moreover, the investigation into the applicants' allegations about their stay in Vienna had been sufficient and the authorities' resulting assessment, given the facts of the case and the evidence available, had been reasonable. Any further steps in the case – such as confronting the applicants' employers – would not have had any reasonable prospect of success, as no mutual legal assistance agreement existed between Austria and the United Arab Emirates, and as the applicants had only turned to the police approximately one year after the events in question, when their employers had long left the country.

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PARADISO AND CAMPANELLI v. ITALY

Date: 24/01/2017 **Application no.:** 25358/12

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

Conclusion: Remainder inadmissible; No violation of Article 8 – Right to respect for private and family life (Article 8-1 – Respect for private life)

The case concerned the placement in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract, entered into with a Russian woman by an Italian couple who had no biological relationship with the child.

Having regard to the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional

bonds, the Court held that a family life did not exist between the applicants and the child. It found, however, that the contested measures fell within the scope of the applicants' private life.

The Court considered that the contested measures had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. On this last point, it regarded as legitimate the Italian authorities' wish to reaffirm the State's exclusive competence to recognise a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children.

The Court then accepted that the Italian courts, having concluded in particular that the child would not suffer grave or irreparable harm as a result of the separation, had struck a fair balance between the different interests at stake, while remaining within the room for manoeuvre ("margin of appreciation") available to them.

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Avgjørelser mot Norge: Januar

H.A. AND H.A. v. NORWAY

Date: 03/01/2017 **Application no.:** 56167/16

Articles: 2; 3; 8; 13; 13+3; 35

Conclusion: Inadmissible

The applicants are two brothers of Iranian nationality, born in Dubai, the United Arab Emirates. The first applicant was born in 1992, and the second in 1995. They are currently living in Norway.

The applicants entered Norway via Russia on 30 October 2015 together with their mother and three minor brothers, and applied for asylum on the same day. In support of their applications they submitted, firstly, that they did not wish to return to Dubai, where they would depend on their father's residence permit, secondly, that they feared being considered as apostates upon travelling to Iran and, finally, that they could not travel to Nepal as, allegedly, their mother's Nepalese citizenship was false.

On 20 January 2016, the Directorate of Immigration conducted oral interviews with each of the applicants, in the presence of interpreters. Both applicants said that they had grown up and lived in Dubai with their mother of Tibetan origin and their father of Iranian nationality. The father, who lived in Iran with his Iranian wife and her two sons, had problems with alcoholism and abusive tendencies.

The Directorate of Immigration rejected their applications for asylum on 10 June 2016, finding that there was no risk of persecution in Iran. Even though the applicants were of Buddhist faith, there was nothing in the way that they manifested their faith that would attract any sort of negative attention from the Iranian authorities. The Directorate took account of Iranian law, which holds that non-Muslims shall have rights, and of relevant background information, in particular concerning Christians and other religious minorities in Iran. Both applicants appealed against the decisions to the Immigration Appeals Board.

The Immigration Appeals Board rejected both appeals on 6 September 2016. It initially found that the supplementary information given by the applicants, insofar as it concerned the manifestations of their faith, lacked credibility. The Board therefore assessed their cases in the light of the facts as they had appeared before the Directorate of Immigration, and agreed with the decisions adopted by the Directorate of Immigration.

The applicants complained that their removal to Iran would be contrary to Articles 2, 3 and 8 of the Convention. Moreover they submitted under Article 3, in conjunction with Article 13, that the domestic authorities had failed to engage in a rigorous scrutiny of all the facts on which their decisions were based.

The Court reiterated that the national authorities were best placed to assess the applicants' credibility and whether their amended statements about the manifestation of their Buddhist religion could be considered established facts. The Court found no reason to depart from the domestic authorities' conclusion that the applicants' observances of their faith were so discreet as not to draw negative attention, including charges of apostasy, from the Iranian authorities. Furthermore, as to the other reasons relied on by the applicants in support of their request for asylum, namely family conflict, the allegation of homosexuality or future refusals to perform military service, the Court saw no grounds to deviate from the conclusions drawn by the domestic authorities.

As regards Article 8 of the Convention, the Court found that this part of the application had to be declared inadmissible for non-exhaustion of domestic remedies. In respect of Article 13 of the Convention, it could not be said that applicants had an "arguable claim" under article 2 and 3, and the complaint was rejected.

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