EMD-bulletin
– nytt fra menneskerettsdomstolen i Strasbourg

Nr. **3** År **2017** Dato **08. mai** Utgiver **Norsk senter for menneskerettigheter**

I mars ble det avsagt tre kategori 1-avgjørelser, mot Kroatia, Russland og Hellas. Avgjørelsen mot Hellas ble avsagt kun på fransk. Det ble ikke avsagt noen avgjørelser mot Norge i mars.

Månedens utvalgte: **NAGMETOV v. RUSSIA**

Date: 30/03/2017 **Application no.:** 35589/08

Articles: 2; 2-1; 41

Conclusion: Violation of Article 2 - Right to life (Article 2-1 - Life) (Substantive aspect); Violation of Article 2 - Right to life (Article 2-1 - Effective investigation) (Procedural aspect); Non-pecuniary damage - award (Article 41 - Non-pecuniary damage - Just satisfaction)

Saken omhandler:

Saken gjaldt spørsmålet om hvorvidt en russisk statsborgers død på grunn av myndighetenes ulovlige våpenbruk utgjorde en krenkelse av artikkel 2. Videre vurderte Domstolen om den hadde adgang til å tilkjenne erstatning etter artikkel 41 selv om det ikke var fremsatt et erstatningskrav.

Fakta:

Klageren er en russisk statsborger født i 1949. Den 25. april 2006 ble klagerens sønn skadet og drept av russisk politi under en demonstrasjon mot korrupsjon. Påtalemyndigheten iverksatte umiddelbart etterforskning, som ble suspendert den 26. februar 2007 grunnet tap av bevis. Etterforskningen ble gjenopptatt 16. desember 2009 etter en sak anlagt av klagerens andre sønn, men ble atter suspendert den 16. januar 2010. Påtalemyndigheten krevde til sist etterforskningen gjenopptatt den 21. februar 2011. Etterforskningen ble imidlertid igjen suspendert den 17. april 2011, uten funn.

Klageren brakte saken inn for Domstolen den 11. juli 2008. Saken ble anlagt for Domstolen uten angivelse av et erstatningskrav. Domstolen i kammer avsa dom 5. november 2015 [no. 35589/08]. Den 14. mars 2016 ble saken henvist til storkammeret etter anmodning fra staten.

Anførsler:

Klageren anførte at artikkel 2 var krenket ettersom sønnens død var forårsaket av ulovlig og overdreven maktbruk. I tillegg hevdet han at det ikke var gjennomført effektiv etterforskning i forbindelse med dødsfallet. Klageren anførte videre at til tross for at han ikke hadde angitt et erstatningskrav, var Domstolen ikke avskåret fra å tilkjenne rimelig erstatning etter artikkel 41.

Norsk senter for menneskerettigheter
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Staten imøtegikk klagerens anførsler hva gjaldt erstatningsutmålingen. Spørsmålet om det forelå brudd på artikkel 2 ble ikke bestridt for storkammeret.

Domstolens vurderinger:

Domstolen sluttet seg til kammerets avgjørelse vedrørende spørsmålet om brudd på artikkel 2, da denne delen ikke var gjenstand for statens anke. Kammeret uttalte om sakens materielle aspekt at det utgjorde et brudd på artikkel 2 at klagerens sønn ble fratatt livet på grunn av russiske myndigheters ulovlige våpenbruk. Vedrørende det prosessuelle aspektet fant kammeret det ikke bevist at myndighetene hadde tatt nødvendige skritt for å etterforske bevistapet. Avgjørelsene som suspenderte etterforskningen inneholdt heller ingen vurdering av annet foreliggende bevismateriale. Etter en helhetsvurdering konkluderte kammeret derfor med at staten ikke hadde uttømt alle rimelige og praktiske tiltak som kunne iverksettes for å identifisere skytteren, og at artikkel 2 var krenket.

§ Article 41 – Just satisfaction

1. If the Court finds that there has been a violation of the Convention or the protocols hereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Deretter vurderte Domstolen om det var grunnlag for erstatning i den foreliggende saken. Innledningsvis uttalte retten på generelt grunnlag at artikkel 41 ikke pålegger prosessuelle vilkår for utforming av erstatningskravet, men at slike vilkår blant annet finnes i Domstolens prosedyreregler. Klageren kunne imidlertid ikke anses for å ha fremsatt et erstatningskrav på noe punkt i saksgangen, og var i det henseende også ansvarlig for feil gjort av prosessfullmektigen. Retten fant likevel at tilkjennelsen av erstatning er en del av dens oppgave med å yte rettferdighet, og at den i helt særegne tilfeller kan tilkjenne økonomisk kompensasjon for ikke-økonomisk skade selv om krav om dette ikke er fremsatt. Dette gjelder til tross for at det er en statlig forpliktelse å gjenopprette rettferdigheten etter et konvensjonsbrudd, og at Domstolens herskende praksis har vært å forholde seg kun til de kravene som faktisk er fremsatt av partene. For å underbygge dette vektla at dens viktigste retningslinje er rimelighet, hvilket innebærer krav til fleksibilitet og objektiv vurdering av hva som må anses som rettferdig og rimelig i den konkrete saken. Dette vil også gjelde for tilkjennelsen av erstatningskrav etter artikkel 41. Det er en forutsetning for rettens utmåling av erstatning etter artikkel 41 at klageren har uttrykt ønske om økonomisk kompensasjon i tillegg til anerkjennelse av konvensjonsbrudd. Det må også være årsakssammenheng mellom konvensjonsbruddet og den ikke-økonomiske skaden. Ved erstatningsutmålingen skal retten vektlegge krenkelsens alvor og konsekvenser for klageren, de konkrete omstendighetene i saken og eksistensen av kompenserende tiltak på nasjonalt nivå. Domstolen fant i den konkrete saken at det var grunnlag for å tilkjenne rimelig erstatning etter artikkel 41.

Norsk sammendrag på Lovdata.no

ŠKORJANEC v. CROATIA

Date: 28/03/2017 **Application no.:** 25536/14

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

Conclusion: Remainder inadmissible; Violation of Article 3+14 - Prohibition of torture (Article 3 - Effective investigation) (Article 14 - Prohibition of discrimination – Discrimination - Race) (Procedural aspect); Non-pecuniary damage - award (Article 41 - Non-pecuniary damage - Just satisfaction)

Relying on Articles 3 (prohibition of inhuman or degrading treatment), 8 (right to private and family life) and 14 (prohibition of discrimination), Ms Škorjanec complained in particular of the failure to prosecute her attackers for a hate crime against her. She maintained that domestic law and practice was deficient, as it did not provide protection against discriminatory violence for individuals who were victims due to their association with another person.

Whilst the appropriate legal provisions were in place for the recognition of the attack against Ms Škorjanec as a suspected hate crime, the way in which the criminal-law mechanisms were implemented in practice was defective to the point of constituting a violation of the Convention.

In the course of the initial investigation by police, Ms Škorjanec and her partner both gave statements suggesting that the former had fallen victim to a racially motivated attack due to the fact that she had been in the company of the latter. Nevertheless, the authorities failed to properly consider the possibility that Ms Škorjanec had been the victim of a hate crime. The authorities also refused to investigate whether a hate crime had been committed against her, after she had made specific allegations of racially motivated violence against her in her criminal complaint; and after further information came to light in the course of the criminal proceedings against the attackers, suggesting that she had been the victim of racially motivated violence.

The Court reiterated its subsidiary role to that of the national courts, and that it is mindful that it is prevented from substituting its own assessment of the facts for that of the national authorities. Nevertheless, the Court noted that the prosecuting authorities' insistence on the fact that Ms Škorjanec herself was not of Roma origin and their failure to identify whether she was perceived by the attackers as being of Roma origin herself, as well as their failure to take into account and establish the link between the racist motive for the attack and Ms Škorjanec's association with her partner, resulted in a deficient assessment of the circumstances of the case.

That impaired the adequacy of the domestic authorities' procedural response to Ms Škorjanec's allegations to an extent that is irreconcilable with the State's obligation of taking all reasonable steps to unmask the role of racist motives in the incident. The Court was forced to the conclusion that the domestic authorities failed in their obligations under the Convention when rejecting Ms Škorjanec's criminal complaint without conducting further investigation prior to their decision. There had therefore been a violation of Article 3 under its procedural aspect in conjunction with Article 14.

Norsk sammendrag på Lovdata.no

CHOWDURY AND OTHERS v. GREECE

Date: 30/03/2017 **Application no.:** 21884/15

Articles: 4; 4-1; 4-2; 34; 35; 35-1; 41; 44-3

Conclusion: Preliminary objection dismissed (Article 34 – Victim); Violation of Article 4 – Prohibition of slavery and forced labour (Article 4 – Positive obligations – Article 4-2 – Forced labour); Non-pecuniary damage and pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

Relying on Article 4 § 2 (prohibition of forced labour), the applicants alleged that they had been subjected to forced or compulsory labour; they further submitted that the State was under an obligation to prevent their being subjected to human trafficking, to adopt preventive measures for that purpose and to punish the employers.

The Court reiterated that the States must put in place a legislative and administrative framework that prohibits and punishes forced or compulsory labour, servitude and slavery. Greece had largely complied with that obligation, in particular by ratifying the Palermo Protocol and the Council of Europe Convention on Action against Trafficking in Human Beings (see §§ 105 to 109 of the judgment for details).

The States were required to adopt a series of measures[5] to prevent trafficking and protect the rights of victims. In the present case, the Court noted that well before the events of 17 April 2013, the authorities had been aware of the situation in the Manolada strawberry plantations, their attention having been drawn to it by reports and press articles. Debates had been held in Parliament and three ministers had ordered inspections and the drafting of legislative texts aimed at improving the migrants' situation. However, this mobilisation had not yielded any tangible results. In April 2008 the Ombudsman's Office had alerted several ministers and State bodies, as well as the public prosecutor's office, recommending that a series of measures be adopted. However, the authorities' reaction had been on an *ad hoc* basis, and they had not, at least until 2013, provided a general solution to the problems faced by the Manolada migrant workers. Furthermore, the Amaliada police station seemed to have been aware of the employers' refusal to pay the applicants' wages, as one of its police officers had given evidence to the assize court that workers from the farm had come to the police station to complain about this refusal. In consequence, the Court considered that the operational measures taken by the authorities had not been sufficient to prevent human trafficking and to protect the applicants from the treatment to which they were being subjected.

The States had to ensure that the investigation and judicial proceedings were effective. In cases involving exploitation, the authorities had to carry out an investigation capable of leading to the identification and punishment of those responsible. They had to act of their own motion once the matter had come to their attention.

With regard to the applicants who did not take part in the procedure before the assize court: they had filed a complaint on 8 May 2013, claiming that they had been employed on the farm belonging to T.A. and N.V. in conditions of human trafficking and forced labour, and alleging that they had been present at the scene of the incident on 17 April 2013 in order to demand their unpaid wages. Their complaint was dismissed, as the Amaliada prosecutor considered, among other points, that had they really been victims, they would have reported the matter to the police authorities on 17 April 2013 rather than waiting until 8 May 2013. The Court considered that by omitting to verify whether the allegations by this group of applicants were well-founded, the prosecutor had not complied with his obligation to carry out an investigation, and that in dismissing their request on the grounds that they had delayed in complaining to the police, the prosecutor had breached the regulatory framework governing trafficking in human beings. Indeed, Article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings provided for a "recovery and reflection period" of at least 30 days, so that the person concerned could recover and escape the influence of traffickers and take an informed decision on cooperating with the competent authorities. The Court therefore concluded that there had been a violation of Article 4 § 2 of the Convention with regard to the procedural obligation to conduct an effective investigation.

With regard to the applicants who took part in the proceedings before the assize court: the Patras Assize Court acquitted the defendants of the charge of trafficking in human beings, finding, in particular, that it had not been absolutely impossible for the workers to protect themselves and that their freedom of movement had not been compromised in that they had been free to leave their jobs. The Court considered that a restriction on freedom of movement was not a condition *sine qua non* for classifying a situation as forced labour or even human trafficking. A trafficking situation could exist in spite of the victim's freedom of movement. Moreover, the Patras Assize Court had acquitted the defendants of the charge of human trafficking and had converted the prison sentence imposed on the two convicted individuals for serious bodily harm into a financial penalty of EUR 5 per day of imprisonment. The public prosecutor at the Court of Cassation had refused to appeal on points of law against the acquittal judgment. The assize court had ordered T.A. and one of the armed guards to pay a total amount of EUR 1,500, or EUR 43 per injured worker, for the prejudice sustained. Yet Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings required the Contracting States, including Greece, to provide for the right of victims to obtain compensation from the persons who committed the offence, and, among other measures, to create a compensation fund for victims. The Court accordingly held that there had been a violation of Article 4 § 2 of the Convention as regards the State's procedural obligation to carry out an effective investigation into the situation of human trafficking and forced labour complained of by the applicants and to provide effective judicial proceedings.

In conclusion, the Court held that there had been a violation of Article 4 § 2 of the Convention on account of the State's failure to fulfil its positive obligations under that provision, namely to prevent the human trafficking situation complained of, to protect the victims, to conduct an effective investigation into the offences and to punish those responsible for the trafficking.

The Court held that Greece was to pay each of the applicants who had participated in the proceedings before the assize court 16,000 euros (EUR), and each of the other applicants EUR 12,000 in respect of all the damage sustained, plus EUR 4,363.64 to the applicants jointly in respect of costs and expenses.

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