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THE COVID-19 PANDEMIC AND THE EUROPEAN COURT OF HUMAN RIGHTS



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1 INTRODUCTION

The ongoing COVID-19 pandemic raises a large number of questions concerning the protection of human rights,¹ including under the European Convention on Human Rights² (ECHR). Although the requirement to exhaust domestic remedies³ before a case can be brought to the European Court of Human Rights (ECtHR) means that it usually takes years for a specific situation to lead to proceedings in Strasbourg (with the exception of the possibility to seek interim relief under Rule 39 of the ECtHR Rules of Court⁴). Yet, the pandemic has already played a role in a number of cases at the ECtHR. In this text, it will be shown how the pandemic already impacts the work of the Court. Given that even in case a vaccine should become widely available soon, the pandemic is likely to continue for some time, the experiences so far might serve as an indicator of future issues both in Strasbourg and potentially also in the context of other international courts. Moreover, some of the cases which are currently pending at the European Court of Human Rights in connection with the COVID-19 pandemic and/or state responses thereto are of a more general interest and these cases are worth monitoring as the legal processes continue in Strasbourg.

¹ See e.g. Kirchner, Stefan (ed.) (forthcoming). *Governing the Crisis: Law, Human Rights and COVID-19*. Münster: LIT Verlag.

² Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, European Treaty Series No. 5, https://www.echr.coe.int/documents/convention_eng.pdf.

³ Article 35 (1) ECHR.

⁴ European Court of Human Rights, Rules of Court (as of 1 January 2020), https://www.echr.coe.int/documents/rules_court_eng.pdf.

2 PENDING CASES

Most cases in which the Court had reason to address the pandemic concern applications which are still pending but which have already been communicated by the European Court of Human Rights to the respondent State. The amount of information available on these cases is therefore limited.

A) COMMUNAUTÉ GENEVOISE D'ACTION SYNDICALE (CGAS) V. SWITZERLAND

The cases deal with a range of issues. In the case of the *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*,⁵ the application concerns prohibitions to hold demonstrations, which are covered by the freedom of assembly under Article 11 ECHR, which reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."⁶

These prohibitions were part of a package of measures taken by the Swiss authorities on 13 March 2020.⁷ The applicant is a labour union which frequently organized demonstrations.⁸ Due to the limitations imposed by the authorities, the applicant's planned large-scale demonstration which had been planned for 1 May 2020, had to be cancelled.⁹ The prohibition of demonstrations was imposed to prevent the spread of the SARS-CoV-2 virus. As such, it seems likely that the European Court of Human Rights will find the ban on demonstrations to have been lawful, given that Article 11 para. 2 ECHR explicitly mentions the protection of health as a valid reason for limitations on the freedom of assembly. The potential grounds for restrictions of human rights are virtually identical for the rights contained in Articles 8 to 11 ECHR, which also happen to be rights which will be particularly affected by measures to combat the spread of the virus. The freedom of assembly under Article 11 ECHR is particularly relevant as limiting in-person meetings is an effective way to achieve the goal of a reduced infection rate. Therefore, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* is a case worth keeping an eye on also regarding other potential applications concerning measures which limit freedoms for the purpose of stopping the pandemic.

B) KHACHATRYAN V. ARMENIA

In a number of cases, the current pandemic only played a relatively marginal role and is not decisive for the case. The applicant in the case of *Khachatryan v. Armenia*¹⁰ is imprisoned in Armenia and requested to be transported to a clinic in Germany. In describing the applicant's current detention situation, the respondent State explained that he was being held alone in a prison's medical ward

⁵ European Court of Human Rights, *Communauté genevoise d'action syndicale (CGAS) v. Switzerland*, Application no. 21881/20, Communicated Case, 11 September 2020, <http://hudoc.echr.coe.int/eng?i=001-205025>.

⁶ Article 11 ECHR.

⁷ *Supra*, note 5.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ European Court of Human Rights, *Khachatryan v. Armenia*, Application no. 54684/19, Communicated Case, 23 September 2020, <http://hudoc.echr.coe.int/eng?i=001-205283>.

due to the COVID-19 pandemic.¹¹ The application itself, however, does not relate to risks posed by COVID-19 or State measures aimed at combating the spread of the disease. Like *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* and the other cases highlighted in this text (except for the last one), the case of *Khachatryan v. Armenia* is currently still pending before the European Court of Human Rights.

C) HAFEEZ V. THE UNITED KINGDOM

The case of *Hafeez v. the United Kingdom*¹² also concerns a detention situation. The applicant had been arrested in the United Kingdom due to an extradition request by the United States of America as the applicant was thought to be involved in the importation and distribution of drugs in the United States, notably of heroin, hashish and methamphetamines.¹³ The applicant suffers from asthma and diabetes,¹⁴ both of which are considered risk factors for severe effects of an infection with the SARS-CoV-2 virus.¹⁵ The applicant feared that he might be sentenced to life without the possibility of parole by the relevant court in the United States, if he were to be extradited there¹⁶ and sought protection against such an outcome by invoking the *Trabelsi*¹⁷ precedent in the domestic court. In *Trabelsi v. Belgium*, the European Court of Human Rights had found Belgium at fault for violating Article 3 ECHR by extraditing the applicant to the United States despite the ECtHR having granted interim relief to the applicant under Rule 39 of the ECtHR's Rules of Court.¹⁸ The domestic court in *Hafeez*, however, disagreed with the ECtHR's *Trabelsi* judgment and refused to honor the obligation contained in Article 1 ECHR, and highlighted by the States parties to the ECHR in the Brighton Declaration,¹⁹ to implement the ECHR as interpreted by the ECtHR.²⁰ Instead, the domestic court in *Hafeez* claimed that the criminal justice system would be outside the scope of review of the European Court of Human Rights, invoking a number of earlier ECtHR cases.²¹ This view by the British court is based on a fundamental misunderstanding: the *organization* of the criminal justice system is, as the domestic court noted correctly,²² up to the State. Individual measures and systematic administrative practices can be reviewed by the European Court of Human Rights. It is not up to the States which have ratified the ECHR to determine the line between mere organizational issues concerning the criminal justice system and specific measures which are relevant for the enjoyment of human rights by the detained person. Whether or not the United Kingdom actually violated the applicant's rights will depend on the specific circumstances of the case. The health risks associated with asthma and diabetes, in particular in light of the extreme number and rate of COVID-19 infections in the United States of America, can be factors which might be taken into account by the European Court of Hu-

¹¹ Ibid.

¹² European Court of Human Rights, *Hafeez v. the United Kingdom*, Application no. 14198/20, Communicated Case, 24 March 2020, <http://hudoc.echr.coe.int/eng?i=001-202335>, section "Statement of Facts".

¹³ Ibid., para. 2.

¹⁴ Ibid., para. 1.

¹⁵ Centers for Disease Control and Prevention (2020). "People with Certain Medical Conditions", 2 November 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

¹⁶ See supra, note 12, para. 7.

¹⁷ European Court of Human Rights, *Trabelsi v. Belgium*, Application no. 140/10, Judgment of 4 September 2014, <http://hudoc.echr.coe.int/eng?i=001-146372>.

¹⁸ Ibid., para. 154.

¹⁹ European Court of Human Rights (2012). High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration, https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

²⁰ Ibid., para. 7.

²¹ See supra, note 12, para. 14.

²² Ibid.

man Rights in the context of an investigation into the question, whether Article 3 ECHR has been violated. So far, the European Court of Human Rights has directed two questions to the applicant and to the respondent State:

“1. If the applicant were to be extradited to the United States of America, would there be a real risk that he would be subjected to inhuman and degrading punishment through the imposition of an “irreducible” life sentence? In particular, would his extradition, in circumstances where he risks the imposition of a life sentence without parole, be consistent with the requirements of Article 3 of the Convention (see in particular *Harkins and Edwards v. the United Kingdom*, nos. 9146/07 and 32650/07, 17 January 2012, *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, ECHR 2013 (extracts) and *Trabelsi v. Belgium*, no. 140/10, ECHR 2014 (extracts))?”

2. Having particular regard to the ongoing Covid-19 pandemic, if the applicant were to be extradited would there be a real risk of a breach of Article 3 of the Convention on account of the conditions of detention he would face on arrival?”²³

The latter question is of a hypothetical nature, as is regularly the case in proceedings at the European Court of Human Rights in which a detained person wants to prevent a possible extradition (frequently to the United States). It is noteworthy, though, that the manner in which the question is asked implies that there is a real risk that the extradition could happen while the pandemic is still ongoing. This is not surprising given the respondent State’s desire to extradite the applicant and the nature of the pandemic. In the long term, the case could become relevant also in the context of other situations in which a person who is in the care of the State²⁴ is exposed to a higher level of risk than the person is in at the moment.

D) D. C. V. ITALY

In *D. C. v. Italy*, essentially a child custody case, the applicant is seeking relief from the ECtHR after his request for interim relief by the Italian courts was denied. The applicant’s daughter is currently with her mother after the latter had separated from the applicant. The case is noteworthy in that the applicant had sought interim relief from an Italian court on 2 April 2020, which had been denied on 9 April 2020, and the applicant submitted the application to the ECHR on 18 April 2020. At stake is here not only the possible violation of the right to family life under Article 8 ECHR but also the right to an effective remedy under Article 13 ECHR. The domestic procedures in Italy were based on an Act which was adopted earlier this year, among other reasons, to limit the effects of the COVID-19 pandemic on the judicial system. The subject matter of the case itself is unrelated to the pandemic, rather, it is the pandemic’s effects on procedural matters which may become relevant in the course of this case which is still pending at this time.

E) SPÎNU V. ROMANIA

The applicant in this case²⁵ is imprisoned in Romania. He has requested to attend a religious service outside of the prison.²⁶ This request has been denied because, due to the COVID-19 pandemic, all

²³ European Court of Human Rights, *Hafeez v. the United Kingdom*, Application no. 14198/20, Communicated Case, 24 March 2020, <http://hudoc.echr.coe.int/eng?i=001-202335>, section “Questions to the Parties”.

²⁴ In addition to detained persons this can also cover other groups of persons who are not free in their decision where they are at a given time and who depend on decisions made by State organs, such as soldiers or pupils in schools in countries with obligatory schooling systems.

²⁵ European Court of Human Rights, *Spînu v. Romania*, Application no. 29443/20, Communicated Case, 1 October 2020, <http://hudoc.echr.coe.int/eng?i=001-205604>,

²⁶ *Ibid.*

activities outside the prison are to be reduced to an absolute minimum, i.e., only necessary activities.²⁷ Even if the applicant would have received the permission to leave the prison grounds for a specific purpose, this would not be the case now because of the limitations imposed to combat the pandemic. *Spînu v. Romania* therefore actually is a case in which the State's actions to limit the spread of the SARS-CoV-2 virus has had a direct impact on the exercise of a specific human right by an individual person. Although the freedom of religion is an important human right, the restrictions which are possible in the context of Article 9 ECHR are very similar to those regarding Articles 8, 10 and 11 ECHR. It is questionable whether this application can be successful as it is now widely known that limiting contacts between persons is a crucial component of any effective strategy aimed at stopping the pandemic.

3 ENFORCEMENT OF EARLIER JUDGMENTS

In addition, the Committee of Ministers had reason to be concerned with COVID-19 in the context of the enforcement of the Court's judgment²⁸ of 31 July 2014 in the case *OAO Neftyanaya kompaniya Yukos v. Russian Federation*. On 1 October 2020, the Committee of Ministers adopted Interim Resolution CM/ResDH(2020)204.²⁹ Within the framework of the ECHR, the Committee of Ministers is tasked with ensuring, together with the court, that the States in question comply with the judgments of the ECtHR.³⁰ In the 2014 *Yukos* "judgment the Court awarded EUR 1,866,104,634 in respect of pecuniary damage, payable to the applicant company's former shareholders and their legal successors and heirs, and indicated that within six months of the judgment becoming final the respondent State must produce, in cooperation with the Committee of Ministers, a comprehensive plan, including a binding time frame, for distribution of the award of just satisfaction in respect of pecuniary damage".³¹ In addition, the Court had ordered the Russian Federation to cover the applicant's costs of 300,000 EUR.³² So far, the Russian Federation has not made the payments to which it had been obliged by the European Court of Human Rights.³³ The Committee of Ministers announced that it was aware that the pandemic provides challenges³⁴ and accordingly has set a deadline of 31 March 2021 for the government of the Russian Federation to consult with the Committee of Ministers regarding Russia's compliance with the judgment of 31 July 2014. The Committee of Ministers plans to revisit the issue at its next meeting in 2021. Russia's lack of cooperation in the *Yukos* case is only one example, albeit a notable one, of the dependency of the international legal system on the willingness of States to cooperate and to adhere to international legal norms. Enforcing international law has long been a challenge and the dependency on States' goodwill remains the core weakness of public international law to this day. This becomes particularly visible in the context of international human rights treaties. In the case of a multilateral treaty, it is the community of States parties which can ensure the enforcement of said treaty. In the case of the European Conven-

²⁷ Ibid.

²⁸ European Court of Human Rights, *OAO Neftyanaya kompaniya Yukos v. Russian Federation*, Application no. 14902/04, Judgment of 31 July 2014, <http://hudoc.echr.coe.int/eng?i=001-145730>.

²⁹ Committee of Ministers, *OAO Neftyanaya kompaniya Yukos v. Russian Federation*, Application no. 14902/04, Res-54, Interim Resolution CM/ResDH(2020)204 Execution of the judgment of the European Court of Human Rights *OAO Neftyanaya kompaniya Yukos against Russian Federation*, 1 October 2020, <http://hudoc.echr.coe.int/eng?i=001-205910>.

³⁰ See in detail Article 46 ECHR.

³¹ *Supra*, note 29.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

tion on Human Rights, the framework provided by the Council of Europe (CoE) ensures that in extreme cases, significant non-compliance with the ECHR can even lead to exclusion from the CoE. Today, the CoE brings together almost all Europeans. With the exception of Belarus, Kazakhstan and the State of the Vatican City, all European States are members of the CoE and parties to the ECHR. The Holy See (which is an ancient subject of international law different from the State of the Vatican City, which was founded in 1929 and in turn is governed by the Holy See) enjoys observer status with the CoE, as do a number of States with close ties to Europe (Israel, Canada, Japan, Mexico and the United States of America).³⁵ Expelling Russia from this organization would not be an easy decision to make, not only because as the largest and most populous member State, Russia remains important in political terms, and because the CoE provides a forum for cooperation across the continent, but, more importantly, because expelling Russia would deprive almost 150 million people of the protections afforded by the system of international human rights treaties which has been created in the context of the CoE. The road to improved compliance with the ECHR by Russia will require more than the threat of being expelled from the CoE. By referring to the challenges posed by the pandemic and by setting a deadline for consultations for early 2021, the Committee of Ministers has left the door open for Russia to come around and found a way to comply with the *Yukos* judgment. Although it seems unlikely at this time that the Russian government will make use of this opportunity, it shows that the pandemic has become a tool on the political level, in this case in the form of awareness of the financial challenges the pandemic brings for some countries. International cooperation in the fight against COVID-19 might also be a way to lay the groundwork for a future convergence of views on issues such as human rights. Currently, this international cooperation can be seen among member States of the European Union (EU), although the EU member States have retained the power to make decisions regarding health care.

4 CONCLUSIONS AND OUTLOOK

The limited international cooperation is just one example for how States have failed, and continue to fail, during this crisis. The pandemic makes it necessary to think about human rights. Yet, many national responses to COVID-19 ignore the right to health and focus on strategies which have been proven to not be working, such as denying that COVID-19 is real, or hoping for a herd immunity, which appears to be impossible without widespread immunization through a vaccine, which will have to be freely available and safe for everyone. Wishful thinking, rather than science, seems to inform the decisions made in many national capitals. COVID-19 will not disappear just because we want the pandemic to be over. The European Court of Human Rights has recognized this and takes the COVID-19 pandemic into account as a fact which has a wide range of consequences. The response to COVID-19 must be based on human rights, in particular on the duty of States to actively protect the right to life, which is enshrined in Article 2 ECHR. The right to life is essential to the enjoyment of all other human rights, it therefore has to take precedence over other rights, let alone extra-legal considerations such as the economy or tax revenue. The positive obligation to protect the right to life requires the States to take into account the best available scientific information. Failing to act decisively against the pandemic puts human lives and human rights at risk. At the time of writing, over 1.36 million people have officially lost their lives to COVID-19³⁶ (although the true number of victims is likely much higher as many governments downplay the effects of COVID-19 in their respective countries). Just like governments all over the world take positive action to reduce

³⁵ Council of Europe (2020). Our member States, <https://www.coe.int/en/web/about-us/our-member-states>.

³⁶ Johns Hopkins University (2020). COVID-19 Dashboard, 20 November 2020, 7:26 a.m. Eastern European Time, <https://coronavirus.jhu.edu/map.html>.

the number of road traffic fatalities, governments have to take the steps which are required to minimize the number of people affected by COVID-19. Respect for human rights is not limited to not violating rights directly but also requires States to create the conditions necessary for the full enjoyment of human rights, including functioning health care systems. COVID-19 is a global challenge, and we all play a role in meeting this challenge. Under the positive obligations which are part of Article 2 ECHR, governments of States parties to the ECHR have a particular legal obligation to take positive action.