EMD-bulletin
– nytt fra menneskerettsdomstolen i Strasbourg

Nr. **7** År **2015** Dato **11. august** Utgiver **Norsk senter for menneskerettigheter**

I juni ble det avsagt syv kategori 1-avgjørelser, mot Estland, Frankrike, Aserbajdsjan, Romania, Armenia og Russland. Avgjørelsen mot Romania ble avsagt kun på fransk. Det ble ikke avsagt noen avgjørelser mot Norge i juni.

Månedens utvalgte: **Delfi AS v. Estonia**

Date: 16/06/2015 **Application no.:** 64569/09

Articles: 8; 8-1; 10; 10-1; 10-2; 17

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

Fakta:

Klageren var et selskap som eide en av de største internettbaserte nyhetsportalene i landet.

I januar 2006 publiserte nyhetsportalen en artikkel om et fergeselskap. Under artikkelen var det et kommentarfelt, hvor mange brukere skrev svært krenkende eller truende kommentarer om fergeselskapet og dets eier. Fergeselskapets eiers advokater ba om at kommentarene ble fjernet, noe klageren etterkom i mars 2006, omtrent seks uker etter at de ble publisert.

Fergeselskapets eier saksøkte klageren i april 2006, men klagen ble avvist av førsteinstansdomstolen. Eieren anket, noe ankedomstolen tillot. Ankedomstolen opphevet førsteinstansdomstolens avgjørelse, og sendte saken tilbake for ny vurdering. I juni 2008 fikk eieren medhold i førsteinstansdomstolen, og ankedomstolen opprettholdt denne avgjørelsen. Klageren anket til høyesterett, som opprettholdt avgjørelsen. Klageren ble dømt til å betale erstatning for ikke-økonomisk skade.

Klageren brakte som inn for Domstolen 4. desember 2009, og i dom 10. oktober 2013, avsagt i kammer, konkluderte Domstolen enstemmig med at det ikke forelå krenkelse av artikkel 10. Saken ble 17. februar 2014 besluttet henvist til avgjørelse i storkammer, etter anmodning fra klageren.

Tredjepartsintervensjon fra the Helsinki Foundation for Human Rights, Article 19, Access, Media Legal Defence Initiative (MLDI) sammen med 28 tilknyttede organisasjoner, the European Digital Media Association (EDiMA), the Computer and Communications Industry Association (CCIA Europe) og the pan-European association of European Internet Services Providers Associations (euroISPA).

Norsk senter for menneskerettigheter
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Anførsler:

Klageren anførte at å holde selskapet ansvarlig for kommentarene som ble skrevet og lagt ut av nyhetsportalens lesere utgjorde en krenkelse av klagerens ytringsfrihet etter artikkel 10.

Staten imøtegikk klagerens anførsler.

Domstolens vurderinger:

Domstolen bemerket innledningsvis at brukergenererte ytringer på internett utgjør en helt ny plattform for ytringsfriheten, som medfører både fordeler og ulemper. Domstolen slo fast at klageren hadde blitt utsatt for et inngrep i sin ytringsfrihet, noe begge partene var enige i. Domstolen vurderte videre om inngrepet var foreskrevet ved lov. Spørsmålet var om den nasjonale lovgivningen var tilstrekkelig forutsigbar. Domstolen fant at lovgivningen og nasjonal rettspraksis var forutsigbar når det gjaldt at et selskap som drev en slik internettbasert nyhetsportal med økonomisk formål, kunne bli holdt ansvarlig for ulovlige kommentarer på siden. Domstolen bemerket at klageren, som en profesjonell aktør, burde være kjent med lovgivningen og rettspraksisen, og kunne også ha søkt juridisk råd. Domstolen fant derfor at inngrepet var foreskrevet ved lov. Domstolen slo videre fast at inngrepet hadde sin bakgrunn i et saklig formål, nemlig beskyttelse av andres rettigheter og omdømme. Domstolen vurderte deretter om inngrepet var nødvendig i et demokratisk samfunn. Domstolen viste til sin tidligere praksis, og trakk fram pressens grunnleggende rolle i et demokratisk samfunn og internetts viktige rolle i å spre informasjon og nyheter. Domstolen uttalte at ved vurderingen av om et inngrep er nødvendig i et demokratisk samfunn på grunn av beskyttelse av andres rettigheter eller omdømme, må det vurderes om staten har oppnådd en rimelig balanse mellom beskyttelse av ytringsfriheten på den ene siden, og retten til respekt for sitt privatliv etter artikkel 8 på den andre. Domstolen bemerket at artikkel 8 og artikkel 10 i prinsippet er likeverdige, og at skjønnsmargin skal være lik etter begge artikler. Staten vil vanligvis ha en vid skjønnsmargin der det må oppnås en balanse mellom konkurrerende rettigheter. I den konkrete vurderingen tok Domstolen først for seg kommentarenes kontekst. Domstolen fant det bevist at klagerens rolle i publiseringen av kommentarene gikk utover det å være en passiv, rent teknisk tjenesteleverandør, og at høyesteretts drøfting på dette grunnlaget ikke var i strid med artikkel 10. Domstolen vurderte videre ansvaret til de som hadde skrevet kommentarene. Domstolen fant at det var usikkerhet knyttet til muligheten til å få vite identiteten til de som hadde skrevet kommentarene, og manglende muligheter for et offer til å effektivt fremsette krav mot dem. Domstolen fant derfor at høyesterett hadde basert sin avgjørelse på relevante og tilstrekkelige

> **§ Article 10 – Freedom of expression**
>
> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

grunner. Domstolen vurderte deretter de tiltakene klageren hadde gjort for å hindre ulovlige kommentarer. Domstolen bemerket at klageren hadde uthevet antall kommentarer på artiklene på nettsiden, og derfor kunne redaktørene lett følge med på hvilke kommentarfelt som hadde de livligste diskusjonene. Domstolen fant at et krav om å fjerne hatefulle ytringer og oppfordringer til vold uten unødig opphold i utgangspunktet ikke utgjorde et uforholdsmessig inngrep i klagerens ytringsfrihet. Domstolen fant at klageren hadde gjort tiltak for å hindre ulovlige ytringer, men at disse hadde svakheter. Domstolen vurderte videre hvilke konsekvenser inngrepet hadde fått for klageren. Domstolen fant at boten klageren måtte betale ikke var så stor at den var uforholdsmessig sammenliknet med krenkelsen som klageren ble dømt for i nasjonale domstoler. Det var heller ikke nødvendig for klageren å legge om virksomheten sin. Domstolen konkluderte med at inngrepet ikke utgjorde en uforholdsmessig begrensning av klagerens ytringsfrihet. Domstolen fant med femten stemmer mot to at det ikke forelå en krenkelse av artikkel 10.

Norsk sammendrag på Lovdata.no

Andre kategori 1-avgjørelser fra EMD: Juni

LAMBERT and OTHERS v. FRANCE

Date: 05/06/2015 **Application no.:** 46043/14

Articles: 2; 2-1; 34; 35

Conclusion: Preliminary objection allowed (Article 34 – Locus standi); Remainder inadmissible; No violation of Article 2 – Right to life (Article 2-1 – Life)(Substantive aspect)(Conditional)

The case concerned the judgment delivered on 24 June 2014 by the Conseil d'État authorising the withdrawal of the artificial nutrition and hydration of Vincent Lambert.

The Court observed that there was no consensus among the Council of Europe member States in favour of permitting the withdrawal of life-sustaining treatment. In that sphere, which concerned the end of life, States must be afforded a margin of appreciation. The Court considered that the provisions of the Act of 22 April 2005, as interpreted by the Conseil d'Etat, constituted a legal framework which was sufficiently clear to regulate with precision the decisions taken by doctors in situations such as that in the present case.

The Court was keenly aware of the importance of the issues raised by the present case, which concerned extremely complex medical, legal and ethical matters. In the circumstances of the case, the Court reiterated that it was primarily for the domestic authorities to verify whether the decision to withdraw treatment was compatible with the domestic legislation and the Convention, and to establish the patient's wishes in accordance with national law.

The Court's role consisted in examining the State's compliance with its positive obligations flowing from Article 2 of the Convention.

The Court found the legislative framework laid down by domestic law, as interpreted by the Conseil d'État, and the decision-making process, which had been conducted in meticulous fashion, to be compatible with the requirements of Article 2.

The Court reached the conclusion that the present case had been the subject of an in-depth examination in the course of which all points of view could be expressed and that all aspects had been carefully considered, in the light of both a detailed expert medical report and general observations from the highest-ranking medical and ethical bodies.

Norsk sammendrag på Lovdata.no

TAHIROV v. AZERBAIJAN

Date: 11/06/2015 **Application no.:** 31953/11

Articles: 35; 37; 37-1; 41; P1-3

Conclusion: Preliminary objection dismissed (Article 37-1 – Striking out applications); Violation of Article 3 of Protocol No. 1 – Right to free elections-{general}(Article 3 of Protocol No. 1 – Stand for election); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

The case concerned the complaint of an independent candidate in the 2010 parliamentary elections, Mr Tahirov, that he was arbitrarily refused registration.

The Court found in particular that Mr Tahirov had been deprived of the opportunity to challenge the electoral commissions' conclusion that the signatures supporting his candidacy were not authentic, a situation that seemed to be of a systemic nature. Indeed, after the 2010 elections, the European Court of Human Rights itself had received around 30 applications, including Mr Tahirov's, by candidates complaining about the registration process and in particular about the invalidation of their supporting signatures. Furthermore, neither the electoral commissions nor the domestic courts had addressed any of the well-founded arguments put forward by Mr Tahirov or motivated their judgments.

The Court therefore considered that the refusal of Mr Tahirov's candidacy had been arbitrary and that the procedure for verifying signatures supporting his candidacy had been conducted in a manner which did not provide sufficient procedural safeguards against arbitrariness, although such guarantees were provided for by the Electoral Code.

Norsk sammendrag på Lovdata.no

MANOLE AND "ROMANIAN FARMERS DIRECT" v. ROMANIA

Date: 16/06/2015 **Application no.:** 46551/06

Articles: 11; 11-1; 11-2; 35; 35-3

Conclusion: Preliminary objection joined to the merits and dismissed (Article 35-3 – Ratione materiae); No violation of Article 11 – Freedom of assembly and association

The case concerned the refusal to register the union of self-employed farmers which Mr Manole wished to set up.

The Court, taking into consideration the relevant international instruments in this sphere and in particular the Conventions of the International Labour Organisation, found that under the Romanian legislation farmers' organisations enjoyed essential rights enabling them to defend their members' interests in dealings with the public authorities, without needing to be established as trade unions. In agriculture as in the other sectors of the economy, that form of association was now reserved solely for employees and members of cooperatives.

The Court held that the refusal to register the applicant union had not overstepped the Romanian authorities' margin of appreciation as to the manner in which they secured the right of freedom of association to self-employed farmers.

Norsk sammendrag på Lovdata.no

SARGSYAN v. AZERBAIJAN

Date: 16/06/2015 **Application no.:** 40167/06

Articles: 1; 8; 8-1; 13; 19; 34; 35; 35-1; 35-3; 41; P1-1; P1-1-1

Conclusion: Preliminary objection dismissed (Article 35-1 – Exhaustion of domestic remedies); Preliminary objection dismissed (Article 35-3 – Continuing situation); Preliminary objection joined to the merits and dismissed (Article 34 - Victim); Remainder inadmissible; Violation of Article 1 of Protocol No. 1 – Protection of property (Article 1 of Protocol No. 1 – Positive obligations Article 1 para. 1 of Protocol No. 1 – Peaceful enjoyment of possessions Possessions); Violation of Article 8 – Right to respect for private and family life (Article 8 – Positive obligations Article 8-1 – Respect for family life Respect for home Respect for private life); Violation of Article 13 – Right to an effective remedy (Article 13 – Effective remedy); Just satisfaction reserved (Article 41 – Just satisfaction)

The case concerned an Armenian refugee's complaint that, after having been forced to flee from his home in the Shahumyan region of Azerbaijan in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh, he had since been denied the right to return to his village and to have access to and use his property there.

It was the first case in which the Court had to decide on a complaint against a State which had lost control over part of its territory as a result of war and occupation, but which at the same time was alleged to be responsible for refusing a displaced person access to property in an area remaining under its control.

There are currently more than one thousand individual applications pending before the Court which were lodged by persons displaced during the conflict over Nagorno-Karabakh.

In Mr Sargsyan's case, the Court confirmed that, although the village from which he had to flee was located in a disputed area, Azerbaijan had jurisdiction over it.

The Court considered that while it was justified by safety considerations to refuse civilians access to the village, the State had a duty to take alternative measures in order to secure Mr Sargsyan's rights

as long as access to the property was not possible. The fact that peace negotiations were ongoing did not free the Government from their duty to take other measures. What was called for was a property claims mechanism which would be easily accessible to allow Mr Sargsyan and others in his situation to have their property rights restored and to obtain compensation.

Norsk sammendrag på Lovdata.no

CHIRAGOV and OTHERS v. ARMENIA

Date: 16/06/2015 **Application no.:** 13216/05

Articles: 1; 8; 8-1; 8-2; 13; 34; 35; 35-1; 35-3; 41; P1-1; P1-1-1

Conclusion: Preliminary objection dismissed (Article 35-1 – Exhaustion of domestic remedies Article 35-3 – Ratione loci); Preliminary objections dismissed (Article 34 - Victim); Violation of Article 1 of Protocol No. 1 – Protection of property (Article 1 para. 1 of Protocol No. 1 – Peaceful enjoyment of possessions Possessions); Violation of Article 8 – Right to respect for private and family life (Article 8-1 – Respect for family life Respect for home Respect for private life); Violation of Article 13 – Right to an effective remedy (Article 13 – Effective remedy); Just satisfaction reserved (Article 41 – Just satisfaction)

The case concerned the complaints by six Azerbaijani refugees that they were unable to return to their homes and property in the district of Lachin, in Azerbaijan, from where they had been forced to flee in 1992 during the Armenian-Azerbaijani conflict over Nagorno-Karabakh.

There are currently more than one thousand individual applications pending before the Court which were lodged by persons displaced during the conflict over Nagorno-Karabakh.

In the applicants' case, the Court confirmed that Armenia exercised effective control over NagornoKarabakh and the surrounding territories and thus had jurisdiction over the district of Lachin.

The Court considered that there was no justification for denying the applicants access to their property without providing them with compensation. The fact that peace negotiations were ongoing did not free the Government from their duty to take other measures. What was called for was a property claims mechanism which would be easily accessible to allow the applicants and others in their situation to have their property rights restored and to obtain compensation.

Norsk sammendrag på Lovdata.no

KHOROSHENKO v. RUSSIA

Date: 30/06/2015 **Application no.:** 41418/04

Articles: 5; 5-1; 5-1-a; 8; 8-1; 8-2; 35; 41

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

The case concerned the complaint by a life prisoner about various restrictions on family visits during ten years of his detention in a special regime correctional colony.

The Court found in particular that the strict regime had been disproportionate to the aims pursued and that such a regime seriously complicated a prisoner's social reintegration and rehabilitation. Given that a majority of Council of Europe member States did not make a distinction between life prisoners and other prisoners as regards the prison regime and that in those States the minimum frequency of family visits allowed for life prisoners was not lower than once every two months, Russia had only a narrow room for manoeuvre ("margin of appreciation") in this field.

Norsk sammendrag på Lovdata.no

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Avgjørelser mot Norge: Juni

Det ble ikke avsagt noen avgjørelser mot Norge i juni.

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