EMD-bulletin
– nytt fra menneskerettsdomstolen i Strasbourg

Nr. **5** År **2016** Dato **9. juni** Utgiver **Norsk senter for menneskerettigheter**

I april ble det avsagt fem kategori 1-avgjørelser, mot Ungarn, Nederland og Tyrkia. Det ble ikke avsagt noen avgjørelser mot Norge i april.

Månedens utvalgte: **İzzettin Doğan and others v. Turkey**

Date: 26/04/2016 **Application no.:** 62649/10

Articles: 9; 9-1; 9-2; 14; 14+9-1; 41

Conclusion: Violation of Article 9 - Freedom of thought conscience and religion (Article 9-1 - Freedom of religion); Violation of Article 14+9-1 - Prohibition of discrimination (Article 14 - Discrimination) (Article 9-1 - Freedom of religion Article 9 - Freedom of thought conscience and religion); Non-pecuniary damage - finding of violation sufficient (Article 41 - Non-pecuniary damage Just satisfaction)

Fakta:

Klagerne er 203 tyrkiske statsborgere, som alle bekjenner seg til religionen Alevi. I juni 2005 innga klagerne en begjæring til statsministeren hvor de klaget på at religionsdepartementet begrenset sin virksomhet til kun én retning innenfor Islam, og at klagernes religion ble ekskludert. Klagerne mente av deres rettigheter hadde blitt krenket, og viste blant annet til restriksjoner knyttet til deres steder for tilbedelse. I august 2005 avviste statsministerens kontor klagernes forespørsler.

1.919 medlemmer av Alevi-troen, inkludert klagerne, reiste deretter søksmål for den administrative domstolen, under henvisning til at de ble vilkårlig behandlet. Den administrative domstolen avviste saken i juli 2007. Klagerne anket avgjørelsen, men den øverste administrative domstolen avviste anken i februar 2010.

Klagerne brakte saken inn for Domstolen 31. august 2010. Kammeret avstod jurisdiksjon til fordel for storkammeret 25. november 2014.

Anførsler:

Klagerne anførte at deres rett til å gi uttrykk for sin religion ikke hadde blitt tilstrekkelig beskyttet i nasjonal lov, i strid med artikkel 9. Klagerne anførte også at de var ofre for diskriminering, i strid med artikkel 14 sammenholdt med artikkel 9.

Staten imøtegikk klagernes anførsler.

Norsk senter for menneskerettigheter
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Domstolens vurderinger:

Domstolen behandlet først klagernes anførsel om krenkelse av artikkel 9. Domstolen fant at saken skulle vurderes under statens negative forpliktelser, og at det ikke var nødvendig å vurdere statens positive forpliktelser. Domstolen fant at myndighetenes avvisning av klagernes forespørsler utgjorde en mangel av anerkjennelse av klagernes religion, som fikk mange konsekvenser for religionsutøvelsen og religionens organisasjon og finansiering. Det forelå dermed et inngrep i klagernes rett til religionsfrihet, og spørsmålet var derfor om inngrepet kunne rettferdiggjøres. Domstolen fant at inngrepet var foreskrevet ved lov, og at inngrepet hadde sin bakgrunn i et saklig formål, nemlig beskyttelse av offentlig orden. Domstolen gikk deretter over til å vurdere om inngrepet kunne sies å være nødvendig i et demokratisk samfunn. Domstolen vurderte først statens forpliktelse til nøytralitet og upartiskhet overfor religioner. Under henvisning til tidligere rettspraksis bemerket Domstolen at kun de øverste religiøse myndighetene i et religiøst samfunn, og ikke staten eller nasjonale domstoler, kan avgjøre hvilken trosretning samfunnet tilhører. Domstolen fant derfor at statens holdning overfor klagernes religion krenket religionens rett til uavhengig eksistens. Domstolen fant at statens holdning til klagernes religion ikke tok religionens særegne trekk i betraktning, noe som gjorde at religionen ble rammet av en lov som inneholdt flere vesentlige forbud. Domstolen fant derfor at statens holdning overfor klagernes religion, de religiøse skikkene og religionens steder for tilbedelse var uforenlig med statens plikt til nøytralitet og upartiskhet, og med religiøse samfunns rett til uavhengig selvstyre. Domstolen vurderte deretter i hvor stor grad troende som bekjenner seg til klagernes religion hadde frihet til å utøve sin tro. Domstolen slo fast at klagernes religion falt innenfor lovbestemmelser som medførte flere forbud, for eksempel når det gjaldt bruken av visse titler på religiøse ledere og steder for tilbedelse. Domstolen fant at friheten til å utøve troen var i stor grad avhengig av lokale myndigheters velvilje, noe som gjorde at Domstolen tvilte på den reelle friheten til å utøve sin tro. Domstolen fant også at klagernes religion stod overfor mange problemer, blant annet når det gjaldt organisasjon av deres religiøse liv, manglende status for de religiøse lederne, og en rekke andre juridiske, organisatoriske og økonomiske problemer. Domstolen var derfor ikke overbevist om at friheten til å utøve sin tro, som staten ga klagernes religion, var tilstrekkelig til at de fikk fullt ut utøve sine rettigheter etter artikkel 9. Domstolen gikk deretter over til å behandle spørsmålet om statens skjønnsmargin. Staten slo fast at statene har en viss skjønnsmargin når det gjelder samarbeid med ulike lokalsamfunn, men at staten i denne saken hadde overskredet denne skjønnsmarginen. Domstolen vurderte så om det var av betydning at det var diskusjon innad i klagernes religion om religionens grunnleggende læresetninger og behovene til det religiøse samfunnet. Domstolen fant at slik uenighet ikke endret statusen som et religiøst samfunn, og rettighetene etter artikkel 9.

§ Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Domstolen konkluderte med at inngrepet ikke kunne sies å være nødvendig i et demokratisk samfunn, og kom med tolv mot fem stemmer til at det forelå en krenkelse av artikkel 9.

Domstolen vurderte deretter klagernes anførsel om krenkelse av artikkel 14 sammenholdt med artikkel 9. Domstolen fant at klagerne kunne hevde å være i en sammenliknbar situasjon som andre innbyggere som hadde fått juridisk anerkjennelse av sin religion. Domstolen bemerket at klagernes religion, uavhengig av dens stilling innenfor muslimsk teologi, var en religiøs overbevisning som var dypt forankret i statens samfunn og historie. Domstolen fant at klagerne, som troende, ble behandlet dårligere enn de som fikk tilgang til religiøse offentlige tjenester. Domstolen viste til flere ulemper klagerne ble utsatt for som følge av forskjellsbehandlingen, blant annet manglende anerkjennelse av steder for tilbedelse, tilnærmet ingen statlig finansiering og de troende fikk ingen nytte av de religiøse offentlige tjenestene. Domstolen fant at statens behandling av klagernes religion var åpenbart uforholdsmessig, og at forskjellsbehandlingen klagerne hadde blitt utsatt for ikke hadde noen objektiv og tilfredsstillende begrunnelse. Domstolen konkluderte med seksten mot en stemmer at det forelå en krenkelse av artikkel 14 sammenholdt med artikkel 9.

Norsk sammendrag på Lovdata.no

Andre kategori 1-avgjørelser fra EMD: April

R.B. v. HUNGARY

Date: 12/04/2016 **Application no.:** 64602/12

Articles: 3; 8: 8-1; 14; 35; 35-3; 41

Conclusion: Remainder inadmissible (Article 35-3 – Manifestly ill-founded); Violation of Article 8 – Right to respect for private and family life (Article 8 – Positive obligations Article 8-1 – Respect for private life); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

The case concerned the complaint by a woman of Roma origin that she had been subjected to racist insults and threats by participants in an anti-Roma march and that the authorities had failed to investigate the racist verbal abuse.

The Court considered in particular that, given that the insults and acts in question had taken place during an anti-Roma march and had come from a member of an extremely right-wing vigilante group, the authorities should have conducted the investigation in that specific context. However, they had failed to take all reasonable steps to establish the role of racist motives.

Norsk sammendrag på Lovdata.no

CUMHURİYET HALK PARTİSİ v. TURKEY

Date: 26/04/2016 **Application no.:** 19920/13

Articles: 11; 11-1; 11-2; 35; 41

Conclusion: Remainder inadmissible; Violation of Article 11 – Freedom of assembly and association (Article 11-1 – Freedom of association); Pecuniary damage – award (Article 41 – Pecuniary damage Just satisfaction)

The case concerned the confiscation of a substantial part of the assets of Turkey's main opposition party, Cumhuriyet Halk Partisi, by the Constitutional Court following an inspection of its accounts for the years 2007 to 2009.

The Court found that requiring political parties to subject their finances to official inspection did not in itself raise an issue under Article 11, as it served the goals of transparency and accountability, thus ensuring public confidence in the political process. The Court stressed however that, having regard to the important role played by political parties in democratic societies, any legal regulations which might have the effect of interfering with their freedom of association, such as the inspection of their expenditure, had to be couched in terms that provided a reasonable indication as to how those provisions would be interpreted and applied. In Cumhuriyet Halk Partisi's case, the scope of the notion of unlawful expenditure under the relevant legal provisions in force at the time as well as the applicable sanctions for unlawful expenditure had, however, been ambiguous.

Norsk sammendrag på Lovdata.no

CANGÖZ and OTHERS v. TURKEY

Date: 26/04/2016 **Application no.:** 7469/06

Articles: 2; 2-1; 2-2; 3; 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); No violation of Article 3 – Prohibition of torture (Article 3 – Degrading treatment) (Substantive aspect); Non-pecuniary damage – award (Article 41 – Non-pecuniary damage Just satisfaction)

The case concerned the killing on 17 and 18 June 2005 of 17 of the applicants' relatives, members of an outlawed organisation in Turkey (the Maoist Communist Party, "the MKP") who had gone to a 9 rural area near the city of Tunceli to hold a meeting, by the security forces and the subsequent exhibiting of their bodies in a car park for identification and examination purposes.

It was undisputed that the applicants' relatives had been killed by members of the armed forces of the respondent State. Long before the killing the security forces had been aware of their presence in the area and their reason for being there, which was to hold a meeting, not to carry out acts of violence. However, there was no information in the case file to suggest that alternative and non-fatal methods to for apprehending them had been considered. The Court therefore had strong doubts about whether lethal force had been necessary.

The ensuing investigation was so manifestly inadequate and left so many obvious questions unanswered that it was incapable of establishing the true facts surrounding the killings. The Government had thus failed to discharge their burden of proving that the killing of the applicants' relatives constituted the use of force which was absolutely necessary or a proportionate means of achieving the purposes they advanced.

From the beginning, the investigation file was categorised as "confidential" by a judge at the prosecutor's request, thus leaving the applicants unable to take any part in the investigation. This decision had also prevented them from seeing the investigation file until it was submitted to the Court by the Government in the context of the Convention proceedings. A very large number of pertinent requests made by the applicants – such as for the prosecutor to visit the area, to question the security forces, to establish which weapons the security forces had used, to look for fingerprints on the rifles, and to try and eliminate the inconsistencies between the military reports – had not been taken on board by the prosecutor. It followed that the national authorities failed to carry out an effective investigation into the deaths.

After the military operation ended the bodies of the applicants' relatives were brought to a military base, placed outdoors, stripped of their clothes and examined by the prosecutor and two doctors. The bodies could thus be seen by a number of soldiers. After the prosecutor concluded his examination, the bodies were not given to the relatives but taken to a forensic-medicine institute for autopsies to be carried out. Regardless of whether or not the applicants actually saw their relatives' corpses in person, in view of their knowledge of the conditions in which the bodies were examined, there was little doubt that they must have endured mental suffering. Thought could have been given by the authorities to protecting the deceased's dignity and their relatives' feelings by using a screen to block the bodies from view and carrying out the necessary procedure in a more appropriate manner.

Nevertheless, the circumstances of the instant case distinguished it from those cases, concerning the mutilation of bodies, burning of houses or bombing civilians with fighter jets, in which the Court had found violations of Article 3 of the Convention, as the acts in question in those cases were carried out deliberately and without lawful excuse. In the present case, however, the applicants' suffering stemmed from lawful action by a prosecutor who was performing his duties to investigate but failed to appreciate the consequences. Accordingly, and in view of the purpose of the treatment, which was to enable the prosecutor and doctors to examine the bodies, the circumstances were not such as to give the applicants' suffering a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to any family member of a deceased person in a comparable situation.

Norsk sammendrag på Lovdata.no

MURRAY v. THE NETHERLANDS

Date: 26/04/2016 **Application no.:** 10511/10

Articles: 3; 34; 41

Conclusion: Preliminary objection dismissed (Article 34 – Locus standi Victim); Violation of Article 3 – Prohibition of torture (Article 3 – Degrading punishment Inhuman punishment) (Substantive aspect); Non-pecuniary damage – finding of violation sufficient (Article 41 – Non-pecuniary damage Just satisfaction)

The case concerned the complaint by a man convicted of murder in 1980, who consecutively served his life sentence on the islands of Curaçao and Aruba (part of the Kingdom of the Netherlands) – until being granted a pardon in 2014 due to his deteriorating health –, about his life sentence without any

realistic prospect of release. The applicant, Mr Murray, notably maintained that he was not provided with a special detention regime for prisoners with psychiatric problems. Although a legal mechanism for reviewing life sentences had been introduced shortly after he lodged his application with the Court, he argued that, de facto, he had no perspective of being released since he had never been provided with any psychiatric treatment and therefore the risk of his reoffending would continue to be considered too high to be eligible for release.

Mr Murray passed away while the case was pending before the Grand Chamber. Two of his relatives subsequently pursued his case before the Court.

The Court came to the conclusion that Mr Murray's life sentence had not de facto been reducible. It observed that although he had been assessed, prior to being sentenced to life imprisonment, as requiring treatment, he had never been provided with any treatment for his mental condition during the time he was imprisoned. The opinions of the domestic court advising against his release showed that there was a close link between the persistence of the risk of his reoffending on the one hand and the lack of treatment on the other. Consequently, at the time he lodged his application with the Court, any request by him for a pardon was in practice incapable of leading to his release.

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Avgjørelser mot Norge: April

Det ble ikke avsagt noen avgjørelser mot Norge i april.

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