

EHRC 2018/113

Recht op vrijheid van meningsuiting, Recht op vrijheid en veiligheid, Voorarrest, Onteren monument, Strafrechtelijke veroordeling, Chilling effect

GEGEVENS

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Rechters	De Gaetano (President) Yudkivska Vehabovic Kūris Motoc Ravarani Paczolay
Partijen	Sinkova tegen Oekraïne
Regelgeving	- -

SAMENVATTING

Anna Olegovna Sinkova bakte in 2010, in Kiev, boven de Eeuwige Vlam bij het graf van de onbekende soldaat, een ei. Ze deed dat als lid van de artistieke groep St. Luke Brotherhood. Haar vrienden bakten worstjes. De (bak)actie wilde protesteren tegen verspilling van aardgas door de staat en tegelijk aankaarten dat diezelfde staat geen aandacht heeft voor de slechte levensstandaard van veteranen. De activiteiten werden gefilmd door een groepslid. Achteraf postte Sinkova de video van het optreden, voorzien van ironisch commentaar. Ze werd vervolgens gearresteerd en beschuldigd van 'ontheiliging van het graf van de onbekende soldaat'; een overtreding op art. 297 van het Oekraïense wetboek van strafrecht. Ze spendeerde in 2011 drie maanden in voorlopige hechtenis, vanwege de ernst van het misdrijf en het risico op onttrekking. In 2012 werd ze schuldig bevonden aan de ten laste gelegde feiten.

Voor het EHRM stelt ze allereerst dat de arrestatie en het voorarrest in strijd waren met art. 5 EVRM. Nu niet bekend was waar klaagster zich ophield, kan het Hof zich voorstellen dat zij gezocht ('wanted') was verklaard en is gearresteerd; geen schending van art. 5 lid 1 EVRM op dit punt. De beslissing om haar in voorarrest te houden was daarentegen onvoldoende gemotiveerd, in strijd met art. 5 lid 1 en is bovendien onvoldoende gemotiveerd verlengd, in strijd met art. 5 lid 3 EVRM. Tot slot achtte het Hof ook art. 5 lid 5 geschonden, wegens het ontbreken van een mogelijkheid om schadevergoeding te vragen voor de voorgaande schendingen.

Onder art. 10 EVRM stelt het Hof vast dat het in dit geval gaat om een heel specifieke meningsuiting bij een heel specifiek monument, terwijl dit soort acties juist bij het monument voor de onbekende soldaat strikt verboden zijn. Klaagster had heel wat andere mogelijkheden tot haar beschikking gehad om te protesteren en haar meningen naar voren te brengen. Het was dus niet nodig geweest om juist de eeuwige vlam te ontieren die diende om de soldaten te eren die tijdens de Tweede Wereldoorlog om het leven zijn gekomen. Weliswaar is zij veroordeeld tot drie jaar gevangenisstraf, maar omdat het gaat om een voorwaardelijke straf heeft zij nooit gevangen gezeten; daardoor is de straf niet disproportioneel zwaar. Geen schending art. 10 EVRM (4-3 stemmen).

UITSPRAAK

I. Alleged violations of Article 5 of the Convention

52. The applicant complained that her initial arrest and subsequent detention had been in breach of Article 5 §§ 1, 3 and 5 of the Convention. The provisions relied on read as follows in the relevant parts:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

...

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

A. Admissibility

53. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Alleged violation of Article 5 § 1 of the Convention

(a) The parties' submissions

54. The applicant argued that there had been neither any legal basis nor practical need for her arrest. Given the vague wording of Article 297 of the Criminal Code, it was far from obvious that her actions amounted to desecration of a tomb. Accordingly, her arrest could not be regarded as based on a reasonable suspicion that she had committed a crime.

55. The applicant next contended that she had never absconded. As she had been nineteen years old, she had been free not to live with her parents or grandparents. She considered that there had been no genuine attempt by the investigation to contact her before declaring her wanted by the police. Thus, according to her, it had been open for the investigator to contact her as the author of the video in question via the indicated site. In the alternative, he could have asked the applicant's relatives or friends for her email address. Furthermore, as she had been a university student, she could have easily been reached through her university contacts. Lastly, the investigator could have summonsed her through her mother or grandmother. However, none of those actions had been undertaken.

56. Furthermore, the applicant complained that her detention from 29 May to 17 June 2011 had not been covered by any judicial decision.

57. The Government maintained that the applicant's arrest had been in compliance with national legislation and accompanied by all the requisite safeguards. They argued that the authorities had had good reasons to believe that she had been absconding given the fact that she had not been living at her registered address and her whereabouts had not been known.

58. The Government further submitted that the arrest order with a view to bringing the applicant to court had been aimed at ensuring compliance with the equality-of-arms principle and enabling her to respond to the investigator's arguments.

59. Lastly, as regards the particular period of the applicant's pre-trial detention from 29 May to 17 June 2011, the Government observed that it had been based on the applicable legal provisions and could not be regarded arbitrary.

(b) The Court's assessment

(i) General case-law principles

60. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law; in this respect the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. It requires in addition, however, that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Furthermore, the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is in conformity with national law; it must also be necessary in the circumstances (see *Hadžimejlic and Others v. Bosnia and Herzegovina*, nos. 3427/13 and 2 others, § 52, 3 November 2015, with further references).

(ii) Application of the above principles to the present case

(a) Lawfulness of the applicant's arrest

61. In assessing the lawfulness of the applicant's arrest, the Court attaches weight, firstly, to the fact it was based on a judicial order, and, secondly, to the limited scope of that order, which was aimed at ensuring her presence at the hearing with a view to examination of the investigator's application for her detention.

62. As regards the necessity of that measure in the circumstances, the Court notes that one of the main reasons for the applicant's arrest was the fact that she had been declared wanted by the police.

63. The Court has held in its case-law that the mere fact of being on a "wanted list" does not mean that the person has gone into hiding. The important factor in measuring the risk of absconding is the actual behaviour of the suspect, and not his formal status as a "person on a wanted list" (see *Yevgeniy Gusev v. Russia*, no. 28020/05, § 85, 5 December 2013).

64. The Court is not convinced by the applicant's argument that the decision to put her on a wanted list was hasty and unnecessary and that the police had not made sufficient efforts to contact her. It is not in dispute that her actual whereabouts were unknown to the police. Her family members living at the address of her registered residence denied having that information when questioned on 5 February 2011. It is unclear how the police could have been more efficient in their attempts to reach her by email or through her university contacts. Even less convincing is the applicant's suggestion that she could have been directly contacted as the author of the video on the Internet, given that her identity had first to be established through investigation (see, for example, paragraph 14 above). The Court also has doubts as regards the applicant's submission that she had not been aware of the criminal proceedings against her until her arrest on 29 March 2011. As confirmed by the case-file material, she was in touch with her family members, who had been questioned by the police on 5 February 2011 in respect of her involvement in the incident under investigation.

65. Accordingly, having regard to all the circumstances of the present case, the Court does not see any indication of unlawfulness or arbitrariness as regards the applicant's arrest.

66. There has therefore been no violation of Article 5 § 1 of the Convention in this regard.

(b) Lawfulness of the applicant's detention from 29 May to 17 June 2011

67. The Court observes that the applicant's detention, which had been ordered by the judicial decision of 1 April 2011, expired on 29 May 2011. Meanwhile, on 25 May 2011, the case had been referred to the first-instance court for trial. On 17 June 2011 the Pechersky Court held its preparatory hearing at which it ordered the applicant's further detention as a preventive measure. It follows that her detention between 29 May and 17 June 2011 was not covered by any judicial decision.

68. The Court has already found a violation of Article 5 § 1 of the Convention in a number of cases concerning the practice of holding defendants in custody solely on the basis of the fact that a bill of indictment has been submitted to the trial court. It has held that the practice of keeping defendants in detention without a

specific legal basis or clear rules governing their situation – with the result that they may be deprived of their liberty for an unlimited period without judicial authorisation – is incompatible with the principles of legal certainty and the protection from arbitrariness, which are common threads throughout the Convention and the rule of law (see, for example, *Yeloyev v. Ukraine*, no. 17283/02, § 50, 6 November 2008). The Court has also concluded that this issue seemed to stem from a legislative lacuna in Ukraine (see *Kharchenko v. Ukraine*, no. 40107/02, §§ 70-72 and 98, 10 February 2011).

69. Having regard to its well-established case-law, the Court finds that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention from 29 May to 17 June 2011.

2. Alleged violation of Article 5 § 3 of the Convention

70. The applicant complained that her continued pre-trial detention had been unjustified.

71. The Government contended that it had been based on relevant and sufficient reasons. They observed that, once that preventive measure had no longer been required, the applicant had been released under an undertaking not to abscond.

72. The Court notes that the applicant's pre-trial detention in the present case lasted from 29 March to 30 June 2011, that is to say for three months.

73. The Court reiterates that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*. This must be assessed in each case according to its special features, the reasons given in the domestic decisions and the well-documented matters referred to by the applicant in his applications for release. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty (see, among others, *Labita v. Italy* [GC], no. 26772/95, § 153, ECHR 2000-IV).

74. Turning to the present case, the Court observes that, in extending the applicant's detention and rejecting her applications for release, the domestic courts mainly referred to the reasoning for her initial placement in detention, without any updated details. Furthermore, no consideration seemed to be given to the numerous letters of personal guarantee in support of her release. At no stage in the period under consideration did the domestic courts consider applying any alternative preventive measures, and by relying essentially on the seriousness of the charge and the hypothetical risk of the applicant's absconding, the authorities maintained her detention on grounds which cannot be regarded as sufficient.

75. The Court notes that eventually, on 30 June 2011, the applicant was released under an undertaking not to leave the town. In the Court's opinion, this or a less intrusive preventive measure could have been applied to her earlier; at least, the reasons given by the domestic courts in justifying her continued detention did not suggest any indication to the contrary.

76. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 5 § 3 of the Convention.

3. Alleged violation of Article 5 § 5 of the Convention

77. The applicant complained that, under the existing legislation, she could not claim compensation in respect of the breach of her rights under Article 5 §§ 1 and 3 of the Convention.

78. The Government submitted that the Ukrainian legislation provided for the possibility to claim compensation for unlawful detention subject to a judicial decision acknowledging such unlawfulness. It was not, however, applicable to the circumstances of the present case, because the applicant's detention had been lawful.

79. The Court reiterates that Article 5 § 5 guarantees an enforceable right to compensation to those who have been the victims of arrest or detention in contravention of the other provisions of Article 5 (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 182, 17 January 2012, with further references, and *Lelyuk v. Ukraine*, no. 24037/08, § 50, 17 November 2016).

80. In the present case the Court has found a violation of Article 5 §§ 1 and 3, in conjunction with which the present complaint is to be examined. It follows that Article 5 § 5 of the Convention is applicable. The Court must therefore establish whether Ukrainian law afforded or now affords the applicant an enforceable right to compensation for that violation in her case.

81. The Court observes that the issue of compensation for unlawful detention is regulated in Ukraine by the Compensation Act. The right to compensation arises, in particular, where the unlawfulness of the detention has been established by a judicial decision (see paragraph 49 above).

82. The Court notes that, as long as the applicant's detention is in formal compliance with the domestic legislation, it is impossible for her to claim compensation in that regard at the national level. Furthermore, there is no legally envisaged procedure in Ukraine for bringing proceedings to seek compensation for the deprivation of liberty found to be in breach of one of the other paragraphs by the Strasbourg Court (see *Nechiporuk and Yonkalo v. Ukraine*, no. 42310/04, § 233, 21 April 2011).

83. This means that one of the principles of Article 5 § 5 – namely, that the effective enjoyment of the right to compensation guaranteed by it must be ensured with a sufficient degree of certainty (see *Stanev*, cited above, § 182) – does not appear to have been met in the present case.

84. There has therefore been a violation of Article 5 § 5 of the Convention.

II. Alleged violation of Article 10 of the Convention

85. The applicant complained of a violation of her right to freedom of expression. Although she relied on Articles 7, 10, 11 and 18 of the Convention, the Court considers it appropriate to examine her complaint only under Article 10, which reads as follows:

“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.”

A. Admissibility

86. The Court notes that this complaint is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

87. The applicant submitted that she had protested against wasteful use of natural gas and had tried to attract public attention to that issue. In her opinion, the funds used for maintaining eternal flames throughout the country would better serve their purpose if used to improve the living standards of war veterans.

88. She emphasised that in no case she had meant to insult the memory of the dead or demonstrate a disrespectful attitude towards the tomb. The applicant observed that she had neither damaged the memorial nor breached public order. She also drew the Court's attention to the fact that she had not tried to conceal her actions. To the contrary, she had immediately posted the video on the Internet.

89. The applicant's lawyers further stated her position as follows:

"The applicant believes that any impartial individual who would watch the abovementioned video and who would familiarise [himself] with the statement of the "St. Luke Brotherhood" would understand that the applicant performed an act that was intended to protest [against] the wasteful up-keep of the eternal flame, and was not an expression of contempt to the gravesite."

90. The applicant next argued that there was no conclusive evidence that the Tomb of the Unknown Soldier was located exactly beneath the Eternal Flame, on which she had fried eggs.

91. Overall, the applicant considered that she had wrongly been convicted of a criminal offence which she had not committed. She argued that the interference with her right to freedom of expression could not be regarded as lawful given the lack of clarity in the definition of that offence in the Criminal Code. As regards the definition of "desecration of a tomb" under the Law "On burial and funeral business", the applicant contended that it did attribute weight to the existence of respective criminal intentions, such as "to defile the family or public memory of the deceased or [to manifest] contempt towards the burial place, the social and religious principles and traditions in this area" (see paragraph 47 above). However, she maintained, no such intentions from her side had ever been established.

92. The applicant also submitted, in broad terms, that the judicial decisions taken in her case ran contrary to "the established jurisprudence on the subject". She cited in that regard several domestic judgments on tomb desecration cases (see paragraph 50 above).

93. Furthermore, the applicant maintained that her criminal conviction had not pursued any legitimate aim. According to her, its sole purpose was to punish her for the expression of her views.

94. The applicant also argued that the impugned interference had not been necessary in a democratic society given that the performance had already taken place and had not led to any negative consequences for anybody.

(b) The Government

95. The Government accepted that there had been an interference with the applicant's right to freedom of expression, but argued that it had been in compliance with paragraph 2 of Article 10 of the Convention.

96. They contended that Article 297 § 2 of the Criminal Code, under which the applicant had been convicted, was worded with sufficient precision. As stated therein, desecration of a tomb could consist of different actions and the motives behind were not essential.

97. In the Government's opinion, there were no reasons to doubt that the applicant's actions amounted to desecration of the Tomb of the Unknown Soldier. They noted that the Eternal Flame, on which the applicant had fried eggs, was a part of the memorial comprising thirty-two tombs of soldiers who had lost their lives during the Second World War. It was a sacred and symbolic place where every year war veterans gathered to commemorate their fallen comrades. Accordingly, the Government maintained that, regardless of her stated motives, the applicant's action had demonstrated disrespect and mockery and had been insulting for veterans and for those whose relatives had perished during the war.

98. The Government therefore argued that the applicant's conviction had pursued a legitimate aim, namely protection of morals and others' rights.

99. As to whether it was necessary in a democratic society, the Government drew the Court's attention to the fact that the applicant's prison sentence had been suspended. Accordingly, the interference with her rights under Article 10 could not be regarded as disproportionate to the aim pursued.

2. The Court's assessment

100. It is not in dispute that there has been an interference with the applicant's right to freedom of expression in the present case. It remains to be seen whether that interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society.

(a) Prescribed by law

101. According to the Court's case-law, the expression "prescribed by law" entails, in particular, a requirement of foreseeability. A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the person concerned to regulate his or her conduct: he or she needed to be able – if need be with appropriate advice – to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action could entail. However, the Court has held that these consequences do not need to be foreseeable with absolute certainty, as experience showed that to be unattainable. Even in cases in which the interference with the applicants' right to freedom of expression had taken the form of a criminal "penalty", the Court has recognised the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society, and has accepted that the need to avoid rigidity and keep pace with changing circumstances means that many laws are couched in terms which are to some extent vague and whose interpretation and application are questions of practice (see, for example, *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 131 and 133, ECHR 2015 (extracts), with further references).

102. In the present case the applicant was criminally prosecuted for desecrating the Tomb of the Unknown Soldier under Article 297 of the Criminal Code (see paragraph 44 above). The Court is not convinced by her argument that that legal provision was worded so vaguely that she could not foresee its applicability to her case. Indeed, it is neither possible nor reasonable to specify the behaviour that might be considered as amounting to desecration of a tomb in different circumstances. The Court therefore considers that the interference with the applicant's right to freedom of expression complied with the requirement of lawfulness.

(b) *Legitimate aim*

103. The Court also subscribes to the Government's view that the measure applied to the applicant pursued a legitimate aim of protecting morals and the rights of others.

(c) *Necessary in a democratic society*

(i) *General principles*

104. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24, and, for a more recent reference, *Bédat v. Switzerland* [GC], no. 56925/08, § 48, 29 March 2016). Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression. Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his or her freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his or her situation and the means he or she uses (see, for example, *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 26, 25 January 2007).

105. The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered in the exercise of their discretion. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see *Bédat*, cited above, § 48).

106. Lastly, the fairness of the proceedings, the procedural guarantees afforded and the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see, among many other authorities, *Besry v. Poland*, no. 57675/10, § 58, 3 November 2015, and *Medzlis Islamske Zajednice Brcko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 118, 27 June 2017).

(ii) *Application of the above principles to the present case*

107. Turning to the facts of the present case, the Court notes that the applicant carried out what she considered to be an artistic performance aimed at protesting against wasteful use of natural gas by the State while turning a blind eye to poor living standards of veterans (see paragraph 87 above). More specifically, she fried eggs on the Eternal Glory Memorial, had her actions filmed, prepared a statement explaining her position and posted the video with that statement on the Internet. However, the applicant was criminally prosecuted and convicted only on account of frying eggs over the Eternal Flame, which the domestic courts considered to have amounted to desecration of the Tomb of the Unknown Soldier, an offence under the Ukrainian Criminal Code. The charge against her concerned neither the subsequent distribution by her of the respective video nor the contents of the rather sarcastic and provocative text accompanying that video (see, in particular, paragraph 7 above).

108. In other words, the applicant was not convicted for expressing the views that she did or even for expressing them in strong language. Her conviction was a narrow one in respect of particular conduct in a particular place (compare *Maguire v. the United Kingdom* (dec.), no. 58060/13, 3 March 2015). Moreover, it was based on a general prohibition of contempt for the Tomb of the Unknown Soldier forming part of ordinary criminal law.

109. As regards the fairness of the proceedings and the procedural guarantees afforded, the Court notes that there is nothing in the case file which would suggest that the domestic courts erred in their assessment of the relevant facts or incorrectly applied domestic law. Moreover, while the domestic courts paid little attention to the applicant's stated motives given their irrelevance for the legal classification of her actions, the Court notes that they did take into account the applicant's individual circumstances in deciding on her sentence. As regards the applicant's reference to domestic cases concerning factually different incidents of desecration (see paragraph 50 above), the Court does not see how her conviction was in contradiction with that case-law.

110. The Court cannot agree with the applicant's submission that her conduct at the memorial could not be reasonably interpreted as contemptuous towards those in whose honour that memorial had been erected. According to her logic, the only thing that mattered about the Eternal Flame was the natural gas required to keep it burning. However, eternal flames are a long-standing tradition in many cultures and religions most often aimed at commemorating a person or event of national significance, or serving as a symbol of an enduring nature. The one on which the applicant fried eggs is part of a monument commemorating soldiers who gave their lives defending their and the applicant's country during the Second World War. There were many suitable opportunities for the applicant to express her views or participate in genuine protests in respect of the State's policy on the use of natural gas or responding to the needs of war veterans, without breaking the criminal law and without insulting the memory of soldiers who perished and the feelings of veterans, whose rights she had ostensibly meant to defend.

111. In assessing the nature and severity of the penalty, the Court notes its conclusion in the case concerning imprisonment for pouring paint over statues of Atatürk that peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence (see *Murat Vural v. Turkey*, no. 9540/07, § 66, 21 October 2014). The Court observes, however, that in contrast to that case, where the applicant was imprisoned for over thirteen years, the applicant in the present case was given a suspended sentence and did not serve a single day of it (see paragraph 35 above).

112. Having regard to all the circumstances of the case, the Court considers that the restriction complained of is reconcilable with the applicant's freedom of expression.

113. The Court therefore concludes that there has been no violation of Article 10 of the Convention.

III. Application of Article 41 of the Convention

114. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, 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."

A. Damage

115. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

116. The Government contested that claim as unsubstantiated and exorbitant.

117. Having regard to all the circumstances of the present case and the nature of the violations found, the Court considers it appropriate to award the applicant EUR 4,000 in respect of non-pecuniary damage.

B. Costs and expenses

118. The applicant did not submit any claims under this heading apart from her request for legal aid. The Court therefore makes no award.

C. Default interest

119. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, unanimously, that there has been no violation of Article 5 § 1 of the Convention in respect of the applicant's arrest;

3. *Holds*, unanimously, that there has been a violation of Article 5 § 1 of the Convention in respect of the applicant's detention from 29 May to 17 June 2011;

4. *Holds*, unanimously, that there has been a violation of Article 5 § 3 of the Convention;

5. *Holds*, unanimously, that there has been a violation of Article 5 § 5 of the Convention;

6. *Holds*, by four votes to three, that there has been no violation of Article 10 of the Convention;

7. *Holds*, unanimously,

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,000 (four thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted in the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Joint partly dissenting opinion of Judges Yudkivska, Motoc and Paczolay

We fully share the reasoning and conclusions in the judgment on all points related to Article 5 of the Convention. We respectfully dissent, however, from the majority's finding that Article 10 of the Convention was not violated in the present case.

Undoubtedly, the applicant's performance was extremely provocative, given the sensitive nature of war memorials. However, it is a firm stance of this Court, expressed more than forty years ago in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), that freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".

Although we acknowledge that decisions concerning attacks on "a long-standing tradition in many cultures and religions ... aimed at commemorating a person or event of national significance" (paragraph 110) are hard for all courts, the reasons adduced by the national authorities to justify the restriction imposed on the applicant were not, in our view, "relevant and sufficient". In particular, we cannot agree that the national judicial authorities applied the principles embodied in Article 10 and that they based their decisions on a satisfactory assessment of the relevant facts.

First of all, we find that the analysis by the domestic courts was deficient for its failure to address the purpose of the applicant's performance and its satirical nature. The majority believe that since the applicant was convicted only on account of frying eggs over the Eternal Flame, and not for the subsequent distribution of the respective video and accompanying text, it cannot be said that she was convicted for expressing her views (see paragraph 107 of the judgment). We cannot share this view – she was convicted precisely for the performance as a whole. Two police officers who commented to her and her associates that their behaviour was inappropriate *did not* pursue the matter until after the subsequent posting of the video online and the relevant complaints.

The applicant belonged to an artistic group called the St Luke Brotherhood, which was known for its provocative public performances (paragraph 6). Their performance, as she explained, was aimed at drawing public attention to the incompatibility of the official pathos when it came to remembrance of the Second World War with the miserable situation of surviving war veterans. Together with other participants, she sought to highlight what they perceived as the superfluous nature of an eternal flame which, whilst honouring the sacrifices of those who fell in the service of their country, did little to support war veterans who desperately needed the State's limited resources. *Satura quidem tota nostra est* is the famous saying of Quilitian describing the composite nature of this literary genre. Satire extended rapidly to all form of artistic expression mainly in the social and political arena. As Stanislaw Jerzy Lec wittily mentioned in his *Unkempt Thoughts*, "there are times when satire has to restore what pathos has destroyed". This satirical performance necessarily included *filming* the process of frying eggs to be later put on the Internet with the relevant commentary. By filming and subsequently disseminating the video, supplemented by the song and text, the applicant and other participants chose to express their criticism through a rude and irreverent satire.

This Court's approach to freedom of artistic protests is clearly established in its case-law. In *Vereinigung Bildender Künstler v Austria* (no. 68354/01, § 33, 25 January 2007) the Court stated that:

"satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right [or anyone else's right] to such expression should be examined with particular care."

(see also *Eon v. France*, no. 26118/10, § 60, 14 March 2013, and *Alves da Silva v. Portugal*, no. 41665/07, § 27, 20 October 2009). Such careful examination has not been afforded to the applicant, whose claim before the domestic courts that the criminal proceedings against her were contrary to Article 10 was not adequately

considered. The majority dismissed the applicant's protest stating – in a surprisingly edificatory manner – that “there were many suitable opportunities for the applicant to express her views ... on the use of natural gas or responding to the needs of war veterans” (at paragraph 110), thus ignoring its intended message and purpose.

The applicant's satire had done exactly what this art frequently does: it transferred the viewer's attention from an object to its social context. An artistic gesture might demonstrate the conditionality of established value boundaries, but it does not reject them. In the context of freedom of speech, the US Supreme Court noted in the famous case of *Texas v. Johnson*, when holding that the desecration of the American Flag was protected speech under the First Amendment, that “symbolism is a primitive but effective way of communicating ideas”.¹ In a fast-moving world, it is not surprising that those who wish to highlight a particular cause or voice an opinion would have recourse to those symbolic acts and demonstrations which are likely to gather a greater degree of attention and trigger a wider debate than might have been achievable with more conventional and established forms of protest. The relationship between art and the conveyance of opinions is a complicated one; and whilst art should not be reduced to an opinion, art quite often relates to the expression of an opinion.

In the present case, the Soviet song with a repeated refrain (“The battle is going on again and again”) as a soundtrack to the video also underlines the satirical nature of the protest, and is self-explanatory – the protesters were criticising, in their view, the hypocritical behaviour of authorities who do not want to accept that the battle is already over and that it is time to propose real and not illusory care of those who handed the victory. The applicant's actions, and those of her associates, undoubtedly generated significant controversy and offence among many of those who became aware of it, due perhaps to its perceived bad taste, but their aim was the opposite: in the words of George Orwell, “the aim of the joke is not to degrade the human being, but to remind him that he is already degraded”.

The matter received extensive coverage in the media and online. Yet it must be emphasised that it is not the applicant's opinions which have shocked and angered others, but rather the manner in which she chose to communicate them. To our regret, neither domestic courts nor this Court commented on the satirical nature of the performance. Moreover, the domestic courts paid little attention to the applicant's stated motives given their irrelevance for the legal classification of her actions, although a little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate required them to give consideration to the structure of the performance as a whole and to conduct a sufficiently careful balancing exercise on the basis of the criteria laid down in the Court's case-law. In *Murat Viral v. Turkey*, cited in the judgment, the Court stated:

“in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question.”

This approach must surely be relevant not simply in determining the applicability of Article 10, but also in assessing whether there has been a violation of that provision.

Finally, this Court has already mentioned that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society (see *Eon v. France*, cited above, § 61).

As the Court stated in *Murat Viral*, “peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence”. In that case, even the infliction of criminal damage, specifically the pouring of paint onto a statue, were not viewed as being “of a gravity justifying a custodial sentence”. In *Dmitriyevskiy v. Russia* (no. 42168/06, § 117, 3 October 2017), the Court considered that the conviction of a journalist for incitement to hatred or enmity and his two-year suspended sentence and four months' probation had violated Article 10 as “both the applicant's conviction and the severe sanction imposed were capable of producing a chilling effect on the exercise of journalistic freedom of expression”. We find some inconsistency in the Court's concern over the “severe sanction” of a suspended sentence in *Dmitriyevskiy*, and the position of the majority as to the same sanction in the present case, where the applicant committed no criminal damage, nor any breach of the peace.

In sum, given the lack of adequate assessment by the national authorities of the applicant's performance from the standpoint of Article 10 of the Convention, and the complete disregard of its satirical nature, in addition to the disproportionate sentence, we believe that Article 10 was violated in the present case.

As a general remark, the present judgment inevitably gives rise to the question of how far a contracting State may criminalise insults to memory and designate certain spaces and structures as “off-limits” for individuals to exercise their right to protest and express their opinions, in a manner consistent with Article 10.² There is a real risk of eroding the right of individuals to voice their opinions and protest through peaceful, albeit controversial, means.

NOOT

1. Een appèl en een ei. Je kan geen omelet maken zonder wetten te breken. Van gebakken eieren tot gebakken peren. Of nog: wie een omelet bakt boven een monument, kan maar beter op eieren lopen.

Het arrest *Sinkova* is een dankbaar voorwerp voor flauwe woordspelingen. Inhoudelijk lijkt er minder reden te zijn voor enthousiasme.

2. Oké, het Hof stelt in zijn arrest, unaniem, drie afzonderlijke schendingen vast van art. 5 EVRM. Maar dat doet niets af aan het feit dat de analyse op het vlak van art. 10 EVRM problematisch is. Weliswaar hanteert het Hof daar, zoals altijd, zijn mantra dat ook uitingen die ‘kwetsen, schokken of verontrusten’ bescherming genieten, maar dat lijkt in deze zaak weinig te betekenen.

3. Om te beginnen aanvaardt het Hof weliswaar dat er sprake is van een inmenging in art. 10 EVRM, maar het stelt Sinkova's strafrechtelijke veroordeling tegelijkertijd zo voor dat die nauwelijks nog iets met de expressievrijheid te maken heeft.

Die verdwijntruc werkt als volgt. Verzoekster werd, zo stelt het Hof, alleen vervolgd en veroordeeld voor haar ‘eibakactie’ en niet (tevens) voor het verspreiden van de video ervan en evenmin voor de ‘rather sarcastic and provocative text’ (par. 107) waarvan de video vergezeld ging. Kortom, zo vervolgt het Hof, Sinkova ‘was not convicted for expressing the views that she did or even for expressing them in strong language’: ‘Her conviction was a narrow one in respect of particular conduct in a particular place’ (verwijzend naar *Maguire t. Verenigd Koninkrijk*, EHRM 3 maart 2015 (ontv.), nr. 58060/13, ECLI:CE:ECHR:2015:0303DEC005806013). Dat ruimt natuurlijk lekker op, maar die redenering is bedenkelijk.

4. Zo is de steun die het Hof zoekt in *Maguire* verrassend. Die zaak ging over een volstrekt ander soort kwestie. Verzoeker was veroordeeld wegens ordeverstoring omdat hij – in een stadion, bij een wedstrijd tussen clubs waartussen vanouds sectair religieus geweld plaatsvond (protestanten tegen katholieken) – een kledingstuk droeg waarop een verwijzing stond naar het *Irish National Liberation Army*, een terroristische organisatie, alsook ‘FUCK YOUR POPPY; REMEMBER DERRY’. Dat laatste als verwijzing naar het gedenkteken (de klaproos) voor gesneuvelde soldaten en naar de plaats (Derry) in Noord-Ierland waar Britse soldaten dertien demonstranten en omstanders doodden in januari 1972 (*Bloody Sunday*).

Het Hof zag geen schending in die veroordeling en achtte de verzoeker zelfs niet ontvankelijk. De relevantie van dit precedent, als grond om (ook) in *Sinkova* geen

schending te zien, is niet direct duidelijk. Het omgekeerde lijkt eerder het geval.

Het Hof geeft in *Maguire* namelijk uitdrukkelijk aan dat het louter feit dat verzoekers daden ‘deliberately provocative’ waren, niet zou hebben gerechtvaardigd dat hij werd gearresteerd en veroordeeld voor ordeverstoring. Het Hof legde sterk de nadruk op het feit dat verzoekers kledij, gezien de ontvlambare context en gezien eerdere feiten, een zeer reëel risico op geweld opleverde. Van een soortgelijke risicosituatie was totaal geen sprake in *Sinkova*. Zelfs de autoriteiten maakten overigens die inschatting: toen Sinkova en haar *sous-chefs* bezig waren met hun actie, werden ze benaderd door twee politieagenten, die aangaven dat hun gedrag ‘ongepast’ was, maar daar bleef het op dat moment bij. Pas nadat Sinkova de video online zette, werd juridische actie ondernomen.

5. Bovendien is de claim van het Hof in de feiten bijzonder gammel: het optreden, de video en de uitingen waren *de facto* duidelijk een onlosmakelijk geheel voor de autoriteiten en alleen de combinatie ervan verklaart waarom er zo streng werd opgetreden. Denk opnieuw aan de initiële reactie van de politie: als het probleem louter de bakactie was geweest, hadden zij wel direct opgetreden. *Quod non*. Het was pas na online publicatie van de video, voorzien van commentaar, dat verdere stappen werden gezet. Het is daarenboven enkel door de zogezegd niet geviseerde ‘bijkomende’ expressieve handelingen en uitingen dat men überhaupt kennis had van de daden.

6. Problematisch is verder de wijze waarop het Hof de motieven en intentie van Sinkova benaderde. De Straatsburgse rechters erkennen weliswaar dat hun collega’s in Oekraïne weinig aandacht schonken ‘to the applicant’s stated motives’ (par. 109), maar in één adem voegen ze daaraan toe dat dat was omdat zulks irrelevant was voor de kwalificatie van verzoeksters actie (en bovendien, zo relativiseerde het Hof, nam de nationale rechter de individuele omstandigheden van de betrokkene wel mee bij de straftoemeting).

Dat staat op gespannen voet met veel van ’s Hof’s overige rechtspraak (zie daarover uitvoerig(er): R. Ó Fathaigh en D. Voorhoof, ‘Conviction for performance-art protest at war memorial did not violate Article 10’, *StrasbourgObservers.com*, 19 maart 2018). In veel zaken had het Hof (terecht) wel degelijk oog voor de intenties en motieven van verzoekers in art. 10-zaken; ook in zaken van expressief gedrag of *symbolic speech*.

Zo verwijst de *dissent* van rechters Yudkivska, Motoc en Paczolay op dit punt naar *Murat Vural* t. *Turkije* (EHRM 21 oktober 2014, nr. 9540/07, ECLI:CE:ECHR:2014:1021JUD000954007, «EHRC» 2015/29 m.nt. Janssen), waarbij de verzoekers in Turkije waren veroordeeld, omdat ze – bij wijze van protestactie – verf over standbeelden van Atatürk hadden gegoten (daadwerkelijk vandalisme met materiële schade dus, in tegenstelling tot de feiten in *Sinkova*). In die zaak oordeelde het Hof dat bij de analyse in het licht van art. 10 EVRM enerzijds een beoordeling moet worden gemaakt van de aard van de handeling of het gedrag in kwestie, in het bijzonder van het expressief karakter beschouwd vanuit een objectief oogpunt, maar anderzijds ook van het doel of de intentie van de persoon die de handeling uitvoert of het gedrag in kwestie stelt (par. 54).

Zeker in zaken rond satire en satirisch politiek protest hecht het Hof traditioneel aan een nauwgezette analyse van de betrokken motieven en omstandigheden. Zo kan – opnieuw met de dissenters – verwezen worden naar *Vereinigung Bildender Künstler* t. *Oostenrijk* (EHRM 25 januari 2007, nr. 68354/01, ECLI:CE:ECHR:2007:0125JUD006835401, «EHRC» 2007/46 m.nt. Gerards) waarin het Hof stelde dat satire een vorm van artistieke expressie en sociale kritiek is, die door haar inherente eigenschappen van overdrijving en vervorming van de werkelijkheid, van nature provoceert en agiteert en dat daarom elke beperking van dergelijke uitingen onderzocht moet worden met bijzondere zorg (‘particular care’). Van een dergelijke ‘zorg’ lijkt in de analyse die het Hof in *Sinkova* maakt, niet direct sprake.

7. Merkwaardig is voorts de nadruk die het Hof legt op het feit dat Sinkova ‘many suitable opportunities’ had om haar standpunt tot uitdrukking te brengen door middel van protest, aangaande de zaken die ze met haar actie wilde aankaarten, ‘without breaking the criminal law and without insulting the memory of soldiers who perished’ (par. 110). Met die vaststelling vindt plots bijna een omkering van rollen plaats, waarbij Sinkova van verzoekster halvelings tot gedaagde verwordt, die verweten wordt ‘minder verregaande middelen’ ter beschikking te hebben gehad, waardoor haar acties niet ‘noodzakelijk’ waren.

Natuurlijk was het mogelijk geweest voor Sinkova om voor andere acties te kiezen. Misschien was dat ook verstandiger of zelfs fatsoenlijker geweest. Maar voor de beoordeling of haar vervolging en veroordeling een schending van art. 10 EVRM oplevert, is die oefening op zich niet relevant. De wél relevante vraag is of de inhoud van de geviseerde uitingen de rechten van derden zodanig schenden of beperken dat ze strafwaardig kunnen worden geacht, rekening houdend met de expressievrijheid. Op dat punt komt het Hof met de dooddoener dat Sinkova’s acties de strafwet schonden (door de nagedachtenis aan overleden soldaten te beledigen). Maar dat aanvaardt het ter discussie staande punt *a priori* als bewezen: de vraag was nu net of er – rekening houdend met art. 10 EVRM – wel voldoende redenen waren om het gedrag van verzoekster als strafbaar of strafwaardig te beschouwen.

Bovendien waren er, zoals de *dissent* ook aangeeft, redenen om (wel) te hebben gekozen voor de bakactie, ook al begaf men zich daarmee op de grens van wat rechtens toegelaten is: “In a fast-moving world, it is not surprising that those who wish to highlight a particular cause or voice an opinion would have recourse to those symbolic acts and demonstrations which are likely to gather a greater degree of attention and trigger a wider debate than might have been achievable with more conventional and established forms of protest”.

8. Het laatste punt betreft de straf. Voor het Hof is dit een bijkomende reden om de veroordeling als proportioneel te beschouwen. De rechters verwijzen hier alsnog naar de zaak *Murat Vural* (hoewel men dat naliet waar het ging om de inhoudelijke vergelijking van de (nochtans niet onvergelykbare) feiten: *supra* nr. 6). De straf in *Murat Vural* betrof een gevangenisstraf van meer dan dertien jaar. In deze zaak, zo stelt het Hof laconiek, ging het slechts om een voorwaardelijke straf (van drie jaar), waarvan verzoekster ‘did not serve a single day’ (par. 111).

Terecht verwijst de *dissent* hier naar het gegeven dat het Hof in andere rechtspraak benadrukte dat om het even welke strafsancie voor satirische of artistieke meningsuitingen of expressief gedrag een *chilling effect* riskeert te hebben (zie bijvoorbeeld *Eon* t. *Frankrijk*, EHRM 14 maart 2013, nr. 26118/10, ECLI:CE:ECHR:2013:0314JUD002611810, «EHRC» 2013/125 m.nt. De Lange). Dat terwijl dergelijke acties en uitingen een belangrijke rol spelen in het bevorderen van een open debat over zaken van algemeen belang.

Meer algemeen aanvaardde het Hof in andere arresten ook uitdrukkelijk dat specifiek een voorwaardelijke straf een dergelijk *chilling effect* kan hebben, zo bijvoorbeeld in *Dmitriyevskiy* t. *Rusland* (EHRM 3 oktober 2017, nr. 42168/06, ECLI:CE:ECHR:2017:1003JUD004216806, «EHRC» 2017/221). In die zaak sprak het Hof van ‘a severe sanction’, waar het ging om een voorwaardelijke straf van twee jaar voor aanzetten tot haat, door een journalist. In *Sinkova* lijkt het Hof dat precedent plots te zijn vergeten (vergelijk ook *Cumpăna en Mazăre* t. *Roemenië*, EHRM 17 december 2004 (GK), nr. 33348/96, ECLI:CE:ECHR:2004:1217JUD003334896, «EHRC» 2005/17 m.nt. Gerards; zie verder Ó Fathaigh en Voorhoof, reeds aangehaald, *supra* nr. 6).

9. *Sinkova* lijkt al bij al problematisch zowel in het licht van eerdere rechtspraak van het Hof als op conceptueel niveau. In dat opzicht zou doorverwijzing naar de Grote Kamer – desgevallend – zeker niet misplaatst zijn. Immers, zoals de *dissent* opnieuw treffend stelt: “There is a real risk of eroding the right of individuals to voice their opinions and protest through peaceful, albeit controversial, means”.

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- 1 491 U.S. 397, 405 (1989), citing *West Virginia State Board of Education v. Barnette* 319 U.S. 624, 632 (1943). In *Johnson*, the petitioner had been convicted for desecration of a venerated object under Texas state law (Tex. Penal Code Ann. § 42.09(a)(3) (1989)). Under the law, “‘desecrate’ means to deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action”.
- 2 For a discussion on this topic see the concurring opinions of Judge Sajo in the case of *Murat Vural v. Turkey* and Judge Pinto de Albuquerque in the case of *Faber v. Hungary*.