THE USE OF ANALOGY IN LEGAL REASONING

ADAMS
v.
NEW JERSEY STEAMBOAT CO.
Court of Appeals of New York (Dec. 8, 1896).

O'BRIEN, J.

On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer Drew, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum of $160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person, who apparently reached it through the window of the room. The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is whether the defendant is, in law, liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at general term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest. A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations. The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff, unless the loss was caused by the act of God or the public enemies; and a reasonable sum of money for the payment of his

expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage. Carr. § 24; Ang. Carr. § 80. Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money, under the circumstances, than for the loss of what might be strictly called baggage. The question involved in this case was very fully and ably discussed in the case of Crozier v. Steamboat Co., 43 How. Prac. 466, and in Macklin v. Steamboat Co., 7 Abb. Prac. (N. S.) 229. The liability of the carrier in such cases as an insurer seems to have been very clearly demonstrated in the opinion of the court in both actions, upon reason, public policy, and judicial authority. It appears from a copy of the remittitur attached to the brief of plaintiff's counsel that the judgment in the latter case was affirmed in this court, though it seems that the case was not reported.

It was held in Carpenter v. Railroad Co., 124 N. Y. 53, 26 N. E. 277, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large, nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation, and liability for loss of baggage, is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different, with respect to his personal effects, from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping cars is held to a high degree of care in such cases, it is not liable for a loss of this character, without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases, and that do not apply in the case at bar.

But, aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked, and otherwise guarded from intrusion. In the latter case, when he retires for the night he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common-law rule of responsibility. The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of

absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule, and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing-room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect; and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches, in a condition to protect themselves. But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract, before the question of responsibility can arise, whether the passenger be in one of the sleeping berths, or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves, and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest; and it would perhaps be unjust to so extend the liability, when the nature and character of the duties which it assumes are considered. But the traveler who pays for his passage, and engages a room, in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at an hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence.

McBOYLE v.UNITED STATES

Circuit Court of Appeals, Tenth Circuit (Aug. 18, 1930).

Before COTTERAL, PHILLIPS, and McDERMOTT, Circuit Judges.

PHILLIPS, Circuit Judge.

William W. McBoyle was convicted and sentenced for an alleged violation of the National Motor Vehicle Theft Act, section 408, title 18, U.S. Code (18 U.S.C. § 408). The indictment

THE UNITED STATES SUPREME COURT

HOLY TRINITY CHURCH v. U.S.
143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226
Feb. 29, 1892

Mr. Justice BREWER delivered the opinion of the court.

Plaintiff in error is a corporation duly organized and incorporated as a religious society under the laws of the state of New York. E. Walpole Warren was, prior to September, [143 U.S. 457, 458] 1887, an alien residing in England. In that month the plaintiff in error made a contract with him, by which he was to remove to the city of New York, and enter into its service as rector and pastor; and, in pursuance of such contract, Warren did so remove and enter upon such service. It is claimed by the United States that this contract on the part of the plaintiff in error was forbidden by chapter 164, 23 St. p. 332; and an action was commenced to recover the penalty prescribed by that act. The circuit court held that the contract was within the prohibition of the statute, and rendered judgment accordingly, (36 Fed. Rep. 303), and the single question presented for our determination is whether it erred in that conclusion.

The first section describes the act forbidden, and is in these words:
'Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration, of any alien or aliens, any foreigner or foreigners, into the United States, its territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its territories, or the District of Columbia.'

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words 'labor' and 'service' both used, but also, as it [*512] were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind;' and, further, as noticed by the circuit judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic [143 U.S. 457, 459] servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.

(…) General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such

cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. (…)

[143 U.S. 457, 463] It will be seen that words as general as those used in the first section of this act were by that decision limited, and the intent of congress with respect to the act was gathered partially, at least, from its title. Now, the title of this act is, 'An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia. Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. No one reading such a title would suppose that congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain. The common understanding of the terms 'labor' and 'laborers' does not include preaching and preachers, and it is to be assumed that words and phrases are used in their ordinary meaning. So whatever of light is thrown upon the statute by the language of the title indicates an exclusion from its penal provisions of all contracts for the employment of ministers, rectors, and pastors.

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. U.S. v. Railroad Co., 91 U.S. 72, 79. The situation which called for this statute was briefly but fully stated by Mr. Justice BROWN when, as district judge, he decided the case of U.S. v. Craig, 28 Fed. Rep. 795, 798: 'The motives and history of the act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level [143 U.S. 457, 464] of the assisted immigrant. The evil finally became so flagrant that an appeal was made to congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.'

It appears, also, from the petitions, and in the testimony presented before the committees of congress, that it was this cheap, unskilled labor which was making the trouble, and the influx of which congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of congress, or of the people, was not directed. So far, then, as the evil which [*514] was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act.

(…) We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to congress, the reports of the committee of each house, all concur in affirming that the intent of congress was simply to stay the influx of this cheap, unskilled labor.

But, beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from ''Ferdinand and Isabella,

by the grace of God, king and queen of Castile,'' etc., and recites that ''it is hoped that by God's assistance some of the continents and islands in the [496] ocean will be discovered,'' etc. The first colonial grant, that made to Sir Walter Raleigh in 1584, was from ''Elizabeth, by the grace of God, of England, France, and Ireland, queen, defender of the faith,'' etc.; and the grant authorizing him to enact statutes of the government of the proposed colony provided that ''they be not against the true Christian faith now professed in the Church of England.'' The first charter of Virginia, granted by King James I. in 1606, after reciting the application of certain parties for a charter, commenced the grant in these words: ''We, greatly commending, and graciously accepting of, their Desires for the Furtherance of so noble a Work, which may, by the Providence of Almighty God, hereafter tend to the Glory of His Divine Majesty, in propagating of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God, and may in time bring the Infidels and Savages, living in those parts, to human Civility, and to a settled and quiet Government; DO, by these our Letters Patents, graciously accept of, and agree to, their humble and well intentioned Desires.''

(…) There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people. While because of a general recognition of this truth the question has seldom been presented to the courts, yet we find that in Updegraph v. Comm., 11 Serg. & R. 394, 400, it was decided that, ''Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; * * * not Christianity with an established church and tithes and spiritual courts, but Christianity with liberty of conscience to all men.'' (…)

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, ''In the name of God, amen;'' the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation. In the face of all these, shall it be believed that a congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?

(…) The judgment will be reversed, and the case remanded for further proceedings in accordance with the opinion.

JUDGMENT OF THE COURT
26 September 1996 *

In Case C-241/94,

French Republic, represented by Edwige Belliard, Assistant Director in the Directorate for Legal Affairs, Ministry of Foreign Affairs, and Catherine de Salins, Assistant Director in the same directorate, and Jean-Marc Belorgey, Chargé de Mission in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

v

Commission of the European Communities, represented by Jean-Paul Keppenne and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission decision SG(94) D/8907 of 27 June 1994 concerning aid to the company Kimberly Clark Sopalin,

* Language of the case: French.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Rapporteur), (Presidents of Chambers), G. F. Mancini, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, L. Sevón and M. Wathelet, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 March 1996, at which the French Republic was represented by Catherine de Salins and Jean-Marc Belorgey and the Commission by Ben Smulders and by Xavier Lewis, of its Legal Service, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 7 May 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 2 September 1994, the French Republic brought an action under the first paragraph of Article 173 of the EC Treaty for annulment of Commission Decision SG(94) D/8907 of 27 June 1994 (hereinafter 'the contested decision').

2 By the contested decision, the Commission classified as State aid within the meaning of Article 92(1) of the Treaty the financial participation of the Fonds National de l'Emploi (National Employment Fund, hereinafter 'the FNE') in the implementation of a social plan by the company Kimberly Clark Sopalin (hereinafter 'Kimberly Clark').

3 Kimberly Clark, whose main business is the manufacture and processing of cellulose wadding, has a manufacturing plant at Sotteville-les-Rouen, which, at the beginning of 1993, employed 465 people. As part of a restructuring operation, Kimberly Clark decided to concentrate solely on the manufacture of paper handkerchiefs, and at the same time to modernize its industrial equipment, reorganized its production system, adopted new working methods and reduced its workforce by 207.

4 In accordance with the French regulations on redundancy on economic grounds, Kimberly Clark drew up a social plan comprising a number of measures some of which were jointly financed by the State through the FNE. The cost of the plan was calculated as FF 109.08 million, of which FF 27.25 million — about 25% — was borne by the State.

5 On the basis of the information provided by the French authorities by memoranda of 28 January and 10 March 1994, the Commission adopted the contested decision. In it the Commission first noted that, as a result of the agreement concluded between the State (FNE) and Kimberly Clark, the FNE undertook to fund part of the cost of the social plan to the extent of FF 27.25 million. The Commission considered that the FNE intervention constituted State aid, since such agreements are negotiated with undertakings encountering employment problems and the FNE contribution, which is financed out of the State budget, is determined case by case by reference to the financial situation of the undertaking and the latter's own efforts. It also stated that the aid was liable to distort competition and to affect trade between Member States, thereby falling within the scope of Article 92(1) of the EC Treaty.

6 The Commission nevertheless declared the aid compatible with the common market since it was intended to facilitate the development of certain activities or of certain economic areas, without, in the terms of Article 92(3)(c) of the EC Treaty, adversely affecting trading conditions to an extent contrary to the common interest. In reaching that conclusion, the Commission attached importance to the reduction of capacity resulting from the restructuring of the undertaking, the fact that the laid-off workers were the main beneficiaries of the aid and the limited amount of aid granted.

7 In support of its application, the French Government puts forward only one plea in law, namely that the Commission erred in law. It considers that the mechanism put into effect by the FNE does not fall within the category of aid for undertakings with which Article 92 of the Treaty is concerned but constitutes a general measure for the benefit of employees intended to combat unemployment. In that regard, it contends that, in general, FNE intervention does not benefit 'certain undertakings or the production of certain goods' within the meaning of Article 92(1) of the Treaty. Moreover, Kimberly Clark did not, in its view, obtain any advantage: the FNE mechanisms do not alleviate the burdens of undertakings, since their implementation does not help them to meet their legal obligations, the beneficiaries are the employees and the intervention taken does not have the effect of improving the competitive situation of the undertakings concerned.

8 The French rules provide that, in the event of redundancies on economic grounds (Article L 321-1 of the Code du Travail — Labour Code), the employer must pay to the laid-off employees compensation as prescribed by law or by a collective agreement, the former constituting the minimum compensation (Article L 122-9 of the Code du Travail). Moreover, the employer must without fail grant the employees concerned 're-recruitment priority' for a period of one year (Article L 321-14) and offer them the possibility of access to a training-leave agreement (Article L 321-5) if they have two years' service, or less than that if more favourable provisions of a collective agreement apply, and if they are aged less than 57.

9 Over and above that minimum requirement, the French legislation provides for a social plan, which must be drawn up and implemented in undertakings with 50 or more employees where the number of redundancies envisaged is 10 or more within a single period of 30 days, as in the Kimberly Clark case. The purpose of such a plan is to avoid laying off employees or to limit the number laid off and facilitate redeployment of those employees whom it is impossible to avoid laying off, in particular those who are older and those whose social circumstances or qualifications are such that it would be particularly difficult for them to find other employment.

10 Every social plan is designed, as a minimum, to allow redeployment of employees who lose their jobs and for that purpose it must incorporate alternatives to training-leave agreements. However, those alternatives are not defined by statute or regulation.

11 It is apparent from the documents before the Court that a national court before which proceedings are brought may, by declaring redundancies inoperative, condemn a plan which does not ensure that genuine action for the redeployment of those who lose their jobs. The measures which the social plan may involve include FNE intervention.

12 That intervention takes place by means of agreements negotiated and signed between the undertaking and the State. Depending on their type, those agreements pursue one of three aims: short-time working as an alternative to redundancy, enhancement of the possibilities of redeployment, and retirement for older employees on better terms than those applicable to the unemployed.

13 The State's participation in the implementation of social plans derives from provisions laid down by statute and regulations which are applicable to all undertakings and varies according to the social objectives pursued by the State. FNE assistance is subject to ceilings established by the Code du Travail for each type of agreement, which apply to all undertakings.

14 The extent to which the assistance contributed may vary within the prescribed maximum limits is laid down by circulars and depends, first, on the size of the undertaking, since the costs of preventive measures and redundancy arrangements are extremely high, and, secondly, in most cases on the quality of the social plan adopted.

15 In certain cases, application of the rule requiring joint financing may be waived, in particular in the case of undertakings that are the subject of composition proceedings or are being wound up under court supervision, for which there are exemptions, and, in very exceptional cases, where the undertaking is in very serious financial difficulties.

16 The French Government contends, first, that the FNE mechanisms, which pursue a purely social objective, are applicable to all undertakings without exception. It considers that the criteria according to which the State allows or rejects conclusion of an agreement with the FNE at the request of an undertaking are objective and are limited to the circumstances laid down by the statutes and regulations concern-

ing such agreements (for example the age of the worker or his suitability for redeployment). FNE agreements are thus in no way linked with any specific kind of undertaking, production sector or region.

17 Regarding the limits imposed by the legislation, the French Government refers to the provisions of the Code du Travail concerning FNE intervention. The participation of undertakings and employees in the financing of the FNE special pre-retirement allowances is directly determined by regulations. Failure to observe those limits is penalized by the courts as being in contravention of the law.

18 As regards the limits fixed by the administration itself, the French Government states that they derive from circulars or directions that are available to the public, their purpose being to define, within the bounds of the discretion granted by the regulations, the general approach to be taken by the administration. In that context, the French Government emphasizes that the assessment made by the public authority in the case of FNE assistance certainly does not have the effect of favouring the undertaking that receives it at the expense of its competitors but is intended on the contrary to ensure that strict equality of treatment is maintained.

19 It must be borne in mind that Article 92(1) of the Treaty provides that any aid granted by a Member State, or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the common market.

20 According to settled case-law, Article 92(1) does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 13).

21 The social character of the FNE assistance is not therefore sufficient to exclude it outright from being categorized as aid for the purposes of Article 92 of the Treaty.

22 It must also be noted that FNE intervention is not limited sectorially or territorially or by reference to a restricted category of undertakings.

23 However, as the Commission has rightly pointed out, the FNE enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided. The French Government itself concedes that the administration may depart from its own guidelines where particular circumstances justify that course of action.

24 In those circumstances, it must be held that, by virtue of its aim and general scheme, the system under which the FNE contributes to measures accompanying social plans is liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid within the meaning of Article 92(1) of the Treaty.

25 The French Government's argument on that point cannot therefore be upheld.

26 The French Government maintains, secondly, that the FNE mechanisms do not mitigate the charges borne by undertakings since their implementation does not help undertakings to meet their legal obligations and calls for additional efforts on their part over and above the cost to them of strictly complying with the requirements of the ordinary law. In its view, undertakings which are required to draw up a social plan are entitled, when planning redundancies, to decline to use the FNE mechanisms. The aim of the social plan, namely redeployment, could be attained by the undertaking by its own methods, without recourse to FNE agreements. Those agreements are intended to enable undertakings to do more than the minimum necessary to discharge their legal obligations regarding social plans.

27 The French Government states that since FNE agreements do not constitute a legal obligation for undertakings, the charges which they must bear as a result are of an optional nature. The State does not therefore help undertakings to meet their legal obligations. The financial impact of concluding one or more FNE agreements

moreover represents for them in most cases a significant cost, particularly since, more often than not, the State is a minority contributor, in particular where large undertakings are concerned. Kimberly Clark is a good example.

28 If Kimberly Clark had contented itself with laying off the staff initially regarded as surplus to requirements (312 persons) and offering each employee concerned a training-leave agreement, thus meeting its general obligation under the ordinary law, the cost for Kimberly Clark would have been FF 45 million at most, the average unit cost of severance allowances under collective agreements for the staff affected by the restructuring being around FF 140 000 and Kimberly Clark's contribution to financing of the training-leave agreements being FF 4 500 (FF 45 million = 312 x 140 000 + 312 x 4 500). In order to simulate a situation in which Kimberly Clark had prepared a social plan enabling it broadly to meet its legal requirements out of its own resources, it would be necessary to add a further FF 7 million for additional measures. The total cost of the plan would thus have been FF 52 million (45 million plus 7 million).

29 In contrast, the social plan put into effect by Kimberly Clark, including the FNE assistance, cost it FF 81.83 million and cost the State FF 27.25 million. The FNE assistance thus entailed a substantially higher cost for Kimberly Clark than it would have had to bear if it had introduced, using its own resources, a plan enabling it to meet its legal obligations in full.

30 The Commission observes that the fact that the assistance covers expenses incurred by the beneficiary by choice is not sufficient to exclude the possibility that it constitutes aid. It has consistently taken the view that assistance for certain undertakings or for the production of certain goods is to be classified as aid even if it is used to finance costs incurred voluntarily by the undertaking concerned. In any event, where the establishment of a social plan is compulsory, as in the Kimberly Clark case, it is not correct to say that the FNE assistance never covers any cost which is compulsory for the undertaking: since the latter is required to bear, in addition to compulsory expenses in the strict sense (severance payments, and so on), the additional costs of implementing the social plan (under the supervision of the court), the FNE assistance covers a variable proportion of a body of costs which are, to an indeterminate extent, compulsory; it could therefore cover compulsory costs.

31 As regards the contested decision, the information provided by letter from the French authorities of 28 January 1994 was not such as to rule out the possibility that part of the compulsory costs had been borne by the FNE.

32 That being so, the Commission considers that the 'simulation' carried out by the French Government in order to assess whether the FNE assistance for Kimberly Clark involved any advantage for that company does not add anything new. That exercise is based on hypothetical elements and does not explain why Kimberly Clark agreed, without thereby obtaining any advantage, to assistance which allegedly caused it to incur considerably greater costs than it would have done had it introduced a plan covered by its own resources that would have enabled it to meet its legal obligations in full. The simulation shows above all that if Kimberly Clark had been exempted from payment of its part of the cost of the plan — an exemption which the FNE is entitled to grant — the net benefit would have been undeniable and it would have been clear that the FNE assistance covered compulsory costs.

33 It must be borne in mind, as a preliminary point, that, as the Court has held, the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case 234/84 *Commission* v *Belgium* [1986] ECR 2263, paragraph 16).

34 It must next be observed that the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13).

35 In that regard, it is important to note that, in view of the number of redundancies envisaged, Kimberly Clark was under an obligation to draw up a social plan. As is apparent from the memorandum from the French Government of 10 March 1994, the social plan adopted included, for the employees not laid off, several aspects involving FNE participation, such as short-time agreements, aid for transition to half-time working, and so on. As regards the 207 employees laid off, it is apparent from the plan that the costs relating to severance payments under collective agreements, which were paid in full by Kimberly Clark, amounted to FF 37.6 million. Kimberly Clark also undertook to increase that compensation by FF 22.44 million.

36 To enable it to assess the compatibility with the common market of the measures in question, the Commission, by letter of 4 February 1994, asked the French Government, among other things, what the costs of the plan would have been if it had been limited to the minimum prescribed by French legislation. The French Government replied that no minimum social plan existed for which a figure could easily be arrived at. It was only in its reply that the French Government clarified this point, stating in particular that Kimberly Clark initially intended laying off 312 members of its workforce of 465 employees and that it contented itself with laying off 207 after negotiations with the FNE resulting in the latter's subsequent involvement in the social plan.

37 Since the Commission was thus unable, despite making a specific request, to assess the nature and effects of the measures concerned, it was entitled to conclude that, in drawing up a social plan in collaboration with the State under which Kimberly Clark contributed FF 81.83 million and the State contributed FF 27.25 million, Kimberly Clark had received State aid within the meaning of Article 92 of the Treaty.

38 Consequently, the French Government's second argument must also be rejected.

39 The French Government claims, thirdly, that the FNE agreements, the aim of which is to limit the social repercussions of redundancy for the employees affected, are for the direct benefit of the employees and in no way improve the undertaking's competitive position.

40 In view of the foregoing considerations, it need merely be stated that, on the basis of the information available to it when it adopted the contested decision, the Commission was entitled to consider that, as a result of the FNE intervention, Kimberly Clark had been relieved of certain legal obligations *vis-à-vis* its employees and that, accordingly, it was put in a more favourable position than that of its competitors.

41 Since none of the French Government's arguments has been upheld, the application must be dismissed.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the French Republic to pay the costs.

Rodríguez Iglesias Kakouris Edward Puissochet

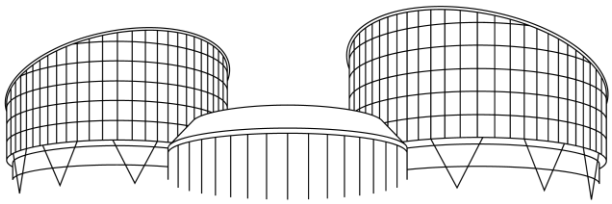
Hirsch Mancini Kapteyn Gulmann

Murray Sevón Wathelet

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HIRSI JAMAA AND OTHERS v. ITALY

(Application no. 27765/09)

JUDGMENT

Strasbourg

23 February 2012

Libya. In that connection, the Court has already had occasion to note that the presence of UNHCR in Tripoli hardly constituted a guarantee of protection for asylum-seekers on account of the negative attitude of the Libyan authorities, which did not recognise any value in the status of refugee (see paragraph 130 above).

154. In those circumstances, the Court cannot subscribe to the Government's argument that the activities of UNHCR represented a guarantee against arbitrary repatriation. Moreover, Human Rights Watch and UNHCR had denounced several earlier forced returns of irregular migrants, including asylum-seekers and refugees, to high-risk countries.

155. Therefore, the fact that some of the applicants have obtained refugee status does not reassure the Court as regards the risk of arbitrary return. On the contrary, the Court shares the applicants' view that that constitutes additional evidence of the vulnerability of the parties concerned.

156. In view of the foregoing, the Court considers that, when the applicants were transferred to Libya, the Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR.

157. Furthermore, the Court reaffirms that Italy is not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum or to describe the risks faced as a result of the lack of an asylum system in Libya. It reiterates that the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees.

158. It follows that the transfer of the applicants to Libya also violated Article 3 of the Convention because it exposed the applicants to the risk of arbitrary repatriation.

IV. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL No. 4 TO THE CONVENTION

159. The applicants stated that they had been the subject of a collective expulsion having no basis in law. They relied on Article 4 of Protocol No. 4 to the Convention, which provides:

> "Collective expulsion of aliens is prohibited."

A. The parties' submissions

1. The Government

160. The Government submitted that Article 4 of Protocol No. 4 was not applicable in the instant case. They argued that the guarantee provided by that provision came into play only in the event of the expulsion of persons on the territory of a State or who had crossed the national border illegally. In the instant case, the measure in issue was a refusal to authorise entry into national territory rather than "expulsion".

2. The applicants

161. While acknowledging that the word "expulsion" might seemingly constitute an obstacle to the applicability of Article 4 of Protocol No. 4, the applicants submitted that an evolutive approach should lead the Court to recognise the applicability of Article 4 of Protocol No. 4 in the present case.

162. In particular, the applicants sought a functional and teleological interpretation of that provision. In their view, the primary purpose of prohibiting collective expulsions was to prevent States from forcibly transferring groups of aliens to other States without examining their individual circumstances, even summarily. Such a prohibition should also apply to measures to push back migrants on the high seas, carried out without any preliminary formal decision, in so far as such measures could constitute "hidden expulsions". A teleological and "extraterritorial" interpretation of that provision would render it practical and effective rather than theoretical and illusory.

163. According to the applicants, even if the Court were to decide to make the prohibition established by Article 4 of Protocol No. 4 strictly territorial in scope, their return to Libya would in any case fall within the scope of application of that Article because it had occurred on a vessel flying the Italian flag, which, under Article 4 of the Italian Navigation Code, was considered to be "Italian territory".

Their return to Libya, carried out with no prior identification and no examination of the personal circumstances of each applicant, had constituted a removal measure that was, in substance, "collective".

3. Third-party interveners

164. The United Nations High Commissioner for Human Rights (OHCHR), whose submissions were shared by UNHCR, argued that Article 4 of Protocol No. 4 was applicable in the instant case. They submitted that the issue was of key importance, having regard to the potentially significant effects of a broad interpretation of that provision in the field of international migration.

Having pointed out that collective expulsions of aliens, including those in an irregular situation, were generally prohibited by international and Community law, the OHCHR argued that persons intercepted on the high seas should be able to benefit from protection against that kind of expulsion, even though they had not been able to reach a State's border.

Collective expulsions on the high seas were prohibited having regard to the principle of good faith, in the light of which the Convention provisions must be interpreted. To allow States to push back migrants intercepted on the high seas without complying with the guarantee enshrined in Article 4 of Protocol No. 4 would amount to accepting that States were able to evade their obligations under the Convention by advancing their border-control operations.

Moreover, recognition of the extraterritorial exercise of a Contracting State's jurisdiction over actions taking place on the high seas would, according to the OHCHR, entail a presumption that all the rights guaranteed by the Convention and its Protocols would be applicable.

165. The Columbia Law School Human Rights Clinic pointed out the importance of procedural guarantees in the area of protection of the human rights of refugees. States were bound to examine the situation of each individual on a case-by-case basis in order to guarantee effective protection of the fundamental rights of the parties concerned and to avoid removing them while there was a risk of harm.

The Columbia Law School Human Rights Clinic submitted that clandestine immigration by sea was not a new phenomenon but that the international community had increasingly recognised the need to identify constraints on State immigration-control practices, including interception at sea. The principle of *non-refoulement* required States to refrain from removing individuals without having assessed their circumstances on a case-by-case basis.

Various bodies of the United Nations, such as the Committee Against Torture, had clearly stated that such practices risked breaching international human rights standards and had emphasised the importance of individual identification and assessment to prevent people being returned to situations where they would be at risk. The Inter-American Commission for Human Rights had recognised the importance of these procedural guarantees in *The Haitian Centre for Human Rights et al. v. United States* (Case no. 10.675, report no. 51/96, § 163), in which it had expressed the opinion that the United States had impermissibly returned interdicted Haitian migrants without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as refugees. That decision was of particular significance as it contradicted the earlier position of the Supreme Court of the United States in *Sale v. Haitian Centers Council* (113 S. Ct., 2549, 1993).

B. The Court's assessment

1. Admissibility

166. The Court must first examine the question of the applicability of Article 4 of Protocol No. 4. In *Becker v. Denmark* (no. 7011/75, Commission decision of 3 October 1975, Decisions and Reports (DR) 4, p. 236) concerning the repatriation of a group of approximately two hundred Vietnamese children by the Danish authorities, the Commission defined, for the first time, the "collective expulsion of aliens" as being "any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group".

167. That definition was used subsequently by the Convention bodies in other cases concerning Article 4 of Protocol No. 4. The Court observes that the majority of such cases involved persons who were on the territory in issue (see *K.G. v. the Federal Republic of Germany*, no. 7704/76, Commission decision of 11 March 1977, unreported; *O. and Others v. Luxembourg*, no. 7757/77, Commission decision of 3 March 1978, unreported; *A. and Others v. the Netherlands*, no. 14209/88, Commission decision of 16 December 1988, DR 59, p. 274; *Andric v. Sweden* (dec.), no. 45917/99, 23 February 1999; *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I; *Davydov v. Estonia* (dec.), no. 16387/03, 31 May 2005; *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia"* (dec.), no. 18670/03, ECHR 2005-VIII; *Sultani v. France*, no. 45223/05, ECHR 2007-IV; *Ghulami v. France* (dec.), no. 45302/05, 7 April 2009; and *Dritsas and Others v. Italy* (dec.), no. 2344/02, 1 February 2011).

168. The case of *Xhavara and Others v. Italy and Albania* ((dec.), no. 39473/98, 11 January 2001), however, concerned Albanian nationals who had attempted to enter Italy illegally on board an Albanian vessel and who had been intercepted by an Italian warship approximately 35 nautical miles off the Italian coast. The Italian ship had attempted to prevent the parties concerned from disembarking on national territory, leading to the death of fifty-eight people, including the applicants' parents, as a result of a collision. In that case, the applicants complained in particular of Legislative Decree no. 60 of 1997, which provided for the immediate expulsion of irregular aliens, a measure subject only to appeal without suspensive effect. They considered that that constituted a breach of the guarantee afforded by Article 4 of Protocol No. 4. The Court rejected the complaint on the ground of incompatibility *ratione personae*, as the provision in question had not been applied to their case, and did not rule on the applicability of Article 4 of Protocol No. 4 to the case in issue.

169. Therefore, in the instant case, the Court must, for the first time, examine whether Article 4 of Protocol No. 4 applies to a case involving the removal of aliens to a third State carried out outside national territory. It must ascertain whether the transfer of the applicants to Libya constituted a "collective expulsion of aliens" within the meaning of the provision in issue.

170. In interpreting the provisions of the Convention, the Court draws on Articles 31 to 33 of the Vienna Convention on the Law of Treaties (see, for example, *Golder v. the United Kingdom*, 21 February 1975, § 29, Series A no. 18; *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 65, ECHR 2008; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008).

171. Pursuant to the Vienna Convention on the Law of Treaties, the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken. It must take account of the fact that the provision in issue forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). The Court must also take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties (see *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI, and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; see also Article 31 § 3 (c) of the Vienna Convention). The Court may also have recourse to supplementary means of interpretation, notably the *travaux préparatoires* of the Convention, either to confirm the meaning determined in accordance with the methods referred to above or to clarify the meaning when it would otherwise be ambiguous, obscure or manifestly absurd and unreasonable (see Article 32 of the Vienna Convention).

172. The Government submitted that there was a logical obstacle to the applicability of Article 4 of Protocol No. 4 in the instant case, namely the fact that the applicants were not on Italian territory at the time of their transfer to Libya so that measure, in the Government's view, could not be considered to be an "expulsion" within the ordinary meaning of the term.

173. The Court does not share the Government's opinion on this point. It notes, firstly, that, while the cases thus far examined have concerned individuals who were already, in various forms, on the territory of the country concerned, the wording of Article 4 of Protocol No. 4 does not in itself pose an obstacle to its extraterritorial application. It must be noted that Article 4 of Protocol No. 4 contains no reference to the notion of "territory", whereas the wording of Article 3 of the same Protocol, on the contrary,

specifically refers to the territorial scope of the prohibition on the expulsion of nationals. Likewise, Article 1 of Protocol No. 7 explicitly refers to the notion of territory regarding procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a State. In the Court's view, that wording cannot be ignored.

174. The *travaux préparatoires* are not explicit as regards the scope of application and ambit of Article 4 of Protocol No. 4. In any event, the Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that as far as the Committee of Experts was concerned the purpose of Article 4 was to formally prohibit "collective expulsions of aliens of the kind which was a matter of recent history". Thus, it was "agreed that the adoption of [Article 4] and paragraph 1 of Article 3 could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past". The commentary on the draft reveals that, according to the Committee of Experts, the aliens to whom the Article refers are not only those lawfully resident on the territory but "all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality" (Article 4 of the final Committee draft, p. 505, § 34). Lastly, according to the drafters of Protocol No. 4, the word "expulsion" should be interpreted "in the generic meaning, in current use (to drive away from a place)". While that last definition is contained in the section relating to Article 3 of the Protocol, the Court considers that it can also be applied to Article 4 of the same Protocol. It follows that the *travaux préparatoires* do not preclude extraterritorial application of Article 4 of Protocol No. 4.

175. It remains to be seen, however, whether such an application is justified. To reply to that question, account must be taken of the purpose and meaning of the provision in issue, which must themselves be analysed in the light of the principle, firmly rooted in the Court's case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, for example, *Soering*, cited above, § 102; *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *X, Y and Z v. the United Kingdom*, 22 April 1997, *Reports* 1997-II; *V. v. the United Kingdom* [GC], no. 24888/94, § 72, ECHR 1999-IX; and *Matthews v. the United Kingdom* [GC], no. 24833/94, § 39, ECHR 1999-I). Furthermore, it is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32; *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I; and *Leyla Şahin v. Turkey* [GC], no. 44774/98, § 136, ECHR 2005-XI).

176. A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing

use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control in so far as they constitute tools for States to combat irregular immigration.

The economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.

177. The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land.

178. It is therefore clear that, while the notion of "jurisdiction" is principally territorial and is presumed to be exercised on the national territory of States (see paragraph 71 above), the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction (see *Medvedyev and Others*, cited above, § 81).