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

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Recourse by police to kettling technique, which at the relevant time had no legal basis, violated the rights to freedom of movement and assembly of the applicants, who were prevented from participating in a demonstration

In today's **Chamber** judgment[1] in the case of **Auray and Others v. France** (application no. 1162/22) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 2 of Protocol No. 4 (freedom of movement) to the European Convention on Human Rights, and

a violation of Article 11 (freedom of assembly and association) read in the light of Article 10 (freedom of expression)

The case concerned the applicants' containment for several hours on Place Bellecour in Lyons on 21 October 2010, during a demonstration against a pension reform bill.

Having noted that the reason for cordoning off Place Bellecour had been to separate and contain potentially violent trouble-makers in order to avert a risk to the safety of persons and ensure the proper conduct of the demonstration, the Court acknowledged that such a restriction on personal freedom had been necessary in order to avert a real risk of serious harm to people or property, and that it had been limited to the minimum needed to achieve that aim. It concluded that, despite its duration and its effects on the applicants and having regard to its nature and the manner in which it had been implemented, the restriction had not therefore amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention.

As to the complaints concerning the rights to freedom of movement (Article 2 of Protocol No. 4), freedom of expression (Article 10) and freedom of assembly (Article 11), the Court reiterated that any measure restricting those freedoms had to be "prescribed by law". However, it noted that the general legal framework on maintaining order in force at the time of the events at issue could not be regarded as defining the rules on the use of the kettling technique with sufficient precision to represent a safeguard against the risk of arbitrary interferences with the freedoms of the individuals likely to be affected by it. The Court concluded that the police's use of the kettling technique had not, at the relevant time, been "prescribed by law" within the meaning of the provisions relied on.

For that reason, having noted that in December 2021, that is to say after the events of the present case, the Minister of the Interior had issued a new national instruction on maintaining public order, the Court concluded that there had been a violation of Article 2 of Protocol No. 4 and Article 11 of the Convention read in the light of Article 10.

Principal facts

The applicants, Marc Auray, Arnaud De Rivière de la Mure, Leila and Mathilda Millet, Elisa Teton, Myriam Prevost, Caroline Benkhedda, Benjamin Cottet-Emard, Catherine Vincensini, Nora Bonal, Florence Del Canto and Samuel Perez, are French nationals who were born between 1960 and 1992

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

and live in Saint-Just-Saint-Rambert, Lyons, Mouxy, Mens, Grenoble, Caluire-et-Cuire, Grézieu-la-Varenne, Geyssans, Jonage and Bourges.

Several demonstrations were held in Lyons against a pension reform bill between 14 and 22 October 2010.

Advance notice of a demonstration to be held on Thursday 21 October 2010 was submitted to the authorities. Demonstrators started to arrive at Place Bellecour around 11 a.m., and by the end of the morning between 500 and 600 people had gathered.

At 1.23 p.m. a kettling measure was put in place at Place Bellecour. This was intended to prevent the "numerous trouble-makers" who had gathered on the square from joining the demonstration.

Towards 3.30 p.m. around a hundred people were permitted to leave Place Bellecour and to join the demonstration. The demonstration ended at around 4.45 p.m. and the decision to lift the kettling measure at Place Bellecour was taken around 5 p.m. Identity checks continued until 7 p.m.

In response to a criminal complaint with an application to join the proceedings as a civil party lodged on 29 July 2011 by, among others, the applicants, a judicial investigation was opened on 9 November 2011 in respect of a person or persons unknown for arbitrary interference with individual freedom by a person exercising public authority and refusal by a person exercising public authority to recognise a right on grounds of origin, ethnicity or nationality. The regional prefect and the head of police of the Rhône *département* were designated "witnesses assisted by a lawyer" (*temoins assistés*). On 2 February 2017 the two judges in charge of the investigation at the Lyons *tribunal de grande instance* decided to discontinue the proceedings.

In a judgment of 5 March 2020, the Investigation Division of the Lyons Court of Appeal noted that the discontinuance decision in respect of the offence of discrimination was final, held that there was no need to order additional investigative measures, upheld the discontinuance decision of 2 February 2017, and held that there were no grounds for prosecution.

The civil parties to the proceedings appealed on points of law and lodged a request for a preliminary ruling on constitutionality, which the Court of Cassation decided to refer to the Constitutional Council.

In decision no. 2020-889 QPC of 12 March 2021, the Constitutional Council declared the provision in issue to be compliant with the Constitution.

The civil parties appealed on points of law, relying, in particular, on Articles 5, 10 and 11 of the Convention and Article 2 of Protocol No. 4. On 22 June 2021 the Court of Cassation dismissed their appeal.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), the applicants submitted that they had been deprived of their liberty in a way that had been neither regulated by law nor justified. Relying on Article 2 of Protocol No. 4 (freedom of movement), the applicants claimed that the kettling measure to which they had been subjected had violated their freedom of movement in a way that had been neither regulated by law nor justified by the circumstances of the present case. Lastly, relying on Articles 10 (freedom of expression) and 11 (freedom of assembly and association), the applicants complained that the police cordon around Place Bellecour on 21 October 2010 had prevented them from joining the demonstration in which they had wished to take part.

The application was lodged with the European Court of Human Rights on 22 December 2021.

Judgment was given by a Chamber of seven judges, composed as follows:

Georges **Ravarani** (Luxembourg), *President*,
Lado **Chanturia** (Georgia),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
María **Elósegui** (Spain),
Mattias **Guyomar** (France),
Kateřina **Šimáčková** (the Czech Republic),

and also Martina **Keller**, *Deputy Section Registrar.*

Decision of the Court

Article 5 § 1

The Court pointed out that the impugned kettling measure had to be viewed in the context of the urban violence which had occurred in Lyons between 14 and 21 October 2010. The Investigation Division of the Lyons Court of Appeal had considered that, on 21 October, the authorities had had "objective and reasonable grounds" to fear that the events and incidents of the previous week, which had worsened on a daily basis and been characterised by serious clashes and violent acts, could resume. It noted that the aim of sealing the square off had not been to frustrate the demonstration or to prevent people from taking part in it peacefully but to avert a "real risk", and that instructions had been given to lift the measure completely as soon as the risk had receded at the end of the demonstration. The Court saw no reason to depart from that assessment.

The Court also noted that Place Bellecour had not been completely sealed off. The authorities had followed the evolving situation closely and the police officers had received orders to distinguish between demonstrators and trouble-makers.

The Court noted that the restriction on the liberty of the individuals at Place Bellecour in Lyons on the afternoon of 21 October 2010 had been the result of circumstances beyond the authorities' control, had been necessary to avert a real risk of serious harm to people and property, and had been limited to the minimum needed to achieve that aim. Despite its duration and its effects on the applicants, and having regard to its nature and the way in which it was implemented, the restriction had not therefore amounted to a "deprivation of liberty" within the meaning of Article 5 § 1 of the Convention. This part of the application therefore had to be rejected as incompatible with the provisions of the Convention.

Article 2 of Protocol No. 4

The Court noted that the State was under a duty to guarantee public safety, in particular by ensuring the maintenance of peace and public order (*ordre public*) and the protection of individuals and property and that, in that connection, its role in municipalities under the State police regime (*police étatisée*) – like Lyons – was to curb disturbances to public tranquillity such as "gatherings". To this end, the prefect was responsible for coordinating the actions of the national police force in the areas of public order and administrative law enforcement.

The Court pointed out that it followed from the well-established case-law of the Constitutional Council and the *Conseil d'État* that a measure for the protection of public order which interfered with individuals' fundamental rights, including freedom of movement, had to be appropriate, necessary and proportionate to that aim.

The Court concluded that the principle of police intervention, in a situation such as that at issue in the present case, had to be considered as having a legal basis in domestic law.

As indicated by the Constitutional Council in its decision of 12 March 2021 in respect of section 1 of the Law of 21 January 1995, the provisions conferring on the State the general duty of maintaining public order "[did] not define the manner in which this duty should be carried out or, specifically, the means permitted to achieve it". The Court noted that at the time of the events complained of, no other instrument or provision had expressly provided for recourse to the kettling technique used by the police in the present case, nor, *a fortiori*, regulated it. In the light of that particular circumstance, it was the Court's task to examine, with regard to the complaint under Article 2 of Protocol No. 4, the quality of the law, an aspect which, it noted, the domestic courts had not considered.

In the first place, the Court reiterated that, as a preventive technique likely to affect the fundamental rights and freedoms of peaceful demonstrators, it was essential to establish rules on its use, setting out precisely under what circumstances and conditions it could be implemented, how it should be carried out and time-limits for its use.

Secondly, the Court noted that kettling was a practice that the police were likely to use to maintain order when faced with a serious likelihood of disorder, but that, at the time of the disputed events, it had not been regulated by any specific legal framework.

The Court considered that the general legal framework on maintaining order in force at the relevant time could not be regarded as defining the rules on the use of the kettling technique with sufficient precision to represent a safeguard against the risk of arbitrary interferences with the freedom of movement of the individuals likely to be affected by it.

Having noted that in December 2021, that is, after the events of the present case, the Minister of the Interior had issued a new national instruction on maintaining public order, the Court concluded that the use by the police of the kettling technique, which had constituted an interference with the applicants' right to freedom of movement, had not, at the relevant time, been "in accordance with law" within the meaning of Article 2 of Protocol No. 4.

There had therefore been a violation of that provision.

Articles 10 and 11

The Court noted that the applicants, who had been contained on Place Bellecour on the afternoon of 21 October 2010 as a result of the impugned kettling measure, had been unable to take part in the demonstration against a pension reform bill, at which their sole aim had been to express their opinion.

The Court concluded that the applicants' containment on Place Bellecour, as a result of the police action to cordon it off, had constituted an interference with the exercise of their freedom of peaceful assembly and freedom of expression.

Reiterating that under both Article 11 and Article 10, any measure restricting those freedoms had above all to be "prescribed by law", the Court held, for the same reasons as those set out in its examination of the complaint under Article 2 of Protocol No. 4, that this condition had not been fulfilled in the present case.

There had therefore been a violation of Article 11 of the Convention read in the light of Article 10.

Just satisfaction (Article 41)

The Court held that France was to pay the applicants, jointly, 1,714.28 euros in respect of costs and expenses.

The judgment is available only in French.

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