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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Life

Failure to safeguard life of drug addict who leapt to his death while trying to escape police custody: *violation*

Keller v. Russia - 26824/04
Judgment 17.10.2013 [Section I]

Facts – On 13 September 2000 the applicant's son (V.K.) was arrested in connection with the theft of two bicycles. The interrogation record noted that he was a drug addict. Three days later he was brought to an office on the third floor of the Regional Department of the Interior ("the ROVD"), where in the presence of a duty lawyer, he was charged with theft. After the interview ended and the duty lawyer had left, the investigator asked a trainee investigator to keep an eye on V.K. while she was away at a meeting with a prosecutor. Just over an hour later V.K. was found dead in the internal courtyard of the ROVD station. In his report, the trainee investigator stated that V.K. had suddenly run out of the office and into a toilet where he had apparently leapt to his death through a third-floor window.

Law – Article 2 (*substantive aspect*): There was an insufficient factual and evidentiary basis on which to conclude that V.K. had been defenestrated or coerced into jumping or had died trying to escape ill-treatment by police officers. Having regard to the case file and the parties' submissions, the Court found that the authorities had validly concluded that V.K. had died as the result of an unfortunate attempt to escape from detention.

As to whether the State had complied with its duty to protect V.K.'s life, the Court reiterated that the obligation to protect the health and well-being of persons in detention clearly encompassed an obligation to protect the life of arrested and detained persons from a foreseeable danger. Although there was insufficient evidence to show that the authorities knew or ought to have known that there was a risk that V.K. might attempt to escape by jumping out of a third-floor window, there were certain basic precautions which police officers should be expected to take in respect of persons held in detention in order to minimise any potential risk of attempts to escape.

In that connection, the escort and supervision arrangements for V.K.'s detention on 16 September 2000 had been seriously deficient. In clear breach of the applicable domestic rules, no escorting officers had been on the spot either before or during V.K.'s attempt to escape and the interview had taken place in an investigator's office rather than in appropriate designated premises. The police had not adopted any safety measures despite V.K.'s known drug addiction and his noticeable anxiety on the day in question. Finally, V.K. had remained without any effective supervision in an unlocked office for quite some time, making it possible for him to slip out of the investigator's office unnoticed and head for a third-floor toilet before jumping out of the window. While it would be excessive to request States to put bars on every window at a police station in order to prevent tragic events like the one in the instant case, this did not relieve them of their duty under Article 2 to protect the life of arrested and detained persons from foreseeable danger.

In sum, the State authorities had failed to provide V.K. with sufficient and reasonable protection.

Conclusion: violation (unanimously).

The Court also held, unanimously, that there had been no violation of the procedural limb of Article 2 in respect of the investigation into V.K.'s death, that there had been no violation of the substantive limb of Article 3 in respect of the injuries V.K. had allegedly sustained in custody, but a violation of the procedural limb of that provision in respect of the authorities' failure to hold an effective investigation into how those injuries had occurred.

Article 41: EUR 11,000 in respect of non-pecuniary damage.

(See also *Robineau v. France* (dec.), 58497/11, 3 September 2013, Information Note 166)

Effective investigation

Failure to effectively investigate civilian disappearances in Ingushetia: *violation*

Yandiyev and Others v. Russia - 34541/06, 43811/06 and 1578/07
Judgment 10.10.2013 [Section I]

Facts – The applicants were close relatives of three men who disappeared in Ingushetia in 2002 and 2004 after being apprehended by armed men they identified as Russian security forces. In each case a criminal investigation was opened by the local prosecutor's office and the proceedings were subsequently

suspended and resumed on several occasions. At the time of the European Court's judgment, the proceedings were still pending and the whereabouts of the missing men and the identity of the abductors were still unknown. The parties disputed the level of State involvement in the disappearances as well as whether the abducted men could be presumed dead.

Law – Article 2

(a) *Substantive aspect* – The Court found it established that the applicants' family members had been taken into custody by agents of the State. In the absence of any reliable news of the three men since their abduction, and given the life-threatening nature of such detention, they could be presumed dead. Responsibility for their deaths rested with the respondent State, who had provided no grounds justifying the deaths.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The investigations into the disappearance of the applicants' relatives had been pending for many years without bringing about any significant development as to the identities of the perpetrators or the fate of the victims. The proceedings in each of the cases had been plagued by a combination of defects. In particular, no steps had been taken to find out the nature and provenance of the special passes the abductors had used when transporting the men. This could have led to the establishment of the abductors' identities and the discovery of their fate. What was at stake here was nothing less than public confidence in the State's monopoly on the use of force. The State had therefore to ensure, by all means at its disposal, an adequate response, judicial or otherwise, so that the legislative and administrative framework set up to protect the right to life was properly implemented, and any breaches of that right were halted and punished. The respondent State had failed to ensure such an adequate response in the instant case.

Conclusion: violation (unanimously).

The Court further found unanimously violations of Article 3 (on account of the distress and anguish suffered by the applicants), Article 5 (on account of the detention without any legal grounds or acknowledgement) and of Article 13 (on account of the lack of an effective remedy in respect of the applicants' complaints under Articles 2 and 3).

Article 41: The applicants were awarded between EUR 45,000 and EUR 60,000 in respect of non-pecuniary damage and between EUR 7,800 and EUR 23,000 in respect of pecuniary damage.

(See *Imakayeva v. Russia*, 7615/02, 9 November 2006, Information Note 91; *Gakayeva and Others v. Russia*, 51534/08 et al., 10 October 2013; *Aslakhanova and Others v. Russia*, 2944/06 et al., 18 December 2012, Information Note 158; and *Varnava and Others v. Turkey*, 16064/90 et al., 18 September 2009, Information Note 122)

ARTICLE 3

Positive obligations

Authorities' failure to ensure safety of prisoner at risk of violence from co-prisoners: *violation*

D.F. v. Latvia - 11160/07
Judgment 29.10.2013 [Section IV]

Facts – The applicant was convicted in 2006 of rape and indecent assault on minors and sentenced to thirteen years' imprisonment. He was kept in Daugavpils Prison for over a year where he was allegedly subjected to violence by other inmates because they knew he had acted as a police informant and was a sex offender. The prison administration frequently moved him from one cell to another, exposing him to a large number of other prisoners. He made numerous applications to be moved to a special prison with a section for detainees who had worked for or collaborated with the authorities. However, his requests were repeatedly rejected because the Prisons Administration did not find it established that he had been a police informant. He was eventually transferred to the special prison.

Law – Article 3

(a) *Alleged ill-treatment* – The applicant had failed to submit any details of his ill-treatment, or supply any proof that he had suffered any injuries.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Failure to ensure the applicant's safety* – The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) had found that prisoners charged with sexual offences were exposed to a heightened risk of violence by other prisoners. It had also repeatedly expressed particular concern about such violence in Daugavpils Prison. The prison authorities had clearly been aware of the nature of the charges against the applicant and the risk they entailed. In addition, there was information within the State apparatus about the applicant's past collaboration

with the police but such information had not been systematically passed on between the relevant authorities. The Court lacked information on any specific steps taken by the Daugavpils Prison administration to address the applicant's vulnerability. Moreover, the Government had not submitted any convincing justification for the applicant's frequent transfers from one cell to another, or referred to any strategy covering the transfers. In accordance with the recommendations of the CPT, any transfer of vulnerable prisoners had to form part of a carefully designed strategy for dealing with inter-prisoner violence. In order for a domestic preventive mechanism to be effective, it had to allow the authorities to respond as a matter of particular urgency, in a manner proportionate to the perceived risk faced by the person concerned. As had been made clear in the applicant's case, a request to the law-enforcement agencies to acknowledge previous collaboration could turn into a lengthy and heavily bureaucratic procedure owing to a lack of sufficient coordination among investigators, prosecutors and penal institutions with a view to preventing possible ill-treatment of vulnerable detainees. The possibility of requesting an interim measure before the administrative courts could not remedy the situation, as at the material time they were not subject to a time-limit for dealing with such requests. The system in place for transferring vulnerable prisoners had not, therefore, been effective, either in law or practice. Given the applicant's fear of the imminent risk of ill-treatment for over a year and the unavailability of an effective remedy to resolve that problem, there had been a violation of Article 3.

Conclusion: violation (unanimously).

Article 41: EUR 8,000 in respect of non-pecuniary damage.

(See also *J.L. v. Latvia*, 23893/06, 17 April 2012, Information Note 151; *Rodić and Others v. Bosnia and Herzegovina*, 22893/05, 27 May 2008, Information Note 108; and *Premininy v. Russia*, 44973/04, 10 February 2011, Information Note 138)

Positive obligations
Inhuman treatment

Alleged failure adequately to account for fate of Polish prisoners executed by Soviet secret police at Katyń in 1940: *no violation*

Janowiec and Others v. Russia - 55508/07 and 29520/09
Judgment 21.10.2013 [GC]

Facts – The applicants were relatives of Polish officers and officials who were detained in Soviet camps or prisons following the Red Army's invasion of the Republic of Poland in September 1939 and who were later killed by the Soviet secret police without trial, along with more than 21,000 others, in April and May 1940. The victims were buried in mass graves in the Katyń forest. Investigations into the mass murders were started in 1990 but discontinued in 2004. The text of the decision to discontinue the investigation remained classified at the date of the European Court's judgment and the applicants were not given access to it. Their repeated requests to gain access to that decision and to declassify its top-secret label were continuously rejected by the Russian courts. The Russian authorities also refused to produce a copy of the decision to the European Court on the grounds that the document was not crucial to the applicants' case and that they were prevented by domestic law from disclosing classified information.

In a judgment of 16 April 2012 (see Information Note 151), a Chamber of the Court held by four votes to three that the Government had failed to comply with Article 38 of the Convention by not producing a copy of the decision to discontinue the investigation, but that it had no temporal jurisdiction to examine the merits of the applicants' complaint of a violation of its obligation to carry out an effective investigation into the deaths. By five votes to two, the Chamber found a violation of Article 3 in respect of ten of the applicants due to the suffering caused by the continuous disregard shown for their situation by the Russian authorities.

Law – Article 2 (*procedural aspect*): The Court reiterated that its temporal jurisdiction to review a State's compliance with its procedural obligation under Article 2 to carry out an effective investigation into alleged unlawful killing by State agents was not open-ended where the deaths had occurred before the date the Convention entered into force in respect of that State. In such cases, the Court had jurisdiction only in respect of procedural acts or omissions in the period subsequent to the Convention's entry into force and provided there was a "genuine connection" between the death as the triggering event and the entry into force. For a "genuine connection" to be established, the period between the death and the entry into force had to have been reasonably short and a major part of the investigation had or ought to have been

carried out after the date of entry into force. For this purpose, a reasonably short period meant a period of no more than ten years.

On the evidence, the applicants' relatives had to be presumed to have been executed by the Soviet authorities in 1940. However, Russia had not ratified the Convention until May 1998, some fifty-eight years later. That period was not only many times longer than the periods which had triggered the procedural obligation under Article 2 in all previous cases that had come before the Court, but also too long in absolute terms for a genuine connection to be established between the deaths and the entry into force of the Convention in respect of Russia. Further, although the investigation into the origin of the mass burials had only been formally terminated in 2004, six years after the entry into force of the Convention in respect of Russia, it was impossible, on the basis of the information available in the case file and in the parties' submissions, to identify any real investigative steps after the date of entry into force. The Court was unable to accept that a re-evaluation of the evidence, a departure from previous findings or a decision regarding the classification of the investigation materials could be said to have amounted to the "significant proportion of the procedural steps" required for establishing a "genuine connection" for the purposes of Article 2. Nor had any relevant piece of evidence or substantive item of information come to light in the period since the critical date. Accordingly, neither criterion for establishing the existence of a "genuine connection" had been fulfilled.

Nevertheless, as the Court had noted in Šilih *v. Slovenia*, there might be extraordinary situations which did not satisfy the "genuine connection" standard, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection. For the required connection to be found in such cases the triggering event would have to be of a larger dimension than an ordinary criminal offence and amount to the negation of the very foundations of the Convention. Serious crimes under international law, such as war crimes, genocide or crimes against humanity would fall into that category. However, this so-called "Convention values" clause could not be applied to events which occurred prior to the adoption of the Convention on 4 November 1950, for it was only then that the Convention had begun its existence as an international human-rights treaty. A Contracting Party could not be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention. In this connection, there was a fundamental difference between a State having the possibility to prosecute for a serious crime under international law where circumstances allowed, and it being obliged to do so by the Convention. The events that might have triggered the obligation to investigate under Article 2 had taken place in early 1940, more than ten years before the Convention came into existence. Accordingly, there were no elements capable of providing a bridge from the distant past into the recent post-entry-into-force period and the Court had no competence to examine the complaint under Article 2.

Conclusion: preliminary objection upheld (thirteen votes to four).

Article 3: In its case-law, the Court had accepted that the suffering of family members of a "disappeared person", who had gone through a long period of alternating hope and despair, might justify finding a violation of Article 3 on account of the particularly callous attitude of the authorities towards their requests for information. However, in the applicants' case, the Court's jurisdiction only extended to the period starting on 5 May 1998, the date of entry into force of the Convention in respect of Russia. By then, no lingering uncertainty as to the fate of the Polish prisoners of war remained. Even though not all of the bodies had been recovered, their deaths had been publicly acknowledged by the Soviet and Russian authorities and had become an established historical fact. It necessarily followed that what could initially have been a "disappearance" case had to be considered a "confirmed death" case. Since none of the special circumstances of the kind which had prompted the Court to find a separate violation of Article 3 in "confirmed death" cases (for example, being a direct witness of the victim's suffering), were present in the applicants' case, their suffering had not reached a dimension and character distinct from the emotional distress inevitably caused to relatives of victims of a serious human-rights violation.

Conclusion: no violation (twelve votes to five).

Article 38: The Government had not complied with the Court's request to provide it with a copy of the decision of September 2004 to discontinue the Katyń investigation, on the grounds that the decision had been lawfully classified top-secret at domestic level and that the Government were precluded from communicating classified material

to international organisations in the absence of guarantees as to its confidentiality.

The Court reiterated that, even where national security was at stake, the concepts of lawfulness and the rule of law in a democratic society required that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence, otherwise the State authorities would be able to encroach arbitrarily on rights protected by the Convention.

In the instant case, the national courts had not subjected to any meaningful scrutiny the executive's assertion that information contained in the decision to discontinue the investigation should be kept secret more than seventy years after the events. They had confined the scope of their inquiry to ascertaining that the classification decision had been issued within the administrative competence of the relevant authorities, without carrying out an independent review of whether the conclusion that its declassification constituted a danger to national security had a reasonable basis in fact. They had not addressed in substance the argument that, since it brought to an end the investigation into one of the most serious violations of human rights committed on orders from the highest level, the decision was not in fact amenable to classification under the domestic law. Nor had they performed a balancing exercise between, on the one hand, the alleged need to protect the information and, on the other, the public interest in a transparent investigation and the private interest of the victims' relatives in uncovering the circumstances of their death. Given the restricted scope of the domestic judicial review of the classification decision, the Court was unable to accept that the submission of a copy of the 2004 decision to discontinue the investigation could have affected Russia's national security.

The Court also emphasised that legitimate national security concerns could be accommodated in proceedings before it by means of appropriate procedural arrangements, including restricted access to the document in question under Rule 33 of the Rules of Court and, *in extremis*, the holding of a hearing behind closed doors. However, the Government had not requested the application of such measures.

Conclusion: failure to comply with Article 38 (unanimously).

Article 41: Claims in respect of damage dismissed as a failure to comply with Article 38 of the Convention was a procedural matter which did not call for an award of just satisfaction.

(See Šilih *v. Slovenia* [GC], 71463/01, 9 April 2009, Information Note 118)

Positive obligations
Expulsion

Failure by Russian authorities to protect Tajik national in their custody from forced repatriation to Tajikistan despite risk of proscribed treatment: *violation*

Nizomkhon Dzhurayev v. Russia - 31890/11
Judgment 3.10.2013 [Section I]

Facts – The applicant was a Tajik national and prominent businessman. In 2007 he fled Tajikistan fearing for his life. He eventually arrived in Russia, where his partner lived, in August 2010. Two weeks later he was arrested and detained by the Russian authorities pursuant to an international warrant issued by the Tajik authorities, who sought his extradition on criminal charges. The extradition request was granted in February 2011 and upheld by the Russian courts, but was not executed as in the meantime the European Court had issued an interim measure under Rule 39 of its Rules directing that he should not be returned to Tajikistan. In January 2012 the Registrar of the Court wrote to the Russian Government to express his profound concern at repeated allegations that applicants had been secretly transferred from Russia to Tajikistan in breach of interim measures and inviting the Government to provide the Court with exhaustive information about any follow-up to these incidents.

On 29 March 2012 the applicant was released from the remand centre where he was being held. Neither his lawyer nor his next-of-kin were notified by the authorities of the decision to release him, although the lawyer said she was alerted to the applicant's imminent departure by a phone call from one of his cellmates. However, by the time she reached the remand centre the applicant had disappeared without trace. On 7 April 2012 Tajik State television broadcast a video of the applicant reading out a statement saying that immediately after his release from the remand centre he had decided to return to Tajikistan, as he was feeling guilty and was worried about his children and elderly mother. In the statement, he said he had borrowed the equivalent of EUR 370 from compatriots

at a local market and travelled overland to Tajikistan, before turning himself in.

Law – Article 3: It was beyond reasonable doubt that the applicant had been secretly and unlawfully transferred from Russia to Tajikistan by unknown persons in the wake of his release from detention in Russia on 29 March 2012. His forcible return to Tajikistan had exposed him to a real risk of treatment contrary to Article 3.

As to regards the responsibility for his transfer, irrespective of whether and by what means Russian State agents had been involved in the impugned operation, the respondent State was responsible for a breach of its positive obligations under Article 3.

It was indisputable that the Russian authorities had failed to protect the applicant against the real and immediate risk of forcible transfer to Tajikistan and ill-treatment in that country. It was beyond doubt that they were or should have been aware of such a risk when they decided to release him. The applicant's background, the Tajik authorities' behaviour in his case, and not least the recurrent similar incidents of unlawful transfers from Russia to Tajikistan to which the Russian authorities had been insistently alerted by both the Court and the Council of Europe's Committee of Ministers were worrying enough to trigger the authorities' special vigilance and require appropriate measures of protection corresponding to that special situation. The authorities had nonetheless failed to take any measure to protect the applicant at the critical moment of his unexpected release. Even more striking was their deliberate failure to inform the applicant's representative of the planned release in due time, so depriving the applicant of any chance of being protected by his representative or next-of-kin. Nor had the competent authorities taken any measures to protect the applicant after receiving insistent official requests from the applicant's representatives immediately after his disappearance. As a result, the applicant had been withdrawn from Russian jurisdiction and the Tajik authorities' aim of having him extradited to Tajikistan had been achieved in a manifestly unlawful manner.

The Russian authorities had also failed to conduct an effective investigation into the applicant's disappearance and unlawful transfer. They had repeatedly refused to open a criminal investigation into the case for absence of *corpus delicti* and the only investigative measure the Court had been informed of was a request, sent nine months after the impugned events, to check the information about the illegal crossing of the Russian State border. Indeed, the authorities had given every appearance of wanting to withhold valuable evidence.

The Russian Federation had thus breached its positive obligations to protect the applicant against a real and immediate risk of torture and ill-treatment in Tajikistan and to conduct an effective domestic investigation into his unlawful and forcible transfer to that country. In the Court's view, Russia's compliance with those obligations had been of particular importance in the applicant's case, as it would have disproved an egregious situation that tended to reveal a practice of deliberate circumvention of the domestic extradition procedure and the interim measures issued by the Court. The continuation of such incidents in the respondent State constituted a flagrant disregard for the rule of law and entailed the most serious implications for the Russian domestic legal order, the effectiveness of the Convention system and the authority of the Court.

Conclusion: violation (unanimously).

(See *Iskandarov v. Russia*, 17185/05, 23 September 2010, Information Note 133; *Abdulkhakov v. Russia*, 14743/11, 2 October 2012, Information Note 156; and *Savriddin Dzhurayev v. Russia*, 71386/10, 25 April 2013, Information Note 162)

Article 34: On 26 May 2011 the Court had asked the respondent Government not to extradite the applicant to Tajikistan until further notice. Notwithstanding that request, the applicant was forcibly repatriated to Tajikistan at some point between 29 March and 7 April 2012.

The Court had already found the Russian authorities responsible for failing to protect the applicant against his exposure to a real and immediate risk of torture and ill-treatment in Tajikistan, which had made possible his forced repatriation. Accordingly, responsibility for the breach of the interim measure also lay with the Russian authorities.

Conclusion: failure to comply with Article 34 (unanimously).

Article 38: The applicant's case involved controversial factual questions which could only be elucidated through the genuine cooperation of the respondent Government in line with Article 38 of the Convention. The Court had put a number of detailed factual questions and requested the relevant domestic documents, but the Government had submitted only cursory answers referring to pending inquiries and containing virtually no element of substance. They had also failed, without giving any reasons, to provide the Court with any of the domestic decisions refusing to open a criminal

investigation or quashing such decisions by a higher authority.

The Government's failure to cooperate, viewed in the context of their evasive answers to specific factual questions and coupled with severe investigative shortcomings at the domestic level, highlighted the authorities' unwillingness to uncover the truth regarding the circumstances of the case.

Conclusion: failure to comply with Article 38 (unanimously).

The Court also found, unanimously, a violation of Article 5 § 4 of the Convention on account of delays in hearing an appeal by the applicant against detention.

Article 41: EUR 30,000 in respect of non-pecuniary damage to be held in trust by the applicant's representatives.

Degrading treatment

Heavy-handed nature of police operation to arrest politician at his home in the presence of his wife and minor children: *violation*

Gutsanovi v. Bulgaria - 34529/10
Judgment 15.10.2013 [Section IV]

Facts – The applicants are Mr Gutsanov, a well-known local politician, his wife and their two minor daughters. The authorities suspected Mr Gutsanov of involvement in corruption and ordered his arrest and a search of his home. On 31 March 2010 at 6.30 a.m. a special team made up of several armed and masked police officers went to the applicants' home. When Mr Gutsanov did not respond to the order to open the door, the police officers forced in the front door of the house and entered the premises. Mr Gutsanov's wife and their two young children were awoken by the arrival of the police. The first applicant was taken into a separate room. The house was searched and a number of items of evidence were taken away following the operation. When Mr Gutsanov left his home under police escort at around 1 p.m., journalists and television crews had already gathered outside. A press conference was held. The following day a regional daily newspaper published the comments made by the public prosecutor, together with extracts from an interview with the Interior Minister concerning the case. On the same day the prosecutor charged Mr Gutsanov with several criminal offences including involvement, in his capacity as a public servant, in a criminal group whose activities entailed the award of contracts potentially damaging to the municipality, and abuse of office by a public servant. The prosecutor ordered the first applicant's detention for seventy-two hours in order to ensure his attendance in court. On 3 April 2010 Mr Gutsanov appeared in court and was taken into pre-trial detention at the close of the hearing. On 25 May 2010 the court of appeal made him the subject of a compulsory residence order. On 26 July 2010 the first-instance court released him on bail. In April 2013 the criminal proceedings against him were still pending at the preliminary investigation stage.

Law – Article 3: The aims of the police operation had been an arrest, a search and a seizure of items, and had been apt to promote the public interest in the prosecution of criminal offences. Although the four members of the family had not suffered any physical injuries in the course of the police operation, the latter had nonetheless entailed a degree of physical force. The front door of the house had been forced open by a special intervention unit, and Mr Gutsanov had been immobilised by armed officers wearing masks, led downstairs by force and handcuffed. Mr Gutsanov was a well-known politician who had been chairman of Varna municipal council. There had been no evidence to suggest that he had a history of violence and that he might have presented a danger to the police officers. The presence of a weapon in the applicants' home could not in itself justify the deployment of a special intervention unit or the type of force that had been used. The possible presence of family members at the scene of an arrest was a factor to be taken into consideration in planning and carrying out this kind of operation. The lack of prior judicial review of the necessity and lawfulness of the search had left the planning of the operation entirely at the discretion of the police and the criminal investigation bodies and had not enabled the rights and legitimate interests of Mrs Gutsanova and her two minor daughters to be taken into consideration. The law-enforcement agencies had not contemplated any alternative means of conducting the operation at the applicants' home, such as staging the operation at a later hour or even deploying a different type of officer in the operation. Consideration of the legitimate interests of Mrs Gutsanova and her daughters had been especially necessary since the former had not been under suspicion of involvement in the criminal offences of which her husband was suspected, and her two daughters had been psychologically vulnerable because they were so young (five and seven years of age). Mrs Gutsanova and her daughters had been very severely affected by the events.

The fact that the police operation took place in the early morning and involved special agents wearing masks had served to heighten the feelings of fear and anxiety experienced by these three applicants, to the extent that the treatment to which they had been subjected exceeded the threshold of severity required for Article 3 to apply. They had therefore been subjected to degrading treatment. The police operation had been planned and carried out without consideration for a number of factors such as the nature of the criminal offences of which Mr Gutsanov was suspected, the fact that he had no history of violence and the possible presence of his wife and daughters in the house. All these elements indicated clearly that the means used to arrest Mr Gutsanov at his home had been excessive. The manner in which his arrest had taken place had aroused strong feelings of fear, anxiety and powerlessness in Mr Gutsanov, liable to humiliate and debase him in his own eyes and in the eyes of his family. Accordingly, he too had been subjected to degrading treatment.

Conclusion: violation (unanimously).

Article 5 § 3

(a) *Appearance before a judge* – Mr Gutsanov had been arrested on 31 March 2010 at 6.30 a.m. and had appeared before a judge three days, five hours and thirty minutes later. He had been a suspect in a case concerning misappropriation of public funds and abuse of office, but had not been suspected of involvement in violent criminal activities. He had been subjected to degrading treatment during the police operation leading to his arrest. Following those events, and notwithstanding the fact that he was an adult and had been assisted by a lawyer from the beginning of his detention, Mr Gutsanov had been psychologically vulnerable in the early days following his arrest. Furthermore, the fact that he was a well-known politician, and the media interest in his arrest, had undoubtedly added to the psychological pressure on him during the early part of his detention. During his first day in detention Mr Gutsanov had taken part in several investigative measures. However, the regional public prosecutor's office had not requested his placement in pre-trial detention until the last day of the four-day period of custody permitted under domestic law in the absence of judicial authorisation, although the applicant had not participated in any investigative measure for two days. He had been detained in the city where the court empowered to rule on his pre-trial detention was located, and no exceptional security measures had been required in his case. In sum, in view of the applicant's psychological vulnerability in the early days after his arrest, and the absence of any circumstances justifying the decision not to bring him before a judge on the second or third day of his detention, the State had failed in its obligation to bring the applicant "promptly" before a judge or other officer empowered to review the lawfulness of his detention.

Conclusion: violation (six votes to one).

(b) *Length of detention* – Mr Gutsanov had been deprived of his liberty for four months, of which two months had been spent under a compulsory residence order. Even at the time of his early applications for release the domestic courts had ruled out any risk that he might abscond. They had nevertheless ordered his continued detention on the grounds that he might commit further offences, in particular by tampering with the evidence. The court of appeal, in its ruling of 25 May 2010, had taken the view that the latter risk had also ceased to exist in view of the applicant's resignation from his position as chair of the municipal council. A compulsory residence order had nevertheless been made in respect of Mr Gutsanov, without the court of appeal giving any specific reason justifying the measure, which had remained in place for a further two months. Accordingly, the authorities had failed in their obligation to give reasons justifying the applicant's continued detention after 25 May 2010.

Conclusion: violation (unanimously).

Article 5 § 5: The action for damages provided for by the State Liability Act could not be regarded as an effective domestic remedy. No other provision existed in domestic law by which to obtain compensation for damage sustained on account of the excessive length of detention or of a delay in being brought before a judge.

Conclusion: violation (unanimously).

Article 6 § 2: The comments made by the Interior Minister the day after Mr Gutsanov's arrest, and published in a newspaper at a time when the case was the focus of intense public interest, had gone beyond the mere conveying of information. The Minister's comments had been liable to give the public the impression that Mr Gutsanov was one of the "brains" behind a criminal group which had misappropriated large sums of public money. They had therefore infringed the applicant's right to be presumed innocent. As to the reasons given for the decision ordering Mr Gutsanov's continued detention, the judge had stated that the court "remains of the view that a criminal offence was committed and that the accused was involved". This phrase

amounted to a declaration of guilt before any decision had been given on the merits, and had also breached the applicant's right to be presumed innocent.

Conclusion: violation (unanimously).

Article 8: The search had been carried out without prior authorisation by a judge. The report drawn up following the search had been submitted to a judge of the first-instance court, who had given his formal approval but had given no reasons. The Court did not consider this sufficient to demonstrate that the judge had conducted an effective review of the lawfulness and necessity of the search. That review had been especially necessary since at no point prior to that had it been specified which documents and items connected to the criminal investigation the investigators had been expecting to find and seize at the applicants' home. The general nature of the search in question was confirmed by the large number and variety of items and documents seized and by the absence of any apparent link between some of these items and the criminal offences under investigation. Furthermore, as the criminal investigation had been started five months previously, the investigators could have applied for a court order before carrying out the search. In the absence of prior authorisation by a judge and of retrospective review of the measure in question, the procedure had not been attended by sufficient safeguards to prevent the risk of an abuse of power by the criminal-investigation authorities. The applicants had been effectively deprived of the requisite protection against arbitrariness. The interference with their right to respect for their home had therefore not been "in accordance with the law".

Conclusion: violation (unanimously).

Article 13 in conjunction with Articles 3 and 8: Neither a criminal complaint nor an action for damages against the State would have constituted an adequate domestic remedy. The fact of inflicting psychological suffering did not constitute a criminal offence in domestic law, with the result that a possible criminal complaint by the applicants would have been bound to fail. The applicants had not had available to them any domestic remedy by which to assert their right not to be subjected to inhuman or degrading treatment or their right to respect for their home.

Conclusion: violation (unanimously).

Article 41: EUR 40,000 jointly in respect of non-pecuniary damage.

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Postponement of date of applicant's release following change in case-law after she was sentenced: *violation*

Del Río Prada v. Spain - 42750/09
Judgment 21.10.2013 [GC]

(See Article 7 below, page 23)

Article 5 § 1 (e)

Persons of unsound mind

Order for psychiatric confinement made as a result of finding of unfitness to plead: *inadmissible*

Juncal v. the United Kingdom - 32357/09
Decision 17.9.2013 [Section IV]

Facts – In December 1997 the applicant was brought before the Crown Court on a charge of unlawful wounding. He claimed he had been acting in self-defence. However, after hearing psychiatric evidence that had been adduced at the defence's initiative, the jury found that he was unfit to plead. There was no investigation of the facts upon which the criminal charge was based. Once the jury had made its finding, the Crown Court was obliged by the Mental Health (Northern Ireland) Order 1986 to order the applicant's admission to hospital and to make a restriction order preventing him from taking unsupervised leave from the hospital without authorisation from the Secretary of State.

Law – Article 5 § 1: The applicant did not deny that he had at all relevant times been a person of "unsound mind" and that his mental disorder had been such as to warrant compulsory confinement. His complaint instead focused on the procedure whereby the hospital order was made. In particular, he complained that there had been no investigation into the facts upon which the criminal charge was based and that the fitness-to-plead procedure did not require consideration to be given to whether the nature of his mental disorder warranted compulsory confinement.

As to the first point, the Court observed that, once the jury had found the applicant unfit to plead, the material ground of detention moved from that provided for in subparagraphs (a) or (c) of Article 5 § 1 to that provided for by sub-paragraph (e). The question whether or not he had performed the *actus reus* of the offence was of only peripheral relevance to the issues to be considered in connection with detention under Article 5 § 1 (e). Accordingly, the failure to determine whether the applicant had committed the acts charged had not given rise to any arbitrariness.

As to the second point, the Court observed that the test for determining whether a person was unfit to plead under domestic law – which involved an enquiry into his or her capacity to instruct legal representatives, understand the trial and participate effectively in it – was different from the requirement under Article 5 § 1 (e) to determine whether the person concerned is suffering from a mental disorder of a nature or degree requiring compulsory confinement. Despite that difference, under the applicable domestic law the judge was obliged to make an order for compulsory confinement once the jury had found the applicant unfit to plead. To that extent, there could therefore be said to have been a theoretical shortcoming in the text of the domestic legislation.

Nevertheless, the Court had to base itself on the facts of the individual case. In order to determine whether the applicant was unfit to plead and whether a hospital and restriction order should be made, the Crown Court had heard evidence from two psychiatrists both of whom considered that he was suffering from psychotic mental illness. The psychiatrist called by the defence had found that the seriously damaging and dangerous nature of the applicant's behaviour meant that he required psychiatric treatment in the specialist setting of a maximum- security unit, while the psychiatrist appointed by the prosecution had found that the combination of his personality problems and psychotic mental illness made him potentially very dangerous. The uncontested evidence before the Crown Court therefore supported the view that the *Winterwerp* criteria were satisfied in the circumstances of the applicant's case and the applicant had never challenged this assessment of him by the domestic authorities. In these circumstances, the hospital order had not failed to comply with the requirements of Article 5 § 1.

The applicant's final complaint under Article 5 § 1, which related to the making of a restriction order (meaning that Secretary of State authorisation was required before he could take unsupervised leave from hospital) was also ill-founded as, while the restriction order altered some of the legal conditions of the applicant's detention regime, it did not change the character of his deprivation of liberty as a mental patient and Article 5 § 1 (e) was not in principle concerned with conditions of detention.

Conclusion: inadmissible (manifestly ill-founded).

Article 5 § 4: The applicant further complained that he had been unable to challenge the legality of his continuing detention by reference to the facts charged against him in the criminal indictment. The Court noted, however, that the *Winterwerp* criteria for "lawful detention" under sub-paragraph (e) of Article 5 § 1 entailed that the review of lawfulness guaranteed by Article 5 § 4 in relation to the continuing detention of a mental-health patient should be made by reference to the patient's contemporaneous state of health, including his or her dangerousness, as evidenced by up-to-date medical assessments, not by reference to past events at the origin of the initial decision to detain.

The applicant had a right to apply to the Mental Health Review Tribunal at regular intervals and in default the Secretary of State was obliged to refer his case to the Tribunal at least once every two years. The Tribunal was empowered to examine whether the *Winterwerp* criteria continued to apply: namely, whether the applicant continued to suffer from a mental disorder of a kind or degree warranting compulsory confinement. Since the applicant's detention fell under the exception to the right to liberty set out in Article 5 § 1 (e), the scope of this review was sufficient for compliance with Article 5 § 4.

Conclusion: inadmissible (manifestly ill-founded).

(See also *Stanev v. Bulgaria* [GC], 36760/06, 17 January 2012, Information Note 148; and *Winterwerp v. the Netherlands*, 6301/73, 24 October 1979)

Article 5 § 3

Brought promptly before judge or other officer

Duration of police custody (3 days 5 hours and 30 minutes): *violation*

Gutsanovi v. Bulgaria - 34529/10
Judgment 15.10.2013 [Section IV]

(See Article 3 above, page 15)

Article 5 § 4

Speediness of review

Speediness of application for bail by person detained pending deportation: *Article 5 § 4 not applicable; inadmissible*

Ismail v. the United Kingdom - 48078/09
Decision 17.9.2013 [Section IV]

Facts – In November 2006 the applicant was detained under powers contained in the Immigration Act 1971 on the basis that he was subject to a decision to make a deportation order. In March 2007 he made an application for bail, which was refused on the grounds there was a risk of his absconding. A deportation order was subsequently issued, whereupon the applicant made a fresh application for bail and requested a bail hearing within three working days. When this did not happen he sought judicial review, arguing that the failure to list his bail application within the three-day period set out in the relevant domestic rules was a violation of his rights under Article 5 § 4 of the Convention. However, he was refused permission to bring judicial-review proceedings, *inter alia*, on the grounds that Article 5 § 4 was not applicable because an application for bail did not determine the lawfulness of detention.

Law – Article 5 § 4: The applicant was detained from November 2006 to July 2007, initially on the basis that he was subject to a decision to make a deportation order, and then on the basis that he was subject to a deportation order. He did not seek to challenge the lawfulness of his detention, including whether it was compatible with the requirements of Article 5 § 1 (f); had he chosen to do so, he could have issued a writ of habeas corpus or made an application for judicial review. Instead, he chose to apply for bail, on the grounds that, notwithstanding that his detention was lawful, less coercive means, such as release subject to reporting requirements or other conditions, would also have ensured that he would be available at such time as the deportation were scheduled to go ahead. Accordingly, since the lawfulness of the detention under Article 5 § 1 (f) was not in issue, Article 5 § 4 was not engaged.

Conclusion: inadmissible (incompatible *ratione materiae*).

(See *Garcia Alva v. Germany*, 23541/94, 13 February 2001, Information Note 27; and *Allen v. the United Kingdom*, 18837/06, 30 March 2010, Information Note 128)

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations

Proceedings challenging a burgomaster's decision to close a "coffee shop" for failure to comply with conditions attached to tolerance of sale of soft drugs: *Article 6 § 1 not applicable*

De Bruin v. the Netherlands - 9765/09
Decision 17.9.2013 [Section III]

Facts – In October 1999 the applicant became the landlord of a coffee shop in The Hague. The former owner had received a written communication, known as a "toleration decision", from the Burgomaster stating that the shop would be designated as an existing retail outlet for soft drugs. This meant that no administrative action would be taken against the sale of soft drugs in the shop provided certain conditions were met. In July 2001, following repeated warnings, the Burgomaster informed the applicant that the shop would be closed for a period of nine months owing to breaches of the conditions set out in the "toleration decision". The applicant challenged that decision in the domestic courts, but to no avail.

Before the European Court, the applicant complained, *inter alia*, of various violations of Article 6 § 1 of the Convention in the domestic proceedings.

Law – Article 6 § 1 (*applicability*): Save in so far as substantive provisions of the Convention may require the active prosecution of individuals reasonably suspected of being responsible for serious violations thereof, decisions whether or not to prosecute were not within the Court's remit. While public authority may have tolerated transgressions of the prohibition on the retail of soft drugs to a certain extent, or subject to certain conditions, it could not follow that a "right" to commit acts prohibited by law could arise from the absence of sanctions, not even if public authority renounced the right to prosecute. Such renunciation, even if delivered in writing to a particular individual, was not to be equated with a licence granted in accordance with the law. Accordingly, the "dispute" in the applicant's case, though undoubtedly genuine and serious, was not about a "right" which could be said, at least on arguable grounds, to be recognised under domestic law.

Conclusion: inadmissible (incompatible *ratione materiae*).

Access to court

Mandatory 10% fine for unsuccessful challenge to forced sale at public auction: *violation*

Sace Elektrik Ticaret ve Sanayi A.Ş. v. Turkey - 20577/05
Judgment 22.10.2013 [Section II]

Facts – Section 134(2) of the Enforcement and Bankruptcy Act (Law no. 2004) provided for the imposition of a fine amounting to 10% of the value of the successful bid when a debtor made an unsuccessful attempt to obtain the annulment of a public auction.

The applicant company was fined the equivalent of EUR 140,000 after unsuccessfully applying for a court order annulling the enforced auction of its land. Although the domestic courts found in the course of the proceedings that the successful bid had not reached the statutory minimum, as it did not include the costs and expenses of the sale, they ultimately decided not to set aside the auction after the claim for costs and expenses was waived.

Before the European Court, the applicant company complained that the heavy fine it had been ordered to pay constituted a breach of its right of access to a court.

Law – Article 6 § 1: Although the imposition of a fine in order to prevent a build-up of cases before the domestic courts and to ensure the administration of justice was not, as such, incompatible with the right of access to a court, the amount of the fine was a material factor in determining whether or not the right was effective.

Even where, as here, the applicant had had access to all stages of the proceedings the imposition of a considerable financial burden after the conclusion of the proceedings could act as a restriction on the right to a court and would only be compatible with Article 6 § 1 if it pursued a legitimate aim and was proportionate. The fine imposed pursuant to section 134 of Law no. 2004 pursued the legitimate aims of ensuring the proper administration of justice and protecting the rights of others. However, it could not be considered proportionate. The proceedings initiated by the applicant company had not been frivolous as they had revealed a shortcoming in the auction proceedings, even if it had later been remedied. Importantly, the financial burden imposed on the applicant company was particularly significant (EUR 140,000) and the imposition of a fine had been mandatory without any discretion being left to the domestic courts. In these circumstances, the restriction on the applicant company's right of access to a court could not be considered proportionate to the legitimate aims pursued.

Conclusion: violation (unanimously).

Article 41: Finding of a violation sufficient just satisfaction in respect of any non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Article 6 § 1 (criminal)

Fair hearing

Refusal to call defence witnesses to clarify an uncertain situation which constituted basis of charges: *violation*

Kasparov and Others v. Russia - 21613/07
Judgment 3.10.2013 [Section I]

(See Article 11 below, page 32)

Different decisions, without sufficient reasons, by two different courts as to admissibility of same piece of evidence: *violation*

S.C. IMH Suceava S.R.L. v. Romania - 24935/04
Judgment 29.10.2013 [Section III]

Facts – The applicant, a commercial company, was the subject of a criminal complaint alleging that it had sold diesel fuel mixed with water. Two fuel samples were taken. The authority responsible for producing the expert report and the second opinion concluded that the fuel under examination did not correspond to any type of diesel conforming to the applicable standards. However, the reports noted that the manner in which the samples had been sealed meant that the containers of diesel fuel could be removed from their plastic bag without the seals being damaged. The applicant company was found by two separate authorities to have committed a minor offence. Relying mainly on the fact that the fuel samples had not been taken correctly, the applicant company applied to have the two penalties set aside. The domestic courts examining the applicant company's complaint concerning the first notice of a minor offence held that they could not admit the expert reports in evidence because of the defective manner in which the samples had been taken. Accordingly, they held that the offence of which the applicant company was accused could

not be made out and it could therefore not be held liable. In examining the complaint concerning the second notice of a minor offence, issued by the Economic Crimes Department, the same domestic courts, constituted differently, held that the expert report was reliable evidence of the offence of which the applicant company was accused.

Before the European Court, the applicant company complained that the national courts had attached different evidential value to the same expert reports produced in two separate sets of proceedings.

Law – Article 6 § 1: The main item of supporting evidence in the two sets of proceedings had been the expert reports and second opinions produced on the basis of samples found by the experts to have been stored in a defective manner. While reiterating that the admissibility of evidence was primarily a matter for regulation by national law and the national courts, the Court noted that in the present case the validity and reliability of the same item of evidence had been assessed differently by the domestic courts. This contradictory assessment had led to different legal conclusions as to the establishment of the facts, and more specifically the question of the applicant company's possession of non-standard diesel fuel. Since this was the decisive piece of evidence for establishing the facts, an issue arose in terms of the fairness of the proceedings. Admittedly, in imposing the second penalty on the applicant company, the Economic Crimes Department had relied on other written documents besides the expert reports. Nevertheless, the domestic courts that had examined the applicant company's complaint against the penalty had made no mention of those documents in their decisions. The applicant company had informed the courts dealing with the second set of proceedings of the existence of the previous judgment in which the validity of the evidence had been assessed differently. Although the court had referred to that judgment, it had not provided sufficient reasons for choosing to adopt a contrary position concerning the validity of the same item of evidence. Bearing in mind the decisive role of the evidence in question, a specific and express reply to that argument had been required from the courts. In the absence of such a reply, it was impossible to ascertain whether the courts had simply neglected to deal with the argument or if they had intended to dismiss it and, if so, for what reasons.

Conclusion: violation (six votes to one).

Article 41: No claim made in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Article 6 § 2

Presumption of innocence

Public accusation of murder made by chairman of independent political party in immediate aftermath of shooting: *inadmissible*

Mulosmani v. Albania - 29864/03
Judgment 8.10.2013 [Section IV]

Facts – In September 1998 a Member of Parliament and his bodyguards were shot and fatally wounded as they came out of the Democratic Party headquarters in Tirana. Immediately afterwards, the Party Chairman, a well-known public figure, went on air accusing the applicant, a police officer, of the crime. It appears that an official Democratic Party press statement was issued later the same day also identifying the applicant as the killer. Over a year later, in December 1999, a district court ordered the applicant's arrest at the request of the prosecutor investigating the case. Both the district court and the prosecutor expressly noted that the Democratic Party Chairman had mentioned the applicant's name as being the perpetrator of the crime. The applicant was arrested in May 2001. At his trial he was found guilty of murder and sentenced to life imprisonment.

Before the European Court, the applicant complained, *inter alia*, that the Democratic Party Chairman's comments in September 1998 had deprived him of the benefit of the presumption of innocence, in breach of Article 6 § 2 of the Convention.

Law – Article 6 § 2: The Court reiterated that the presumption of innocence enshrined in Article 6 § 2 is violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law.

In the instant case, however, the Democratic Party Chairman could not be regarded as having acted as a public official within the meaning of Article 6 § 2. He had not been involved in the criminal investigation into the murder as a police officer, investigator or a prosecutor. He did not hold public office or exercise public authority and, in fact, no powers had been formally delegated to him by any State body. He had acted as a private individual, in his capacity as the chairman of a political party which was legally and financially independent from the State. His statement, which was made in a heated political climate, could be regarded as his party's condemnation of the MP's assassination. As

such, the mere fact that his actions might have been socially useful in calling for justice to be rendered did not transform him into a public official acting in the public interest.

Conclusion: inadmissible (manifestly ill-founded).

(See also, *mutatis mutandis*, *Kotov v. Russia* [GC], 54522/00, 3 April 2012, Information Note 151)

The Court also found that there had been no violation of Article 6 §§ 1 and 3 (a) to (d) of the Convention.

Article 6 § 3 (c)

Defence through legal assistance

Lack of legal representation at initial stage of investigation when applicant made a confession during interview as a witness: *no violation*

Bandaletov v. Ukraine - 23180/06
Judgment 31.10.2013 [Section V]

Facts – The applicant was summoned to a police station with several others for questioning as a witness in connection with an investigation into a double murder committed in his home. He confessed to the offence. The following day he was arrested as a suspect and a lawyer was appointed to assist him. The applicant at all times thereafter confirmed his confession. He was sentenced to life imprisonment. Before the European Court he complained that at the initial stage of the investigation he had not been assisted by a lawyer, and that the domestic courts had failed to mitigate his sentence even though he had voluntarily surrendered to the police and confessed to the crime.

Law – Article 6 §§ 1 and 3 c): There was no indication that the authorities had had any reason to suspect the applicant of involvement in the murder before his first communication with the police. There had been nothing in the statements taken by the police from various interviewees that day which could have cast suspicion on him. The applicant had volunteered the confession of his own free will while being questioned as a witness and it was only after his confession that the police had considered him a suspect. Furthermore, the applicant had been summoned to the police station with all the other witnesses and so had not been taken by surprise, but had had the opportunity to collect his thoughts and choose what stance to take during the questioning. It was true that the police could have immediately interrupted the applicant's interview after his confession and refrained from including those statements in the case file as the basis for starting the investigation against him. But that would have been exactly the opposite of what the applicant had wanted and of what the police could have held to be in his best interest, as a voluntary surrender to the police made before the beginning of the procedure could be considered a mitigating factor. The Court did not lose sight of the applicant's argument that his legal representation during the first questioning would have ensured the proper documenting of his surrender to the police and its further mitigating effect on his sentence. However, the applicant's voluntary surrender had consistently been referred to by him and his counsel at the trial, and the domestic courts had never expressed any doubts or criticism as to how that surrender had been documented. The fact that they had not considered it necessary to mitigate the applicant's sentence on that ground had no bearing on his complaint to the Court.

The applicant had failed to explain, both in the domestic proceedings and in those before the Court, what prejudice to the overall fairness of his trial had been caused by the alleged early restriction on his defence rights, other than the severity of his sentence. In the Court's opinion, any connection between the absence of legal representation at such an early stage of the investigation, when the applicant had not even been treated as a suspect, and the severity of his sentence was purely speculative. The domestic authorities had changed the applicant's status from witness to suspect and provided him with a lawyer as soon as they had plausible reasons to suspect him. At his first interview as a suspect the applicant was legally represented and no investigative measures were taken after his initial confession before he had been assigned a lawyer. The applicant had maintained his confession throughout the pre-trial investigation and judicial proceedings, during which he was represented by several different lawyers. His initial confession could hardly be regarded as having been used to convict him, as the trial court had relied exclusively on the investigative measures conducted afterwards, when the applicant already had legal assistance. Lastly, the applicant's request for mitigation of sentence on the ground of his voluntary surrender had been examined by the domestic courts. Accordingly, the criminal proceedings against the applicant had been fair overall.

Conclusion: no violation (unanimously).

(See also *Salduz v. Turkey* [GC], 36391/02, 27 November 2008, Information Note 113)

ARTICLE 7

Article 7 § 1

Nulla poena sine lege

Imposition of penalty in the form of confiscation order despite termination of criminal proceedings: *violation*

Varvara v. Italy - 17475/09
Judgment 29.10.2013 [Section II]

Facts – Criminal proceedings were instituted against the applicant for unlawful land development. Many years later, in 2006, a court of appeal discontinued the proceedings on the grounds that prosecution of the offence had become time-barred in 2002, but ordered the confiscation of the land and buildings concerned.

Law – Article 7: In the *Sud Fondi* case the Court had found that the enforcement of a confiscation order despite the applicant companies' acquittal had been arbitrary, devoid of any legal basis and in breach of Article 7 of the Convention. In the present case the proceedings against the applicant had been discontinued on the grounds that prosecution of the offence of unlawful land development had become time-barred; however, a criminal penalty had been imposed on him, namely the confiscation of the structures and land concerned by the unlawful development plan. It was unclear to the Court how the punishment of an accused person whose trial had not led to a conviction could be reconciled with Article 7 of the Convention, which set forth the principle of legality in criminal law. It was inconceivable for a system to allow the punishment of a person who had been found innocent, or in any case had not been found criminally liable in a verdict as to his guilt. The prohibition on imposing a penalty without a finding of liability was thus a further consequence of the principle of legality in criminal law, and likewise flowed from Article 7. This principle had already been established by the Court in relation to Article 6 § 2 of the Convention.[1] The Court had held that such a situation could not be compatible with the presumption of innocence and had found a violation of Article 6 § 2. A comparison of Article 5 § 1 (a) with Article 6 § 2 and Article 7 § 1 showed that for Convention purposes there could not be a "conviction" unless it had been established in accordance with the law that there had been an offence – either criminal or, as appropriate, disciplinary. The logic of the terms "penalty" and "punishment", and the concept of "guilty" (in the English version) and the corresponding notion of "*personne coupable*" (in the French version), supported an interpretation of Article 7 requiring a punishment to follow from a finding of liability by the domestic courts, on the basis of which the perpetrator of the offence could be identified and punished. In the absence of such a finding, the punishment would be devoid of purpose. It would be inconsistent to require an accessible and foreseeable legal basis, while at the same time allowing a punishment to be imposed, as in this instance, on a person who had not been convicted. In the present case the criminal penalty imposed on the applicant, despite the fact that prosecution of the offence in question had become time-barred and his liability had not been established in a verdict as to his guilt, was irreconcilable with the principle that only the law could define a crime and prescribe a penalty, an integral part of the principle of legality as enshrined in Article 7 of the Convention. Accordingly, the penalty in issue was not provided for by law for the purposes of Article 7 and was arbitrary.

Conclusion: violation (six votes to one).

The Court also held, unanimously, that there had been a violation of Article 1 of Protocol No. 1.

Article 41: EUR 10,000 in respect of non-pecuniary damage; question reserved in respect of pecuniary damage.

(See *Sud Fondi srl and Others v. Italy*, 75909/01, 20 January 2009, Information Note 115)

Nulla poena sine lege
Heavier penalty
Retroactivity

Postponement of date of applicant's release following change in case-law after she was sentenced: *violation*

Del Río Prada v. Spain - 42750/09
Judgment 21.10.2013 [GC]

Facts – Between 1988 and 2000, in eight sets of criminal proceedings, the applicant received a series of prison sentences amounting to more than 3,000 years in total for various offences linked to terrorist attacks. In November 2000, in view of the close legal and chronological connection between the offences, the *Audiencia Nacional* combined the

1. *Geerings v. the Netherlands*, 30810/03, 1 March 2007, Information Note 95.

applicant's sentences and fixed the total term to be served at thirty years, in accordance with the limit provided for in the 1973 Criminal Code, as in force at the relevant time. In April 2008 the authorities at the prison where the applicant was being held scheduled the date of her release for July 2008, after deducting remissions of sentence for the work she had done in prison since the start of her detention in 1987. Subsequently, in May 2008 the *Audiencia Nacional* asked the prison authorities to revise the applicant's planned release date and recalculate it on the basis of a new approach (known as the "Parot doctrine") adopted by the Supreme Court in a judgment of February 2006, according to which the relevant sentence adjustments and remissions were to be applied to each of the sentences individually and not to the maximum term of thirty years' imprisonment. As a result, the final date for the applicant's release was set at 27 June 2017. Her subsequent appeals were unsuccessful.

In a judgment delivered on 10 July 2012 (see Information Note 154) a Chamber of the Court held, unanimously, that there had been a violation of Articles 5 and 7 of the Convention, finding that the application of the new method for calculating remissions of sentence had not been foreseeable at the time of the applicant's conviction and had amounted to retroactive application, to her detriment, of a change that had taken place after the offences had been committed.

Law – Article 7: The parties' submissions mainly concerned the calculation of the total term to be served by the applicant in accordance both with the rules on combining sentences and setting a maximum term, and with the system of remissions of sentence for work done in detention as provided for in the 1973 Criminal Code.

(a) *Scope of the penalty imposed* – Under the 1973 Criminal Code, as applicable at the time when the offences had been committed, the maximum term of thirty years' imprisonment corresponded to the maximum term that could be served (*condena*) in the event of multiple related offences, as distinct from the concept of the "sentences" (*penas*) pronounced or imposed in the various judgments convicting the offender. Furthermore, for the purpose of discharging the "sentence imposed", prisoners were entitled to one day's remission for every two days' work done. However, there had been no specific rules on how to apply remissions of sentence when multiple sentences were combined and a maximum total term of imprisonment was set, as in the applicant's case, where sentences totalling three thousand years' imprisonment had been reduced to thirty years. It was not until the new 1995 Criminal Code had been drafted that the law had expressly stated, with regard to the application of sentence adjustments, that in exceptional cases the total duration of the sentences imposed could be taken into account, rather than the maximum term that could be served by law.

Having regard to the case-law and practice concerning the interpretation of the relevant provisions of the 1973 Criminal Code, prior to the Supreme Court's 2006 judgment, when a prisoner's sentences had been combined and a maximum total term set, the prison authorities and the courts had applied any remissions of sentence for work done in detention to the maximum term to be served. They had thus taken into account the maximum legal term of thirty years' imprisonment when applying remissions of sentence for work done in detention. In a judgment of March 1994 the Supreme Court had referred to the maximum legal term of thirty years' imprisonment as a "new, independent sentence" to which any adjustments provided for by law should be applied. Accordingly, despite the ambiguity of the relevant provisions of the 1973 Criminal Code and the fact that the Supreme Court had not set about clarifying them until 1994, it had clearly been the practice of the prison and judicial authorities to treat the term to be served (*condena*), as resulting from the thirty-year upper limit, as a new, independent sentence to which certain adjustments, such as remissions of sentence for work done in detention, were to be applied. In the light of that practice, while serving her prison sentence the applicant had been entitled to believe that the penalty imposed was the one resulting from the thirty-year maximum term, from which any remissions of sentence for work done in detention would be deducted. Moreover, remissions of sentence for work done in detention had been expressly provided for by statutory law, which required the term of imprisonment to be automatically reduced as a recompense for any work done in detention, except in two cases: when the prisoner escaped or attempted to escape, and when the prisoner misbehaved. Even in these two cases, remissions of sentence already allowed by a judge could not be taken away retroactively, as the days corresponding to the remissions of sentence already granted were deemed to have been served and formed part of the prisoner's legally acquired rights.

Although the 1995 Criminal Code had done away with remissions of sentence for work done in detention for people convicted in the future, its

transitional provisions allowed prisoners convicted under the old 1973 Criminal Code – like the applicant – to continue to enjoy the benefits of such arrangements if this was to their advantage. However, the law had introduced harsher conditions for granting release on licence, even for prisoners convicted before its entry into force. The Court inferred from this that in opting, as a transitional measure, to maintain the effects of the rules concerning remissions of sentence for work done in detention and for the purposes of determining the more lenient criminal law, the legislature had considered those rules to be part of substantive criminal law, that is to say of the provisions affecting the actual fixing of the sentence, and not just its execution.

In the light of the foregoing, at the time when the applicant had committed the offences for which she had been prosecuted and when the decision had been taken to combine the sentences and set a maximum prison term, the relevant law, taken as a whole, had been formulated with sufficient precision to enable the applicant to discern, to a degree that was reasonable in the circumstances, the scope of the penalty imposed on her, bearing in mind the maximum legal term of thirty years and the system of remissions of sentence for work done in detention as resulting from the 1973 Criminal Code. The penalty imposed on the applicant had thus amounted to a maximum of thirty years' imprisonment, it being understood that any remissions of sentence for work done in detention would be deducted from that term.

(b) *Whether the application of the "Parot doctrine" to the applicant had altered only the means of executing the penalty or its actual scope* – In May 2008 the *Audiencia Nacional* had rejected the proposal to set 2 July 2008 as the date for the applicant's final release, instead relying on the "Parot doctrine" established in the Supreme Court's judgment of February 2006 – well after the offences had been committed, the sentences combined and a maximum term of imprisonment fixed. It had taken the view that the new rule by which remissions of sentence for work done in detention were to be applied to each of the individual sentences – rather than to the thirty-year maximum term as previously – was more in conformity with the actual wording of the 1973 Criminal Code. The application of the "Parot doctrine" to the applicant's situation had rendered ineffective the remissions of sentence for work done in detention to which she had been entitled by law and in accordance with final decisions by judges responsible for the execution of sentences. As a result, the maximum term of thirty years' imprisonment had ceased to be an independent sentence to which remissions for work done in detention were to be applied, and instead had become a thirty-year prison sentence to which, in practice, no such remissions were applicable.

(c) *Whether the "Parot doctrine" had been reasonably foreseeable* – The change in the system for applying remissions of sentence had been the result of the Supreme Court's departure from previous case-law, as opposed to a change in legislation. In March 1994 the Supreme Court had taken the view that the maximum term of thirty years' imprisonment was a "new, independent sentence" to which all the remissions of sentence provided for by law were to be applied. In any event, it had been the practice of the prison and judicial authorities prior to the "Parot doctrine" to apply remissions of sentence for work done in detention to the maximum term of thirty years' imprisonment. The Supreme Court had not departed from its previous case-law until 2006, ten years after the law to which it referred had been repealed. It had thus produced a new interpretation of the provisions of a law that was no longer in force, namely the 1973 Criminal Code, which had been superseded by the 1995 Criminal Code. In addition, the transitional provisions of the 1995 Criminal Code had been intended to maintain the effects of the system of remissions of sentence for work done in detention set in place by the 1973 Criminal Code in respect of people convicted under that Code, precisely so as to comply with the rules prohibiting retroactive application of the more stringent criminal law. However, the Supreme Court's new interpretation, which had rendered ineffective any remissions of sentence already granted, meant in practice that the applicant and other people in similar situations were deprived of the benefits of the remission system.

Lastly, while the Court accepted that the Supreme Court had not retroactively applied the law amending the 1995 Criminal Code, it was nevertheless clear from the reasons given by the Supreme Court that it had pursued the same aim as the law in question, namely to guarantee the full and effective execution of the maximum legal term of imprisonment by those serving several long sentences. In this connection, while States were free to change their own criminal policy, for example by increasing the penalties applicable to criminal offences, in doing so they nevertheless had to comply with the requirements of Article 7 of the Convention, which unconditionally prohibited the retrospective application of the criminal law where this was to an accused's disadvantage.

In the light of the foregoing, at the times when the applicant had received her sentences and when she had been notified of the decision to combine them and set a maximum term of imprisonment, there had been no indication of any perceptible line of case-law development in keeping with the Supreme Court's 2006 judgment. The applicant had therefore had no reason to expect that the Supreme Court would depart from its previous case-law or that the *Audiencia Nacional*, as a result, would apply the remissions of sentence she had been granted not in relation to the maximum thirty-year term, but successively to each of the sentences she had received. This departure from the case-law had had the effect of modifying the scope of the penalty imposed, to the applicant's detriment.

Conclusion: violation (fifteen votes to two).

Article 5 § 1: The applicant had been convicted by a competent court in accordance with a procedure prescribed by law, and had received prison sentences totalling over 3,000 years. In most of the judgments concerned, as well as in its decision of November 2000 to combine the sentences and set a maximum total term, the *Audiencia Nacional* had indicated that the applicant was to serve a maximum term of thirty years' imprisonment in accordance with the 1973 Criminal Code. The applicant's detention had not yet attained that maximum term. There was clearly a causal link between the applicant's convictions and her continuing detention after 2 July 2008, which had resulted respectively from the guilty verdicts and the maximum thirty-year term of imprisonment.

In the light of the considerations that had led it to find a violation of Article 7 of the Convention, the Court considered that at the times when the applicant had been convicted, when she had worked while in detention and when she had been notified of the decision to combine the sentences and set a maximum term of imprisonment, she could not reasonably have foreseen that the method used to apply remissions of sentence for work done in detention would change as a result of a departure from case-law by the Supreme Court in 2006, and that the new approach would be applied to her. This had delayed the date of her release by almost nine years. She had therefore served a longer term of imprisonment than she should have served under the domestic legal system as it had stood at the time of her conviction, taking into account the remissions of sentence she had already been granted in conformity with the law. Accordingly, since 3 July 2008 the applicant's detention had not been "lawful".

Conclusion: violation (unanimously).

Article 46: In view of the particular circumstances of the case and the urgent need to put an end to the violations of the Convention found in the present case, it was incumbent on the respondent State to ensure that the applicant was released at the earliest possible date.

Article 41: EUR 30,000 in respect of non-pecuniary damage.

ARTICLE 8

Positive obligations
Respect for private life

Lack of clear legal guidelines regulating the prescription of drug to enable an individual not suffering from a terminal illness to commit suicide: *case referred to the Grand Chamber*

Gross v. Switzerland - 67810/10
Judgment 14.5.2013 [Section II]

The applicant has been wanting to end her life for many years. She has become increasingly frail with age and is unwilling to continue suffering the decline of her physical and mental faculties. She has been certified capable of forming her own judgment. Following a failed suicide attempt, she decided that she wanted to end her life by taking a lethal dose of sodium pentobarbital. However, the four doctors she consulted refused to issue her with the requested prescription. At least two of them refused to comply on the grounds that the Code of Professional Medical Conduct prevented them from issuing the prescription, or that they feared being drawn into lengthy judicial proceedings or exposing themselves to adverse consequences professionally. The administrative courts dismissed an appeal lodged by the applicant.

By a judgment of 14 May 2013 (see Information Note 163), a Chamber of the Court held that there had been a violation of the applicant's right to respect for her private life, guaranteed by Article 8 of the Convention, on account of the lack of clear and comprehensive statutory guidelines on whether an individual should be granted the ability to acquire a lethal dose of sodium pentobarbital, but did not, however, express a view on the content of such guidelines.

On 7 October 2013 the case was referred to the Grand Chamber at the Government's request.

Respect for private life
Respect for family life
Respect for home

Eviction of French travellers from private land where they had been living for many years: *violation*

Winterstein and Others v. France - 27013/07
Judgment 17.10.2013 [Section V]

Facts – The applicants had been living on the land in question for between five and thirty years, and some of them had been born there. The plots of land were located in an area that had been designated *ex post facto* as a "protected natural area" under the land-use plan, in a part where camping and caravanning were permitted provided that the site was suitably equipped and the persons concerned had the requisite authorisation. In 2004 the *tribunal de grande instance* ruled that the applicants' presence on the site was in breach of the land-use plan, and ordered them to vacate the land or face a fine for each day's delay. That judgment was upheld by the court of appeal in 2005. The judgment has not been enforced to date, but many of the applicants left the site rather than risk paying the daily fine, which continues to apply to those who remain. The authorities also decided to carry out an urban and social study, following which four families were rehoused in social housing. No satisfactory solution has been found in respect of the others.

Law – Article 8: The applicants, who had lived for many years in the same locality, had had sufficiently close and continuing links with the caravans, huts and bungalows located on the land for these to be considered as their homes, irrespective of whether their presence on the land was lawful under the domestic legislation. The present case also pertained to the applicants' right to respect for their private and family lives. Living in caravans was an integral part of travellers' identity, even when they no longer led a nomadic existence, and measures affecting the stationing of their caravans had an impact on their ability to maintain their identity and to lead their private and family lives in accordance with that tradition.

The requirement for the applicants to remove their caravans and vehicles, as well as any buildings, from the land or risk payment of a daily fine constituted interference with their right to respect for their private and family lives and their homes, notwithstanding the fact that the 2005 judgment had not been enforced to date. This was especially so since the case concerned decisions ordering the eviction of a community of almost a hundred people, with inevitable repercussions on their way of life and their social and family ties. The interference had been in accordance with the law, accessible and foreseeable, and had pursued the legitimate aim of protecting the "rights of others" in the form of protection of the environment.

It was not disputed that the applicants had been living on the land in question for many years or had been born there, and that the municipal authorities had tolerated their presence over a lengthy period before seeking to put an end to the situation in 2004. In ordering the applicants' eviction, the domestic courts had given overriding consideration to the fact that their presence on the land ran counter to the land-use plan, without in any way balancing this against the arguments advanced by the applicants. The authorities had not offered any explanation or argument as to the "necessity" of the eviction, although the land in question had already been classified as a protected natural area in the previous land-use plans, it was not communal land on which development was planned, and there were no third-party rights at stake. The applicants had therefore not had the benefit of a review of the proportionality of the interference in accordance with the requirements of Article 8 of the Convention.

In the particular circumstances of the case and bearing in mind the long-standing presence of the applicants, their families and the community they had formed, the principle of proportionality required that particular consideration be given to the consequences of their eviction and the risk that they would be made homeless. Numerous international and Council of Europe instruments stressed the need, in the event of forced eviction of Roma or travellers, to provide the persons concerned with alternative accommodation except in cases of *force majeure*, bearing in mind that they belonged to a vulnerable minority. This had been only partly achieved in the present case. While the consequences of eviction and the applicants' vulnerability had not been taken into consideration by the authorities before commencing the eviction proceedings, or by the courts in the course of those proceedings, an urban and social study had been undertaken following the judgment of the court of appeal in order to determine the situation of each family and assess the options for rehousing them. Some families who had opted for social housing had been rehoused in 2008, that is to say, four years after the eviction ruling. To that extent, the authorities had given sufficient consideration

to the needs of the families concerned. As to those applicants who had requested alternative accommodation on so-called family sites, that project had been abandoned by the municipal authorities, who had decided instead to designate the land in question as a site for itinerant travellers.

For their part, the applicants could not be said to have remained inactive. A number of them had applied for social housing under the Law on the justiciable right to housing, specifying that they wished to be housed on family sites. Their applications had been rejected by the Mediation Commission and by the administrative court; furthermore, those who had left the locality had attempted to find alternative accommodation which for the most part had proved precarious and unsatisfactory. Nor could they be criticised for not applying for or accepting social housing which, as the Court acknowledged, did not correspond to their way of life. Apart from the four families rehoused in social housing and two families who had moved to other parts of the country, the applicants were all in a highly precarious position. Accordingly, the authorities had not given sufficient consideration to the needs of those families who had applied to be rehoused on family sites.

The applicants had not had the benefit, in the context of the eviction proceedings, of a review of the proportionality of the interference in accordance with the requirements of Article 8. There had also been a violation of that Article in respect of those applicants who had applied to be rehoused on family sites, on account of the insufficient consideration of their needs.

Conclusion: violation (unanimously).

Article 41: question reserved.

(See *Yordanova and Others v. Bulgaria*, 25446/06, 24 April 2012, Information Note 151)

ARTICLE 10

Freedom of expression

Conviction for offering mark of respect to leader of terrorist organisation (without any propaganda or incitement to acts of violence or terror): *violation*

Yalçınkaya and Others v. Turkey - 25764/09 et al.
Judgment 1.10.2013 [Section II]

Facts – In July 2008 sixty-seven letters were sent to the State Prosecutor by various individuals. Some of these letters, which were signed by the nineteen applicants, ended with the following passage: "If addressing [someone] using the term "*sayın*"[1] is an offence, then I too say "*sayın*" Abdullah Öcalan, I commit this offence and I denounce myself." The applicants were charged with praising the leader of a terrorist organisation. Before the criminal court, they stated, in particular, that they did not support the PKK (the Kurdistan Workers' Party) or its activities, and that they had no connection with that organisation. They submitted that they had used the term "*sayın*" to refer to Abdullah Öcalan because he was a human being and they respected human beings. They added that if the fact of referring to Abdullah Öcalan in this way was an offence, then they accepted being judged and convicted for doing so. Finally, they submitted that they had no intention of praising a crime or a criminal, but that the use of the "*sayın*" to refer to Abdullah Öcalan was consonant with their freedom of thought. The applicants were sentenced to terms of imprisonment, commuted to a fine of about EUR 689 each.

Law – Article 10: The applicants' convictions were been based on Article 215 of the Criminal Code. In the letters sent to the State Prosecutor, the applicants had sought to criticise the fact that it was considered a criminal offence to use the term "*sayın*" when referring to Abdullah Öcalan. Thus, in the circumstances of the case, they were not uninformed of the impugned legislation, which criminalised praise of a crime or showing respect to a criminal on account of the crimes committed by him or her. They had been able to foresee, to a degree that was reasonable, that, given the content of their letters, criminal prosecution was likely. The interference in issue could therefore be considered as "prescribed by law" and pursued the legitimate aim of national security.

As to whether it had been "necessary in a democratic society", the applicants' conviction appeared to have been based solely on their use of the expression "*sayın* Abdullah Öcalan", which was interpreted by the courts as a mark of respect and a public defence of that individual and of the terrorist activities carried out by him. Nonetheless, the passage from the relevant letters, as cited in the impugned judgments, did not indicate that the

1. The Turkish Language Institute (Türk Dil Kurumu) defines the word "*sayın*" as follows: "1. Respected, chosen, dear. 2. Attribute placed before a person's name, in oral and written form, as a mark of respect".

applicants expressed any support whatsoever for the acts committed by Abdullah Öcalan or the PKK, or any approval of them. The criminal court had considered that the letters in question contained neither incitement to violence or terror nor propaganda for a terrorist organisation. In addition, it did not appear from the materials in the file that there existed a clear and imminent danger which would justify the disputed interference. It followed that the reasons given by the domestic courts in their decisions supporting the applicants' conviction could not in themselves be considered sufficient to justify the interference with the applicants' exercise of their right to freedom of expression. Consequently, the interference had not been "necessary in a democratic society".

Conclusion: violation (unanimously).

The Court also concluded, unanimously, that there had been a violation of Article 6 § 1 of the Convention.

Article 41: EUR 2,500 each in respect of non-pecuniary damage and EUR 640 each in respect of pecuniary damage.

Imposition of suspended prison sentence on television producer for divulging confidential information belonging to State broadcaster: *violation*

Ricci v. Italy - 30210/06
Judgment 8.10.2013 [Section II]

Facts – The applicant, as the producer and presenter of a satirical television programme, intercepted images of a row between a writer and a philosopher, during the recording of a programme to be broadcast on a State television channel. The presenter of that programme could later be seen complaining that she could not use the footage because the philosopher had not signed a document allowing it to be broadcast and acknowledging that the individuals concerned had been invited for the sole purpose of provoking an argument that would attract a large number of viewers.

In 1996 the applicant broadcasted the images in order to denounce the real nature of television. The TV station lodged a criminal complaint, with an application to join the proceedings as a civil party, for fraudulent interception and disclosure of confidential communications. The philosopher also joined the proceedings as a civil party. In 2002 the applicant was ordered to pay the TV station and the philosopher damages, of which the amount was to be fixed in separate civil proceedings, and was given a suspended prison sentence of four months and five days, for the public disclosure of recordings in the TV station's internal data-transmission system. In addition, the applicant was required to pay immediately, by way of an advance, 10,000 EUR to each of the civil parties. After the Court of Appeal dismissed his appeal in 2004 he appealed on points of law. In 2005 the Court of Cassation declared the offence time-barred and quashed the Court of Appeal's judgment without remitting it. However, it upheld the order that the applicant was to compensate the civil parties and ordered him to pay the TV station's legal costs.

Law – Article 10: The applicant's conviction had constituted an interference with his right to freedom of expression. That interference was prescribed by law and had the legitimate aims of protecting the reputation of others and of preventing the disclosure of information received in confidence.

As to the necessity of the interference in a democratic society, the Court rejected the argument of the District Court and the Court of Cassation that the protection of communications based on a computer or data-transmission system precluded in principle any possibility of balancing against the exercise of freedom of expression. Even where such information was broadcast, there were a number of separate aspects to be examined, namely the interests at stake, the review by the domestic courts, the applicant's conduct and the proportionality of the sanction.

As regards the interests at stake, the applicant had argued that the broadcast footage concerned a subject of general interest, namely the function and "real nature" of television in modern society. The role of a State-owned television channel in a democratic society was a subject of general interest. The community could thus have a certain interest in being informed of the content of footage which illustrated a tendency to want to impress and entertain the public rather than to impart information of a cultural nature. However, the applicant had been seeking above all to stigmatise and ridicule individual conduct. If he had intended to start a discussion on a subject of paramount interest for society, other means had been available to him without involving any breach of the confidentiality of data communications.

As to the review exercised by the domestic courts, only the Court of Appeal had raised the question of the conflict between the right to the confidentiality of communications and freedom of expression. It had attached particular weight to the social interest of the information thus broadcast, finding

that it could not be regarded as of "paramount" interest. The Court was of the view that the analysis had not been arbitrary and had relied on the criteria established by the Court's case-law.

As regards the applicant's conduct, he could not have been unaware, as a media professional, that the impugned recording had been made on a channel reserved for the internal use of the television station, or that, consequently, the fact of broadcasting it would breach the confidentiality of that State-owned TV station's communications. Accordingly, the applicant had not acted in accordance with the ethics of journalism. In view of the foregoing, the Court found that his conviction had not constituted, in itself, a violation of Article 10.

As regards the nature and severity of the sanctions imposed, in addition to the award of compensation, the applicant had been sentenced to four months and five days in prison. Even though it had been a suspended sentence and the Court of Cassation had found the offence to be time-barred, the fact that a prison sentence had been handed down must have had a significant chilling effect. In addition, the case in question, which concerned the broadcasting of a video whose content was not likely to cause significant damage, was not marked by any exceptional circumstance justifying recourse to such a harsh sanction. Consequently, on account of the nature and quantum of the sentence imposed on the applicant, the interference with his right to freedom of expression had not remained proportionate to the legitimate aims pursued.

Conclusion: violation (six votes to one).

Article 41: Finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage.

Award of damages against Internet news portal for offensive comments posted on its site by anonymous third parties: *no violation*

Delfi AS v. Estonia - 64569/09
Judgment 10.10.2013 [Section I]

Facts – The applicant company owned one of the largest Internet news portals in Estonia. On its website, readers could anonymously and without prior registration post comments below the published articles. Although the applicant company could not edit or moderate such comments, it could remove them using a prior automatic-word filtering system or on being alerted by readers. In 2006 the applicant published an article stating that a ferry company had changed its routes thereby causing the break-up of ice at potential locations of ice roads. As a result, the opening of the roads – which were a cheaper and faster connection to the Estonian islands compared to the company's ferry services – had to be postponed for several weeks. A number of comments containing personal threats and offensive language directed against the ferry-company owner were posted below the article. The applicant company removed them some six weeks later at the insistence of the ferry company. The owner of the ferry company instituted defamation proceedings against the applicant company, which was ultimately ordered to pay EUR 320 in damages.

Law – Article 10

(a) *Applicability* – The Government had argued that, since the applicant company claimed that it was neither the author nor the discloser of the defamatory comments, Article 10 did not apply. The Court noted that the applicant company had been directly affected by the domestic courts' decisions, which held it liable for defamation in its capacity as the discloser of the comments posted on its portal. Therefore, its complaint related to freedom of expression and fell within the scope of Article 10.

(b) *Merits* – The applicant company had argued that the domestic law did not impose on it an obligation to pre-monitor content posted by third parties, and that its liability was limited under the EU Directive on Electronic Commerce[1]. However, the domestic courts found that this was not the case and the Court recalled in this respect that it was primarily for the national courts to interpret domestic legislation. The interference with the applicant's freedom of expression was lawful within the meaning of Article 10, because the domestic legislation and case-law made it clear that a media publisher was liable for any defamatory statements made in its media publication. In this regard, considering the publication of articles and comments on an Internet portal to be a journalistic activity and its administrator to be a publisher could be seen as applying the existing tort law to a novel area related to new technologies.

As to whether the interference was necessary in a democratic society, the article that had given rise to the defamatory comments concerned a matter

1. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

of public interest and the applicant company could have foreseen the negative reactions and exercised a degree of caution in order to avoid being held liable for an infringement of others' reputations. However, the prior automatic filtering and notice-and-take-down system used by the applicant company did not ensure sufficient protection for the rights of third parties. Moreover, publishing news articles and making public readers' comments on them was part of the applicant company's professional activity and its advertising revenue depended on the number of readers and comments. Since the applicant company was able to exercise a substantial degree of control over readers' comments, it was in a position to predict the nature of the comments a particular article was liable to prompt and to take technical or manual measures to prevent defamatory statements from being made public. Furthermore, there had been no realistic opportunity of bringing a civil claim against the actual authors of the comments as their identity could not be easily established. In any event, the Court was not convinced that measures allowing an injured party to bring a claim only against the authors of defamatory comments would have guaranteed effective protection of the injured parties' right to respect for private life. It was the applicant company's choice to allow comments by non-registered users, and by doing so it must be considered to have assumed a certain responsibility for such comments. For all the above reasons, and considering the moderate amount of damages the applicant company was ordered to pay, the restriction on its freedom of expression was justified and proportionate.

Conclusion: no violation (unanimously)

(See also *Krone Verlag GmbH & Co. KG v. Austria (no. 4)*, 72331/01, 9 November 2006)

Freedom to impart information

Lack of procedural safeguards when issuing injunction against national newspaper: *violation*

Cumhuriyet Vakfı and Others v. Turkey - 28255/07
Judgment 8.10.2013 [Section II]

Facts – The applicants were respectively the owner, publisher, editor-in-chief and chief editorial writer of a daily Turkish newspaper *Cumhuriyet*. In April 2007, in the run-up to the presidential elections, the newspaper published a political advertisement that reproduced a quote from a 1995 British newspaper article in which one of the candidates in the 2007 elections, Mr Abdullah Gül, was alleged to have said: "It is the end of the Republic of Turkey – we definitely want to change the secular system". Mr Gül subsequently brought defamation proceedings against the applicants. In May 2007 a domestic court issued an injunction restraining re-publication of the quote published in *Cumhuriyet* and of any news related to the pending defamation proceedings. Mr Gül was elected President and, in view of his new status, decided not to pursue the matter. In March 2008 the case was dismissed and the interim injunction lifted.

Law – Article 10: The very general and unqualified terms of the ban set out in the injunction rendered its scope unclear and potentially extremely wide. In particular, the lack of clarity as to what material could and could not be published under the interim measure could be interpreted as forbidding coverage of any political statement made by Mr Gül relating to the subject of secularism in Turkey. In the Court's view, the injunction was therefore vulnerable to abuse and could have had a chilling effect not only on the *Cumhuriyet* newspaper, but also on the Turkish media as a whole in the period concerned. The injunction had remained in force for over ten months, including during two stages of the Presidential elections, as a consequence of the lack of a time-limit and the absence of any periodic review as to its continuing necessity or of a prompt determination of the merits of the case. The length and breadth of the injunction therefore had the effect of preventing the newspaper from contributing to the public debate surrounding the elections and the candidature of Mr Gül at a critical time in Turkish political history. The unexplained delays in the procedure and the failure to limit the impugned measure to a reasonable period had thus rendered the restriction on the applicants' freedom of expression unduly onerous. The domestic court had not provided any reasoning for its decisions to grant the injunction and to refuse the ensuing request for it to be lifted. This lack of reasoning not only deprived the applicants of an important procedural safeguard, but also prevented the Court from examining whether the domestic court had duly balanced the parties' interests by taking into account specific issues inherent to the facts of the case. In addition, since the applicants had been unable to contest the interim injunction until over a month after it was first granted, they had been placed at a substantial disadvantage vis-à-vis their opponent, especially considering the perishable

nature of news and the specific political environment in which the impugned measure had been applied.

In the light of these procedural deficiencies, and bearing in mind the severity of the punishment failure to comply with the interim measure would have entailed, the injunction had not constituted a justified or a proportionate interference with the applicants' right to freedom of expression.

Conclusion: violation (unanimously).

Article 41: EUR 2,500 to each of the applicants in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Sapan v. Turkey*, 44102/04, 8 June 2010, Information Note 131)

ARTICLE 11

Freedom of peaceful assembly

Imposition of administrative fine for participating in an unauthorised yet peaceful demonstration: *violation*

Kasparov and Others v. Russia - 21613/07
Judgment 3.10.2013 [Section I]

Facts – In April 2007 an anti-government demonstration consisting of a meeting in a delimited area was authorised to take place in Moscow. However, permission for a march after the meeting was refused. The case concerned in particular a series of arrests before the demonstration took place, in circumstances which were in dispute between the parties. The Government alleged that a group of some fifty people had gathered and started marching while shouting anti-government slogans. The police had arrested some members of the group, including the first eight applicants, when they had threatened to spill over into a designated high-security area. The applicants claimed that they had not staged a rally or tried to access an unauthorised zone. The first, second and fifth applicants alleged that they had been walking peacefully towards the venue of the meeting when they were arrested, while the remaining applicants denied any connection with the demonstration whatsoever. In assessing these opposing accounts, the trial judge fully accepted the police report on the grounds that the police were a party "with no vested interest" in the case. The first eight applicants were convicted of an administrative offence for having breached the regulations on holding demonstrations and ordered to pay a fine. Their appeals were unsuccessful.

Law – Article 6 § 1 (first to eighth applicants)

(a) *Applicability* – The Government had argued that Article 6 was inapplicable to administrative proceedings. However, the offence the applicants were convicted of, although classified as "administrative" under Russian law, actually constituted a criminal offence for the purpose of the applicability of Article 6 according to the criteria set out in *Engel and Others v. the Netherlands* (5100/71 et al., 8 June 1976).

Conclusion: preliminary objection dismissed (unanimously).

(b) *Merits* – The applicants' conviction was primarily based on the assumption of them being in a particular place at a particular time. However, the circumstances surrounding the applicants' arrest, such as the purpose of their being at the alleged place, the time of the alleged march and even the time and exact place of the arrest remained in dispute between the parties. The principle of equality of arms and the right to a fair trial implied that the applicants should have been afforded a reasonable opportunity to present their version of the events effectively before the domestic courts. Therefore, the domestic courts' unreserved endorsement of the police report and their refusal to examine the defence witnesses without any regard to the relevance of their statements had led to a limitation of the applicants' defence rights incompatible with the guarantees of a fair hearing.

Conclusion: violation (unanimously).

Article 11 (first, second and fifth applicants) – Although the requirement, for reasons of public order and national security, for prior authorisation when holding public meetings was not *a priori* contrary to the spirit of Article 11, an unlawful situation such as the staging of a demonstration without prior authorisation did not justify an infringement of freedom of assembly. In particular, where unauthorised demonstrators did not engage in acts of violence, public authorities must show a certain degree of tolerance towards peaceful gatherings. As for the Government's allegation that the applicants were trying to access an unauthorised zone, considering the modest size of the group and the undeniably peaceful character of the march, the Court was not persuaded that the threat of the marchers penetrating the security area was imminent. The Government's argument that the police had resorted to arresting the protesters because they were taken aback by the unforeseeable and un-

authorised demonstration and were otherwise unable to cope was inconsistent with the facts established by the domestic courts. The preparatory measures taken by the police should undoubtedly have enabled them to divert a march of this scale from the high-security area and, given the heavy police presence, it should have been possible to maintain public order and safety without resorting to arrests. It followed that the applicants had been arrested and charged with administrative offences for the sole reason that the authorities had perceived their demonstration as being unauthorised. The Government had thus failed to demonstrate that there had existed a "pressing social need" to arrest them. In these circumstances, the police's forceful intervention was disproportionate and not necessary for the prevention of disorder.

Conclusion: violation (unanimously)

Article 41: EUR 10,000 each to the first, second and fifth applicants in respect of non-pecuniary damage; EUR 4,000 each to the third, fourth, sixth, seventh and eighth applicants in respect of non-pecuniary damage.

(See also *Galstyan v. Armenia*, 26986/03, 15 November 2007, Information Note 102; and *Sergey Kuznetsov v. Russia*, 10877/04, 23 October 2008, Information Note 112)

ARTICLE 14

Discrimination (Article 8)

Dismissal, as a result of pressure from colleagues, of employee suffering from HIV infection: *violation*

I.B. v. Greece - 552/10
Judgment 3.10.2013 [Section I]

Facts – In February 2005, while he was on annual leave, the applicant learned that he had contracted the human immunodeficiency virus (HIV). This news spread throughout the company in which he was employed. Members of staff began to complain to the employer about having to work with a person who was HIV-positive and called for his dismissal. The applicant's employer then invited an occupational doctor to visit the workplace to explain the HIV infection, and its means of transmission, to the staff. The doctor tried to reassure the employees and explained what precautions should be taken. Nonetheless, about half of the staff sent a letter to the applicant's employer, calling for his dismissal in order to "preserve their health and their right to work", and stating that the harmonious atmosphere which reigned in the company was likely to deteriorate if he remained. Two days before the applicant's return from leave, the employer dismissed him, while paying the allowance provided for under Greek law. The applicant applied to the courts. Overturning the judgment of the court of appeal, the Court of Cassation held that the applicant had not been unfairly dismissed.

Law – Article 14 in conjunction with Article 8

(a) *Applicability* – The applicant complained that the authorities had failed to protect his private sphere against interference by his employer, which could engage the State's responsibility. There was no doubt that issues concerning employment and situations involving persons with HIV came within the scope of private life. The present case had a particular feature: the dismissal of an HIV-positive employee. There was no doubt that, while the reason given for the applicant's dismissal had been the preservation of a harmonious working environment in the company, the trigger had definitely been the news of his positive HIV status. It was this event which had resulted in the employees' open threat to disrupt the company's operations so long as the applicant continued to be employed there. It was clear that his dismissal had resulted in stigmatisation of an individual who, although HIV-positive, had shown no symptoms of the disease. This measure could not fail to have serious repercussions on his personality, the respect which was shown to him and, ultimately, on his private life. Mention had also to be made of the uncertainly arising from the search for new employment, as the prospects of finding a new job could reasonably be considered remote, given his experience with his existing employer. The fact that the applicant had found new employment following his dismissal was not sufficient to eliminate the damaging effects that the impugned events had had on his ability to lead a normal personal life. Articles 8 and 14, taken together, were therefore applicable.

(b) *Merits* – The applicant's situation had to be compared to that of the company's other employees, since this was what was relevant in assessing his complaint of a difference in treatment. It was undisputed that the applicant had been treated less favourably than another colleague would have been, solely on the basis of his HIV-positive status. In its judgment in *Kiyutin v. Russia*, the Court had held that ignorance about how this disease spreads had bred prejudices which, in turn, stigmatised or

marginalised those who carried the virus. It therefore considered that people living with HIV were a vulnerable group with a history of prejudice and stigmatisation and that the States should be afforded only a narrow margin of appreciation in choosing measures that could single out this group for differential treatment on the basis of their HIV status. However, the applicant's employer had terminated his contract on account of the pressure to which it was subjected by certain employees, and this pressure had originated in the applicant's HIV status and the concerns that it had given rise to among those persons. Furthermore, the company's employees had been informed by the occupational doctor that there was no risk of infection in the context of their working relations with the applicant.

The court of appeal had expressly recognised that the applicant's HIV-positive status had no effect on his ability to carry out his work and there was no evidence that it would lead to an adverse impact on his contract, which could have justified its immediate termination. It had also recognised that the company's very existence was not threatened by the pressure exerted by the employees. The employees' supposed or expressed prejudice could not be used as a pretext for ending the contract of an HIV-positive employee. In such cases, the need to protect the employer's interests had to be carefully balanced against the need to protect the interests of the employee, who was the weaker party to the contract, especially where that employee was HIV-positive. However, the Court of Cassation had not weighed up the competing interests in such a detailed and in-depth manner as the court of appeal. In reasoning that was relatively short, given the importance and unprecedented nature of the issues raised by the case, it held that the dismissal had been fully justified by the employer's interests, in the correct sense of that term, since it had been decided in order to restore calm within the company and ensure its smooth operation. While the Court of Cassation had also not disputed the fact that the applicant's illness had no adverse effect on the fulfilment of his employment contract, it had nonetheless based its decision, in justifying the employees' fears, on clearly inaccurate information, namely the "contagious" nature of the applicant's illness. In so doing, it had ascribed to the smooth functioning of the company the same meaning which the employees wished to give it, and had aligned it with the employees' subjective perception of that issue. Finally, the only issue at stake for the applicant before the Court of Cassation was the compensation he had been awarded by the court of appeal, as his initial request to be reinstated in his post had been dismissed by both the first-instance and appeal courts. Moreover, the Court could not speculate as to what the attitude of the company's employees would have been had the Court of Cassation upheld the findings of the lower courts in this case, or, in particular, had there existed in Greece legislation or well-established case-law protecting HIV-positive individuals in their workplace.

In conclusion, the Court of Cassation had not provided an adequate explanation as to how the employer's interests outweighed those of the applicant, and had failed to weigh up the rights of the two parties in a manner consistent with the Convention.

Conclusion: violation (unanimously).

Article 41: EUR 8,000 in respect of non-pecuniary damage; EUR 6,339.18 in respect of pecuniary damage.

(See *Kiyutin v. Russia*, 2700/10, 10 March 2011, Information Note 139)

Discrimination (Article 1 of Protocol No. 1)

Application of special provisions setting shorter time-limit for claims by members of staff of public bodies: *no violation*

Giavi v. Greece - 25816/09
Judgment 3.10.2013 [Section I]

Facts – On 18 June 1997 the applicant, a cleaner, brought an action against the hospital in which she worked, claiming wage supplements and allowances she had allegedly not been paid between 1 June 1994 and 21 March 1997, the date of her retirement. In July 2001 the court of appeal awarded her some of the amount she had claimed but held that her claims for the period from 1 June to 31 December 1994 were time-barred by the two-year limitation period set out in the decree on the compatibility of public-law entities, contracts and limitation periods. The applicant appealed on points of law. She alleged that there was no valid reason justifying the application of a two-year limitation period for claims by employees against public entities, when the ordinary limitation period applicable to claims by other private individuals against third parties was five years. She emphasised that the financial interests of public entities could not justify granting them favourable treatment to the detriment of their employees. Her appeal on points of law was dismissed.

Law – Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1: The applicant's claims for the period from 1 June to 31 December 1994, which the court of appeal had found to be time-barred, came within the scope of Article 1 of Protocol No. 1 and the right to the protection of property guaranteed by it, which sufficed to render Article 14 of the Convention applicable.

The mere fact that the applicant's claims had been subjected to a time-limit raised no issue under the Convention. Moreover, the right of a State to enforce such laws as it deemed necessary to control the use of property in accordance with the general interest was not in doubt. Thus, the claims of employees in public-law entities could justify regulation in the interest of the public purse, the efficient management of public funds and the continuity of public service. According to the highest national courts (the Court of Cassation, the Supreme Administrative Court and the Special Supreme Court), the public interest targeted by the special two-year limitation period was, in particular, the need for speedy settlement of debts arising from the monthly allowances paid by public-law entities, rapid payment being necessary to ensure protection of the assets and financial situation of those entities, to which citizens contributed through the payment of taxes. In contrast to the situation in the *Zouboulidis* case, in which the arguments relied on by the Government had been general and abstract in nature, the information submitted in the present case illustrated the unpredictability that claims lodged several years after the event could create for legal entities, obliging them to set aside public funds in order to cover obligations which could arise in an unforeseeable manner, and also the adverse consequence of such claims on their budgets. In addition, it was undeniable that decisions on the merits of such claims would lie with the courts and would risk further overloading their lists.

It was for the domestic legal system of the State concerned to regulate the procedural rules on judicial remedies in such a way as to ensure protection of the rights of State employees, so long as those rules did not in practice render impossible or unduly difficult the exercise of the rights conferred by the domestic legal order. In the Court's opinion, a two-year limitation period did not unduly limit the possibility for State employees to claim, through the courts, any salaries and allowances owed to them by the authorities. In the present case, the applicant had not indicated tangible factors which would have prevented or dissuaded her in any way from pursuing her remedy in the two years after her claim arose.

Finally, in contrast to the *Zouboulidis* case, the applicant in the present case concentrated her complaint primarily on the alleged difference in treatment between State employees, on the one hand, and private-sector employees or the State's creditors (other than its own employees), on the other. These situations were not comparable: there was no analogy between civil servants and private-sector employees. As to the other creditors, for the most part these were suppliers who had an occasional relationship with the State when performing services for which they had been contracted, and not an ongoing employment relationship, as was the case for civil servants. Moreover, the Special Supreme Court had highlighted the different legal regimes governing the relationships between those two categories of employees and their employers. This was particularly relevant given that, under the Constitution, civil servants could not be removed from post. These differences in regime could justify granting private-sector employees a longer period in which to bring their pay disputes before the courts.

Consequently, the application of the special provisions laying down a two-year limitation period in respect of claims by employees of public-law entities had not upset the fair balance to be struck between the protection of property and the requirements of the public interest.

Conclusion: no violation (unanimously).

(See *Zouboulidis v. Greece (no. 2)*, 36963/06, 25 June 2009, Information Note 120)

ARTICLE 34

Hinder the exercise of the right of petition

Failure by Russian authorities to protect Tajik national in their custody from forcible repatriation to Tajikistan in breach of interim measure issued by European Court: *failure to comply with Article 34*

Nizomkhon Dzhurayev v. Russia - 31890/11
Judgment 3.10.2013 [Section I]

(See Article 3 above, page 13)

ARTICLE 35

Admissibility

Applicant's failure to submit a short summary of his 39-page application in disregard of the requirement of the Practice Direction on the Institution of Proceedings: *preliminary objection dismissed*

Yüksel v. Turkey - 49756/09
Decision 1.10.2013 [Section II]

Facts – Relying on Article 2 of the Convention, the applicant complained before the European Court that his brother had died as a result of the use of arbitrary and disproportionate force by police officers. He also complained of the inactivity and ineffectiveness of the investigation into the circumstances of the death.

The Government claimed that the application to the Court had not complied with Rule 47 of the Rules of Court and with paragraph 11 of the Practice Direction on the Institution of Proceedings, in that the events described in the application form and the applicant's complaints had not been submitted in a short summary, the application being 39 pages long. In this connection, they submitted that as the application form had been filled in by the applicant's lawyer, there was no excuse for failing to comply with the requirements of Rule 47. They therefore invited the Court to reject the application.

Law – Article 35: Under Rule 47 of the Rules of Court, an application form must contain, among other things, a statement of the facts and a statement of the alleged violation(s) of the Convention and the relevant arguments. At the material time paragraph 11 of the Practice Direction issued by the President of the Court stated that where an application was longer than ten pages (not including annexes containing copies of documents), the applicant must also submit a short summary.[1]

In the present case, the applicant had described the facts in detail in his application form and clearly indicated the violations of the Convention which he was alleging. In consequence, his complaints had been submitted in accordance with Rule 47. The provision in the Practice Direction relied on by the Government could by no means be equated with one of the grounds for admissibility set out in Article 35 of the Convention. It followed that the Government had no grounds for requesting the rejection of the application for the sole reason that it considered it too lengthy. The Government's arguments on this point were therefore rejected.

Conclusion: preliminary objection dismissed (unanimously).

Article 2: It was not established that the State had failed in its positive obligation to protect the right to life of the applicant's brother, and there were no grounds to believe that he had been a victim of ill-treatment or that the facts of the case had not been properly by the domestic authorities.

Conclusion: inadmissible (manifestly ill-founded).

1. The Practice Direction was updated on 1 January 2014 and no longer contains a reference to the number of pages.

Article 35 § 1

Exhaustion of domestic remedies

New remedy to be exhausted in cases concerning length of proceedings before the administrative courts: *inadmissible*

Techniki Olympiaki A.E. v. Greece - 40547/10
Decision 1.10.2013 [Section I]

Facts – Before the European Court, the applicant company complained of the length of the proceedings before the administrative courts in its case and of the lack of an effective remedy in that regard.

Law – Article 35 § 1: In its pilot judgment in *Vassilios Athanasiou and Others v. Greece* (50973/08, 21 December 2010, Information Note 136), the Court had held that the excessive length of administrative proceedings constituted a structural problem, and had requested the State to institute an effective domestic remedy within one year. The Greek authorities complied with that request by enacting Law no. 4055/2012, which entered into force on 2 April 2012. The Court considered that the remedies enabling proceedings to be speeded up and litigants to obtain compensation under the new Law should be regarded as effective for the purposes of Article 13 of the Convention. It noted that the compensatory remedy had already proved its effectiveness in practice, as demonstrated by recent domestic court rulings.

In the present case, the judicial proceedings had begun on 20 May 1986 with an application to the administrative court of appeal and had concluded on 20 November 2012 when the judgment of the Supreme Administrative Court was finalised and

certified. The Court decided to examine the proceedings before these two courts separately since, under Law no. 4055/2012, any claim for compensation was lodged separately with each level of jurisdiction.

(a) *Proceedings before the administrative court of appeal* – These had concluded on 29 July 1988 with publication of the judgment. Since Law no. 4055/2012 had entered into force on 2 April 2012, the applicant company could not have lodged an application for the proceedings to be speeded up or a claim for compensation, as these remedies had not been available at the time. The Government's objection of failure to exhaust domestic remedies therefore had to be rejected. As to the merits of the complaint, the proceedings at issue had lasted for approximately two years and two months. Given that the applicant company had been responsible for a delay of over a year, the length of the proceedings before the administrative court of appeal had not been unreasonable.

Conclusion: inadmissible (manifestly ill-founded).

(b) *Proceedings before the Supreme Administrative Court* – A request for proceedings to be accelerated could be submitted only in relation to applications made after 16 September 2012. Accordingly, the preventive remedy by which to have the proceedings speeded up had not been available to the applicant company in these proceedings.

As to the compensatory remedy, the present application had been lodged on 23 June 2010, that is to say, before the entry into force of Law no. 4055/2012 on 2 April 2012. In view of the nature of that Law and the context in which it had been enacted, there were justifiable grounds for making an exception to the general principle whereby the effectiveness of a given remedy had to be assessed with reference to the date on which the application had been lodged. Furthermore, the Supreme Administrative Court judgment had been published on 6 February 2012, that is to say, before the entry into force of the Law in question. Law no. 4055/2012 did not preclude an application to the competent courts in relation to proceedings terminated before its entry into force, within the time-limits which it laid down. Accordingly, it had been open to the applicant company in the instant case to apply to the Supreme Administrative Court between 2 April 2012 – the date on which the Law in question had entered into force – and 6 August 2012, the date on which the time-limit laid down by the Law had expired.

With regard to finalisation of the Supreme Administrative Court judgment, the applicant company had also had the opportunity, when bringing its action and throughout the compensation proceedings, to complain of any delay in finalising and certifying the judgment. By 6 February 2012, the date of publication of the judgment in question, the proceedings before the Supreme Administrative Court had already been pending for over twenty-three years, a period which was in principle excessive for a single level of jurisdiction. Accordingly, on the date of entry into force of Law no. 4055/2012, the applicant company could legitimately have complained to the Supreme Administrative Court under that Law about the delays in the proceedings, without waiting for the above-mentioned judgment to be finalised.

In the light of the foregoing considerations, the applicant company had been required under Article 35 § 1 of the Convention to make use of that remedy. Since it had not done so, its complaint under Article 6 § 1 of the Convention had to be rejected for failure to exhaust domestic remedies.

Conclusion: inadmissible (failure to exhaust domestic remedies).

Exhaustion of domestic remedies
Effective domestic remedy – Latvia

Claim for compensation in administrative courts in respect of conditions of detention: *effective remedy*

Ignats v. Latvia - 38494/05
Decision 24.9.2013 [Section IV]

Facts – Before the European Court, the applicant complained, *inter alia*, of the conditions of his detention in prison. The Government objected that he had failed to exhaust domestic remedies.

Law – Article 35 § 1: While the Court had in previous cases found that recourse to the administrative courts was not a remedy accessible in practice to detainees, at least before 15 June 2006, it could not reach that conclusion in the applicant's case.

The applicant had approached the administrative courts with a claim that related at least in part to his conditions of detention, so it could not be said that the administrative courts had not been accessible. Although initially his claim was not accepted, eventually it was allowed and the administrative proceedings were commenced. About a year later, however, the applicant had withdrawn his com-

plaint with the result that the proceedings were terminated. He had not provided any reasons for his actions to the Court.

Since its judgment in *Melnītis*, the Court had received a number of examples of cases in which the administrative courts had dealt with complaints concerning conditions of detention and in the recent case of *Timofejevi* the administrative courts had examined the administrative-law concept of "an action of a public authority", scrutinised the conditions of detention in a detention facility for at least part of the period in respect of which the present applicant complained, and had awarded compensation roughly equivalent to EUR 11,000.

The applicant did not claim that he had pursued the administrative proceedings as a preventive remedy and, since they were commenced after he had left the prison to which his complaint related, they had to be seen rather as a compensatory remedy. As the Court had stated in previous cases, in principle, applicants who complain about detention conditions after their release may have to make use of a compensatory remedy at national level in order to exhaust domestic remedies. Accordingly, in view of the evolution in the domestic case-law, which largely related to the period in which the applicant was detained, the applicant should have pursued his case in the first-instance administrative court, with the further possibility of judicial review and an appeal on points of law.

Conclusion: inadmissible (failure to exhaust domestic remedies).

(See also *Melnītis v. Latvia*, 30779/05, 28 February 2012; *Katajevs v. Latvia* (dec.), 1710/06, 11 September 2012; and *Timofejevi v. Latvia*, 45393/04, 11 December 2012)

The Court also declared inadmissible for failure to exhaust domestic remedies a complaint by the applicant concerning his right to respect for his correspondence under Article 8 of the Convention.

Exhaustion of domestic remedies
Effective domestic remedy – Lithuania

Length-of-proceedings complaint under Article 6.272 of the Civil Code as interpreted by domestic courts: *effective remedy*

Savickas and Others v. Lithuania - 66365/09 et al.
Decision 15.10.2013 [Section II]

Facts – The applicants were serving or former judges or their lawful heirs. Following a reduction in judges' salaries by 30% in 1999, the applicants instituted proceedings before the domestic courts claiming payment of the lost part of their salaries. The litigation ended in 2009-10, when the Supreme Administrative Court eventually granted the applicants' claims in part. Relying on, *inter alia*, Articles 6 § 1 and 13 of the Convention the applicants complained before the European Court about the excessive length of the domestic proceedings and the lack of an effective domestic remedy in that respect.

Law – Article 35 § 1: In its judgment of 6 February 2007 the Lithuanian Supreme Court established that Article 6.272 of the Lithuanian Civil Code provided compensation in respect of the unjustified length of court proceedings in the same way as Article 6 § 1 of the Convention. Since that decision, Article 6 § 1, as interpreted by the European Court, had been applied by the Lithuanian courts of all jurisdictions in the context of length-of-proceedings complaints. Furthermore, when assessing the reasonableness of the length of proceedings, the domestic courts applied the criteria established by the Court, namely what was at stake for the applicant, the complexity of the case, and the conduct of the applicant and of the domestic authorities. The Court further welcomed the 2011 Government proposal to supplement Article 6.272 with a norm which explicitly established a right to compensation for excessively long court proceedings and the introduction of legislative amendments aimed at expediting civil proceedings. In the light of the above, the Court considered that the uncertainty regarding the effectiveness of Article 6.272 as a domestic remedy had been removed by judicial interpretation on 6 February 2007. When a particular remedy resulted from court interpretation, the persons concerned could be obliged to use it only after six months from the date on which the decision establishing the remedy was delivered, in order to allow the case-law development to acquire a sufficient degree of legal certainty. Therefore, applicants in cases concerning the length of civil, criminal or administrative court proceedings in Lithuania whose applications were lodged with the Court after 6 August 2007 were required to make use of the remedy. In the applicants' case, since they had lodged their application with the Court between 2009 and 2011, their length-of-proceedings complaints were inadmissible.

Conclusion: inadmissible (non-exhaustion of domestic remedies).

(See also *Turgut and Others v. Turkey* (dec.), 4860/09, 26 March 2013, Information Note 161; and *Balakchiev and Others v. Bulgaria* (dec.), 65187/10, 18 June 2013, Information Note 164)

Article 35 § 3

Competence *ratione temporis*

Court's temporal jurisdiction in respect of deaths that occurred 58 years before the Convention entered into force in respondent State: *preliminary objection allowed*

Janowiec and Others v. Russia - 55508/07 and 29520/09
Judgment 21.10.2013 [GC]

(See Article 3 above, page 11)

ARTICLE 38

Furnish all necessary facilities

Refusal on grounds of national security to provide copy of domestic court decision to discontinue criminal investigation into Katyń massacre: *failure to comply with Article 38*

Janowiec and Others v. Russia - 55508/07 and 29520/09
Judgment 21.10.2013 [GC]

(See Article 3 above, page 11)

Failure to comply with requests for information and documents in case concerning forcible repatriation to country where applicant was at risk of ill-treatment: *failure to comply with Article 38*

Nizomkhon Dzhurayev v. Russia - 31890/11
Judgment 3.10.2013 [Section I]

(See Article 3 above, page 13)

ARTICLE 1 OF PROTOCOL No. 1

Positive obligations

Inability to recover frozen foreign-currency savings following the dissolution of the former USSR: *inadmissible*

Likvidējamā p/s Selga and Others v. Latvia - 17126/02 and 24991/02
Decision 1.10.2013 [Section IV]

Facts – During Soviet rule in Latvia, the applicants – a company and a natural person – held foreign-currency savings in the Latvian section of *Vneshekonombank*, a State bank, which was dealing with foreign-currency transactions throughout the former USSR in accordance with the rules applicable at the time. Following the restoration of Latvian independence in 1991, the *Vneshekonombank* froze the applicants' foreign-currency savings disabling them from withdrawing their funds until the Latvian and Russian Governments had settled the issues related to the external foreign-currency debt and assets of the former USSR on the inter-State level. An intergovernmental commission was established to this end, but no agreement was ever reached and the commission had not met since 1998. Meanwhile, the Bank of Latvia agreed to pay certain monthly amounts to natural, but not legal, persons whose foreign-currency savings had been frozen. The applicants' civil claims lodged with the Bank of Latvia with a view to recovering their frozen assets were unsuccessful.

Law – Article 1 of Protocol No. 1: The applicants' complaint was twofold. They claimed, firstly that Latvia was responsible for the freezing of their foreign-currency savings and, secondly, that the Latvian authorities had failed to take effective measures to enable them to obtain access to those assets. As regards the first limb, the Court found it established that the applicants' foreign-currency assets had been frozen by the *Vneshekonombank*, an entity operating in another country, and that its actions could thus not be attributed to Latvia. As regards the second limb, there had been no suggestion that the Latvian authorities had ever accepted any liability for public debt incurred during the period when its territory was under Soviet rule. Latvia and the Russian Federation had not been able to reach any agreement on this issue due to their apparently diverging views on this matter. Moreover, unlike States successors of the former Social Federal Republic of Yugoslavia, Latvia had never demonstrated any sign of accept-

ance or acknowledgement of claims such as those made by the applicants. While the Bank of Latvia had agreed to pay some money to private individuals whose foreign-currency assets had been frozen by the *Vneshekonombank*, these payments had been made with the aim of reducing social tensions and compensating, from the State's own resources, damage sustained by individuals residing in Latvia as a result of the collapse of the USSR. Given that the Convention did not impose any specific obligation on States to right injustices or harm caused before they ratified the Convention, the decisions taken by the Bank of Latvia could not be interpreted as implying that there was a positive obligation under international law incumbent on the respondent State to make any payments, let alone payments equal to the total amount of the frozen foreign-currency assets in another State.

Conclusion: incompatible *ratione personae* and *ratione materiae* (unanimously).

Peaceful enjoyment of possessions

Restrictions on use of land assigned to public authority twenty years before its expropriation: *violation*

Hüseyin Kaplan v. Turkey - 24508/09
Judgment 1.10.2013 [Section II]

Facts – Since 1982 the applicant's land had been assigned to a public authority and the land register had been amended accordingly. The land, which was initially classified as meadow, was reclassified as building land in 1991 and was designated in the urban development plan for the construction of a technical and professional college. More than twenty years passed without the authorities had either beginning construction of the college or expropriating the applicant's land. In September 2007 the court dismissed the applicant's claim for damages against the authorities, on the ground that the municipality had not taken possession of the disputed land and that the applicant had not provided evidence of the alleged pecuniary damage. The applicant's appeal was dismissed.

Law – Article 1 of Protocol No. 1: There had been an interference with the applicant's right to peaceful enjoyment of his possessions. The situation had indisputably restricted his ability to dispose of the land, although without a formal deprivation of property, since the applicant's title remained intact in law. He had not been denied access to the land or lost control of it and, in principle, he could still sell the property, although with greater difficulty.

However, since its allocation to a public authority in 1982, the land had been subject to certain constraints. Under the urban development plan, its initial classification as a meadow had been changed to that of building land in 1991 and a prohibition on building on the land, which was due to be expropriated, had been in force continuously since the land was designated for use as a school under the urban development plan.

In such a complex and difficult sphere as urban development, the Contracting States enjoyed a wide margin of appreciation in order to implement their town-planning policy. The interference with the applicant's right to the peaceful enjoyment of his possessions satisfied the requirements of the general interest. Nonetheless, throughout the period concerned, the applicant was left in a state of total uncertainty as to the future of his property. On 20 March 2013 his property had still not been expropriated. That state of affairs had impeded the his full enjoyment of his right of property, as he could neither build on the land designated as building land nor even plant trees on it. In addition, this situation had adversely affected him, *inter alia*, by reducing decreased his prospects of selling the land. Finally, no compensation had been granted for his loss.

Thus, the applicant had had to bear an individual and excessive burden, which had upset the fair balance that should be maintained between the demands of the general interest on the one hand and protection of the right to the peaceful enjoyment of possessions on the other.

Conclusion: violation (unanimously).

Article 41: question reserved.

Reduction in benefits payable to public-sector pensioners: *inadmissible*

Da Conceição Mateus and Santos Januário v. Portugal - 62235/12 and 57725/12
Decision 8.10.2013 [Section II]

Facts – The applicants, who were pensioners affiliated to Portugal's State pension scheme, asked the Court to rule that the cuts imposed on certain of their pension entitlements (holiday and Christmas bonuses) as a result of a programme of austerity measures had breached their rights under Article 1 of Protocol No. 1.

Law – Article 1 of Protocol No.1: Both applicants were legally entitled to holiday and Christmas subsidies, which they received as usual in 2012, although with a reduction amounting to 10.8% of the total annual pension benefits in the case of the first applicant and to 10.7% in the case of the second applicant. Accordingly, they had a proprietary interest falling within the ambit of Article 1 of Protocol No. 1. Although the relevant provisions of the 2012 State Budget Act had been declared unconstitutional, on the basis that no equivalent effort had been required of citizens employed in the private sector, a decision to allow the cuts for 2012 had nevertheless been adopted by the Constitutional Court on the basis of a constitutional provision which allowed the effects of a finding of unconstitutionality to be restricted in exceptional circumstances. The cuts had therefore been allowed in accordance with the domestic law.

The cuts had been intended to reduce public spending and were part of a broader programme designed by the national authorities and their counterparts in the European Union and International Monetary Fund to allow Portugal to secure the necessary short-term liquidity to the State budget with a view to achieving medium-term economic recovery. The very fact that a programme of such magnitude had had to be put in place showed that the economic crisis and its effect on the State budget balance had been exceptional in nature. As it had recently done in similar circumstances relating to austerity measures in Greece[1], the Court considered that the cuts in social-security benefits provided by the 2012 State Budget Act had clearly been in the public interest. As in Greece, the measures had been adopted in an extreme economic situation, but unlike the position in Greece, they were transitory. While it had reduced the applicants' subsidies by EUR 1,102.40 and EUR 1,368.04 respectively, the State Budget Act had left unchanged the rate of their basic pension, which they had continued to receive for the full twelve months of 2012. In addition, the cuts had only been applicable for a period of three years (2012-14). The interference of the 2012 State Budget Act with the applicants' right to the peaceful enjoyment of their possessions had therefore been limited both in time and in quantitative terms (less than 11% of their total social-security benefits).

In those circumstances, it had not been disproportionate to reduce the State budget deficit by cutting salaries and pensions paid in the public sector, when no equivalent cuts had been made in the private sector. Moreover, since the legislature had remained within the limits of its margin of appreciation and previous measures involving "remuneratory reductions" contained in the State Budget Act for 2011 had proved to be insufficient, it was not for the Court to decide whether better alternative measures could have been envisaged in order to reduce the State budget deficit. In the light of the exceptional economic and financial crisis faced by Portugal at the material time and given the limited extent and the temporary effect of the reduction of their holiday and Christmas subsidies, the applicants had not borne a disproportionate and excessive burden.

Conclusion: inadmissible (manifestly ill-founded).

1. *Koufaki and Adedy v. Greece* (dec.), 57665/12 and 57657/12, 7 May 2013, Information Note 163.

RULE 47 OF THE RULES OF COURT

Contents of an individual application

Applicant's failure to submit a short summary of his 39-page application in disregard of the requirement of the Practice Direction on the Institution of Proceedings: *preliminary objection dismissed*

Yüksel v. Turkey - 49756/09
Decision 1.10.2013 [Section II]

(See Article 35 above, page 36)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

The following case has been referred to the Grand Chamber in accordance with Article 43 § 2 of the Convention:

Gross v. Switzerland - 67810/10
Judgment 14.5.2013 [Section II]

(See Article 8 above, page 26)

COURT NEWS

1. HUDOC database

Turkish version

The Court has now launched a Turkish version of the Court's case-law database HUDOC which was partly funded by a voluntary contribution from the Turkish Government. The HUDOC database was revamped in 2012 and is increasingly serving as a one-stop-shop for translations of the Court's case-law in languages other than its official ones (English and French). Thanks to contributions from Turkey and the Human Rights Trust Fund, HUDOC now contains nearly 10,000 translations into 27 languages, of which over 2,600 are in Turkish (including all of the Court's judgments in respect of Turkey). A language-specific filter allows for rapid searching in HUDOC, including in free text. The Turkish Ministry of Justice is also translating and disseminating the Court's factsheets and case-law information notes.

A Russian HUDOC interface is nearing completion and will be launched in the coming months. More information on case-law in non-official languages is available online (Case-Law/Translations of the Court's case-law).

Communicated cases 2010-11

Communicated cases from 2010 and 2011 have been added to the Hudoc website as a separate sub-site and can now be consulted here.

2. Case filtering – reduction in number of pending applications

The Court has confirmed that the methods employed since the entry into force of Protocol No. 14 to the Convention on 1 June 2010 have been successful in reducing the backlog of cases which are clearly inadmissible. Since the entry into force of Protocol No. 14, judges have been sitting in Single Judge formations, assisted by rapporteurs from the Court's Registry, to decide cases that are clearly inadmissible or that can be struck out without further examination. To optimise this mechanism, initially, some two thirds of incoming cases were placed under the organisation of a new Filtering Section tasked with streamlining the new procedure and ensuring that best practices were adopted for the treatment of incoming applications as well as the older cases still waiting for examination. These methods, which have in the meantime been extended to all incoming cases, have proved successful in diminishing the backlog of cases allocated for examination by a single judge.

At its highest, on 1 September 2011, the backlog of these cases had reached over 100,000 (the total number of cases pending having reached 160,200 at that time). On 1 October 2013 the backlog of cases allocated for examination by a single judge had dropped to 38,200, the total number of pending cases being 111,350. This practice of treating incoming applications has now been confirmed and a Filtering Section Registrar has been appointed. The Filtering Section is made up of the judges appointed as Single Judge (currently 36) and the Registry rapporteurs who have been appointed by the President of the Court to assist the Single Judges. It has responsibility for supervising the Court's case-load of incoming applications and assuring the speedy allocation of cases to the correct judicial body for decision.