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

Information Note on the Court's case-law

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Positive obligations

Refusal to carry out urgent operation on pregnant woman owing to her inability to pay medical fees: *violation*

Mehmet Şenturk and Bekir Şenturk v. Turkey - 13423/09
Judgment 9.4.2013 [Section II]

Facts – The first applicant's wife and second applicant's mother, who was thirty-four weeks pregnant, went to a university hospital together with her husband, complaining of persistent pain. She was examined by an emergency doctor before being treated by a team of doctors from the gynaecology and obstetrics department, who found, after performing an ultrasound scan, that the child she was carrying was dead and that she required immediate surgery. She was then allegedly told that a fee would be charged for her hospital admission and the operation and that a deposit equivalent to approximately EUR 1,000 had to be paid. Since the first applicant stated that he did not have the money required, his wife could not be admitted to the hospital. The emergency doctor accordingly arranged for her to be transferred to another hospital in a vehicle without any medical personnel. She died on the journey.

An investigation was opened by a commission of inquiry reporting to the Ministry of Health, which established the liability of the hospital doctors for the patient's death. It criticised the decision to transfer the patient without treating her and the importance that had been attached to payment of her medical fees. No criminal proceedings were instituted against the duty doctor because prosecution of the alleged offence had become time-barred. Other doctors were found guilty at first instance but never faced any criminal penalties because the Court of Cassation terminated the proceedings in October 2010, also on account of the statute of limitations.

Law – Article 2

(a) *Substantive aspect* – The Court reiterated that the State's positive obligations under Article 2 of the Convention required it to make regulations compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives.

Although it was not the Court's task to rule *in abstracto* on the State's public-health policy concerning access to treatment at the time of the events complained of in the present case, it was sufficient for it to note, having regard to the findings of the national authorities, that the provision of treatment at the hospital in question had been contingent on advance payment. This requirement had served as a deterrent for the patient, causing her to decline treatment at the hospital. Such a decision could not possibly be regarded as informed, or as exempting the national authorities from liability as regards the treatment which the deceased should have been given. It was not disputed that the patient had arrived at the hospital in a serious condition and that she required emergency surgery, failing which there were likely to be extremely grave consequences. The medical staff had been fully aware that transferring the patient to another hospital would put her life at risk. Furthermore, the panel that had refused to authorise prosecution of the personnel concerned had not been provided with any material indicating how to proceed in medical emergencies where the requisite fees had not been paid. The domestic law in this regard did not appear to have been capable of preventing the failure to give the deceased the medical treatment she required on account of her condition. Accordingly, as a result of blatant failings on the hospital authorities' part, the deceased had been denied access to appropriate emergency treatment. That finding was sufficient for the Court to hold that the State had failed to comply with its obligation to protect her physical integrity.

Conclusion: violation (unanimously).

(b) *Procedural aspect* – The State's positive obligations also included the requirement to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, could be determined and those responsible made accountable. However, the Court observed that the individuals suspected of being responsible for the first applicant's wife's death had not been convicted with final effect, on account of the statute of limitations. In addition, the length of the proceedings in the case had not satisfied the requirement of a prompt examination. There had also been a notable omission from the outset of the criminal proceedings in that no steps had been taken to prosecute the duty doctor. Accordingly, the State had failed to carry out an effective criminal investigation in the present case.

Conclusion: violation (unanimously).

(c) *Alleged right to life of the foetus* – The applicants alleged that no investigation had been carried out to determine the time of the foetus's death. The Court repeated the approach it had adopted in previous cases by noting that in the absence of a European consensus on the point at which life began, it was left to the State to determine this issue. Since the life of the foetus in the present case had been intimately connected with that of the deceased, no separate examination of this complaint was necessary.

Article 41: EUR 65,000 jointly in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also: *Vo v. France* [GC], no. 53924/00, 8 July 2004, Information Note no. 66; *A, B and C v. Ireland* [GC], no. 25579/05, 16 December 2010, Information Note no. 136; *Tysiąc v. Poland*, no. 5410/03, 20 March 2007, Information Note no. 95)

ARTICLE 3

Inhuman and degrading treatment
Expulsion

Proposed removal of Somali asylum-seeker to Italy under Dublin II Regulation: *inadmissible*

Mohammed Hussein and Others v. the Netherlands and Italy - 27725/10
Decision 2.4.2013 [Section III]

Facts – The first applicant is a Somali national and the mother of two small children (the second and third applicants). She arrived in Italy in August 2008 and applied for asylum. She was transferred to a reception centre and two months later received a temporary residence permit that allowed her to work in Italy. In January 2009 she was given a three-year residence permit and travel document. She left the reception centre in April 2009 and travelled to the Netherlands where, now heavily pregnant, she again applied for asylum. Her application was refused on the grounds that under the Dublin II Regulation, it was the Italian authorities who had responsibility for her asylum request. In her application to the European Court, the applicant complained that her transfer from the Netherlands to Italy would violate her rights under Article 3 of the Convention.

Law – Article 3: Unlike the situation in *M.S.S. v. Belgium and Greece* [GC] (no. 30696/09, 21 January 2011, Information Note no. 137), in the instant case the applicant had within three days of arriving in Italy benefited from the reception facilities that had been put in place by the Italian authorities for asylum seekers and within three months she had been allowed to seek work. Her request for international protection had been accepted and she had been granted a residence permit for subsidiary protection valid for three years. This entitled her to a travel document for aliens, to work and to benefit from the general schemes for social assistance, health care, social housing and education in the same manner as the general population. Even assuming the applicant had been compelled to vacate the reception centre where she was staying in order to make place for newly arrived asylum seekers, as a pregnant women she would have been entitled to a priority placement in a facility for accepted refugees. However, there was no indication that the applicant had ever sought assistance in finding work and/or alternative accommodation under the special public or private social assistance schemes established in Italy for vulnerable persons at risk of destitution and/or homelessness. In these circumstances it had not been established that the applicant's treatment in Italy could be regarded as having attained the minimum level of severity required for treatment to fall within the scope of Article 3.

However, the validity of the applicant's residence permit had since expired and so the Court went on to consider what her situation would be if she was returned to Italy. In that connection, it noted that the Netherlands authorities would give prior notice of the transfer to their Italian counterparts, thus giving them time to prepare. While the applicant would be required to renew her residence permit, as a single mother of two small children she remained eligible for special consideration as a vulnerable person under the applicable legislation.

Although reports on the reception schemes for asylum seekers in Italy disclosed some shortcomings in the general situation and living conditions of asylum seekers and refugees, they did not show any systemic failure to provide support or facilities. The reports drawn up by the UNHCR and the Commissioner for Human Rights referred to recent improvements intended to remedy some of the failings and all the reports were unanimous in depicting a detailed structure of facilities and care to provide for the needs of asylum seekers. The applicant's own request for protection following her arrival in August 2008 had been processed within months and she had been given accommodation and access to health care and other facilities. Against this background, the Court

considered that the applicant had not shown that her future prospects if returned to Italy, whether taken from a material, physical or psychological perspective, disclosed a sufficiently real and imminent risk of hardship severe enough to fall within the scope of Article 3.

Conclusion: inadmissible (manifestly ill-founded).

Degrading treatment

Applicants' placement in a metal cage during court hearings: *case referred to the Grand Chamber*

Svinarenko and Slyadnev v. Russia - 32541/08 and 43441/08
Judgment 11.12.2012 [Section I]

The applicants, who were standing trial for violent offences, appeared in court in a metal cage. No reasons were given by the trial court for subjecting them to such treatment.

In a judgment of 11 December 2012, a Chamber of the Court held unanimously that there had been a violation of Article 6 § 1 (excessive length of criminal proceedings) and a violation of Article 3. Noting that the applicants had been constantly guarded by armed police officers, and that other security measures had also to be taken in the courtroom, and having regard to the absence of any evidence capable of giving serious grounds to fear the applicants posed a danger to order and security in the courtroom, or would resort to violence or abscond, or that there was a risk to their own safety, the Court found that their placement in the cage, where they had been exposed to the public in the courtroom, had not been justified. The impugned treatment had humiliated the applicants in their own eyes and in those of the public and aroused in them feelings of anguish and inferiority amounting to degrading treatment. The Court rejected the applicants' claims in respect of pecuniary damage and awarded EUR 7,500 to each applicant in respect of non-pecuniary damage.

On 29 April 2013 the case was referred to the Grand Chamber at the request of the Government.

Effective investigation

Inaction on part of applicant who took eleven years to make complaint to domestic authorities: *case referred to the Grand Chamber*

Mocanu and Others v. Romania - 10865/09, 45886/07 and 32431/08
Judgment 13.11.2012 [Section III]

In June 1990 the Romanian Government took measures to end the several-week-long occupation of University Square by demonstrators protesting against the regime then in place. On 13 June 1990 the security forces intervened and arrested numerous demonstrators, which had the effect of increasing the demonstrations. The army having been sent into the most sensitive areas, shots were fired from inside the Ministry of the Interior (which was surrounded by demonstrators) and killed the first applicant's husband. Concurrently, the second applicant, Mr Stoica, who was walking to work on the morning of 13 June 1990, was arrested near the premises of the public television station, taken away, then bound and beaten. As a result, he lost consciousness during the night and woke up the following day in hospital. A criminal investigation into the repression began in 1990.

By a judgment of 13 November 2012 (see Information Note no. 157), a Chamber of the Court unanimously held, *inter alia*, that there had been no violation of Article 3 under its procedural aspect, as Mr Stoica had not submitted his complaint to the relevant authorities until 2001, or eleven years after the events.

On 29 April 2013 the case was referred to the Grand Chamber at the second applicant's request.

Expulsion

Proposed removal of driver and interpreter who had worked for the international community in Afghanistan to Kabul: *deportation would not constitute a violation*

H. and B. v. the United Kingdom - 70073/10 and 44539/11
Judgment 9.4.2013 [Section IV]

Facts – The two applicants, who were Afghan nationals, applied for asylum in the United Kingdom because they feared ill-treatment at the hands of the Taliban in reprisal for work they had performed in Afghanistan for the international community, the first applicant as a driver for the United Nations and the second applicant as an interpreter for the United States forces. Their applications were refused, partly on grounds of credibility, but also because the United Kingdom authorities considered they could in any event safely relocate to the capital, Kabul.

Law – Article 3: The general situation in Afghanistan was not such that there would be a real risk

of ill-treatment if an individual was simply returned there and the applicants had not argued that it was, but had instead concentrated on the risk of ill-treatment at the hands of the Taliban owing to their support of the international community. Since the Government proposed to remove the applicants to Kabul and as neither applicant had submitted anything to suggest that he would not be able to gain admittance and settle there, it was unnecessary to examine the question of risk in any other part of the country.

As to the risks in Kabul, it was significant that the Office of the United Nations High Commissioner for Refugees (UNHCR) had indicated in its 2010 Guidelines that the majority of targeted attacks and assassinations by armed anti-government groups had occurred in those groups' strongholds. Furthermore, the Landinfo Report also observed that killings of low profile collaborators were not being reported in areas where they were not in control such as Kabul. Thus, despite suggestions that the number of targeted assassinations was increasing in areas previously considered to be more secure, the Court considered that there was insufficient evidence at present to suggest that the Taliban had the motivation or ability to pursue low level collaborators in Kabul or other areas outside their control. Accordingly, while certain individuals perceived as supportive of the international community might be able to demonstrate a real and personal risk from the Taliban in Kabul this did not apply to everyone with connections to the UN or the US forces, but depended on the individual circumstances of their case, the nature of their connections to the international community and their profile.

The first applicant's case had been thoroughly examined by the domestic authorities, he had been heard both at his asylum interview and before an immigration judge and had been legally represented on appeal. There was no reason to conclude that the domestic authorities' decisions were deficient, that their assessment was insufficiently supported by relevant materials or that the reasons given were inadequate. Nor was there any new evidence to cast doubt on their conclusion that there were no substantial grounds for finding that the first applicant would face a real risk of proscribed treatment, in particular bearing in mind that four years had passed since he had stopped working for the UN and there was no evidence that he remained of any adverse interest to the Taliban.

The second applicant's claim had also been comprehensively examined by the national authorities, who had accepted that he had been an interpreter for US forces but not that he had been involved in the rescue of an aid worker: cogent reasons were required to depart from the findings of fact of national courts and none had been found here. The claim that the second applicant was at risk from the Afghan authorities had never been raised domestically and was not supported by any evidence. As to the alleged risk from the Taliban, the Court was not convinced that he would be at risk in Kabul solely because of his previous work as an interpreter and noted that until early 2011 he had worked in a different province where he had no particular profile. He had not submitted any evidence or reason to suggest that he would be identified in Kabul, an area outside of Taliban control, or that he would come to the adverse attention of the Taliban there. Finally, regarding his claim that he would be destitute if returned to Kabul, the Court reiterated that humanitarian conditions in a country of return could give rise to a breach of Article 3 only in very exceptional cases. The second applicant, a young man in good health who had left Afghanistan as an adult in 2011, had failed to submit any evidence to the Court to suggest that his removal to Kabul, an urban area under government control where he still had family members, would meet that standard.

Conclusion: no violation (six votes to one).

Extradition

Uncertainty over conditions of detention in the event of extradition to the United States of suspected terrorist suffering from serious mental disorder: *extradition would constitute a violation*

Aswat v. the United Kingdom - 17299/12
Judgment 16.4.2013 [Section IV]

Facts – In August 2005 the applicant was arrested in the United Kingdom on the basis of an arrest warrant following a request for his provisional arrest by the United States in connection with his indictment for conspiring to establish a *jihad* training camp. In March 2006 the Secretary of State ordered his extradition. In March 2008 the applicant was transferred to a high security psychiatric hospital because he met the criteria for detention under the United Kingdom's mental health legislation. In November 2011 the First-Tier Tribunal Mental Health considered the applicant's

case and concluded that he was suffering from paranoid schizophrenia which made it appropriate for him to continue to be liable to detention in a medical hospital for his own health and safety.

Law – Article 3: Whether or not the applicant's extradition to the United States would breach Article 3 of the Convention very much depended upon the conditions in which he would be detained and the medical services available to him there. However, any assessment of those detention conditions was hindered by the fact that it could not be said with any certainty in which detention facility or facilities the applicant would be housed, either before or after trial. This was particularly the case with respect to the pre-trial period, about which very little information had been provided. The United States' Department of Justice had given no indication of where the applicant would or could be held, although it had advised that if he consented to his medical records being provided to the United States' authorities on extradition, they would be able to take his mental health concerns into account in deciding where to house him while on remand. It was also unclear how long the applicant might expect to remain on remand pending trial. If the applicant was extradited his representatives would be entitled to contend that he was not fit to stand trial in the United States on account of his mental disorder. A district judge would then have to assess his competency and, if the applicant was found to be competent, he would have a right of appeal to the Court of Appeals. There was no information before the Court concerning the potential length of a competency assessment or any subsequent appeals procedure, but it was reasonable to assume that the length of pre-trial detention might be prolonged if the applicant were to assert these rights. Finally, the Court noted with concern the complete absence of any information about the consequences for the applicant if the district judge were to find that he was not fit to stand trial.

The Court accepted that if convicted the applicant would have access to medical facilities and, more importantly, mental health services, regardless of which institution he was detained in. Indeed, it recalled that in *Babar Ahmad* it had not been argued that psychiatric care in the United States' federal prisons was substantially different from that available in the prison in which Mr Babar Ahmad was being held. However, the mental disorder suffered by the present applicant was of sufficient severity to have necessitated his transfer from ordinary prison to a high-security psychiatric hospital and the medical evidence clearly indicated that it continued to be appropriate for him to remain there "for his own health and safety". Moreover, there was no guarantee that if tried and convicted he would not be detained in ADX Florence, where he would be exposed to a "highly restrictive" regime with long periods of social isolation. There was no evidence to indicate the length of time he would spend in ADX Florence. While the Court in *Babar Ahmad* had not accepted that the conditions in ADX Florence reached the Article 3 threshold for persons in good health or with less serious mental health problems, the applicant's case could be distinguished on account of the severity of his mental condition. The applicant's case could also be distinguished from that of *Bensaid* as he was facing not expulsion but extradition to a country where he had no ties, where he would be detained and where he would not have the support of family and friends. Therefore, in the light of the current medical evidence, there was a real risk that the applicant's extradition to a different country and to a different, and potentially more hostile, prison environment would result in a significant deterioration in his mental and physical health and that such a deterioration would be capable of reaching the Article 3 threshold.

Conclusion: extradition would constitute a violation (unanimously).

Article 41: no claim made in respect of damage.

(See *Babar Ahmad and Others v. the United Kingdom*, nos. 24027/07 et al., 10 April 2012, Information note no. 151; and *Bensaid v. the United Kingdom*, no. 44599/98, 6 February 2001, Information Note no. 27)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Pre-trial detention for allegedly contemptuous behaviour to trial court: *violation*

Tymoshenko v. Ukraine - 49872/11
Judgment 30.4.2013 [Section V]

Facts – The applicant was the leader of one of the leading opposition parties in Ukraine and a former

Prime Minister. In April 2011 criminal proceedings were brought against her for alleged excess of authority and abuse of office and in August 2011 the trial court ordered her detention pending trial. She was later convicted of the offences charged and given a prison sentence.

In her application to the European Court the applicant complained, *inter alia*, of her conditions of detention, of inadequate medical treatment in detention and of ill-treatment during a transfer to hospital (Article 3 of the Convention), that her detention was arbitrary and that she had had no legal remedy to challenge it or to seek compensation (Article 5) and that she had been detained for political motives (Article 18 in conjunction with Article 5).

Law – Article 3

(a) *Conditions of her pre-trial detention* – The Court accepted that the applicant may have experienced certain problems on account of the material conditions during part of her detention – in particular limited access to daylight, lack of hot water and lack of heating during limited periods . She had also been unable to take daily walks owing to problems with mobility when a stick or crutch could have facilitated matters. However, while the applicant's situation may have been uncomfortable, it had not been so harsh as to bring it within the ambit of Article 3.

Conclusion: inadmissible (unanimously).

(b) *Alleged lack of appropriate medical treatment during detention* – It was clear from the materials before the Court that the applicant's health had received considerable attention from the Ukrainian authorities, who had invested efforts far beyond the normal health-care arrangements available for ordinary detainees in Ukraine. The applicant, however, had been extremely cautious and because of a lack of confidence in the authorities had regularly refused to allow most of the medical procedures that were suggested to her. While the Court was mindful that patient trust was a key element of the doctor-patient relationship and could be difficult to create in detention, patients nevertheless had a responsibility to communicate and cooperate with health authorities and there was no specific incident noted in the applicant's medical history while in detention which could have explained such a total lack of confidence on the applicant's part. The European Committee for the Prevention of Torture (CPT) had visited one of the facilities in which the applicant was detained and had not raised any particular concern over the appropriateness of the medical care provided to her. The applicant had also been transferred to an outside hospital to receive specialist care. In sum, the domestic authorities had afforded the applicant comprehensive, effective and transparent medical assistance.

Conclusion: inadmissible (unanimously).

(c) *Alleged ill-treatment during her transfer to hospital* – Several bruises had appeared on the applicant's body during her detention. That alone called for an explanation by the State authorities as to their origin. The location of the bruises – on her stomach and arms – was consistent with her account that she had been violently pulled from her bed and punched in the stomach on the day of her transfer to the hospital. Nevertheless, the Court could not ignore the medical evidence before it that the apparent age of the bruises did not correspond with the time she had indicated and that there had been other possible origins of the bruising which did not involve external trauma. Those findings could only have been satisfactorily confirmed or refuted if she had undergone a full forensic medical examination, which she had refused to allow on two occasions. Given the absence of such forensic evidence as a result of her decision not to undergo the examination, it had not been established to the necessary standard of proof that the bruising had resulted from treatment in breach of Article 3 during her transfer to hospital. Her refusal to undergo a forensic medical examination had also hindered the effectiveness of the investigation into her complaint of ill-treatment, which investigation had therefore been "effective" for the purposes of Article 3.

Conclusion: no violation (four votes to three).

Article 5 § 1: The applicant's detention pending trial had been ordered for an indefinite period, which in itself was contrary to the requirements of Article 5 and was a recurrent issue resulting from legislative lacunae. Further, no risk of absconding was discernible from the accusations which had been advanced among the reasons for her detention: these were all of a minor nature and had not resulted in her failing to attend the hearings. In fact, the main justification for her detention indicated by the judge had been her alleged hindering of the proceedings and contemptuous behaviour, which was not among the list of reasons that could justify deprivation of liberty under Article 5 § 1. Nor was it clear how the replacement of the applicant's obligation not to leave town by her detention was a more appropriate preventive measure in the circumstances. Given that the reasons indicated for her pre-trial detention remained the

same until her conviction, the entire period of pre-trial detention had been arbitrary and unlawful.

Conclusion: violation (unanimously).

Article 5 § 4: The domestic courts' various reviews of the lawfulness of the applicant's detention did not satisfy the requirements of Article 5 § 4 as they were confined to a mere statement that no appeal lay against a ruling on a change of a judicially ordered preventive measure with the result that the deficient reasoning initially applied was reiterated. There was no indication that the domestic courts had considered the specific and pertinent arguments that had been advanced by the applicant in her numerous applications for release. Indeed, the Court had already found in other cases that on the whole Ukrainian law did not provide for a procedure to review the lawfulness of continued detention after the completion of a pre-trial investigation that would satisfy the requirements of Article 5 § 4.

Conclusion: violation (unanimously).

Article 5 § 5: Under Ukrainian law the right to compensation arose in particular when the unlawfulness had been established by a judicial decision. However, there was no procedure under Ukrainian law for seeking compensation for a deprivation of liberty that had been found to be in breach of Article 5 by the European Court. This lacuna had already been noted in other cases against Ukraine.

Conclusion: violation (unanimously).

Article 18 in conjunction with Article 5: An applicant alleging that his rights and freedoms were limited for an improper reason must convincingly show that the real aim of the authorities was not the same as that proclaimed or which could reasonably be inferred from the context. A mere suspicion that the authorities had used their powers for some other purpose than those defined in the Convention was not sufficient to prove that Article 18 was breached.

The applicant's case showed an overall similarity to that of *Lutsenko v. Ukraine* (no. 6492/11, 3 July 2012, Information Note no. 154). As in that case, soon after a change of power, the applicant, who was the former Prime Minister and the leader of the strongest opposition party, was accused of abuse of power and prosecuted. The Court had already established that, although the applicant's detention was formally effected for the purposes envisaged by Article 5 § 1 (c) of the Convention, both the factual context and the reasoning advanced by the authorities suggested that the actual purpose of the measure was to punish the applicant for a lack of respect towards the court which it was claimed she had been manifesting by her behaviour during the proceedings. Accordingly, the restriction of the applicant's liberty was applied not for the purpose of bringing her before a competent legal authority on reasonable suspicion of having committed an offence, but for other reasons.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

Article 5 § 1 (f)

Expulsion

Detention of applicant in respect of whom interim measure by Court preventing his removal was in force: *violation*

Azimov v. Russia - 67474/11
Judgment 18.4.2013 [Section I]

Facts – The applicant, a Tajikistani national, has lived in Russia since 2002, but regularly returned to Tajikistan for periods of several months. In November 2010 he was arrested in Russia and detained pending examination of a request for his extradition to Tajikistan, where he was wanted on charges of being a member of opposition movements allegedly responsible for armed riots. The request was subsequently approved by the Russian deputy Prosecutor General, and the extradition order was upheld by the Russian courts. A request by the applicant for asylum was rejected. In November 2011 the regional court ruled that the applicant's detention could not be extended pending extradition, because the applicant had already been detained for the maximum twelve-month period permitted by law. At the same time, however, it indicated that since the applicant had been residing in Russia without the necessary papers, he was liable to expulsion (administrative removal) and could have been detained on that ground. The following day the town court found the applicant guilty of the administrative offence of unlawful residence in Russia, ordered his expulsion and placed him in detention pending expulsion because of the gravity of the offence and because the applicant had no stable income in Russia. No specific time-limit for the applicant's detention was given. On 23 November 2011 the European Court

issued an interim measure under Rule 39 of the Rules of Court requiring the Government not to remove the applicant to Tajikistan or elsewhere until further notice. In December 2011 the regional court confirmed the validity of the expulsion and detention orders, without setting a time-limit for the applicant's detention.

Law – Article 5 § 1: It was common ground that the applicant had resided illegally in Russia for some months before his arrest. The Court was satisfied that the applicant's detention pending expulsion had been ordered by a court having jurisdiction in the matter and in connection with an offence punishable with expulsion. However, the circumstances surrounding the applicant's detention pending expulsion could be reasonably interpreted as suggesting that the real intention of the authorities had been to keep the applicant in detention with a view to his extradition after the maximum period set by the law for that purpose had expired.

The authorities had been aware of the applicant's irregular immigration status from the moment of his arrest on 3 November 2010. Nevertheless, they had not cited that ground for detaining him until the time-limit provided for detention pending extradition had expired. It was the regional court examining the applicant's extradition case which had recommended that the law-enforcement authorities re-detain the applicant on that new ground. Most importantly, the applicant had been detained "with a view to expulsion" while the extradition proceedings were still pending. The Russian authorities had occasionally used the expulsion (administrative removal) procedure instead of extradition. The applicant's extradition had been "under the control of the President of the Russian Federation", which implied that handing him over to the Tajikistani authorities (whether by expulsion or extradition) must have been regarded as a top priority. All this supported the applicant's claim that the authorities had abused their power and that the new ground for detention had been cited primarily to circumvent the maximum time-limit for detention pending extradition.

Detention under Article 5 § 1 (f) had to be in good faith and closely connected to the ground relied on by the Government. Those two conditions had not been met in the instant case, at least during the short period when the applicant's extradition proceedings were still pending, and probably even after they were over. The overall length of the applicant's detention (over two years and five months) could be divided into two periods. The first had lasted more than one year (between the applicant's arrest in November 2010 and the last domestic judicial decision in that case in December 2011). That period could mostly be attributed to the three sets of proceedings (extradition, expulsion and asylum) which had taken place simultaneously. Those proceedings had been pursued with proper diligence without any long periods of inactivity imputable to the State. It was the period from December 2011 onwards which was a source of concern. The applicant's detention during that time had been mainly attributable to the temporary suspension of the enforcement of the extradition and expulsion orders following the interim measure issued by the Court under its Rule 39 in November 2011.

The suspension of the domestic proceedings due to the indication of an interim measure by the Court should not result in a situation where the applicant languishes in prison for an unreasonably long period. However, no specific time-limits for the applicant's detention pending expulsion had been expressly set by the domestic courts. Under the applicable legislation the expulsion decision had to be enforced within two years and the alien released once that period had expired. However, the rule limiting the duration of the detention of an illegal alien was not set out clearly in the domestic law. Nor was it clear what would happen after the expiry of the two-year period since the applicant would clearly remain in an irregular situation and would again be liable to expulsion and, consequently, to detention on that ground.

Detention with a view to expulsion should not be punitive in nature and should be accompanied by appropriate safeguards. In the instant case, however, the "preventive" measure was much more serious than the "punitive" measure (the maximum penalty for the administrative offence being thirty days). The authorities had not re-examined the question of the lawfulness of the applicant's continuing detention at any stage when the Court's interim measure was in force. Finally, although they had known that the examination of the case before the Court could take some time, they had not tried to find "alternative solutions" to secure the enforcement of the expulsion order in the event the interim measure was lifted.

Conclusion: violation (unanimously).

(See also *Keshmiri v. Turkey (no. 2)*, no. 22426/10, 17 January 2012; and *S.P. v. Belgium* (dec.), no. 12572/08, 14 June 2011, Information Note no. 142)

Article 5 § 4: Throughout the term of his detention pending expulsion the applicant had not had at his disposal any procedure for a judicial review of its lawfulness.

Conclusion: violation (unanimously).

The Court also held unanimously that the forced return of the applicant to Tajikistan would give rise to a violation of Article 3.

Article 41: EUR 5,000 in respect of non-pecuniary damage.

ARTICLE 6

Article 6 § 1 (civil)

Civil rights and obligations
Access to court
Public judgment

Lack of judicial review of assessment that intelligence officer was mentally unfit for work; lack of public delivery of judgments: *violations*

Fazliyski v. Bulgaria - 40908/05
Judgment 16.4.2013 [Section IV]

Facts – The applicant was dismissed from the National Security Service of the Ministry of Internal Affairs after being found mentally unfit to carry out his duties, which included the gathering and dissemination of secret information, by the Ministry's Psychology Institute. A three-member panel of the Supreme Administrative Court rejected his appeal against that decision after finding that the correct procedure had been followed and that, under the terms of the legislation then applicable, it was not competent to review the results of the psychological assessment. That decision was upheld by a five-member panel of the same court. As the proceedings were classified, the applicant was not able to obtain copies of the Supreme Administrative Court's judgments, which were not delivered publicly.

Law – Article 6 § 1

(a) *Applicability*: It was uncontested that there was a dispute over a right recognised under Bulgarian law – the right not to be unfairly dismissed from one's employment –, that the dispute was genuine and serious, and that the outcome of the proceedings before the Supreme Administrative Court was directly decisive for the right concerned. Applying the test laid down in *Vilho Eskelinen and Others* concerning the applicability of Article 6 § 1 to disputes concerning the employment of civil servants, the Court noted that Bulgarian law expressly allowed judicial review of the dismissal of officers employed by the Ministry of Internal Affairs and that the applicant's legal challenge to his dismissal had in fact been examined by the Supreme Administrative Court. Accordingly, the civil limb of Article 6 § 1 was applicable to the proceedings before that court. The fact that the proceedings concerned the applicant's dismissal rather than a question relating to his salary, allowances or similar entitlements did not alter that conclusion.

(b) *Compliance*

(i) *Lack of judicial scrutiny of assessment of applicant's fitness for work* – While Article 6 § 1 did not bar national courts from relying on expert opinions drawn up by specialised bodies to resolve disputes before them when this was required by the nature of the issues under consideration, the Supreme Administrative Court had not simply taken into account the assessment carried out by the Ministry's Psychology Institute, it had considered itself bound by it and refused to scrutinise it in any way. That assessment had been crucial for the determination of the case. Accordingly, the conditions laid down in Article 6 § 1 could only be met if the Institute's assessment was itself made in conformity with the requirements of that provision, but this was not the case: the assessment had been made by a body that was directly subordinate to the Minister, it had consisted of a psychological examination the results of which were not communicated to the applicant and it had not been subject to direct review by a court.

No justification had been offered for that situation. While it was true that the applicant was an officer at the National Security Directorate involved in the gathering and processing of intelligence and that legitimate national-security considerations could justify limitations on Article 6 § 1 rights, neither the Supreme Administrative Court nor the Government had sought to justify the denial of access to a court with adequate jurisdiction in terms of the legitimacy or proportionality of the aim pursued. Indeed, in other cases the Supreme Administrative Court had held that an assessment of mental fitness for work prompting dismissal should be amenable to judicial scrutiny even if it

touched upon national security and the law had been changed in May 2006 to provide for direct judicial review of the mental fitness assessments of all members of the Ministry's staff.

Conclusion: violation (unanimously).

(ii) *No public delivery of the Supreme Administrative Court's judgments* – As a result of the initial classification of the proceedings, the judgments of the Supreme Administrative Court were not delivered in public, the materials in the case file (including the judgments) were not accessible to the public and the applicant was not able to obtain copies. Although the judgments were later declassified, the fact remained that they were not given any form of publicity for a considerable period (fifteen months) without any convincing justification.

As the Court had held in a case concerning expulsion on national security grounds (*Raza v. Bulgaria*, no. 31465/08, 11 February 2010), the complete concealment from the public of the entirety of a judicial decision could not be regarded as warranted. The publicity of judicial decisions aimed to ensure scrutiny of the judiciary by the public and constituted a basic safeguard against arbitrariness. Even in indisputable national-security cases, such as those relating to terrorist activities, some States had opted to classify only those parts of the judicial decisions whose disclosure would compromise national security or the safety of others, thus illustrating that techniques existed which could accommodate legitimate security concerns without fully negating fundamental procedural guarantees such as the publicity of judicial decisions.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

(See also *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, 19 April 2007, Information Note no 96)

Fair hearing

Arbitrary domestic decision amounting to denial of justice: *violation*

Anđelković v. Serbia - 1401/08
Judgment 9.4.2013 [Section II]

Facts – In 2004 the applicant instituted civil proceedings against his employer, who was in financial difficulty, for outstanding holiday pay. The applicant's claim was granted at first instance in line with the applicable labour law and collective agreements, but the judgment was reversed on appeal on the grounds that accepting the applicant's claim would have resulted in the applicant being treated more favourably than the employer's other employees, none of whom had received outstanding holiday pay.

Law – Article 6 § 1: The Court reiterated that the question of the interpretation of domestic law lay primarily with the national courts and it would intervene only when those courts in a particular case applied the law manifestly erroneously or so as to reach an arbitrary conclusion. In the applicant's case the domestic law had clearly provided for instances in which employees were entitled to holiday pay. Having established the relevant facts, the first-instance court had found that the applicant was entitled to the payments. However, the appellate court had overturned that judgment without a single reference to the labour law or the facts as established at first instance. Nor had it explained what the law was or how it should be applied in the applicant's case. In fact, the reasoning of the appellate court had no legal foundation and was based on an abstract assertion falling outside any reasonable judicial discretion. In conclusion, the arbitrary ruling of the appellate court in the applicant's case had amounted to a denial of justice and violated his right to a fair hearing.

Conclusion: violation (unanimously).

(See also *De Moor v. Belgium*, no. 16997/90, 23 June 1994; and *Barac and Others v. Montenegro*, no. 47974/06, 13 December 2011)

Article 6 § 1 (criminal)

Criminal charge
Access to court
Tribunal established by law

Lack of right of appeal to court with power to conduct a full review in respect of imposition of tax surcharges: *violation*

Julius Kloiber Schlachthof GmbH and Others v. Austria - 21565/07 et al.
Judgment 4.4.2013 [Section I]

Facts – In their application to the European Court the applicant companies complained that proceedings concerning the imposition of surcharges ranging from 10% to 60% on unpaid contributions by the national agricultural marketing association, Agrarmarkt Austria AMA, had not been decided by a tribunal within the meaning of Article 6 § 1 of the Convention.

In the domestic proceedings, the applicant companies had sought to argue that AMA contributions were levied for financing activities, such as AMA's quality programme, which were not in compliance with European Union law. After an unsuccessful appeal to the designated appeal authority, the Federal Minister of Agriculture, Forestry, the Environment and Water, they had lodged complaints with the Constitutional Court and the Administrative Court. The Constitutional Court declined to hear their complaints of a violation of their constitutional right to property owing to the lack of prospects of success. Their complaints to the Administrative Court were likewise dismissed.

Law – Article 6 § 1: In line with its judgment in *Steininger v. Austria*, the Court found that Article 6 under its criminal head applied to proceedings concerning the imposition of surcharges for taxes such as the contributions levied by the AMA. Where a sanction was criminal in nature there had to be the possibility of review by a court which satisfied the requirements of Article 6 § 1, even though it was not inconsistent with the Convention for the prosecution and punishment of minor offences to be primarily a matter for the administrative authorities. Decisions taken by administrative authorities which did not themselves satisfy the requirements of Article 6 § 1 had to be subject to subsequent review by a "judicial body that had full jurisdiction".

In the instant case the AMA had ordered the applicant companies to pay surcharges and the Federal Minister of Agriculture, Forestry, the Environment and Water, acting as an appeal authority, had decided their appeal. The former entity was a public-law body in which some administrative powers were vested, the latter an administrative and governmental authority. Neither qualified as a tribunal. In the *Steininger* case, which also concerned surcharges, the Court had found that neither the Administrative Court nor the Constitutional Court qualified as a tribunal since neither had sufficient powers to conduct a full review in respect of proceedings that were of a criminal nature for Convention purposes. There was no reason to depart from that finding in the present case. The applicant companies had thus not had access to a tribunal within the meaning of Article 6 § 1.

Conclusion: violation (unanimously).

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

(See also *Steininger v. Austria*, no. 21539/07, 17 April 2012)

Fair hearing

Conviction based on key pre-trial witness statements retracted before trial court: *violation*

Erkapić v. Croatia - 51198/08
Judgment 25.4.2013 [Section I]

Facts – In the course of a police investigation into drug-trafficking three witnesses gave statements that they purchased heroin from the applicant. During the applicant's trial all three retracted their statements claiming that they had been made under duress from the police. The applicant's lawyer applied for an order excluding the statements from the case file as having been obtained unlawfully. However, the trial court dismissed that request and convicted the applicant on the basis of that evidence. He appealed without success.

Law – Article 6 § 1: The Court had previously held that unless there were important reasons to find otherwise the notion of a fair trial required that greater weight be attached to statements given in court than to records of a witnesses' pre-trial questioning because the latter was primarily a process by which the prosecution gathered information in support of their case. In the applicant's case, the three witnesses had given statements incriminating the applicant to the police which they had retracted at the trial on the grounds that that they had been pressured into making the accusations. Following their testimony at the trial, the applicant had sought to have their statements to the police excluded as having been unlawfully obtained. His request had, however, been dismissed without the trial court taking any action to examine the allegations of unlawfulness, thus denying the applicant an effective opportunity to challenge the authenticity of the evidence given by those witnesses to the police. It was undisputed that the three witnesses were heroin addicts at the time of the police questioning and that one of them also

suffered from a personality disorder. The witnesses had further alleged that their lawyers, who had been imposed on them by the police, had not been present during the questioning and had only attended later to sign the pre-prepared statements. However, the trial court had confined itself to finding that the relevant records did not contain any indication of unlawfulness and had not sought to ascertain the manner and circumstances in which the impugned statements were obtained. There were thus serious doubts about the reliability and accuracy of those witness statements, which if not the sole were at least decisive evidence against the applicant, without which his conviction might not have been possible.

Conclusion: violation (unanimously).

Article 41: EUR 1,500 in respect of non-pecuniary damage.

ARTICLE 7

Article 7 § 1

Nulla poena sine lege

Conviction for "continuing" offence comprising acts committed before it was introduced in the Criminal Code: *no violation*

Rohlena v. the Czech Republic - 59552/08
Judgment 18.4.2013 [Section V]

Facts – The applicant was formally charged with repeatedly physically and mentally abusing his wife while drunk between 2000 and February 2006. In 2007 the court found him guilty of the continuing offence of abusing a person living under the same roof and he was given a suspended sentence of two years and six months' imprisonment and put on probation for five years. The court found that the offence defined in Article 215a of the Criminal Code as worded since 1 June 2004 had been made out, considering that that definition extended to acts perpetrated prior to that date to the extent that at the time they amounted to another offence, namely, at least that of violence perpetrated against an individual or group of individuals under Article 197a of the Criminal Code. That judgment was upheld by the appeal court and the Supreme Court. Referring to its case-law, the Supreme Court observed that where the offence was a continuing one that was regarded as a single act, the criminal nature of that act had to be assessed under the law in force at the time of the last act constituting the offence and that that law also applied to the preceding acts on condition that these would have been criminal acts according to the preceding law. In the present case the applicant's acts prior to the amendment of the Criminal Code of 1 June 2004 had amounted to violence against an individual or group of individuals within the meaning of Article 197a of the Criminal Code and assault within the meaning of Article 221 of that Code. In 2008 the Constitutional Court dismissed as manifestly ill-founded a constitutional appeal lodged by the applicant, considering that the courts' decisions in his case had not been of a retrospective effect prohibited by the Constitution.

Law – Article 7: The issue to be determined by the Court was whether the extension of application of the Criminal Code, as worded since 1 June 2004, to acts committed prior to that date had given rise to a violation of the guarantee enshrined in Article 7. The Court – whose task was not to take the place of the domestic courts in examining the question whether the applicant's acts could be classified as a continuing offence under domestic law – accepted that, under Czech law, there had been no retrospective application of the criminal law. It also observed that the interpretation of the concept of continuing offence defined in Article 89 § 3 of the Criminal Code had been based on clear and established case-law of the Supreme Court and the opinion of academic commentators. In so far as the applicant disputed the effects of that interpretation, which in his view resulted in an actual retrospective effect, the Court had to determine whether, in the present case, those effects were in keeping with the substance of the offence and reasonably foreseeable. The interpretation adopted by the courts in the present case was not in itself unreasonable, given that a continuing offence extended, by definition, over a certain period of time and that it was not arbitrary to consider that it ceased at the time of perpetration of the last assault. The courts had not punished isolated acts by the applicant but his conduct extending continuously over the period in question. Moreover, the Czech authorities had observed that the applicant's acts had at all times been punishable as criminal offences. Lastly, it should be observed that the applicant had not alleged that the courts' interpretation in this case was contrary to established case-law or that it had not been foreseeable, having recourse if necessary to appropriate advice. In these circumstances the relevant legal provisions, together with interpretative case-law, were capable of enabling the applicant to regulate his conduct. The Court observed in that connection that the

case-law had developed prior to the date on which the applicant had first assaulted his wife. He could have presumed that by continuing his actions after 1 June 2004, when the offence of ill-treating a person living under the same roof was introduced into the Criminal Code, he ran the risk of being convicted of a continuing offence and being punished as provided for by the law in force at the time of the last assault. He had therefore been in a position to foresee the legal consequences of his acts and adapt his conduct accordingly.

Conclusion: no violation (unanimously).

ARTICLE 8

Positive obligations
Respect for private life
Respect for family life

Revocation of adoption while criminal proceedings for suspected child abuse were still pending: *violation*

Failure adequately to investigate unauthorised disclosure of confidential information or to protect reputation and right to be presumed innocent of parent suspected of child abuse: *violations*

Ageyevy v. Russia - 7075/10
Judgment 18.4.2013 [Section I]

Facts – In 2008 the applicants, a married couple, adopted two small children (a boy and a girl). Following an incident on 20 March 2009 in which the boy was badly burnt at home and had to go to hospital for treatment, the authorities took the children into care as they suspected abuse. According to the applicants, their son had been scalded when he knocked over an electric kettle and had then hurt himself falling down some stairs. They challenged the removal order before the domestic courts, but it was eventually upheld in April 2009. In June 2009, the couple's adoption of the children was revoked by the district court, which based its decision in particular on a finding that the parents had failed to look after the children's health (a medical report from the hospital indicated that both children had a number of untreated illnesses) and on the fact that a criminal investigation had been lodged against the applicants in respect of the injuries sustained by the boy. The decision to revoke the adoption was upheld in August 2009.

In November 2010 the first applicant was acquitted of the charges against him; the second applicant was convicted of the offences of non-fulfilment of duties relating to the care of minors and of the intentional infliction of mild harm to health. She was sentenced to one year and eight months' correctional work (which meant that during that period she had to pay 15% of her salary to the State).

In their application to the European Court the applicants complained under Article 8 of the Convention of the sudden removal of their adopted children, of the revocation of the adoption and of being refused access to the children for some fourteen months. They further alleged a breach of their privacy on account of: the conduct of hospital officials who had provided journalists with access to their son and with photographs and medical information about him, of the unauthorised disclosure of confidential information concerning their son's adopted status in the media and of a failure by the domestic courts to protect the second applicant's reputation against factually incorrect and defamatory media reports.

Law – Article 8

(a) *Removal of the children* – The removal of the applicants' children in March 2009 had constituted an interference with the applicants' right to respect for their family life. The interference had been in accordance with the law: although the applicable legislation was couched in rather general terms and conferred a certain measure of discretion on the authorities, the circumstances in which it could be necessary to take a child into public care were so variable that it would scarcely be possible to formulate a law to cover every eventuality. That being so and since the removal order had been reviewed by the courts at two levels of jurisdiction, the scope of the discretion was reasonable and acceptable to satisfy the quality of law requirement for the purposes of Article 8. The measure pursued the legitimate aim of protecting health and morals and rights and freedoms.

The measure had also been necessary in a democratic society. Given that their primary task was to safeguard the interests of the children, the authorities could reasonably have considered that it was in the children's best interests to be placed in care pending the outcome of the criminal investigation into the events of 20 March 2009. The decision had been reviewed by two levels of jurisdiction, which had considered all relevant circumstances and the applicants had been represented by counsel and able to state their case and contest evidence in those proceedings.

Conclusion: no violation (unanimously).

(b) *Revocation of the adoption* – The decision to revoke the adoption had interfered with the applicants' family life. The measure was in accordance with the law despite the general terms in which the legislation was couched since, as with care orders, the circumstances in which it could be necessary to revoke an adoption were too variable to make it possible to formulate a law to cover every eventuality and the domestic case-law provided additional guidance on this question. The interference had also pursued a legitimate aim.

However, it had not been necessary in a democratic society. Although the domestic courts had given relevant reasons for their decision to revoke the adoption, they had failed sufficiently to justify them for the purposes of Article 8 § 2. The domestic courts had relied on two main grounds, namely (i) an alleged failure to look after the children's health, and (ii) the presence of injuries on the boy's body and the related criminal investigation. However, their assessment of these grounds was manifestly superficial consisting of a simple enumeration of the diseases the children had been diagnosed with or a description of the injuries, without any explanation of their origin or any examination of the extent to which the applicants were responsible. While the suspicion of child abuse had justified the children's temporary removal, that suspicion alone was not sufficient, absent other weighty reasons, to justify the far-reaching and irreversible decision to revoke the adoption. There had been no assessment of the family bonds that had been established between the applicants and the children and the potential emotional damage to them that might result from breaking those bonds. The criminal proceedings had in fact ended with the first applicant's acquittal and the second applicant's conviction of non-fulfilment of duties only in respect of the incident of March 2009, while all other charges had been dropped. Accordingly, the court decisions revoking the adoption had not been sufficiently justified.

Conclusion: violation (unanimously).

(c) *Lack of access to the children* – The decision to revoke the adoption had stripped the applicants of their legal right to see the children and they were denied access for over fourteen months. The Court had already found that the authorities had failed to advance relevant and sufficient reasons to justify such a drastic measure that severed all links between the applicants and their adoptive children. There had thus been a violation on account of the applicants' lack of access during the period in question.

Conclusion: violation (unanimously).

(d) *Conduct of the hospital officials* – The Court found it established that: doctors and officials of the hospital had taken photographs of the applicants' son for non-medical purposes and passed them on to the assistant of a member of the Duma, and that they had informed several media crews of the boy's identity and given them direct access to him and to medical information concerning his condition. This constituted interference with the applicants' right to respect for their private and family life. All these actions had been taken without seeking the authorisation of, or informing, the applicants. Since the relevant authorisations had been given by the head of the hospital in his capacity as an official under the authority of the Department of Healthcare of the City of Moscow, the respondent State's responsibility was engaged. However, in their submissions to the Court, the Government had failed to demonstrate that these actions had any basis in the domestic law.

Conclusion: violation (unanimously).

(e) *Unauthorised communication of confidential information* – The applicants' allegations accusing the State of disclosing confidential information about a minor's adoption status to the media had not been substantiated, so that part of the application was rejected as being manifestly ill-founded.

Nevertheless, their allegations had been supported by prima facie evidence and concerned fundamental values and essential aspects of private life where effective deterrence was indispensable, primarily through criminal-law provisions and their application through effective investigation and prosecution. Although the actions complained of were criminal under the domestic law, it had nevertheless taken the authorities more than a year to react to the applicants' complaint. Subsequently, without questioning the most obvious potential witnesses, they had later decided to suspend the investigation because the perpetrators had not been identified. Although that decision was later quashed, the investigation did not appear to have advanced since. The authorities had thus failed to effectively investigate the unauthorised disclosure of the confidential information.

Conclusion: violation (unanimously).

(f) *Alleged failure to protect the second applicant's reputation and private and family life* – The second applicant complained that the domestic courts had failed to protect her reputation in defamation proceedings she had instituted in respect of media reports describing her alleged ill-treatment of her

son. Her complaint about the reports, in which she could be identified, fell within the scope of her "private life" for the purpose of Article 8. The Court was prepared to accept that the subject matter – involving a suspicion of domestic violence in respect of an adopted child – could be considered important to the public. However, any reporting about the incident should have taken into account the second applicant's right to be presumed innocent and the fact that the incident concerned a private person in a purely private context. Instead, the articles had made premature, factually incorrect and defamatory assessments and the material had been presented in a sensational manner. It was not evident that the domestic courts in the defamation proceedings had attached any importance to her right to be presumed innocent. Nor had they examined closely whether the journalists had acted in good faith and had provided reliable and precise information in accordance with the ethics of journalism. Even though nothing in the case-file suggested that the journalists had not been acting in "good faith", they had obviously failed to take the necessary steps to report the incident in an objective and rigorous manner, trying instead either to exaggerate or oversimplify the underlying reality. In these circumstances, the Court was not convinced that the reasons advanced by the domestic courts regarding the protection of the freedom of expression of the media company had outweighed the second applicant's rights to have her reputation and right to the presumption of innocence safeguarded.

Conclusion: violation (unanimously).

Article 41: EUR 25,000 to the first applicant and EUR 30,000 to the second applicant in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Respect for private life
Respect for family life

Refusal to give applicant female identity number following sex change unless marriage was transformed into civil partnership: *case referred to the Grand Chamber*

H. v. Finland - 37359/09
Judgment 13.11.2012 [Section IV]

The applicant was born male and married a woman in 1996. The couple had a child in 2002. In 2009 the applicant underwent gender re-assignment surgery. However, although she changed her first names she could not have her identity number changed to a female one unless her wife consented to the transformation of their marriage into a civil partnership or the couple divorced. However, both the applicant and her spouse wished to remain married as a divorce would be against their religious convictions and they considered that a civil partnership did not provide the same security as marriage for them and their child.

In her application to the European Court the applicant complained, *inter alia*, under Article 8 of the Convention that her right to private and family life had been violated when the full recognition of her new gender was made conditional on the transformation of her marriage into a civil partnership.

In a judgment of 13 November 2012 a Chamber of the Court held unanimously that there had been no violation of Article 8 of the Convention. Article 12 did not impose an obligation on Contracting States to grant same-sex couples access to marriage and Article 8, a provision of more general purpose and scope, could not be interpreted as imposing such an obligation. While the applicant faced daily situations in which the incorrect identity number created inconvenience for her, she had a real possibility to change that state of affairs either, with the consent of her spouse, by turning her marriage into a civil partnership or, if consent was not obtained, by divorcing. It was not disproportionate to require that the applicant's marriage be turned into a civil partnership as the latter was a real option which provided legal protection for same-sex couples which was almost identical to that of marriage and did not alter the applicant's rights and obligations arising either from paternity or parenthood. A fair balance had thus been struck between the competing interests at stake. The Court further held unanimously that there had been no violation of Article 14 in conjunction with Article 8 as, firstly, the applicant's situation was not sufficiently similar to that of non-transgender persons and unmarried transgender persons and, secondly, even assuming it was, since there was no obligation on Contracting States to grant same-sex couples access to marriage, it could not be said that the applicant had been discriminated against *vis-à-vis* other persons when not being able to obtain a female identity number. There was no need to examine the case under Article 12.

On 29 April 2013 the case was referred to the Grand Chamber at the applicant's request.

Respect for private life

Absence of safeguards for collection, preservation and deletion of fingerprint records of persons suspected but not convicted of criminal offences: *violation*

M.K. v. France - 19522/09
Judgment 18.4.2013 [Section V]

Facts – In 2004 and 2005 the applicant was the subject of two investigations into the theft of some books. He was acquitted following the first set of proceedings and the second set of proceedings was discontinued. On both occasions his fingerprints were taken and recorded in the fingerprints database. In 2006 the applicant requested that his prints be deleted from the database. His request was granted only in relation to the prints taken during the first set of proceedings. The appeals lodged by the applicant were dismissed.

Law – Article 8: The consultation procedures in relation to the impugned measure were sufficiently well defined. The same was not true of the procedures for the gathering and retention of the data. The purpose of the database, notwithstanding the legitimate aim pursued – namely, the detection and prevention of crime – necessarily implied the addition and retention of as many entries as possible. Furthermore, the reason invoked by the public prosecutor for refusing to delete the fingerprints taken during the second set of proceedings had been the need to safeguard the applicant's interests by ensuring that his involvement could be ruled out should someone attempt to assume his identity. Besides the fact that the decree concerning the fingerprints database, unless it was interpreted particularly broadly, contained no express reference to such grounds, accepting the argument as to the supposed protection against potential identity theft by third persons would be tantamount in practice to permitting the storage of data concerning the entire French population, a measure that would clearly be excessive and redundant.

Furthermore, in addition to the primary purpose of the database, which was to make it easier to trace and identify the perpetrators of serious crimes and other major offences, the legislation referred to a second purpose, namely "to facilitate the prosecution, investigation and trial of cases before the judicial authority". It was not stated clearly that this related solely to serious crimes and other major offences. Since the legislation referred also to "persons implicated in criminal proceedings who need to be identified", it could in practice be applied to all offences, including minor ones, in so far as this would enable the perpetrators of serious crimes and other major offences to be identified. In any event, the circumstances of the case, which concerned proceedings for book theft which had been discontinued, testified to the fact that the legislation was applied to minor offences. The present case was thus clearly distinguishable from those relating specifically to serious offences such as organised crime or sexual assault. Furthermore, the decree in question did not make any distinction based on whether or not the person concerned had been convicted by a court or had even been prosecuted. In its judgment in *S. and Marper*, the Court had stressed the risk of stigmatisation stemming from the fact that persons who had been acquitted or whose case had been discontinued – and who were thus entitled to the presumption of innocence – were treated in the same way as convicted persons. The situation in the present case was similar in that respect, as the applicant had been acquitted in the first set of proceedings and the charges in the second set of proceedings had been dropped.

In addition, the provisions of the impugned decree governing the retention of data did not afford sufficient protection to the persons concerned. First of all, the right to apply to a judge at any time to have the data deleted was liable to come into conflict, to use the words of the liberties and detention judge, with the interests of the investigating services, who needed a database with as many entries as possible. Accordingly, as the interests at stake were – at least partly – contradictory, the deletion of the data, which moreover was not a right, constituted a "theoretical and illusory" safeguard rather than one that was "practical and effective". Although the retention of information in the database was limited in time, the storage period was twenty-five years. Given that the prospect of making a successful application for the deletion of data was, to say the least, hypothetical, a period of such length amounted in practice to indefinite storage or, at least, to a norm rather than a maximum period.

In conclusion, the Court held that the respondent State had overstepped its margin of appreciation in the matter as the system for retaining the fingerprints of persons suspected of an offence but not convicted, as applied to the applicant in the present case, did not strike a fair balance between

the competing public and private interests at stake. Accordingly, the retention of the data amounted to disproportionate interference with the applicant's right to respect for his private life and could not be said to be necessary in a democratic society.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

(See *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, 4 December 2008, Information Note no. 114)

Respect for family life

Unjustified physical separation of detainee from visiting family members: *violation*

Kurkowski v. Poland - 36228/06
Judgment 9.4.2013 [Section IV]

Facts – The applicant was detained on remand between December 2004 and October 2006. During that period, on one occasion the authorities rejected his request to have an additional family visit without justifying their decision. On three further occasions the applicant's contact with his family was restricted and he was separated from them by a Perspex partition.

Law – Article 8: The relevant authority had absolute discretion in granting permission for family visits in prison. The applicable law provided no details as regards the conditions for granting permission or the possibility of appealing against a decision refusing permission. Consequently, the refusal of permission for the family visit had not been in accordance with the law.

As regards the physical separation from his visiting family members by the Perpex partition, the Court accepted that such a measure might in certain circumstances be compatible with Article 8. However, in the applicant's case the Government had offered no explanation why such a measure had been necessary on three specific occasions but had not been imposed during any of the other twenty-nine visits. Moreover, no arguments had been adduced regarding the necessity or legitimacy of the aim pursued by the measure. The lack of a coherent pattern of application of the impugned measure led the Court to conclude that it had been applied in an arbitrary and random manner.

Conclusion: violation (unanimously).

The Court further concluded that there had been no violation of Article 3 (prison overcrowding) or of Article 5 § 3 of the Convention (length of pre-trial detention).

Article 41: EUR 1,500 in respect of non-pecuniary damage.

Respect for home

Search and seizure operation at newspaper to confirm identity of article author: *violation*

Saint-Paul Luxembourg S.A. v. Luxembourg - 26419/10
Judgment 18.4.2013 [Section V]

Facts – In December 2008 the newspaper *Contacto*, published by the applicant company Saint-Paul Luxembourg S.A., printed an article under the name "Domingos Martins". The article described the situation of families who had lost the custody of their children, and named some of the persons concerned. In January 2009 the prosecuting authorities opened a judicial investigation concerning the author of the article for a breach of the legislation on the protection of minors and for defamation. In March 2009 an investigating judge issued a search and seizure warrant in respect of the registered office of the applicant company in its capacity as the newspaper's publisher. In May 2009 police officers visited the newspaper's premises. The journalist who had written the article gave them a copy of the newspaper, a notebook and various documents used in preparing the article, and one of the police officers inserted a USB key in the journalist's computer. All the applications made by the applicant company and the journalist to have the warrant set aside and the search and seizure operation declared null and void were rejected.

Law – Article 8: The search and seizure operation carried out at the applicant company's premises had been intrusive, notwithstanding the fact that the journalist had cooperated with the police, who could have executed the measure by force had he refused to cooperate. The incident amounted to interference with the applicant company's right to respect for its "home". The interference had been in accordance with the law and had pursued several legitimate aims: first, the prevention of disorder and crime – as the measure had been designed to

determine the true identity of a person facing criminal prosecution in the context of a judicial investigation and to elucidate the circumstances of a possible offence – and, second, the protection of the rights of others, as the article in question had implicated named individuals and reported on a relatively serious matter.

The journalist had written the article under the name "Domingos Martins". The list of officially recognised journalists in Luxembourg did not include that name, but it did include the name "De Araujo Martins Domingos Alberto", a journalist working for the newspaper *Contacto*. The similarity between the names, the unusual combination of elements they contained and the link to the newspaper in question made the connection between the author of the article and the person on the list obvious. On the basis of that information, the investigating judge could initially have employed a less intrusive measure than a search in order to confirm the identity of the person who had written the article. The search and seizure operation had therefore not been necessary at that stage. Accordingly, the measures complained of had not been reasonably proportionate to the legitimate aims pursued.

Conclusion: violation (six votes to one).

Article 10: The warrant in question had constituted interference with the applicant company's freedom to receive and impart information. That interference had been prescribed by law and had pursued a legitimate aim. Its purpose had been to find and seize "any documents or items, irrespective of form or medium, connected with the alleged offences …". As the warrant had been worded in broad terms, the possibility that it was aimed at uncovering the journalist's sources could not be ruled out. Furthermore, the police officers, who had conducted the search on their own in the absence of any safeguards, had been responsible for deciding which items it was necessary to seize. They had been able to access information which the journalist had not intended to publish and which could have enabled other sources to be identified. The extraction of the data from the computer using a USB key had allowed the authorities to gather information which was unrelated to the offence being prosecuted. The warrant had not been sufficiently limited in scope to avoid possible abuse. Since, according to the Government, the sole purpose of the search had been to discover the real identity of the journalist who had written the article, a more restrictive form of wording, referring solely to that purpose, would have sufficed. The search and seizure operation at the applicant company's registered office had therefore been disproportionate to the aim sought to be achieved.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

Expulsion

Deportation and exclusion orders that would prevent immigrant with two criminal convictions from seeing his minor children: *deportation would constitute a violation*

Udeh v. Switzerland - 12020/09
Judgment 16.4.2013 [Section II]

Facts – In 2001 the first applicant, a Nigerian national, was sentenced to four months' imprisonment for possession of a small quantity of cocaine. In 2003 he married a Swiss national, the second applicant, who had just given birth to their twin daughters, the third and fourth applicants. By virtue of his marriage, the first applicant was granted a residence permit in Switzerland. In 2006 he was sentenced to forty-two months' imprisonment in Germany for a drug-trafficking offence. The Swiss Office of Migration refused to renew his residence permit, stating that his criminal conviction and his family's dependence on welfare benefits were grounds for his expulsion. An appeal by the applicants was dismissed. In 2009 the first applicant was informed that he had to leave Switzerland. In 2011 he was made the subject of an order prohibiting him from entering Switzerland until 2020. The first and second applicants had divorced in the meantime. Custody of the children had been awarded to the mother but the first applicant had been given contact rights.

Law – Article 8: The first applicant's second conviction admittedly weighed heavily against him. However, his criminal conduct was limited to those two offences, a fact which had not been considered relevant by the federal court. It could not therefore be said that the applicant's behaviour indicated that he would reoffend. Moreover, his conduct in prison and following his release had been exemplary. Those positive developments, particularly the fact that he had been released on licence after serving part of his sentence, could be taken into account in weighing up the interests at stake. In that connection the Court considered

purely speculative the argument that the applicant's forty-two month prison sentence was evidence that he represented a threat to public order and safety in the future.

Furthermore, at the time the judgment was adopted the total length of the applicant's residence in Switzerland totalled more than seven and a half years, which was a considerable length of time in a person's lifetime. It appeared indisputable that Switzerland had been the centre of his private and family life for quite a long time. Moreover, he endeavoured to maintain regular contact with his children. He had committed the main offence after the children had been conceived; in other words, his wife could not have known about the offence when she entered into a family relationship. This was a significant factor in the examination of the present case. Besides that, the court had acknowledged the efforts made by the first and second applicants to end their dependence on welfare benefits and had not ruled out the possibility that the first applicant's illness (tuberculosis) had played a role in his inability to earn a proper living. Furthermore, the twins had Swiss nationality. The enforced removal of the first applicant was likely to have the effect of their growing up separated from their father. It was in their best interests that they grow up with two parents and, having regard to the divorce, the only possibility of maintaining contact between the first applicant and the two children was to grant him leave to stay in Switzerland, given that the mother could not be expected to follow him to Nigeria with their two children. Lastly, even if the authorities were to grant a request that the order prohibiting him from entering Switzerland be lifted, such temporary measures could not in any case be regarded as replacing the applicants' right to enjoyment of their right to live together.

Having regard to the foregoing, and in particular to their twin daughters, the family relationship that genuinely existed between the first applicant and his children and to the fact that the former had committed only one serious offence, and his subsequent conduct had been exemplary, which bode well for the future, the respondent State had exceeded the margin of appreciation that it enjoyed in the present case.

Conclusion: deportation would constitute a violation (five votes to two).

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

ARTICLE 10

Freedom of expression

Refusal of permission for non-governmental organisation to place television advert owing to statutory prohibition of political advertising: *no violation*

Animal Defenders International v. the United Kingdom - 48876/08
Judgment 22.4.2013 [GC]

Facts – The Communications Act 2003 prohibits political advertising in television or radio services, the aim being to maintain impartiality in the broadcast media and to prevent powerful groups from buying influence through airtime. The prohibition applies not only to advertisements with a political content but also to bodies which are wholly or mainly of a political nature, irrespective of the content of their advertisements. Before it became law, the legislation was the subject of a detailed review and consultation process by various parliamentary bodies, particularly in the light of the European Court's judgment in the case of *VgT Verein gegen Tierfabriken v. Switzerland* (in which a ban on political advertising had been found to violate Article 10 of the Convention).

The applicant is a non-governmental organisation that campaigns against the use of animals in commerce, science and leisure and seeks to achieve changes in the law and public policy and to influence public and parliamentary opinion to that end. In 2005 it sought to screen a television advertisement as part of a campaign concerning the treatment of primates. However, the Broadcast Advertising Clearance Centre ("the BACC") refused to clear the advert, as the political nature of the applicant's objectives meant that the broadcasting of the advert was caught by the prohibition in section 321(2) of the Communications Act. That decision was upheld by the High Court and the House of Lords, with the latter holding in a judgment of 12 March 2008 ([2008] UKHL 15) that the prohibition of political advertising was justified by the aim of preventing Government and its policies from being distorted by the highest spender.

Law – Article 10: The statutory prohibition of paid political advertising on radio and television had interfered with the applicant's rights under

Article 10. The interference was "prescribed by law" and pursued the aim of preserving the impartiality of broadcasting on public-interest matters and, thereby, of protecting the democratic process. This corresponded to the legitimate aim of protecting the "rights of others". The case therefore turned on whether the measure had been necessary in a democratic society.

The Court reiterated that a State could, consistently with the Convention, adopt general measures which applied to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases. It emerged from the case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying the measure concerned. The quality of the parliamentary and judicial review of the necessity of the measure was of particular importance. Also relevant was the risk of abuse if a general measure were to be relaxed. The application of the general measure to the facts of the case remained, however, illustrative of its impact in practice and was thus material to its proportionality. In sum, the more convincing the general justifications for the general measure were, the less importance the Court would attach to its impact in the particular case.

Both parties to the instant case had the same objective of maintaining a free and pluralist debate on matters of public interest, and more generally, contributing to the democratic process. The applicant NGO considered, however, that less restrictive rules would have sufficed. The Court was therefore required to balance the applicant NGO's right to impart information and ideas of general interest which the public was entitled to receive against the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.

In conducting that balancing exercise, the Court firstly attached considerable weight to the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews by both parliamentary and judicial bodies and to their view that the general measure was necessary to prevent the distortion of crucial public-interest debates and, thereby, the undermining of the democratic process. The legislation was the culmination of an exceptional examination of the cultural, political and legal aspects of the prohibition and had been enacted with cross-party support without any dissenting vote. The proportionality of the prohibition had also been debated in detail in the High Court and the House of Lords, both of which had analysed the relevant Convention case-law and principles, before concluding that it was a necessary and proportionate interference.

Secondly, the Court considered it important that the prohibition was specifically circumscribed to address the precise risk of distortion the State sought to avoid with the minimum impairment of the right of expression. It only applied to paid, political advertising and was confined to the most influential and expensive media (radio and television).

The Court rejected the applicant NGO's arguments contesting the rationale underlying the legislative choices that had been made over the scope of the prohibition, finding notably that:

– A distinction based on the particular influence of the broadcast media compared to other forms of media was coherent in view of the immediate and powerful impact of the former. There was no evidence that the development of the internet and social media in recent years had sufficiently shifted that influence to the extent that the need for a ban specifically on broadcast media was undermined.

– As to the argument that broadcasted advertising was no longer more expensive than other media, advertisers were well aware of the advantages of broadcasted advertising and continued to be prepared to pay large sums of money for it going far beyond the reach of most NGOs wishing to participate in the public debate.

– The fact that the prohibition was relaxed in a controlled fashion for political parties – the bodies most centrally part of the democratic process – by providing them with free party political, party election and referendum campaign broadcasts, was a relevant factor in the Court's review of the overall balance achieved by the general measure, even if it did not affect the applicant.

– Relaxing the rules by allowing advertising by social advocacy groups outside electoral periods could give rise to abuse (such as wealthy bodies with agendas being fronted by social-advocacy groups created for that precise purpose or a large number of similar interest groups being created to accumulate advertising time). Moreover, a prohibition requiring a case-by-case distinction between advertisers and advertisements might not be feasible: given the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay and to allegations of discrimination and arbitrariness.

Further, while there may be a trend away from broad prohibitions, there was no European consensus on how to regulate paid political advertising in broadcasting. A substantial variety of means were employed by the Contracting States to regulate political advertising, reflecting the wide differences in historical development, cultural diversity, political thought and democratic vision. That lack of consensus broadened the otherwise narrow margin of appreciation enjoyed by the States as regards restrictions on public interest expression.

Finally, the impact of the prohibition had not outweighed the foregoing convincing justifications for the general measure. Access to alternative media was key to the proportionality of a restriction on access to other potentially useful media and a range of alternatives (such as radio and television discussion programmes, print, the internet and social media) had been available to the applicant NGO.

Accordingly, the reasons adduced by the authorities to justify the prohibition were relevant and sufficient and the measure could not be considered a disproportionate interference with the applicant's right to freedom of expression.

Conclusion: no violation (nine votes to eight).

(See also *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, 28 June 2001; and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, 11 December 2008, Information Note no. 114; *Bowman v. the United Kingdom* [GC], no. 24839/94, 19 February 1998)

Compensation award against Bar Council President in respect of comments regarding prison warders' "search" of female member of the Bar: *violation*

Reznik v. Russia - 4977/05
Judgment 4.4.2013 [Section I]

Facts – The case concerned defamation proceedings against the President of the Moscow City Bar for critical statements he had made on a live television show about the conduct of male prison warders who had searched a female lawyer representing the prominent businessman Mikhail Khodorkovskiy in criminal proceedings. The applicant had been invited to the talk show with a representative of the Ministry of Justice to speak about a request the Ministry had made for the lawyer to be disbarred after she was allegedly found in possession of a note containing instructions aimed at interfering with the pending investigation into Mr Khodorkovskiy's affairs. On the talk show, the applicant denied that there had been an attempt to pass a note from Mr Khodorkovskiy outside the remand centre, stated that there had been no grounds for carrying out a search and criticised the fact that it had been carried out by male prison warders "rummaging about the body" of the female lawyer. The remand centre and two of its warders sued him in defamation claiming that they had not carried out a search but had merely inspected the lawyer's documents. On appeal, the City Court found against the applicant and ordered him to pay 20 Russian roubles in damages. The television channel was ordered to broadcast a rectification. The council of the Moscow City Bar formally rejected the Ministry's request for Mr Khodorkovskiy's counsel to be excluded from the Bar.

Law – Article 10: The City Court's judgment in the defamation proceedings had constituted interference with the applicant's right to freedom of expression, which interference had a basis in national law and pursued the legitimate aim of protecting the reputation or rights of others.

As to whether the interference had been necessary in a democratic society, the Court noted firstly that the impugned statement had been made in a live television debate over the Ministry of Justice's request to have Mr Khodorkovskiy's counsel disbarred. That request had been made in the context of the criminal proceedings against Mr Khodorkovskiy which were themselves the subject of intense public debate and must have sparked a wave of public interest. Yet although very strong reasons were required for restrictions on debates on questions of public interest, there was nothing in the text of the City Court's judgment to suggest it had performed the necessary balancing exercise.

The Court was not convinced by the Government's argument that, as a lawyer, the applicant should have been particularly meticulous in his choice of words. Lawyers were entitled to comment in public on the administration of justice provided their criticism did not overstep certain bounds. The applicant had been speaking to a lay audience of television viewers, not to legal experts and his use of the word "search" rather than the technical term "inspection" was in everyday language an appropriate description of the procedure to which Mr Khodorkovskiy's counsel had been subjected. Moreover, the format of the television discussion had been designed to encourage an exchange of views or even an argument, so that the opinions expressed would counterbalance each other. As the

discussion had been broadcast live, the applicant had had no possibility of reformulating his words before they were made public and, in any event, the Ministry representative could have dispelled any allegation he considered untrue and presented his own version of the incident.

In any event, nothing in the applicant's statement had permitted the warders to be identified: the applicant had described them simply as "men", without mentioning their names or their employer. Even assuming their names had become public, the applicant's liability in defamation could not go beyond his own words or extend to statements made by others. So the domestic authorities had failed to establish an objective link between his statement and the claimants in the defamation action.

There had also been a sufficient factual basis for the applicant's statement that the inspection was devoid of legal grounds: the Court had already established in *Khodorkovskiy v. Russia* (no. 5829/04, 31 May 2011, Information Note no. 141) that no obvious provision of Russian law prohibited lawyers from keeping notes during meetings with clients and that a legal provision concerning the inspection of visitors carrying prohibited objects did not apply to meetings between defendants and their legal representatives and the Moscow Bar Council had made similar findings when rejecting the request for Mr Khodorkovskiy's counsel to be disbarred. Further, while the applicant's suggestion that the warders had "rummaged" through Mr Khodorkovskiy's counsel's clothing appeared somewhat exaggerated, it had not gone beyond the limits of acceptable criticism, as he had been seeking a way to convey his indignation at the actions of the male warders who had taken it upon themselves to examine a female lawyer's clothing in breach of the requirements of Russian law for searches or inspections to be carried out by persons of the same sex. In sum, the applicant had not gone beyond the limits of acceptable criticism. His statement had rested on a sufficient factual basis and the City Court had not based its decision on an acceptable assessment of the relevant facts.

Lastly, in the light of the foregoing factors, the sanction imposed on the applicant, though negli

gible in financial terms, was not justified and the institution of defamation proceedings against him had been capable of having a deterrent effect on his freedom of expression.

Conclusion: violation (unanimously).

Article 41: no claim made in respect of damage.

Freedom to receive information
Freedom to impart information

Order for search and seizure couched in wide terms that did not preclude discovery of journalist's sources: *violation*

Saint-Paul Luxembourg S.A. v. Luxembourg - 26419/10
Judgment 18.4.2013 [Section V]

(See Article 8 above, page 23)

ARTICLE 11

Freedom of peaceful assembly

Administrative arrest for breach of procedure for holding demonstration, imposed in absence of domestic legislation establishing such procedure: *violation*

Vyerentsov v. Ukraine - 20372/11
Judgment 11.4.2013 [Section V]

Facts – On behalf of a human rights NGO, the applicant notified the Lviv City Mayor that he would hold a series of demonstrations over several months to raise awareness about corruption in the prosecution service. On 12 October 2010 he organised a peaceful demonstration during which he was called aside by police officers who eventually let him go. The following day, following a complaint by the local council, the administrative court prohibited the holding of pre-announced further demonstrations with effect from 19 October 2010. The applicant was invited to the district police station, where he was accused in particular of having breached the procedure for organising and holding a demonstration. The next day he was brought before the district court, which found him guilty of the offences charged and sentenced him to three days of administrative detention. Once he had served his sentence, the applicant unsuccessfully appealed to the regional court of appeal.

Law – Article 11: The legal basis for the applicant's arrest had been the Code on Administrative Offences, which established liability for breaches of the procedure for holding demonstration and was deemed sufficiently accessible. However, there had been no clear and foreseeable procedure for holding peaceful demonstrations in Ukraine since the end of the Soviet Union. Indeed, the general rules laid down in the Ukrainian Constitution as regards the possible restrictions on freedom of assembly still required further elaboration in the

domestic law. In particular, in a decision of 2001 the Constitutional Court held that the procedure regarding the notification of peaceful assembly to the Ukrainian authorities was a matter for legislative regulation. Moreover, the only existing document establishing such a procedure was a decree, which had been adopted in 1988 by a country that no longer existed – the USSR – and was not generally accepted by the domestic courts as still applicable. Therefore, it could not be concluded that the "procedure" referred to in the Code on Administrative Offences was formulated with sufficient precision to enable the applicant to foresee, to a degree that was reasonable in the circumstances, the consequences of his actions. Nor, for the same reason, did the procedures introduced by the local authorities to regulate the organisation and holding of demonstrations in their particular regions appear to provide a sufficient legal basis. Even though the Court acknowledged that it could take some time for a country to establish its legislative framework during a transitional period like the one Ukraine was currently going through, it could not agree that a delay of more than twenty years was justifiable, especially when such a fundamental right as freedom of peaceful demonstration was at stake. The interference with the applicant's right to freedom of peaceful assembly had therefore not been prescribed by law.

Conclusion: violation (unanimously).

Article 7: Although the offence of a breach of the procedure for holding demonstrations was provided for by the Code on Administrative Offences, the procedure was not established in the domestic law with sufficient precision. In the absence of clear and foreseeable legislation laying down the rules for the holding of peaceful demonstrations, the applicant's punishment for breaching an inexistent procedure had been incompatible with Article 7.

Conclusion: violation (unanimously).

Article 6 §§ 1 and 3: Only a few hours had elapsed between the drawing up of the administrative-offence report by the police and the examination of the case by the first-instance court. As a result, the applicant had not been able to assess the charge against him and to prepare his defence accordingly. Further, although he had requested legal representation as provided for under the Code on Administrative Offences, the first-instance court had refused because of his legal background as a human-rights defender; a refusal on those grounds was both unlawful and arbitrary. Third, the main basis for the findings of the first-instance court had been police reports, without any witnesses being questioned, despite the applicant's request to that end. Moreover, the appeal court had failed to remedy the violations since, by the time it had examined the case, the applicant had already served his administrative detention. Finally, despite their relevance, his arguments had been totally ignored by the domestic courts, which had displayed a total lack of adequate reasoning in their decisions.

Conclusion: violations (unanimously).

Article 46: The violations of Articles 11 and 7 which had been found in the instant case stemmed from a legislative lacuna concerning freedom of assembly which had remained in the Ukrainian legal system for more than two decades. Having regard to the structural nature of the problem, specific reforms in Ukraine's legislation and administrative practice should be urgently implemented in order to bring such legislation and practice into line with the Court's conclusions in the instant judgment and to ensure their compliance with the requirements of Articles 7 and 11.

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

ARTICLE 18

Restrictions for unauthorised purposes

Deprivation of opposition leader's liberty for reasons other than bringing him before a competent legal authority on reasonable suspicion of having committed an offence: *violation*

Tymoshenko v. Ukraine - 49872/11
Judgment 30.4.2013 [Section V]

(See Article 5 § 1 above, page 11)

ARTICLE 34

Hinder the exercise of the right of petition

Forcible transfer of person to Tajikistan with real risk of ill-treatment and circumvention of interim measures ordered by the Court: *violation*

Savriddin Dzhurayev v. Russia - 71386/10
Judgment 25.4.2012 [Section I]

(See Article 46 below, page 32)

ARTICLE 35

Article 35 § 3 (b)

No significant disadvantage

Length-of-proceedings complaint concerning insignificant sum of tax: *inadmissible*

Cecchetti v. San Marino - 40174/08
Decision 9.4.2013 [Section III]

Facts – In 1994 the applicant was ordered to pay EUR 13.91 in tax in respect of an additional amount of undeclared income combined with a penalty of EUR 3.48. He challenged that decision in the courts and the case was ultimately remitted for reconsideration in 2008. The proceedings are apparently still pending.

Law – Article 35 § 3 (b): The applicant complained about the length of proceedings concerning the payment of EUR 13.91 in tax and a penalty of EUR 3.48. Although at times even modest pecuniary damage might be significant in the light of the person's specific condition and the economic situation of their country or region of residence, it was beyond doubt that the amount at stake in the present case was of minimal significance to the applicant. His subjective perception that it was an important question of principle to ask an international court to assess whether proceedings dealing with the determination of an insignificant sum conformed to the reasonable-time requirement was not enough for the Court to conclude that he had suffered a significant disadvantage. Furthermore, given that the Court had on numerous occasions determined issues analogous to those arising in the applicant's case and ascertained in great detail the States' obligations under the Convention in that respect including in cases against the respondent State, there were no compelling reasons of public order to warrant an examination on the merits of his case. Finally, the determination of the applicant's taxable income and the supervening penalty had been the subject of various decisions of the domestic courts, and it could not therefore be concluded that his case had not been "duly considered" by the domestic courts.

Conclusion: inadmissible (no significant disadvantage).

(See also *Korolev v. Russia* (dec.), no. 25551/05, 1 July 2010, Information Note no. 132)

ARTICLE 37

Article 37 § 1

Continued examination not justified

Lack of diligence by the applicant in pursuing his case at domestic level: *struck out*

Goryachev v. Russia - 34886/06
Decision 9.4.2013 [Section I]

Facts – In November 2004 the applicant, who suffered from schizophrenia, was involuntarily hospitalised as a result of anxious and aggressive behaviour. Following his discharge about a month later, he challenged the court order authorising his hospitalisation. That decision was ultimately quashed on supervisory review and the case was remitted. In the resumed proceedings, given the repeated absence of the hospital's representative, and the lack of any objection by the applicant, the district court left the hospital's application for involuntary hospitalisation without consideration.

Law – Article 37 § 1 (c): The Court had a wide discretion in identifying grounds capable of being relied on in striking out an application where its continued examination was no longer justified. It had previously struck out cases for lack of diligence on the part of an applicant. In the instant case, all the applicant had needed to do was to object to the district court's decision to leave the case without consideration. He would not have had to provide any further reasons. However, by failing to insist on a consideration of the merits, even though he was represented by counsel, the applicant had effectively consented to the termination of the proceedings without a final judicial decision reviewing the lawfulness of his hospitalisation. He had thus freely chosen not to pursue his complaints through a reasonable avenue on the domestic level and thereby prevented a review of his hospitalisation and the adoption of a final domestic decision in his case. Given his lack of diligence, it was no longer justified to continue the examination of the application.

Conclusion: struck out (unanimously).

ARTICLE 41

Just satisfaction

Cluttering of Court's docket with application concerning length of litigation over very small sum: *finding of a violation sufficient in respect of non-pecuniary damage*

Ioannis Anastasiadis and Others v. Greece - 45823/08
Judgment 18.4.2013 [Section I]

Facts – The administrative-law proceedings brought by the applicants against their State employer lasted almost twelve and a half years. They were eventually successful and recovered the sum each of them had claimed from the administration, namely, EUR 554.65.

Law – The Court held that there had been a violation of Articles 6 and 13 of the Convention on account of the length of the domestic proceedings.

Article 41: The Court had previously, on several occasions, declared inadmissible applications complaining of the length of domestic proceedings on the grounds that there was no reasonable relationship of proportionality between the stakes involved in the domestic proceedings and those involved in the proceedings brought before the Court, having regard in particular to the fact that several applications raising serious human-rights issues were pending before the Court. It had observed, *inter alia*, in inadmissibility decisions, that the applicants in question, on account of their litigiousness – going as far as applying to an international court – had contributed in particular to cluttering up the domestic courts' docket. In the present case the sum originally claimed by the applicants had been EUR 554.65, and that sum had been awarded by a judgment of the Administrative Court of Appeal and paid to the applicants following the dismissal by the Supreme Administrative Court of an appeal lodged by the State. Despite that, the applicants had lodged an application with the Court based solely, in two respects, on the length of the proceedings, which was an issue that had been decided many times by the Court, including with regard to the respondent State. Moreover, it was clear that the sum claimed by the applicants before the Court under the head of non-pecuniary damage (EUR 6,000 each) was disproportionate to the sum awarded in the domestic proceedings. It followed that the finding of a violation of Articles 6 § 1 and 13 was sufficient just satisfaction for the non-pecuniary damage sustained by the applicants.

ARTICLE 46

Execution of a judgment

Respondent State required to take legislative and administrative measures to guarantee property rights in cases where immovable property has been nationalised: *extension of time for compliance*

Maria Atanasiu and Others v. Romania - 30767/05 and 33800/06
Judgment 12.10.2010 [Section III]

On 12 October 2010, in its pilot judgment in *Maria Atanasiu and Others v. Romania*, the Court ruled on the issue of restitution or compensation in respect of property nationalised or confiscated by the State before 1989. After finding, in particular, a violation of Article 1 of Protocol No. 1, the Court held that Romania was to take measures capable of affording adequate redress to all the persons affected by the reparation laws, within eighteen months from the date on which the judgment became final. It decided to adjourn examination of other applications stemming from the same general problem. Subsequently, at the request of the Government, it extended the time-limit for compliance until 12 April 2013. In a letter of 20 March 2013, the Government requested a further one-month extension of the time-limit.

Taking account of the fact that the extra period of time requested was short and that the Government had undertaken to consult the Committee of Ministers in order to incorporate in the draft any comments made by the latter, the Court agreed to the Government's request and extended the time-limit until 12 May 2013. The decision to adjourn examination of other applications stemming from the same general problem remained valid.

General measures

Respondent State required to implement reforms in its legislation and administrative practice regarding procedure for holding peaceful demonstrations

Vyerentsov v. Ukraine - 20372/11
Judgment 11.4.2013 [Section V]

(See Article 11 above, page 28)

Respondent State required without delay to ensure the lawfulness of State action in extradition and expulsion cases and the effective protection of potential victims

Savriddin Dzhurayev v. Russia - 71386/10
Judgment 25.4.2012 [Section I]

Facts – The applicant fled his native Tajikistan fearing persecution because of his religious activities. He travelled to Russia, where he was later granted temporary asylum. In the interim, the Tajik authorities had requested his extradition on charges of criminal conspiracy. The Russian authorities acceded to that request, but the applicant's extradition was postponed in accordance with an interim measure issued by the European Court under Rule 39 of its Rules of Court. However, on the evening of 31 October 2011 the applicant was kidnapped by unidentified persons in Moscow and detained for one to two days before being forcibly taken to the airport and put on a flight to Tajikistan, where he was immediately placed in detention.

Law – Article 3: The competent authorities had been informed by the applicant's representative and the Russian Commissioner for Human Rights of the real and immediate risk of torture and ill-treatment to which the applicant was exposed. Indeed, the circumstances in which the applicant was abducted and the background to his abduction should have left no doubt about the existence of that risk and should have prompted the authorities to take preventive operational measures to protect him against unlawful acts by other individuals. The Government had nonetheless failed to inform the Court of any timely preventive measure taken to avert that risk.

The applicant's allegations of what had happened to him were largely supported by the unrebutted presumption that had been upheld in the cases of *Iskandarov* and *Abdulkhakov v. Russia* in which the Court had found that the forcible transfer of the applicants in those cases to Tajikistan could not have happened without the knowledge and either passive or active involvement of the Russian authorities. The Russian Government had shown nothing to rebut that presumption in the present case. Indeed, the authorities had manifestly failed to elucidate the circumstances of the incident through an effective investigation at the domestic level. Accordingly, the respondent State was responsible under the Convention for the applicant's forcible transfer to Tajikistan on account of State agents' involvement in that operation. The actions of the State agents were characterised by manifest arbitrariness and abuse of power with the aim of circumventing both a lawful decision to grant the applicant temporary asylum in Russia and steps officially taken by the Government to prevent the applicant's extradition in accordance with an interim measure decided by the Court. The operation was conducted "outside the normal legal system" and, "by its deliberate circumvention of due process, [was] anathema to the rule of law and the values protected by the Convention".

Consequently there had been a violation of Article 3 on account of the authorities' failure to protect the applicant against forcible transfer to Tajikistan, where he faced a real and imminent risk of torture and ill-treatment, the lack of effective investigation into the incident and the involvement, either passive or active, of State agents in the operation.

Conclusion: violation (unanimously).

Article 34: While the interim measure requested by the Court was still in force the applicant had been forcibly transferred to Tajikistan by aircraft in a special operation in which State agents were found to have been involved. It was inconceivable that national authorities could be allowed to circumvent an interim measure such as the one indicated in the present case by using another domestic procedure for the applicant's removal to the country of destination or, even more alarmingly, by allowing him to be arbitrarily removed there in a manifestly unlawful manner. As a result of the respondent State's disregard of the interim measure the applicant had been exposed to a real risk of ill-treatment in Tajikistan and the Court had been prevented from securing to him the practical and effective benefit of his rights under Article 3.

Conclusion: violation (unanimously).

The Court also found a violation of Article 5 § 4 on account of long delays in examining the applicant's appeals against two orders for his detention in 2010.

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

Article 46: The respondent State was required to take tangible remedial measures to protect the applicant, to whom it had granted temporary asylum, against the existing risks to his life and health in a foreign jurisdiction. The respondent State was also required to carry out an effective investigation into the incident at issue.

In addition, general measures were needed to prevent further similar violations. The Court had been confronted with repeated incidents of this

kind since its judgment in *Iskandarov*. Such incidents constituted a flagrant disregard for the rule of law and suggested that certain State authorities had developed a practice in breach of their obligations under both Russian law and the Convention. Decisive general measures still remained to be taken including further improving the domestic remedies in extradition and expulsion cases, and ensuring the lawfulness of any State action in this area, the effective protection of potential victims in line with interim measures issued by the Court and the effective investigation of every breach of such measures or similar unlawful acts. The State's obligations under the present judgment required the resolution of this recurrent problem without delay.

(See *Iskandarov v. Russia*, no. 17185/05, 23 September 2010, Information Note no. 133; and *Abdulkhakov v. Russia*, no. 14743/11, 2 October 2012, Information Note no. 156)

Individual measures

Respondent State required to take tangible remedial measures to protect the applicant against the existing risks to his life and health in a foreign jurisdiction

Savriddin Dzhurayev v. Russia - 71386/10
Judgment 25.4.2012 [Section I]

(See above, page 32)

ARTICLE 2 OF PROTOCOL No. 1

Right to education

Legislation imposing entrance examination with *numerus clausus* for access to public and private sector university courses in medicine and dentistry: *no violation*

Tarantino and Others v. Italy - 25851/09, 29284/09 and 64090/09
Judgment 2.4.2013 [Section II]

Facts – In Italy, a *numerus clausus* (limit on the number of candidates allowed to enter a university) applies to certain vocational faculties such as medicine and dentistry in both public and private sector universities. The applicants were all students who were unable to obtain a place in the faculties of medicine or dentistry to which they had applied. The first seven applicants failed the entrance examination. After initially obtaining a place at a faculty of dentistry, the eighth applicant was excluded from the course and required to retake the entrance examination after repeatedly failing to sit the course examinations. All eight applicants complained to the European Court of a violation of their right to education secured by Article 2 of Protocol No. 1.

Law – Article 2 of Protocol No. 1

(a) *Complaint relating to all the applicants* – The restrictions imposed by the entrance examination and *numerus clausus* under the applicable legislation had been foreseeable and conformed to the legitimate aim of achieving high levels of professionalism by ensuring a minimum and adequate education level in universities running in appropriate conditions. This was in the general interest. The case therefore turned on the question of the proportionality of the restrictions.

As to the entrance examination requirement, identifying the most meritorious students through relevant tests was a proportionate measure to ensure a minimum and adequate level of education in the universities. The Court was not competent to decide on the content or appropriateness of the tests involved.

As regards the *numerus clausus*, a balance had to be reached between the individual interest of the applicants and those of society at large, including other students attending the university courses. The two criteria on which the *numerus clausus* was based – the capacity and resource potential of universities, and society's need for a particular profession – were in line with the Court's case-law holding that regulation of the right to education may vary according to the needs and resources of the community and of individuals. They also had to be seen in the context of the highest (tertiary) level of education.

With respect to the first of these criteria, resource considerations were clearly relevant and undoubtedly acceptable as the right to education only applied in so far as it was available and within the limits pertaining to it. While this was particularly true where State-run universities were concerned, it was not disproportionate or arbitrary for the State to regulate access to private institutions as well, not only because the private sector in Italy was partly reliant on State subsidies, but also because regulating access could be considered

necessary both to prevent arbitrary admission or exclusion and to guarantee equal treatment. The State was therefore justified in being rigorous in its regulation of the sector – especially in fields where a minimum and adequate education level was of the utmost importance – to ensure that access to private institutions was not available purely on account of the candidates' financial means, irrespective of their qualifications and propensity for the profession. It was true also that overcrowded classes could be detrimental to the effectiveness of the education system. The first criterion was thus both legitimate and proportionate.

As to the second criterion – society's need for a particular profession – despite the fact that it ignored relevant needs originating in a wider European Union or private context and even future local needs, the Court nevertheless considered it balanced and proportionate. Training specific categories of professionals constituted a huge investment and the Government were entitled to take action to avoid excessive public expenditure. It was reasonable for the State to aspire to the assimilation of each successful candidate into the labour market since unemployment could be considered a social burden on society at large. Nor, given that it was impossible to ascertain how many graduates might seek to exit the local market and find employment abroad, was it unreasonable for the State to base its policy on the assumption that a high percentage would remain in the country to seek employment.

Lastly, the applicants had not been denied the right to apply for other courses or to study abroad and, since there did not appear to be a limit on the number of times they could sit the entrance examination, they still had the opportunity to resit the test and, if successful, gain access to the course. In conclusion, the measures imposed were not disproportionate and the State had not exceeded its margin of appreciation.

Conclusion: no violation (six votes to one).

(b) *Complaint relating only to the eighth applicant* – It was not unreasonable to exclude a student from a course and require him to re-sit the entrance examination when he had failed to sit examinations for eight consecutive years, particularly given that a *numerus clausus* applied to the university course in question. This measure, which had achieved a balance between the interests of the eighth applicant and the interests of other candidates and the community at large was thus proportionate

Conclusion: no violation (unanimously).

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

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

Mocanu and Others v. Romania - 10865/09, 45886/07 and 32431/08
Judgment 13.11.2012 [Section III]

(See Article 3 above, page 9)

Svinarenko and Slyadnev v. Russia - 32541/08 and 43441/08
Judgment 11.12.2012 [Section I]

(See Article 3 above, page 9)

H. v. Finland - 37359/09
Judgment 13.11.2012 [Section IV]

(See Article 8 above, page 21)