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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Effective investigation

Alleged lack of independence of military court upholding prosecutor's decision to discontinue investigation into death of soldier: *no violation*

Mustafa Tunç and Fecire Tunç v. Turkey - 24014/05
Judgment 14.4.2015 [GC]

Facts – In February 2004 a sergeant was fatally injured by gunfire while carrying out his military service. A judicial investigation was opened on the authorities' own motion. In June 2004, holding that there were no grounds for finding that another person had been responsible for the sergeant's death, the prosecutor issued a decision not to bring a prosecution. In October 2004 the military court of the air-force upheld an appeal lodged by the applicants – the sergeant's parents – and ordered the prosecution service to carry out an additional investigation. In December 2004 the prosecutor completed the investigations and returned the file to the military court, together with a report on the requested additional investigation, in which he set out the measures taken and responded to the shortcomings that had been noted by the court. The military court dismissed the applicants' appeal. The applicants accused the authorities of failing to conduct an effective investigation into their son's death. They alleged, *inter alia*, that the legislation in force at the relevant time did not provide all the necessary guarantees of independence in respect of the judicial authorities, especially of the military court which had examined the case at final instance.

By a judgment of 25 June 2013 (see Information Note 164), in spite of its findings on the promptness, adequacy and thoroughness of the investigative measures and the applicants' effective participation in the proceedings, a Chamber of the Court concluded, by four votes to three, that there had been a violation of Article 2 in its procedural aspect, in that the military court did not enjoy the necessary independence in its capacity as the body responsible for the ultimate review of the investigation.

On 4 November 2013 the case was referred to the Grand Chamber at the Government's request.

Law – Article 2 (*procedural aspect*): Article 2 required a concrete examination of the independence of the investigation as a whole. The persons and bodies responsible for the investigation had to be sufficiently independent of the persons and structures whose responsibility was likely to be engaged in the light of all of the particular circumstances of each case.

Where the statutory or institutional independence was open to question, the Court had to carry out a stricter scrutiny of the independence of the investigation. In such cases, the correct approach consisted in examining whether and to what extent the disputed circumstance had compromised the effectiveness of the investigation and its ability to shed light on the circumstances of the death and to punish those responsible.

Compliance with the procedural requirement of Article 2 was assessed on the basis of several essential parameters: the adequacy of the investigative measures, the promptness of the investigation, the involvement of the deceased person's family and the independence of the investigation. These elements were inter-related and each of them, taken separately, did not amount to an end in itself, as was the case in respect of the independence requirement of Article 6.

(a) *Promptness, adequacy and thoroughness of the investigation* – The investigation in question had been conducted with the requisite diligence and had not been beset by excessive delays. The authorities had taken sufficient measures to collect and secure evidence relating to the events in issue. With regard to the questioning of the witnesses, they had taken several statements immediately after the events. There was nothing to support the assertion that they had failed to question key witnesses or that the interviews had been conducted in an inappropriate manner.

(b) *Participation of the deceased's relatives in the investigation* – The applicants had been granted access to the information yielded by the investigation to a degree sufficient for them to participate effectively in the proceedings.

(c) *The independence of the investigation*

(i) *Independence of the prosecution* – The military prosecutor in charge of the investigation had no ties, hierarchical or otherwise, with the main suspect, the gendarmes stationed at the site, the central gendarmerie or even the gendarmerie in general. In addition, he had gathered all the evidence it was necessary to obtain.

With regard to the non-prosecutorial investigators, there was no hierarchical relationship between them and the individuals who were likely to be involved. Moreover, they had not been responsible for steering the investigation, overall control of which had remained in the hands of the prosecutor.

Furthermore, the main acts carried out by these investigators had concerned the scientific aspects of the investigation, such as taking samples or ballistic tests.

(ii) *Independence of the review carried out by the military court* – The regulations in force at the material time cast doubt on the statutory independence of the military court which was called upon to examine the applicants' appeal against the decision by the prosecutor's office not to bring a prosecution.

However, the members of the military court had had no hierarchical or tangible link with the gendarmes stationed at the site or with the gendarmerie in general.

Further, there was nothing in the conduct of the court and its judges to indicate that the latter had been inclined to refrain from shedding light on the circumstances of the death, to accept without question the conclusions submitted to them or to prevent the instigation of criminal proceedings against the last person to have seen the sergeant alive.

On the contrary, the court had initially allowed the applicants' appeal, ordering additional investigations to test the credibility of the hypothesis of an accident put forward by the prosecutor's office, and it was on the basis of these further measures that it had ultimately dismissed the applicants' appeal.

The fact that the court held that all of the investigative measures necessary for establishing the truth had been taken and that there was insufficient evidence to bring proceedings against a suspect could not in any way be regarded as indicating a lack of independence. In this respect, the authorities were under an obligation not of result but of means, and Article 2 did not imply the right to obtain a conviction or to have a prosecution brought.

(iii) *Conclusion concerning the independence of the investigation* – While accepting that it could not be considered in the present case that the entities which played a role in the investigation had enjoyed full statutory independence, the Court found, taking account, on the one hand, of the absence of direct hierarchical, institutional or other ties between those entities and the main potential suspect and, on the other, of the specific conduct of those entities, which did not reflect a lack of independence or impartiality in the handling of the investigation, that the investigation had been sufficiently independent.

In this regard, the sergeant's death had not occurred in circumstances which could, *a priori*, give rise to suspicions against the security forces as an institution, as for instance in the case of deaths arising from clashes involving the use of force in demonstrations, police and military operations or in cases of violent deaths during police custody. Even under the criminal hypothesis, suspicions had fallen on the last person to have seen the sergeant alive, rather than on the authorities. Yet the fact was that that individual had been a mere conscript, and not a rank-holding army officer. It remained the case that the suspicions against him were not related to his particular status as a gendarme or as a member of the armed forces.

In conclusion, the investigation conducted in this case had been sufficiently thorough and independent and the applicants had been involved in it to a degree sufficient to protect their interests and to enable them to exercise their rights.

Conclusion: no violation (twelve votes to five).

Expulsion

Proposed deportation of person suffering from serious illness to his country of origin in face of doubts as to the availability of appropriate medical treatment there: *case referred to the Grand Chamber*

Paposhvili v. Belgium - 41738/10
Judgment 17.4.2014 [Section V]

The applicant, a Georgian national, arrived in Belgium via Italy in November 1998, accompanied by his wife and the latter's six-year-old child. The couple subsequently had two children. The applicant was convicted of a number of offences, including robbery. He suffered from tuberculosis, hepatitis C and chronic lymphocytic leukaemia (CLL). An asylum request by the applicant and his wife was refused in June 1999. The applicant then submitted several applications for regularisation of his administrative status but these were rejected by the Aliens Office. The applicant and his wife were issued with several orders to leave the country, including one in July 2010.

On 23 July 2010, relying on Articles 2, 3 and 8 of the Convention, and arguing that, if deported to Georgia, he would no longer have access to the health treatment he required and that, in view of his very short life expectancy, he would die even more quickly and far from his family, the applicant applied to the European Court for an interim measure under Rule 39 of its Rules of Court

suspending his removal. On 28 July 2010 the Court granted his request.

The order for him to leave Belgian territory was extended until 28 February 2011. On 18 February 2012 the Aliens Office issued an order to leave the country "immediately" pursuant to the ministerial deportation order of 16 August 2007.

A medical certificate issued in September 2012 stated that failure to treat the applicant for the hepatitis and pulmonary infection could result in damage to his organs and significant disability and that failure to treat his leukaemia (CLL) could result in death. Any return to Georgia would condemn him to inhuman and degrading treatment. The applicant was summoned to attend the Aliens Office medical service on 24 September 2012 for a medical examination and to enable the Belgian authorities "to reply to the Court's questions". Referring to the Court's judgment in *N. v. the United Kingdom* ([GC], 26565/05, 27 May 2008, Information Note 108), the Aliens Office found in its report that the medical records did not warrant the conclusion that the threshold of gravity required for Article 3 of the Convention to be engaged had been reached. The applicant's life was not directly threatened. Permanent medical supervision would not be necessary in order to guarantee his survival. In addition, the stage of infection could not be considered terminal at that time.

On 29 July 2009 his wife and her three children were granted indefinite leave to remain.

By a judgment of 17 April 2014 a Chamber of the Court concluded unanimously that there would be no violation of Article 2 (right to life) or of Article 3 (prohibition of torture) of the Convention in the event of the applicant's deportation to Georgia. The conditions from which the applicant suffered had all stabilised and were under control, there was therefore no imminent threat to his life and he was fit to travel. The Chamber of the Court further found no violation of the applicant's right to private and family life (Article 8 of the Convention) since, having regard, in particular, to the nature and seriousness of the offences committed by him, and the fact that the link with his country of origin had not been broken, the Belgian authorities, by refusing him leave to remain, had not attached disproportionate weight to the public interest in relation to the applicant's rights.

On 20 April 2015 the case was referred to the Grand Chamber at the applicant's request.

Proposed removal of a mentally-ill person at risk of severe self-harm: *expulsion would not constitute a violation*

Tatar v. Switzerland - 65692/12
Judgment 14.4.2015 [Section II]

(See Article 3 below, page 11)

ARTICLE 3

Torture

Acts of torture committed by members of security forces against demonstrators at G8 summit: *violation*

Cestaro v. Italy - 6884/11
Judgment 7.4.2015 [Section IV]

Facts – The twenty-seventh G8 summit took place in Genoa in July 2001. A number of NGOs organised an alternative anti-globalisation summit in the city at the same time. On the night of the last day of the summit the security forces decided to carry out a search in two schools used as night shelters for "authorised" demonstrators, to find evidence and possibly to arrest members of a group responsible for acts of violence. About 500 police officers took part in the operation.

After breaking down the doors of the school where the applicant was taking shelter, the security forces began to strike the occupants with their fists, feet, and truncheons, while shouting and threatening the victims, some of whom were lying or sitting on the ground. A number of occupants, awakened by the noise of the attack, were struck while they were still in their sleeping bags. Others had their hands up in surrender or were presenting their identity papers. Some were trying to escape, hiding in toilets or storerooms, but they were caught, beaten and sometimes pulled by their hair from their hiding places. When the police arrived the applicant, then aged 62, was sitting with his back to the wall and his arms raised. He was struck several times, especially on the head, arms and legs, causing multiple fractures. He was operated on in hospital, where he spent four days. He was temporarily unfit for work for a period of more than 40 days. He has never fully recovered from his injuries, which have left him with permanent weakness in his right arm and right leg.

After an investigation opened by the public prosecutor's office, 30 members of the security forces stood trial. The applicant joined the proceedings as a civil party. Some charges were time-barred and, after sentence reductions, the prison sentences actually served were for terms of between three months and one year, and only for attempts to justify ill-treatment and unlawful arrest. No one was convicted for the ill-treatment itself.

Law – Article 3

(a) *Substantive limb* – The facts had been established by the domestic courts and were not in dispute between the parties. It could not be denied that the ill-treatment of the applicant had caused him acute pain and suffering and that it had been particularly serious and cruel in nature. In addition, in view of the lack of resistance on the part of the occupants, there was no causal link between the applicant's conduct and the use of force by the police. The ill-treatment at issue in the present case had thus been inflicted on the applicant totally gratuitously and could not be regarded as a means used proportionately by the authorities to fulfil the intended aim. In this connection it was noteworthy that the storming of the school was supposed to be a search, but at no time had the police attempted to converse with the persons who had lawfully taken shelter in the building, or to ask them to open doors that they had been entitled to close, preferring to break them down. Lastly, the police had systematically beaten up all the occupants in the building. Therefore, the ill-treatment of which the applicant, among others, was a victim had undoubtedly been intentional and premeditated. Nor was there any doubt about the attempts by the police to conceal these events or to justify them on fallacious grounds.

In those circumstances, the seriousness of the ill-treatment inflicted when the police stormed the school could not be relativised in the light of the very tense context resulting from the numerous clashes which had taken place during the demonstrations or the very specific requirements of the protection of public order. Any tension arising during the storming of the school by the police could be explained less by objective reasons than by the decision to carry out well-publicised arrests and by the adoption of operational tactics that did not meet the requirement to protect the values arising from Article 3 of the Convention.

Having regard to the foregoing, the ill-treatment sustained by the applicant when the police raided the school was to be characterised as "torture" within the meaning of Article 3 of the Convention.

Conclusion: violation (unanimously).

(b) *Procedural limb*

(i) *Failure to identify the perpetrators of the ill-treatment at issue* – The police officers who had attacked the applicant in the school and had physically subjected him to acts of torture had never been identified. They had not therefore been the subject of an investigation and had quite simply remained unpunished.

(ii) *Time-barring of charges and partial reduction in sentences* – As regards the storming of the school, the acts of violence committed there and the attempts to conceal or justify them, a number of officers of the security forces, of higher and lower ranks, had been prosecuted and had stood trial for various offences. However, after the criminal proceedings, nobody had been convicted for the ill-treatment perpetrated in the school against the applicant, among others, as the offences of wounding and grievous bodily harm had become time-barred. The convictions upheld by the Court of Cassation had concerned the attempts to justify the ill-treatment and the lack of any factual or legal basis for the arrest of the school's occupants. In addition, by the effect of the general reduction in sentence, the terms of imprisonment had been reduced by three years. The convicted persons had thus had to serve between three months and one year. Having regard to the foregoing, the authorities had not reacted sufficiently in response to such serious acts, and consequently that reaction had been incompatible with their procedural obligations under Article 3 of the Convention.

However, this result could not be imputed to the shortcomings or negligence of the public prosecutor's office or the domestic courts, which had been firm and had not been responsible for any delay in the proceedings. It was the Italian criminal legislation applied in the present case which had proved both inadequate as regards the need to punish acts of torture and devoid of the necessary deterrent effect to prevent other similar violations of Article 3 in the future.

Conclusion: violation (unanimously).

Article 46: The Court ruled out any negligence or indulgence on the part of the public prosecutor's office or the trial courts and found that the Italian criminal legislation had been inadequate. The structural nature of the problem thus seemed undeniable. However, that problem arose not only for the repression of acts of torture but also for the other ill-treatment prohibited by Article 3: in the absence of any appropriately differentiated sanc-

tions under Italian criminal law for all the acts of ill-treatment prohibited by Article 3, the statute of limitations and the system of sentence reduction could in practice preclude any punishment, not only of those responsible for acts of "torture" but also of the perpetrators of "inhuman treatment" and "degrading treatment", in spite of all the efforts of the prosecution authorities and trial courts.

The State's positive obligations under Article 3 might include the duty to introduce an adapted legal framework, in particular through effective provisions of criminal law. In that connection, the Italian legal order needed legal mechanisms that could ensure adequate punishment for the perpetrators of acts of torture or other ill-treatment and prevent such individuals from benefiting from measures that were incompatible with the Court's case-law.

Article 41: EUR 45,000 in respect of non-pecuniary damage; claim in respect of pecuniary damage dismissed.

Effective investigation
Positive obligations (procedural aspect)

Inadequacy of legal machinery for punishing members of security forces responsible for torture and other ill-treatment of demonstrators at G8 summit: *violation*

Cestaro v. Italy - 6884/11
Judgment 7.4.2015 [Section IV]

(See above, page 9)

Expulsion

Homosexual man required to return to Libya in order to apply for family reunion: *struck-out following grant of residence permit*

M.E. v. Sweden - 71398/12
Judgment (striking out) 8.4.2015 [GC]

(See Article 37 below, page 25)

Order for deportation of a Mandaean woman to Iraq: *struck-out following grant of residence permit*

W.H. v. Sweden - 49341/10
Judgment (striking out) 8.4.2015 [GC]

(See Article 37 below, page 26)

Proposed removal of a mentally-ill person at risk of blood feud and of torture by national authorities in country of destination: *expulsion would not constitute a violation*

Tatar v. Switzerland - 65692/12
Judgment 14.4.2015 [Section II]

Facts – In 1994 the applicant and two of his sons were granted refugee status in Switzerland due to their political involvement in the Turkish Communist Party (TCP). His wife and other children followed them to Switzerland. In 2001 the applicant killed his wife and was sentenced to eight years' imprisonment. During the proceedings he was diagnosed with schizophrenia. In March 2009 the Federal Office revoked his asylum status because of his conviction. Owing to his mental state he was ordered to stay in a psychiatric care facility for three years. Expert reports had indicated that he would remain unable to live on his own. In June 2010 the Migration Office revoked his residence permit and ordered him to leave Switzerland. The applicant appealed claiming that he was still protected by the principle of *non-refoulement*. He also alleged that his expulsion would lead to a deterioration of his mental health endangering his life and that he would be at risk of torture and ill-treatment by his wife's family and the Turkish authorities. Although the applicant's probation regarding his criminal conviction was prolonged until July 2016, the order to leave the country still remained in force without a date of removal.

Law – Articles 2 and 3: The Court had to determine whether there was a real risk that the expulsion would be contrary to the standards of Articles 2 and 3. The alleged lack of possibilities for the applicant's medical treatment in Turkey was refuted by information provided by the respondent Government. Although not necessarily available in his hometown, care was available in bigger cities in Turkey. The respondent Government had stated that the applicant's fitness to travel would be checked before his departure and the Turkish authorities informed of the medical treatment required.

Whilst noting the seriousness of the applicant's medical condition and the risk of relapse, the Court did not find compelling humanitarian grounds against his removal. Unlike the position in *D. v. the United Kingdom*, the applicant did not have a terminal illness without prospects of medical care or family support upon removal. He had failed to substantiate his fear of being exposed to a blood feud throughout the entire country. The Court

considered it to be possible for him to find a place to live outside his hometown taking into account that family members would be able to assist him. With regard to his former membership in the TCP, the applicant did not dispute that he had not been politically active for more than 20 years and that members of his family who resided in Switzerland had travelled to Turkey without any difficulties. In the Court's view, he had not sufficiently substantiated his fears that there remained against him a personal threat contrary to Articles 2 or 3. No substantial grounds had been shown for believing that the applicant 's medical condition, the threat of blood feud or his political past would amount to a real risk of him being subjected to treatment contrary to Articles 2 or 3.

Conclusion: expulsion would not constitute a violation (six votes to one).

(See also *D. v. the United Kingdom*, 30240/96, 2 May 1997; *Bensaid v. the United Kingdom*, 44599/98, 6 February 2001, Information Note 27; and *Aswat v. the United Kingdom*, 17299/12, 16 April 2013, Information Note 162; see, more generally, the Factsheets on Expulsions and extraditions and on Mental health)

Proposed deportation of person suffering from serious illness to his country of origin in face of doubts as to the availability of appropriate medical treatment there: *case referred to the Grand Chamber*

Paposhvili v. Belgium - 41738/10
Judgment 17.4.2014 [Section V]

(See Article 2 above, page 8)

ARTICLE 5

Article 5 § 1

Lawful arrest or detention

Lawyer carrying out professional duties taken into police custody as a result of altercation with police officer: *violation*

François v. France - 26690/11
Judgment 23.4.2015 [Section V]

Facts – On the night of 31 December 2002 the applicant, a lawyer, was called to the police station to assist a minor who had been taken into police custody. After a meeting with his client, who claimed to have been a victim of police violence and had sustained injuries to his face, the applicant drafted written observations which he wished to add to the file, also requesting that his client undergo a medical examination. These requests led to an altercation between the applicant and the custody officer on duty, C.Z., who claimed that the applicant had tried to hit her. C.Z. then decided to arrest him *in flagrante delicto* and took him into police custody. The applicant was immediately taken to a cell where various items were taken from him, including his briefcase and shoelaces, and he was subjected to a full-body search, being ordered to undress completely, and then to bend over and cough. On the police officer's instruction he also underwent a blood alcohol test, which proved negative. In total, the applicant was in police custody for about 13 hours. A complaint filed by C.Z. was not taken further and the applicant's actions were dismissed.

Law – Article 5 § 1: The combination of two circumstances in this case was of some significance. First, the applicant had gone to the police station as a lawyer to assist a minor in police custody who had allegedly been assaulted by the police; second, the custody officer who had then claimed personally to be a victim of the applicant's behaviour had herself taken the decision to take him into police custody and to subject him not to mere frisking but to a full-body search and an alcohol test, neither of which had been justified by objective indications.

While the custody officer had then called a colleague from a different branch and had informed her hierarchy, that was only after the full-body search and alcohol test. In addition, at the relevant time, there had been no regulations authorising a body search that went beyond mere frisking. The need for an alcohol test, even though prior to that the applicant had been assisting a client in the police station, could also be called into question, as there were no objective indications that he had committed an offence under the influence of alcohol. Neither the tension following the row, nor the fact that the events had taken place on New Year's Eve, in addition to the negative result of the alcohol test, suggested the existence of such justification. Therefore, the fact of taking the applicant into police custody and subjecting him to such measures exceeded the security requirements and, by contrast, demonstrated an intention that was unconnected with the purpose of police custody.

Consequently, the applicant's placement in police custody had been neither justified nor proportionate and the deprivation of his liberty had not been

compatible with the requirements of Article 5 § 1 (c).

Conclusion: violation (unanimously).

Article 41: EUR 15,000 in respect of non-pecuniary damage.

Article 5 § 3

Reasonableness of pre-trial detention

Pre-trial detention for two-and-a-half months followed by house arrest for seven-and-a-half months: *case referred to the Grand Chamber*

Buzadji v. the Republic of Moldova - 23755/07
Judgment 16.12.2014 [Section III]

The applicant, a businessman, was arrested in May 2007 and formally charged with defrauding a State company of which he was the director. He was placed in detention pending trial given the gravity of the charges against him, the complexity of the case and the risk of collusion. This detention was then extended on a number of occasions, for essentially the same reasons, until July 2007 when the national courts accepted the applicant's request to be placed under house arrest. He remained under house arrest until March 2008 when he was released on bail, the courts finding that he had been in detention and under house arrest for over ten months in total without breaching any of the restrictions imposed on him.

In a Chamber judgment of 16 December 2014, the Court held, by four votes to three, that there had been a violation of Article 5 § 3 of the Convention because the domestic courts had failed to give sufficient reasons for extending the applicant's detention pending trial and subsequently ordering his house arrest.

On 20 April 2015 the case was referred to the Grand Chamber at the request of the Moldovan Government.

ARTICLE 6

Article 6 § 1 (civil)

Impartial tribunal

Impartiality of tribunal in professional misconduct proceedings against a judge: *violation*

Mitrinovski v. the former Yugoslav Republic of Macedonia - 6899/12
Judgment 30.4.2015 [Section I]

Facts – The applicant was a former judge who was removed from office by a decision of the plenary of the State Judicial Council (SJC) on 19 April 2011 that he had been guilty of professional misconduct. In his application to the European Court the applicant complained under Article 6 § 1 of the Convention that the SJC could not be considered to have been an "independent and impartial tribunal" in the circumstances of his case.

Those circumstances were as follows: The applicant presided over a three-judge panel of a court of appeal which granted an appeal by a detainee against an order for pre-trial detention. That decision was overruled by a five-judge panel of the Supreme Court, presided over by Judge J.V. The criminal division of the Supreme Court, which also included Judge J.V., then found that two of the three court of appeal judges who had heard the detainee's appeal had disclosed professional misconduct. It did not name the judges concerned. In his capacity as an *ex officio* member of the SJC Judge J.V. then submitted a request to the SJC to establish professional misconduct in respect of the applicant and one of the other court of appeal judges. Judge J.V. also formed part of the SJC plenary which subsequently declared the request admissible, set up an *ad hoc* Commission for the determination of the complaint of professional misconduct and initiated professional misconduct proceedings. He appeared as the complainant at the hearing before the *ad hoc* Commission and, following a report by the Commission recommending the applicant's dismissal for professional misconduct, was a member of the plenary of the SJC which decided to remove the applicant from office. The applicant's appeal to the Supreme Court Appeal Panel was dismissed.

Law – Article 6 § 1: Section 78(1) of the State Judicial Act 2010, which regulated professional misconduct proceedings against members of the judiciary, provided that any member of the SJC could ask that institution to establish professional misconduct on the part of a judge. In the applicant's case, Judge J.V., who was the President of the Supreme Court at the time and an *ex officio* member of the SJC, had requested the initiation of proceedings after the criminal division of the Supreme Court, including Judge J.V., found unanimously that there had been professional misconduct by two judges in the court of appeal proceedings that had been presided over by the

applicant. Although the criminal division did not name the judges concerned, it was obvious that the applicant was one of them, as confirmed by the SJC. In such circumstances, the European Court considered that the applicant had had legitimate grounds for fearing that Judge J.V. was already personally convinced that he should be dismissed for professional misconduct before that issue came before the SJC.

The *ad hoc* Commission established to conduct the misconduct proceedings was made up of five SJC members. At the hearing, Judge J.V. was able to submit evidence and arguments in support of the allegations against the applicant and had thus acted as a "prosecutor". He then sat as an *ex officio* member of the plenary of the SJC which, following the Commission's recommendation, decided to remove the applicant from office. In these circumstances, the European Court considered that the system in which Judge J.V., as a member of the SJC who had sought the impugned proceedings and subsequently taken part in the decision to remove the applicant from office, cast objective doubt on his impartiality when deciding on the merits of the applicant's case.

Judge J.V.'s role in the proceedings thus failed both the subjective and objective impartiality tests. The fact that he was only one of fifteen members of the SJC could not, in the circumstances, lead to any other result.

Conclusion: violation (unanimously).

Article 41: EUR 4,000 in respect of non-pecuniary damage.

Article 6 § 1 (criminal)

Fair hearing
Positive obligations

Dismissal of appeal on points of law owing to unexplained absence of court appointed lawyer: *violation*

Vamvakas v. Greece - 2870/11
Judgment 9.4.2015 [Section I]

Facts – In June 2009 the applicant appealed on points of law against a judgment of the Criminal Court of Appeal sentencing him to seven years' imprisonment for fraud and forgery to the detriment of a bank. In January 2010, at the request of the applicant, who was in prison, the President of the Court of Cassation appointed a lawyer to represent him in the proceedings before it.

In a judgment of February 2010 the Court of Cassation dismissed the appeal on the grounds that the applicant, who had been duly summoned to the hearing in a timely manner, had not appeared. According to the applicant, he had, from the prison, contacted the appointed lawyer, who had assured him that he would be present at the hearing. However the lawyer did not turn up and never informed the applicant of the reasons for his absence, neither before nor after the hearing.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (c): The Court of Cassation had appointed a lawyer to represent the applicant in the proceedings before it.

Where a lawyer, especially one who had been officially assigned, decided not to act in a case or was prevented from appearing at a hearing, he or she had a duty to inform the assigning authority of the situation and to do all that was necessary as a matter of urgency to preserve his or her client's rights and interests.

The applicant's lawyer did not seem at any time to have explained that he was unable to pursue his mission.

Since it was impossible under Greek law to reverse a decision to find an appeal on points of law inadmissible, it had been for the Court of Cassation to enquire about the reasons for the lawyer's failure to appear, after being officially assigned, and to ensure that the applicant's interests were protected.

The unexplained absence of the applicant's lawyer from the hearing held one month and three days after his appointment, without any request for adjournment having been received from him – or even if such a request had been filed unlawfully, as the applicant contended – constituted a situation of "manifest default", calling for positive measures on the part of the competent authorities. The Court of Cassation should have adjourned its proceedings in order to clarify the situation rather than dismiss the appeal on points of law as if it were not maintained.

Regardless of the circumstances – whether there had been no contact at all or an invalid request for an adjournment – the competent court had had a positive obligation to ensure practical and effective respect for the applicant's defence rights. As that had not been the case, the Court found a breach of the requirements of Article 6 §§ 1 and 3 (c) of the Convention, taken together.

Conclusion: violation (unanimously).

Article 41: EUR 2,000 in respect of non-pecuniary damage.

Article 6 § 1 (administrative)

Fair hearing

Restriction of procedural rights in proceedings challenging emergency economic measures adopted in the banking sector: *inadmissible*

Adorisio and Others v. the Netherlands - 47315/13 et al.
Decision 17.3.2015 [Section III]

Facts – The applicants, all foreign nationals or legal persons, owned shares and subordinated bonds in one of the major Dutch banking and insurance conglomerate, the SNS Reaal's. Following the 2008 global economic crisis, Reaal's banking arm ran into trouble. Given the perceived risk of the bank collapsing, in 2013 the Government decided to nationalise the conglomerate and to expropriate shares, capital securities and subordinated bonds issued by it in order to protect the banking service and customers' savings. In order to ensure a rapid decision in determining the lawfulness of the expropriation, an accelerating procedure specially designed for crises involving large financial institutions was used. The Administrative Jurisdiction Division of the Council of State held a hearing on the applicants' case in February 2013 and issued its decision upholding the expropriation ten days later.

Law – Article 6 § 1: Before the European Court, the applicants complained under Article 6 § 1 of the Convention that the ten-day time-limit for appealing to the Administrative Jurisdiction Division had been too short, that they had had insufficient time to study the Minister of Finance's statement of defence and that they had been given access to incomplete versions of the reports drawn up by a firm of accountants and a firm of real-estate valuers.

The Court accepted at the outset that the Government's decision to nationalise SNS Reaal's had been motivated by the need to intervene as a matter of urgency in order to prevent serious harm to the national economy. The conglomerate was a major domestic financial institution whose collapse had to be prevented to protect the stability of the entire Dutch financial system. Under the accelerated administrative procedure available to challenge the lawfulness of the expropriation, the expropriated entities and individuals had only ten days to lodge an appeal against the Government's decision concerning their assets. The Court understood the applicants' complaints in the sense that the brevity of the time-limit had prevented them from properly developing their arguments and presenting their evidence to the domestic courts. However, although the time-limit for lodging an appeal had admittedly been very short, it had not prevented the applicants from bringing an effective appeal. Moreover, the applicants had been able to submit additional documents until the day before the hearing and to submit further argument orally at the hearing itself. In these circumstances, the time-limit for lodging the applicant's appeals had not undermined the fairness of the proceedings.

Moreover, the Court accepted that the applicants had had relatively little time to study the Minister of Finance's statement of defence, having only seen it on the eve of the hearing. However, the applicants did not claim that such document contained any statements of fact of which they were yet unaware, or arguments which they were unable to counter for lack of preparation time. Nor did they suggest that their oral submissions to the Administrative Jurisdiction Division would have been any different had they had more opportunity to study it. Considering in particular the domestic courts' need for a very speedy decision, the Court could not find that the applicants had been put at an unfair disadvantage in this respect.

Finally, during the domestic proceedings the applicants had been given access to copies of the financial reports with parts blacked out. Given the very exceptional circumstances of this case, the reviews conducted by the administrative tribunal, sitting in a different composition, which determined that the information withheld from the applicants was of purely financial interest and was irrelevant for the lawfulness of the expropriation, had adequately counterbalanced the disadvantage suffered by the applicants at not receiving the full reports. Furthermore, the European Commission had also been given access to at least one of the reports in order to decide whether or not the nationalisation constituted illegal "State aid". After perusal of the financial report, the Commission had decided to exclude the detailed financial information from the documents it had made available to the public and had also approved the expropriation decision. In the light of these circumstances, the Court therefore accepted that a real need had existed to restrict access to this information.

Conclusion: inadmissible (manifestly ill-founded).

Article 6 § 1 (enforcement)

Access to court

Failure to comply with court order requiring applicant's urgent rehousing: *violation*

Tchokontio Happi v. France - 65829/12
Judgment 9.4.2015 [Section V]

Facts – The applicant lives with her daughter and brother in a flat in the Paris region. In a decision of February 2010, a mediation commission, finding that they were housed in indecent and insalubrious conditions, earmarked their case as a priority for urgent re-housing. Six months from the date of that decision she had not received an offer of housing which took account of her needs and capacities, so the applicant lodged an application with the Administrative Court, asking it to order the State to find her accommodation, on pain of a fine. In December 2010, after noting that the matter was particularly urgent, the court granted her request and instructed the prefect to rehouse the applicant, her daughter and her brother, on pain of a fine of EUR 700 per month of delay to be paid into the regional urban development fund. In January 2012, as the applicant had still not been rehoused, the Administrative Court provisionally enforced the fine, ordering the State to pay EUR 8,400 to the regional urban development fund. On the date of the Court's judgment, the applicant and her family had still not been rehoused.

The proceedings in question were brought under the law on the enforceable right to housing, the "DALO" Act of 5 March 2007, providing that a right to decent and independent housing, for individuals who are unable to obtain it by their own means or to keep their existing housing, is guaranteed by the State.

Law – Article 6 § 1 of the Convention: While the applicant had still not been offered housing adapted to her needs and capacities, the fine had certainly been enforced and paid by the State. However, the sole aim of the fine was to compel the State to implement the rehousing order and had no compensatory function. It had not been paid to the applicant but to a State-run development fund. With no new housing forthcoming, the judgment of December 2010 had not been fully enforced, over three and a half years after delivery – even though the domestic courts had indicated that the applicant's request was to be granted with particular urgency. The failure to enforce the judgment in question, attributed by the Government to a lack of available accommodation, was not based on any valid justification within the meaning of the Court's case-law, according to which it was not open to a State authority to cite a lack of funds or other resources as an excuse for not honouring a judgment debt. Consequently, by failing for several years to take the necessary measures to comply with the final and enforceable court decision, the French authorities had deprived Article 6 § 1 of all useful effect.

Conclusion: violation (unanimously).

Article 1 of Protocol No. 1: According to the judgment of December 2010 the prefect had been required to rehouse the applicant. The judgment had obliged the authorities not to grant her the ownership of a flat but to provide one for her use. Under a social tenancy agreement, the applicant should have enjoyed the right to use a flat. Subject to certain conditions she could have been able to buy it, but this was an option, not a right, any sale being subject to the authorisation of the administrative authorities concerned. She did not therefore have any "legitimate expectation" of acquiring property.

Accordingly, it could not be considered that the nature of her claim – her right to a "social tenancy" – constituted a "possession" within the meaning of Article 1 of Protocol No. 1.

Conclusion: inadmissible (incompatible *ratione materiae*).

Article 41: no claim made in respect of damage.

(See also *Teteriny v. Russia*, 11931/03, 30 June 2005, Information Note 76; *Olaru and Others v. the Republic of Moldova*, 476/07 et al., 28 July 2009, Information Note 121; *Ilyushkin and Others v. Russia*, 5734/08, 17 April 2012, Information Note 151; *Gerasimov and Others v. Russia*, 29920/05 et al., 1 July 2014, Information Note 176)

Article 6 § 2

Presumption of innocence

Administrative fine for smuggling imposed on the basis of facts which had previously given rise to acquittal in criminal proceedings: *violation*

Kapetanios and Others v. Greece - 3453/12, 42941/12 and 9028/13
Judgment 30.4.2015 [Section I]

Facts – Criminal proceedings were brought against the three applicants on contraband charges. They

were acquitted by judgments which became final in 1992, 1998 and 2000. In the meantime, they had been ordered to pay administrative fines. These amounted to about 130, 000 euros in the case of one applicant, and to several hundred thousand euros in the case of the other applicants. The administrative proceedings were concluded by judgments of the Supreme Administrative Court in 2011 and 2012. In dismissing the applicants' appeals on points of law, the Supreme Administrative Court noted that the administrative authorities had not been bound by any acquittal judgments delivered by the criminal courts since under the domestic law only final condemnatory judgments by the criminal courts had *res judicata* value for the administrative courts.

The criminal and administrative proceedings against the first applicant had concerned the import, in 1985 and 1986, of twelve electronic appliances, a hunting rifle, a winch and a video camera without the relevant customs duties having been paid. The two sets of proceedings against the second applicant had concerned the sale, between 1993 and 1995, of petrol and diesel oil without purchase certificates. The two sets of proceedings against the third applicant had concerned the importation into Greece in 1992 of two luxury vehicles without payment of customs taxes and duties and their use without prior clearance from the customs authorities.

Law – Article 4 of Protocol No. 7: The administrative penalties in question were criminal in nature, given the severity of the fines imposed and their deterrent effect. The charges brought against the applicants before the administrative and criminal courts referred specifically to the same conduct occurring over the same periods. From the moment that the acquittal judgments in the first set of criminal proceedings acquired became *res judicata*, the applicants ought to have been considered as having "already been finally acquitted" within the meaning of Article 4 of Protocol No. 7. Given that the applicants had relied on and submitted the acquittal judgments, which were already *res judicata*, both to the courts examining the proceedings on merits and at final instance to the Supreme Administrative Court, it was for the administrative court examining the case to consider, of its own motion, the effect the acquittal judgments could have in the context of the pending administrative proceedings as otherwise the failure to take into account the existence of the first "criminal proceedings" would be tantamount to intentionally tolerating a situation within the national legal system which could be in breach of the *ne bis in idem* principle.

Article 4 of Protocol No. 7 did not in principle prohibit the imposition of a term of imprisonment and a fine for the same set of facts, provided that the *ne bis in idem* principle was respected. Thus, in the context of the prevention of contraband, this principle would not have been breached had the two forms of penalty, a custodial sentence and a financial penalty, been imposed as part of a single set of judicial proceedings. Furthermore, the fact that, in the case of two of the applicants, the criminal proceedings had not yet ended when the administrative proceedings were brought was not in itself problematic with regard to the *ne bis in idem* principle. That principle would have been upheld had the criminal court suspended the trial after the opening of the administrative proceedings and subsequently ended the criminal prosecution once the Supreme Administrative Court had confirmed, at final instance, the fine in question.

In its Åklagaren v. Hans Åkerberg Fransson[1] judgment, the Court of Justice of the European Union (CJEU) had specified that, under the *ne bis in idem* principle, a State could impose a double penalty (tax and criminal) for the same acts only where the first penalty was not criminal in nature. In assessing the criminal nature of a tax penalty, the CJEU had relied on the three criteria used by the Court in the *Engel and Others* judgment. In consequence, the Court noted a convergence in the two courts' case-law with regard to the assessment of the criminal nature of tax proceedings and, *a fortiori*, the implementation of the *ne bis in idem* principle in tax and criminal matters.

In the light of the foregoing, the administrative proceedings in question concerned a second "offence" originating in identical acts to those which had been the subject-matter of the first, and final, acquittals.

Conclusion: violation (unanimously).

Article 6 § 2 of the Convention: The present case was clearly distinguishable from the cases already examined by the Court in which an administrative body with disciplinary powers had imposed a penalty as a result of accusations against a State employee following his or her acquittal in criminal proceedings. In those cases, the disciplinary proceedings enjoyed a certain autonomy *vis-à-vis* the criminal proceedings, particularly in terms of the conditions for their implementation and their non-

1. Åklagaren v. Hans Åkerberg Fransson, C-617/10, judgment of the CJEU (Grand Chamber) of 26 February 2013.

punitive purpose. On account of that autonomy, the imposition of an administrative penalty on the employee in question had not been considered, in itself, to be in breach of the principle of the presumption of innocence, in so far as the administrative body's decision did not contain a statement imputing criminal liability to the applicant.

In the present case, after assessing the material in the case files in a different manner to the criminal courts, the administrative courts had held that the applicants had committed the same offences of contraband of which they had previously been acquitted by the criminal courts. These conclusions had subsequently been upheld, at final instance, by the Supreme Administrative Court. Given the similar nature of the two sets of proceedings in issue, the acts in dispute and the constituent elements of the offences concerned, this finding by the administrative courts had breached the applicants' right to be presumed innocent which had already been established by their acquittals by the criminal courts.

Conclusion: violation (unanimously).

The Court also found, in respect of one of the applicants, a violation of Article 6 § 1 and Article 13 of the Convention on account of the excessive length of the proceedings and the lack of an effective remedy in that respect.

(See also *Engel and Others v. the Netherlands*, 5100/71 et al., 8 June 1976; *Moullet v. France* (dec.), 27521/04, 13 September 2007, Information Note 100; *Vagenas v. Greece* (dec.), 53372/07, 23 August 2011; *Vanjak v. Croatia*, 29889/04, 14 January 2010; and *Hrdalo v. Croatia*, 23272/07, 27 September 2011.)

Article 6 § 3 (c)

Defence through legal assistance

Lack of access to case file prior to first hearing before investigating judge: *no violation*

Inability to communicate with lawyer prior to first hearing before investigating judge: *violation*

A.T. v. Luxembourg - 30460/13
Judgment 9.4.2015 [Section V]

Facts – In October 2009 the Luxembourg public prosecutor's office called for the opening of a judicial investigation against the applicant on charges of rape and indecent assault of a minor under 16. In December 2009 the applicant was arrested in the United Kingdom under a European Arrest Warrant and was surrendered to the Luxembourg authorities. On his arrival in Luxembourg he was questioned by the police without legal assistance. The next day he was examined by an investigating judge in the presence of a lawyer who had been assigned to assist him that very morning. Before the judge the applicant gave detailed statements and maintained those that he had given to the police. He was convicted by the domestic courts and is currently serving his sentence. In its judgment the trial court referred to the various statements given by the applicant, taking them into account in its reasoning, finding that he had kept changing his account of events.

Law – Article 6 § 1 in conjunction with Article 6 § 3 (c): The Court found a violation on account of the absence of a lawyer from the initial interrogation of the applicant by the police. Turning to the applicant's first appearance before the investigating judge, the Court considered that it had to separate the question of the lawyer's access to the file from that of lawyer-client communication.

(a) *Lack of access to the file* – Under the Luxembourg Code of Criminal Procedure, the authorities allowed access to the file only after the end of the first appearance before the judge. Restrictions on access to the case file at the stages of the opening of criminal proceedings and of the police or judicial investigation might be justified by, among other things, the need to preserve the secrecy of the authorities' information and to protect the rights of others. In the present case, it was reasonable for the authorities to justify the lack of access to the file by reasons concerning the protection of the interests of justice. In addition, even before being charged, suspects were free to organise their defence, including by exercising their right to remain silent. They were then entitled to consult the file after the first appearance before the investigating judge and to choose their defence strategy throughout the criminal proceedings. A fair balance was therefore struck by guaranteeing access to the file after the end of the first appearance, throughout the judicial investigation and trial.

Article 6 of the Convention could not be interpreted as guaranteeing an unlimited access to the file in criminal proceedings prior to the first appearance before the investigating judge in situations where the national authorities had sufficient reasons, relating to the protection of the interests of justice, not to undermine the effectiveness of the enquiries.

Consequently, the assistance of a lawyer at the time of the first hearing by the investigating judge had not been rendered ineffective by the lack of prior access to the file.

Conclusion: no violation (unanimously).

(b) *Lack of lawyer-client communication* – The Court noted the importance of consultation between lawyer and client prior to the first appearance before the investigating judge, for it was on that occasion that crucial exchanges could take place, if only so that the lawyer could remind the client of his rights. That was particularly true where, as in the present case, the applicant had been interviewed by the police the previous day without a lawyer and the lawyer then assigned to him had been appointed only on the very morning of his appearance before the investigating judge. Lawyers had to be able to provide assistance that was effective and practical, not abstract, by their presence at the first appearance before the investigating judge. To that end, a lawyer-client consultation had to be guaranteed unequivocally by the legislature. That had not been the case, however, under Luxembourg law.

It was clear that in the present case the record of the hearing stated that a lawyer had been appointed that very morning by the investigating judge, but did not indicate the existence of any period of time during which such a consultation could have taken place. It was thus impossible to verify that the applicant had been able to converse with his lawyer before the hearing in question or had thus received effective legal assistance.

In addition, a report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), issued following visits that had been made precisely during the year of the events in the present case, stated that almost all the prisoners interviewed by the delegation had, according to them, seen a lawyer for the first time when they appeared before the investigating judge, and had been able to converse confidentially with the lawyer only after that hearing.

Conclusion: violation (unanimously).

Article 41: The most appropriate form of redress would be a re-trial; claim in respect of non-pecuniary damage rejected.

Dismissal of appeal on points of law owing to unexplained absence of court appointed lawyer: *violation*

Vamvakas v. Greece - 2870/11
Judgment 9.4.2015 [Section I]

(See Article 6 § 1 (criminal) above, page 14)

ARTICLE 8

Respect for home
Respect for correspondence

Search and seizure of electronic data including e-mails subject to lawyer-client privilege: *violation*

Vinci Construction and GTM Génie Civil et Services v. France - 63629/10 and 60567/10
Judgment 2.4.2015 [Section V]

Facts – In October 2007 the liberties and detention judge at the *tribunal de grande instance* authorised the Department for Competition, Consumer Affairs and Fraud Prevention (DGCCRF) to carry out inspections and seizures on the premises of several companies, including those of the applicant companies, as part of an investigation into illegal concerted practices.

During the inspections numerous documents and computer files were seized, as well as the entire contents of the email accounts of certain individuals employed by the applicant companies.

The applicant companies each submitted an application to the liberties and detention judge at the *tribunal de grande instance* to have the inspections set aside and, failing that, seeking restitution of the unlawfully seized documents. Among other arguments, they alleged that the computer seizures had been widespread and indiscriminate, and that many of the seized documents had been unrelated to the investigation or were covered by lawyer-client professional privilege, and that in any event a sufficiently detailed inventory had not been drawn up. They also submitted that they had been unable to inspect the content of the documents prior to their seizure and had thus not been in a position to contest them.

The JLD dismissed all of the claims by the applicant companies, and the Court of Cassation dismissed their appeals on points of law.

Law – Article 8: The search and seizure of electronic data, consisting in particular in electronic messages which were protected by lawyer-client privilege, amounted to interference in the rights protected by Article 8 of the Convention. This interference with the applicant companies' domicile and the secrecy of their correspondence had been "in accordance with the law" and was intended to find evidence and indications of the existence of unlawful agreements in the interests both of the "economic well-being of the country" and the "prevention of disorder or crime".

The inspections had been aimed at seeking evidence of possible anti-competitive practices by the applicant companies and did not therefore appear as such to have been disproportionate for the purposes of Article 8. In addition, the domestic procedure had provided for a number of safeguards.

The investigators had endeavoured to restrict their searches and to seize only material that was related to the subject-matter of their investigation. In addition, a sufficiently detailed inventory, indicating the name of the files, their extensions, origins and digital fingerprints had been drawn up and handed over to the applicant companies, as well as a copy of the documents seized. The seizures could not therefore be described as "massive and indiscriminate".

However, the seizures had concerned numerous electronic documents, including the entire professional email accounts of certain of the applicant companies' employees. It was undisputed that these documents and email accounts contained a number of files and information covered by lawyer-client privilege. The DGCCRF had specifically indicated in its defence submissions to the liberties and detention judge that it had no objection to the restitution of material thus covered by professional privilege.

Further, while the operations in question were being conducted the applicant companies had been unable either to inspect the content of the documents being seized or to discuss the appropriateness of their seizure. Having been unable to prevent the seizure of documents unrelated to the investigation and especially those covered by lawyer-client privilege, the applicant companies should have been able to obtain, *a posteriori*, a tangible and effective review of their lawfulness. An appeal such as that provided for by Article L.4504 of the Code of Commerce ought to have enabled them to obtain, if appropriate, restitution of the documents concerned or an assurance, with regard to the computer files, that they had been deleted in their entirety.

In this regard, where a judge was called upon to examine reasoned allegations that specifically identified documents had been taken although they were unconnected to the investigation or were covered by lawyer-client privilege, he or she was required to rule on their fate after conducting a specific review of proportionality and to order, where appropriate, their restitution. However, although the applicant companies had exercised their statutory right to appeal to the liberties and detention judge and the judge was aware that the documents removed by the investigators contained correspondence from a lawyer, he had merely examined the formal regularity of the impugned seizures, without examining, as he should have done, the actual circumstances in which they were carried out.

In the light of the foregoing, the seizures carried out on the applicant companies' premises had, in the circumstances of the case, been disproportionate to the aim pursued.

Conclusion: violation (unanimously).

The Court also concluded, unanimously, that there had been a violation of Article 6 § 1 of the Convention on account of the lack of effective judicial review of the decisions authorising the inspections and seizures under Article L.4504, paragraph 6, of the Code of Commerce.

Article 41: finding of a violation sufficient in itself in respect of any non-pecuniary damage; claim for pecuniary damage dismissed.

Expulsion

Proposed deportation of person suffering from serious illness to his country of origin in face of doubts as to the availability of appropriate medical treatment there: *case referred to the Grand Chamber*

Paposhvili v. Belgium - 41738/10
Judgment 17.4.2014 [Section V]

(See Article 2 above, page 8)

Proposed removal of a mentally ill person who had lived and worked in the host country for more than twenty years: *expulsion would not constitute a violation*

Khan v. Germany - 38030/12
Judgment 23.4.2015 [Section V]

Facts – The applicant moved from Pakistan to Germany in 1991 with her husband. Three years later her son was born. She and her husband divorced. The applicant worked as a cleaner in different companies and obtained a permanent residence permit in Germany in 2001. In 2005 she committed manslaughter in a state of acute psychosis. She was diagnosed with schizophrenia and confined to a psychiatric hospital. In 2009 her expulsion was ordered as she was found to pose a danger to public safety. Her mental health subsequently improved and she was granted days of leave and allowed to work full-time in the hospital laundry. The applicant lodged appeals on the grounds that her expulsion would interfere with her right to respect for her family life with her son and that her specific circumstances had not sufficiently been taken into account. The domestic courts found that, in addition to a risk of re-offending, the applicant was not integrated into German society since she spoke no German and basic medical care for psychiatric patients was available in big cities in Pakistan. Following a recommendation in a medical report, she was released on probation. She continued to work, showed balanced behaviour and was in regular contact with her son.

Law – Article 8: Previous Court judgments had shown that the strength or weakness of social ties were best dealt with by assessing the proportionality of the applicant's expulsion under Article 8 § 2. The expulsion order was based on Section 55 of the "Act on the Residence, Economic Activity and Integration of Foreigners in the Federal Territory" which permitted expulsion in the event of danger to public safety and law and order. The measure pursued the legitimate aim of public safety.

As to whether expulsion was in the specific circumstances of the case necessary in a democratic society, the Court noted that the offence, though serious, had been committed in a state of mental incapacity, the applicant had lived for more than 20 years in Germany and, by the time the lawfulness of the expulsion order was established domestically, her condition had improved and there was no indication that she had reoffended at any point. However, the applicant's son was now an adult and mere bonds of affection between adult family members did not enjoy specific family life protection. Although the applicant had been integrated into the German labour market, she had not produced any other evidence of participation in social life. She still had family members in Pakistan and was familiar with the language and culture. Although, since her relatives in Pakistan refused to help, problems might arise regarding her medical care, it was possible that these could be overcome with her pension from Germany. Even taking into consideration a rather difficult environment for the applicant in Pakistan, the possible problems did not carry enough weight to represent an overwhelming obstacle for her return there.

Weighing the impact on the applicant's private life against the danger posed to public safety, the Court did not find that the German authorities had overstepped their margin of appreciation.

Conclusion: expulsion would not constitute a violation (six votes to one).

(See, generally, the Factsheets on Expulsions and extraditions and on Mental health)

ARTICLE 10

Freedom of expression

Lawyer's conviction for complicity with a newspaper in the defamation of investigating judges: *violation*

Morice v. France - 29369/10
Judgment 23.4.2015 [GC]

Facts – In 1995 Bernard Borrel, a judge who had been seconded in the context of cooperation agreements between France and Djibouti, was found dead. The investigation by the Djibouti gendarmerie in the days that followed concluded that he had committed suicide. His widow, disputing the finding of suicide, filed a complaint as a civil party, and appointed the applicant to represent her in the proceedings. Two judicial investigations were opened in respect of premeditated murder committed by a person or persons unknown. The judicial investigation was assigned to investigating Judges M. and L.L.

In June 2000 the Indictments Division of the Court of Appeal removed those judges from the case and transferred it to a new investigating judge, Judge P. Shortly afterwards the same Division upheld a request by the applicant for the withdrawal of the high-profile "Scientology" case from Judge M.

In September 2000 the applicant and one of his colleagues wrote to the French Minister of Justice in connection with the judicial investigation into Judge Borrel's death. They stated that they were approaching the Minister once again about the conduct of Judges M. and L.L. which was "completely at odds with the principles of impartiality and fairness" and they asked for an investigation to be carried out by the General Inspectorate of Judicial Services into the "numerous shortcomings ... brought to light in the course of the judicial investigation".

The following day, an article in the newspaper *Le Monde* stated that Mrs Borrel's lawyers had "vigorously criticised" Judge M. to the Minister of Justice, accusing her in particular of conduct which was "completely at odds with the principles of impartiality and fairness", and adding that she had apparently failed to register an item for the case file and to transmit it to her successor.

The two judges filed a criminal complaint as civil parties against the publication director of *Le Monde*, the journalist who had written the article and Mr Morice, accusing them of the offence of public defamation of a civil servant. The applicant was found guilty of complicity in that offence by the Court of Appeal and was ordered to pay a fine of EUR 4,000. The sum of EUR 7,500 in damages was awarded to each of the judges, to be paid by the applicant jointly with the two other defendants.

In a judgment of 11 July 2013 a Chamber of the Court found, by six votes to one, that there had been no violation of Article 10. On 9 December 2013 the case was referred to the Grand Chamber at the applicant's request (see Information Note 169).

Law – Article 10: The applicant's conviction had constituted an interference with his right to freedom of expression, as guaranteed by Article 10 of the Convention. The interference had been prescribed by law and its aim had been the protection of the reputation or rights of others.

In convicting the applicant, the Court of Appeal had taken the view that the mere fact of asserting that an investigating judge's conduct was "completely at odds with the principles of impartiality and fairness" was a particularly defamatory allegation. That court had added that the applicant's comments concerning the delay in forwarding the video-cassette and his reference to the handwritten card from the public prosecutor of Djibouti to Judge M., in respect of which the applicant had used the term "connivance", merely confirmed the defamatory nature of the accusation, the "veracity" of the allegations not having been established and the applicant's defence of good faith being rejected.

(a) *The applicant's status as lawyer* – While it was not in dispute that the impugned remarks fell within the context of the proceedings, they had been aimed at investigating judges who had been removed from the proceedings with final effect at the time they were made. His statements could not therefore have directly contributed to his task of defending his client, since the judicial investigation had by that time been entrusted to another judge who was not the subject of the criticism.

(b) *Contribution to a debate on a matter of public interest* – The applicant's impugned remarks, which concerned the functioning of the judiciary, a matter of public interest, and the handling of the Borrel case – one which had attracted significant media attention – had fallen within the context of a debate on a matter of public interest, thus calling for a high level of protection of freedom of expression, with a particularly narrow margin of appreciation accordingly being afforded to the authorities.

(c) *Nature of the impugned remarks* – The impugned statements had been more value judgments than pure statements of fact, in view of the general tone of the remarks and the context in which they had been made, as they had reflected mainly an overall assessment of the conduct of the investigating judges in the course of the investigation.

The "factual basis" for those value judgments had been sufficient. The failure by the judge to forward the video-cassette had not only been established but it was also sufficiently serious for it to be recorded by Judge P. in the file. As for the handwritten card, in addition to the fact that it had shown a certain friendliness on the part of the public prosecutor of Djibouti towards Judge M., it had accused the civil parties' lawyers of "orchestrating their manipulation".

Lastly, it was an established fact that the applicant had acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge. In both of them the applicant had succeeded in obtaining findings by the appellate courts that there had been shortcomings in the proceedings, leading to the withdrawal of the cases from Judge M.

Moreover, there had been a sufficiently close connection between the expressions used by the applicant and the facts of the case, and his remarks could not be regarded as misleading or as a gratuitous attack.

(d) *Specific circumstances of the case*

(i) *The need to take account of the overall background* – The background to the case could be explained not only by the conduct of the investigating judges and by the applicant's relations with one of them, but also by the very specific history of the case, its inter-State dimension and its substantial media coverage. However, the Court of Appeal had attributed an extensive scope to the impugned remark of the applicant criticising an investigating judge for "conduct which [was] completely at odds with the principles of impartiality and fairness", whereas that quotation should have been assessed in the light of the specific circumstances of the case, especially as it was in reality not a statement made to the author of the article, but an extract from the letter sent by the applicant and his colleague to the Minister of Justice. In addition, at the time when the applicant answered his questions the journalist had already been informed of the letter to the Minister by his own sources. The article's author had been solely responsible for the reference to the disciplinary proceedings against Judge M. in the context of the "Scientology" case. Lawyers could not be held responsible for everything appearing in an "interview" published by the press or for actions by the press.

The Court of Appeal had thus been required to examine the impugned remarks with full consideration of both the background to the case and the content of the letter, taken as a whole.

The use of the term "connivance" could not constitute "in itself" a serious attack on the honour and reputation of Judge M. and the public prosecutor of Djibouti.

In addition, the applicant's statements could not be reduced to the mere expression of an antagonistic relationship with Judge M. The impugned remarks had formed part of a joint professional initiative by two lawyers, on account of facts that were new, established and capable of revealing serious shortcomings in the justice system, involving the two judges who had formerly been conducting the investigation in a case in which the lawyers' clients were civil parties.

While the applicant's remarks certainly had a negative connotation, it had to be pointed out that, notwithstanding their somewhat hostile nature and seriousness, the key question in the statements concerned the functioning of a judicial investigation, which was a matter of public interest, thus leaving little room for restrictions on freedom of expression. In addition, a lawyer should be able to draw the public's attention to potential shortcomings in the justice system and the judiciary might benefit from constructive criticism.

(ii) *Maintaining the authority of the judiciary* – Judges M. and L.L. were members of the judiciary and were therefore subject to wider limits of acceptable criticism than ordinary citizens and the impugned comments could therefore be directed against them in that capacity.

In addition, the applicant's remarks had not been capable of undermining the proper conduct of the judicial proceedings, in view of the fact that the higher court had withdrawn the case from the two investigating judges concerned by the criticisms.

For the same reasons, and taking account of the foregoing, the applicant's conviction could not serve to maintain the authority of the judiciary.

(iii) *Use of available remedies* – The referral to the Indictments Division of the Court of Appeal had patently shown that the initial intention of the applicant and his colleague had been to resolve the matter using the available legal remedies. In reality, it was only after that remedy had been used that the problem complained of had occurred, as recorded by the investigating judge P. in the file. At that stage the Indictments Division was no longer in a position to examine such complaints, precisely because it had withdrawn the case from Judges M. and L.L. In any event, four and a half years had already elapsed since the opening of the judicial investigation, which had still not been closed at the time of the Court's judgment. For their part, the civil parties and their lawyers had been active in the proceedings.

Moreover, the request to the Minister of Justice for an investigation into the new facts had not constituted a judicial remedy – such as to justify possibly refraining from intervention in the press – but a mere request for an administrative investigation subject to the Minister's discretion.

Lastly, neither the Principal Public Prosecutor nor the relevant Bar Council or chairman of the Bar had found it necessary to bring disciplinary proceedings against the applicant on account of his statements in the press, although such a possibility had been open to them.

(iv) *Conclusion as to the circumstances of the case* – The impugned remarks by the applicant had not constituted gravely damaging and essentially unfounded attacks on the action of the courts, but criticisms levelled at Judges M. and L.L. as part of a debate on a matter of public interest concerning the functioning of the justice system, and in the

context of a case which had received wide media coverage from the outset. While those remarks could admittedly be regarded as harsh, they nevertheless constituted value judgments with a sufficient "factual basis".

(e) *Sanctions imposed* – The applicant had been ordered to pay a fine of EUR 4,000 and, jointly with the other two defendants, EUR 7,500 in damages to each of the two judges who had filed the complaint as civil parties. Thus the sanction imposed on him had not been the "lightest possible", but, on the contrary, one of some significance, and his status as a lawyer had even been relied upon to justify greater severity.

In view of the foregoing, the judgment against the applicant for complicity in defamation could be regarded as a disproportionate interference with his right to freedom of expression, and had not therefore been "necessary in a democratic society" within the meaning of Article 10 of the Convention.

Conclusion: violation (unanimously).

The Court also found a violation of Article 6 § 1 in respect of the applicant's complaint that, before the Court of Cassation, his case had not been given a fair hearing by an impartial tribunal, on account of the presence on the bench of a judge who had previously and publicly expressed his support for one of the civil parties. The applicant's fears about a lack of impartiality could be regarded as objectively justified.

Article 41: EUR 15,000 in respect of non-pecuniary damage; EUR 270 in respect of pecuniary damage.

(See also *July and SARL Libération v. France*, 20893/03, 14 February 2008, Information Note 105)

ARTICLE 11

Freedom of association

Refusal to allow police officers to go on strike: *no violation*

Junta Rectora Del Ertzainen Nazional Elkartasuna (ER.N.E.) v. Spain - 45892/09
Judgment 21.4.2015 [Section III]

Facts – The applicant trade union is the largest trade union representing officials of the Basque Country police force. In 2004, following the collapse of negotiations with the Department of the Interior concerning working conditions, the applicant trade union's executive committee applied to the Department of Justice, Employment and Social Security of the Basque Autonomous Community for authorisation to take strike action. The application was refused.

Law – Article 11: The measure complained of had been prescribed by law and had pursued the legitimate aim of preventing disorder.

Furthermore, the restriction laid down by the legislation in question did not apply to all public servants but was imposed exclusively on members of the State security forces, as guarantors of public safety. The same legislation gave those forces greater responsibility, requiring them to act at any time and in any place to uphold the law, both during and outside working hours. This need to provide a continuous service and the fact that these "law-enforcement agents" were armed distinguished this group from other civil servants and justified the restriction of their right to organise. The more stringent requirements imposed on them did not exceed what was necessary in a democratic society, in so far as those requirements served to protect the State's general interests and in particular to ensure national security, public safety and the prevention of disorder, principles set forth in Article 11 § 2 of the Convention. The specific nature of those agents' activities warranted granting the State a sufficiently wide margin of appreciation. Accordingly, the facts complained of in the present case did not amount to unjustified interference with the applicant trade union's right to freedom of association, the essential content of which it had been able to exercise.

Conclusion: no violation (unanimously).

The Court further held unanimously that there had been no violation of Article 14 taken in conjunction with Article 11.

(See also the Factsheet on Trade union rights under the headings "Right to strike and right of peaceful assembly" and "Trade unions' rights in the public sector".)

ARTICLE 14

Discrimination (Article 3 of Protocol No. 1)

New eligibility requirement applicable solely to candidates of national minority organisations not already represented in Parliament: *violation*

Danis and the Association of Ethnic Turks v. Romania - 16632/09
Judgment 21.4.2015 [Section III]

Facts – The applicant association, which represents the Turkish minority in Romania, had already

taken part in the November 2004 parliamentary elections, in which another Turkish minority organisation had polled a slightly higher number of votes and thus won the seat reserved for the Turkish minority. However, when the 2008 elections were held, the newly enacted Law no. 35/2008 entitled the other Turkish minority organisation to stand again without carrying out any further formalities, whereas the applicant association, which was intending to put the first applicant forward as its parliamentary candidate, was required to satisfy a new condition of having been granted charitable status.

Law – Article 14 of the Convention in conjunction with Article 3 of Protocol No. 1: Law no. 35/2008 had introduced a two-tier system for approving candidates put forward by national minority organisations in parliamentary elections. Organisations already represented in Parliament were automatically entitled to field candidates again, being presumed to be representative simply on account of their success in the previous elections, whereas those that were not represented were required to demonstrate their representative nature. It was therefore easier for organisations already represented in Parliament to field candidates. Accordingly, the applicants had been subjected to a difference in treatment in the exercise of their electoral rights under Article 3 of Protocol No. 1 as a result of the enactment of the new electoral law.

The new law had been intended to ensure that organisations not yet represented in Parliament were properly representative and to eliminate frivolous candidates.

As to whether the difference in treatment had been proportionate, Law no. 35/2008 governing elections had come into force on 16 March 2008. Given that candidates' names had had to be submitted at least forty days before the elections of 30 November 2008, the applicants had had approximately seven months to prepare their candidacy.

Furthermore, the new condition of being granted charitable status included a requirement of "significant previous activity" during the three years prior to the application for such status. The applicants had not applied for the applicant association to be granted charitable status since it did not satisfy that requirement. It thus had to be determined whether this failure to act was attributable to the applicants or was an inevitable consequence of the enactment of the new electoral law. The significant nature of an organisation's previous activity was assessed on the basis of whether it had "carried out programmes and projects specific to its purpose". Although the legislation did not define the terms "programmes" or "projects", these concepts could not apply to an organisation's statutory requirements, such as submitting its financial reports to the Court of Audit. On the contrary, the pursuit of such programmes and projects was at the discretion of the organisation in question, which was entitled to determine their objectives, duration and associated activities in accordance with its own aims and available resources. The applicant association had stood in the 2004 elections, polling slightly fewer votes than the organisation that had won the seat representing the Turkish minority. The Court thus concluded that in 2004 the applicant association had satisfied all the eligibility criteria under domestic law and that it had organised its subsequent activities on the basis of the statutory provisions applicable at that time. The applicants could therefore not be criticised for failing to foresee that seven months before the 2008 elections they would be asked to fulfil a new criterion, namely that of having carried out specific programmes and projects for at least three years.

By amending electoral legislation seven months before the 2008 parliamentary elections, the authorities had not given the applicants the opportunity to organise their activities in such a way that they could be granted charitable status. As a result, it had been objectively impossible for them to obtain that status and thus satisfy one of the eligibility requirements under the new electoral law.

Accordingly, the new eligibility criterion, which the applicants – unlike national minority organisations that were already represented in Parliament – had had to satisfy in order to be able to stand in the parliamentary elections, had been disproportionate to the legitimate aim pursued.

Conclusion: violation (unanimously).

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

ARTICLE 37

Striking out applications

Homosexual man required to return to Libya in order to apply for family reunion: *struck-out following grant of residence permit*

M.E. v. Sweden - 71398/12
Judgment (striking out) 8.4.2015 [GC]

Facts – The applicant, a Libyan national who had been living in Sweden since 2010, applied for

asylum there initially on the grounds that he feared persecution because he was homosexual and had married a man. The Migration Board and the Migration Court rejected his request on the grounds that his story lacked credibility.

On 26 June 2014 a Chamber of the Court delivered a judgment in which it held by six votes to one that the implementation of the expulsion order against the applicant would not give rise to a violation of Article 3 of the Convention (see Information Note 175).

On 17 November 2014 the case was referred to the Grand Chamber at the applicant's request.

On 17 December 2014 the domestic authorities issued the applicant with a permanent residence permit.

Law – Article 37 § 1: The granting of a permanent residence permit to the applicant, which effectively repealed the expulsion order, had been taken by the domestic authorities of their own motion. In examining the present case, there was no need to enquire retrospectively into whether a real risk engaging the respondent State's responsibility under Article 3 of the Convention existed when the domestic authorities refused the applicant's asylum requests or when the Chamber adopted its judgment as these historical facts did not shed light on the applicant's current situation. Moreover, when granting the applicant a permanent residence permit, the domestic authorities had taken into account both the deterioration in the security situation in Libya since the summer of 2014 and the applicant's sexual orientation, which would have put him at risk of being persecuted if sent back to his home country. Against this background, the Court found no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which required the continued examination of the case. As the risk of ill-treatment contrary to Article 3 of the Convention alleged by the applicant had been removed by the domestic authorities' decision, the matter was considered resolved within the meaning of Article 37 § 1 (b) of the Convention.

Conclusion: struck-out (unanimously).

(See the Factsheets on Expulsions and extraditions and Sexual orientation issues)

Order for deportation of a Mandaean woman to Iraq: *struck-out following grant of residence permit*

W.H. v. Sweden - 49341/10
Judgment (striking out) 8.4.2015 [GC]

Facts – The applicant was an Iraqi woman belonging to the Mandaean minority. In 2007 she moved to Sweden and applied for asylum on the ground that, in her home country, the members of her ethnic group were subjected to extortion, kidnappings and murder and women and children were forced to convert to Islam, often after being assaulted and raped. She also feared that, as she was divorced, she would be forcibly remarried. Moreover, she was a single woman without a social network in Iraq, and she had a relationship with a Muslim man in Sweden, a situation that would never be accepted in Iraq. In December 2009 her application for asylum was definitively rejected on the ground that the threat concerning forced marriage was primarily related to the general security situation in Iraq which had since improved.

In a judgment of 27 March 2014, a Chamber of the Court held unanimously that the implementation of the deportation order against the applicant would not give rise to a violation of Article 3 of the Convention, provided that she was not returned to parts of Iraq situated outside the Kurdistan Region, which could be considered relatively safe.

On 8 September 2014 the case was referred to the Grand Chamber at the applicant's request (see Information Note 177).

On 15 October 2014 the Migration Board granted the applicant a permanent residence permit in Sweden.

Law – Article 37 § 1: Considering that the applicant had been granted a permanent residence permit in Sweden and that she did not intend to pursue her application, the matter could be regarded as resolved within the meaning of Article 37 § 1 (b) of the Convention. Furthermore, there were no special circumstances regarding respect for human rights as defined in the Convention and its Protocols which required the continued examination of the case.

Conclusion: struck-out (unanimously).

(See the Factsheet on Expulsions and extraditions)

ARTICLE 41

Just satisfaction

Absence of award in respect of non-pecuniary damage where delays in confiscation proceedings were mainly attributable to applicant

Piper v. the United Kingdom - 44547/10
Judgment 21.4.2015 [Section IV]

Facts – In June 2001 the applicant was found guilty of drug-trafficking offences and sentenced to fourteen years' imprisonment (he was released in 2006). By virtue of his conviction he became liable to confiscation of assets under the Drug Trafficking Act 1994. The compensation proceedings ended with a judgment of the Court of Appeal in March 2010 upholding a confiscation order at first instance in which the total amount of the applicant's benefit from criminal conduct was assessed at over 1,800,000 pounds sterling. In his application to the European Court, the applicant complained of the length of the confiscation proceedings (Article 6 § 1 of the Convention).

Law – Article 6 § 1: The period to be taken into account commenced with the applicant's arrest in January 1999 and ended with the judgment of the Court of Appeal in March 2010 (approximately eleven years, two months). Although the applicant had pursued a series of fruitless appeals, there had also been delays in the case attributable to the State authorities totalling approximately three years. Given, in particular, what had been at stake for the applicant, and notwithstanding the fact that he was himself responsible for the majority of the overall delay, the Court found that the proceedings had not been completed within a reasonable time.

Conclusion: violation (unanimously).

Article 41: As regards the applicant's claim for non-pecuniary damage, the Court accepted that, although not fully identified, some of the "strain" experienced by the applicant during the course of the confiscation proceedings had inextricably been linked to the issue of delay. However, that "very limited uncertainty" (in the words of the Court of Appeal) could not be taken to have caused the applicant substantial prejudice at all. Furthermore, it was far from the totality of the extraordinary length of the proceedings that had been found to be attributable to the respondent State. On the contrary, it was the applicant himself who, after being convicted of a serious offence of drug-trafficking involving potentially enormous rewards for himself but much damage to society, was largely responsible for preventing the proceedings aimed at confiscating his assets being brought to a timely close. As the national judges and the Court of Appeal in particular had pointed out, the applicant had "deployed every legal stratagem to delay the confiscation process" and succeeded in his endeavour. Faced with various objections and requirements from the applicant's legal team, the judge in the confiscation proceedings had sought to strike a balance between the need to prevent delay in the proceedings and the importance of allowing the applicant adequate time to prepare and mount his defence.

Having regard to these particular circumstances, the Court did not consider it "necessary", in the terms of Article 41 of the Convention, to afford the applicant any financial compensation and held that the finding of a violation of Article 6 § 1 by reason of the delay in the proceedings attributable to the respondent State in itself constituted adequate just satisfaction for the purposes of the Convention.

ARTICLE 46

Execution of judgment – General measures

Respondent State required to take general measures with a view to punishing persons responsible for torture and other ill-treatment

Cestaro v. Italy - 6884/11
Judgment 7.4.2015 [Section IV]

(See Article 3 above, page 9)

ARTICLE 4 OF PROTOCOL No. 7

Right not to be tried or punished twice

Administrative fine for smuggling imposed on the basis of facts which had previously given rise to acquittal in criminal proceedings: *violation*

Kapetanios and Others v. Greece - 3453/12, 42941/12 and 9028/13
Judgment 30.4.2015 [Section I]

(See Article 6 § 2 above, page 16)

REFERRAL TO THE GRAND CHAMBER

Article 43 § 2

Paposhvili v. Belgium - 41738/10
Judgment 17.4.2014 [Section V]

(See Article 2 above, page 8)

Buzadji v. Republic of Moldova - 23755/07
Judgment 16.12.2014 [Section III]

(See Article 5 § 3 above, page 13)

DECISIONS OF OTHER INTERNATIONAL JURISDICTIONS

Court of Justice of the European Union (CJEU)

Preliminary ruling concerning differences in method of calculation of permanent invalidity pensions for full-time and part-time workers

Lourdes Cachaldora Fernández v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)
- C-527/13
Judgment (Grand Chamber) 14.4.2015

The case originated in a request by the Galicia High Court of Justice for a preliminary ruling from the Court of Justice of the European Union (CJEU) concerning the risk that the Spanish legislation on the calculation of pensions for total permanent invalidity could constitute discrimination between full and part-time workers[1] and between men and women, since the great majority of part-time workers were female[2].

The national rules in question provide that contribution gaps existing within the reference period for calculating a contributory invalidity pension (eight years preceding the date of the event giving rise to the invalidity), after a period of part-time employment, are taken into account at the level of the applicable minimum contribution bases, reduced as a result of the reduction coefficient of that employment, whereas if those gaps follow full-time employment there is no provision for such a reduction.

The CJEU began by noting that the national rules were not directly discriminatory on grounds of sex, since they applied without distinction to both male and female workers.

It further noted that the national provision at issue in the main proceedings was not applicable to all part-time workers, but only to workers who had had a gap in their contributions immediately following a period of part-time work. Moreover, the provision in question benefited workers who, despite working part-time for much of their working lives, were employed full-time immediately before a contribution gap. Hence, the statistical data could not lead to the conclusion that the group of workers disadvantaged by the rule of national law at issue in the main proceedings was mainly composed of part-time workers and, in particular, female workers. In the light of the foregoing considerations, the national provision at issue in the main proceedings could not be regarded as placing at a disadvantage predominantly a particular category of workers, in this case those working part-time and, in particular, women. That provision could not therefore be regarded as being an indirectly discriminatory measure.

For the same reasons, it could not be regarded as a legal obstacle likely to limit the opportunities for part-time work. In any event, the CJEU considered that the type of pension in question was a statutory social security pension. Consequently, it did not constitute an employment condition within the meaning of the Framework Agreement on part-time work and did not therefore fall within its scope.

The CJEU judgment and press release can be found at <http://curia.europa.eu>.

For an overview of EU and Council of Europe law in the field of non-discrimination and the key caselaw of the CJEU and the Strasbourg Court in this sphere, see the Handbook on European non-discrimination law (<www.echr.coe.int> – Publications).

1. Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.
2. Clause 5, paragraph 1, sub-paragraph (a), of the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC.

Compatibility with EU law of a permanent deferral under French law of blood donations from men who have had sexual relations with other men

Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes and Établissement français du sang - C-528/13
Judgment 29.4.2015 (Fourth Chamber)

This case concerned a request by a French administrative court for a preliminary ruling on the question whether a permanent deferral under French law of blood donations from men who have had sexual relations with other men is compatible with Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components.[1]

The CJEU found as follows:

• The national court would have to determine in the light of relevant epidemiological data whether, in France, in the case of a man who has had sexual relations with another man, there was a high risk of acquiring severe infectious diseases that could be transmitted by blood.

• Even if the national court found that such a high risk existed, the question arose as to whether the permanent deferral from blood donation was consistent with the fundamental rights recognised by the European Union legal order and, in particular, with the principle of non-discrimination on the basis of sexual orientation (Article 21(1) of the Charter of Fundamental Rights).

• The permanent deferral provided for in French law aimed to minimise the risk of transmitting an infectious disease to recipients and therefore contributed to the general objective of ensuring a high level of human health protection.

• As regards the principle of proportionality, under CJEU case-law measures laid down by national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued; when there is a choice between several appropriate measures, recourse must be had to the least onerous among them, and the disadvantages caused must not be disproportionate to the aims pursued.

1. According to the directive, persons whose sexual behaviour puts them at a high risk of contracting severe infectious diseases that can be transmitted by blood are subject to a permanent deferral from blood donation.

• In a case such as the present one, that principle was respected only where a high level of health protection for the recipients could not be ensured by effective techniques for detecting HIV which were less onerous than the permanent deferral from blood donation for the entire group of men who have had sexual relations with other men.

• It was for the national court to ascertain whether such techniques existed and, in particular, to verify whether scientific or technical progress in the field of science or health, taking account in particular of the cost of systematic quarantining of blood donations from men who have had sexual relations with other men or the cost of systematic screening for HIV for all blood donations, allowed a high level of health protection for recipients without the resulting burden being excessive.

• If no such techniques existed, the national court would have to ascertain whether there were less onerous methods of ensuring a high level of health protection and, in particular, whether the use of a questionnaire and individual interview with a medical professional would be able to identify high risk sexual behaviour more accurately.

• If effective techniques for detecting severe diseases that can be transmitted by blood or, in the absence of such techniques, less onerous methods than the permanent deferral of blood donation for the entire group of men who have had sexual relations with other men ensure a high level of health protection to recipients, such a permanent contraindication would not respect the principle of proportionality, within the meaning of Article 52(1) of the Charter.

Ruling – The relevant provisions of Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components must be interpreted as meaning that the criterion for permanent deferral from blood donation in that provision relating to sexual behaviour covers the situation in which a Member State, having regard to the prevailing situation there, provides for a permanent contraindication to blood donation for men who have had sexual relations with other men where it is established, on the basis of current medical, scientific and epidemiological knowledge and data, that such sexual behaviour puts those persons at a high risk of acquiring severe infectious diseases and that, with due regard to the principle of proportionality, there are no effective techniques for detecting those infectious diseases or, in the absence of such techniques, any less onerous methods than such a counter indication

for ensuring a high level of health protection of the recipients. It is for the referring court to determine whether, in the Member State concerned, those conditions are met.

The CJEU judgment and press release can be found at <http://curia.europa.eu>.

For an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and ECHR on European non-discrimination law, see the Handbook on European non-discrimination law and update (<www.echr.coe.int> – Publications).

Inter-American Court of Human Rights

Right to nationality, prohibition of collective expulsions and the principle of non-discrimination

Case of Expelled Dominicans and Haitians v. Dominican Republic - Series C No. 282
Judgment 28.8.2014[1]

Facts – In 1999 and 2000, members of six family groups were apprehended by the Dominican authorities and summarily expelled to Haiti. The official identity documents of some of the victims were destroyed or disregarded by Dominican State authorities at the time of the expulsion. In other cases, victims born in the Dominican Republic had never been registered and did not possess documentation proving their nationality. Some of the next of kin of those who were expelled were also considered victims in this case. Some of the victims were Haitians and others were born in Dominican territory. Some were children at the time of the events.

The Inter-American Court established that at the time of the events, Haitians and individuals of Haitian descent in the Dominican Republic were usually undocumented and living in poverty. They were also frequent victims of pejorative or discriminatory treatment, even by State authorities, which increased their situation of vulnerability. At least during an approximate time of a decade, in the 1990s, there was a systematic pattern of expulsions of Haitians and those of Haitian descent, including collective expulsions, based on discriminatory conceptions.

The constitutional provisions in force when the victims were born established the principle of *ius soli* for the acquisition of Dominican nationality, except for, *inter alia*, the children of aliens who were "in transit" in the country. In 2005 and 2013, based on these and on prior constitutional provisions, the Supreme Court and the Constitutional Court of the Dominican Republic interpreted that in the case of aliens in an irregular migratory situation, this irregularity prevented their children born in Dominican territory from obtaining Dominican nationality based on the "in transit" exception. Thus, the Constitutional Court judgment TC/0168/13 of 2013 ordered a general administrative review policy to detect "foreigners" registered in Dominican birth records as of 1929. In 2014, Law No. 169 allowed individuals born in Dominican territory whose parents were aliens in an irregular migratory situation to acquire Dominican nationality by "naturalization."

Law

(a) *Substantive provisions of the American Convention on Human Rights (ACHR)*

(i) *Articles 3, 18, 19, 20 and 24,*[2] *in relation to Articles 1(1) and 23* – The expulsion of individuals who should be considered nationals of the expelling State, disregarding their identity documentation or their nationality, violates their right to identity and, in relation to this, their rights to juridical personality, to a name, and to nationality, as well as, when applicable, the rights of the child. Furthermore, since the expulsion was the result of prejudicial treatment based on personal characteristics, the obligation to respect rights without discrimination was also violated.

Article 20 of the ACHR recognizes the right to nationality.[4] Though the determination of the requirements for acquiring nationality continues to be subject to the internal jurisdiction of States, when regulating the granting of nationality, States must take into account (a) their obligation to pre-

1. This summary was provided courtesy of the Secretariat of the Inter-American Court of Human Rights. A more detailed, official summary is available on that Court's website.

2. Rights to recognition of juridical personality, to a name, of the child, to nationality and to equal protection of the law. In addition, the Court examined the right to identity, which is not expressly included in the American Convention on Human Rights, based on its relationship to the rights to juridical personality, to a name and to nationality.

3. Obligations to respect and ensure rights without discrimination, and to adopt domestic legal provisions.

4. The American Convention includes two aspects of the right to nationality: the right to a nationality from the perspective of endowing the individual with basic legal protection for a series of relationships by establishing his connection to a specific State, and the protection of the individual against the arbitrary deprivation of his nationality because this would deprive him of all his political rights and of those civil rights that are based on a person's nationality.

vent, avoid and reduce statelessness, and (b) their obligation to provide each individual with equal and effective protection of the law without discrimination.

Accordingly, there is no justification *per se* for a differential treatment of persons born in the territory of a State based on the different situation of their foreign parents as regular or irregular migrants. The mere allusion to the "illegal situation" of the parents of those concerned is insufficient when assessing the purpose of the distinction and its reasonableness and proportionality. The Court found no reason to depart from its opinion in its judgment in the case of the *Girls Yean and Bosico v. Dominican Republic* that "the migratory status of a person is not transmitted to his or her children".[1] Thus, the introduction of the standard of irregular permanence of the parents as an exception to the acquisition of nationality by *ius soli* was discriminatory in the Dominican Republic when it was applied in a discriminatory context towards Dominicans of Haitian origin.

Furthermore, a State may not establish regulations that could result in persons born in its territory running the risk of becoming stateless. It is not sufficient that the State argues that another country has a legal system that would allow such persons to acquire nationality; rather it must take measures to verify that, in fact, those persons meet the requirements to be able to obtain that nationality.

Legal certainty regarding the enjoyment of nationality is impaired as a result of retroactive policies that include further requirements based on judicial interpretations of constitutional provisions in force at the time of the birth of the individuals concerned which did not expressly include such requirements.

Even if a general law or measure has not been applied directly to the alleged victims, it may be pertinent to examine it in the context of a contentious case if, according to the circumstances, it may result in an impairment of their rights. Provisions such as those contained in Law No. 169-14, establishing that individuals who should obtain nationality automatically as a basic right because they were born in the territory may acquire it by "naturalization", treat those persons as aliens and subject them to an impediment to the enjoyment of their right to nationality.

Conclusion: violation (unanimously).

1. Case of the *Girls Yean and Bosico v. Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs), judgment of 8 September 2005, Series C No. 130, § 156.

(ii) *Articles 7, 8, 19, 22 and 25,*[2] *in relation to Article 1(1)*[3] – It is unreasonable, and therefore arbitrary, to deprive a person of liberty based on racial profiling because he or she is apparently a foreigner or of foreign descent.

The end of the deprivation of liberty of the victims was not brought about by their release in Dominican territory, but occurred when State agents expelled them from Dominican territory. The expulsion of a person without being brought before a competent authority who could decide, as appropriate, on the possible admissibility of their release, constituted a violation of the guarantee of judicial control of detention.

The basic guarantees of due process must be observed in proceedings that may result in expulsion. As the victims were not accorded the basic guarantees that corresponded to them as persons subject to expulsion, the right to a fair trial was violated.

Conclusion: violation (unanimously).

(iii) The Inter-American Court, unanimously, also determined violations of Articles 11 and 17,[4] in relation to Articles 19 and 1(1), and found that it was not incumbent on the Court to rule on Articles 5 and 21.[5]

(b) *Procedural aspects of the proceedings before the Inter-American Court*

(i) *Evidence* – Even though the absence of documentation or of certifications of administrative or judicial procedures would normally indicate the inexistence of facts that should be substantiated by such means, this is not the case when such absence is part of the factual controversies examined and is consistent with a contextual situation established in the judgment.

A lack of evidence derived from State actions or policies cannot be used as grounds for considering that facts alleged by the alleged victims have not been proved. An assessment of the evidence in that sense would be contrary to the principle that the courts have the obligation to reject any argument based on the negligence of the party presenting it (*nemo auditur propiam turpitudinem alegans*).

2. Rights to personal liberty, to judicial guarantees, of the child, to freedom of movement and residence, and to judicial protection.
3. Obligation to respect and ensure rights without discrimination.
4. Rights to protection of honour and dignity, and to protection of the family.
5. Rights to personal integrity and to property.

It may be disproportionate to place the burden of proving irrefutably, by documentary or other evidence, the occurrence of facts that relate to the State's omissions exclusively on the alleged victims.

(ii) *Application of Article 53 of the Rules of Procedure*[1] – States have the power to institute proceedings to penalize or to annul acts contrary to their laws. However, those who intervene before the Inter-American Court must be assured that they will not be prejudiced because of this. The institution of domestic administrative or judicial proceedings against any of the alleged victims due to the fact that the State is being judged in the international sphere may impair the security of their procedural activity. The Court cannot consider that proceedings arising from a violation of Article 53 of the Rules of Procedure are valid; hence they cannot constitute an impediment to compliance with its judgment.

(c) *Reparations* – The Court ordered the State to (a) annul certain administrative investigations and judicial proceedings; (b) provide some of the victims with Dominican nationality and identity documents; (c) take measures to ensure that a Haitian victim could live in the Dominican Republic (considering that her daughter, also a victim, was Dominican and still a child); (d) publicize the judgment; (e) implement training programs; (f) take measures to prevent judgment TC/0168/13 and specific articles of Law No. 169-14 from continuing to have legal effects; (g) annul any norm, practice, decision or interpretation that established or had the effect of making the irregular situation of foreign parents the basis for denying Dominican nationality to individuals born in the territory of the Dominican Republic; (h) adopt the necessary measures to ensure that all those born in the State's territory can be registered immediately after their birth, regardless of their descent or origin and of the migratory situation of their parents; and (i) pay certain sums as compensation for pecuniary and non-pecuniary damage, and reimburse costs and expenses and the Victims' Legal Assistance Fund.

For information on collective expulsions from a European perspective, with an overview of the legal frameworks of both the European Union and the Council of Europe and of the key jurisprudence of the CJEU and ECHR, see the Handbook on European law relating to asylum, borders and immigration, especially chapter 3.2 (<www.echr.coe.int> – Publications).

Further information on the Convention case-law on the subject can be found in the Factsheet on Collective expulsions (<www.echr.coe.int> – Press).

1. Protection of alleged victims, witnesses, expert witnesses, representatives and legal advisers. Prohibition to prosecute or take reprisals based on declarations or actions before the Inter-American Court.

COURT NEWS

Elections

During its spring session held from 20 to 24 April 2015, the Parliamentary Assembly of the Council of Europe elected five new judges to the Court: Pere Pastor Vilanova in respect of Andorra, Gabriele Kucsko-Stadlmayer in respect of Austria, Pauliine Koskelo in respect of Finland, Síofra O'Leary in respect of Ireland, and Carlo Ranzoni in respect of Liechtenstein. They will begin their nine-year terms in office between 21 July 2015 and 1 January 2016.

2015 René Cassin advocacy competition

The final round of the 30th edition of the René Cassin competition, which takes the form of a mock-trial, in French, concerning rights protected by the European Convention on Human Rights took place at the European Court of Human Rights in Strasbourg on 10 April 2015.

Thirty university teams from seven countries (France, Luxembourg, Netherlands, Romania, Russia, Switzerland and Turkey), selected following the written stage of the competition, competed in a case concerning children's and family rights. Students from the University of Basel (Switzerland) were declared the winners after beating a rival team from the University of Montpellier I (France) in the final round.

Further information about this year's competition and previous contests can be found on the René Cassin competition Internet site (<www.concourscassin.eu>).

RECENT PUBLICATIONS

Reports of Judgments and Decisions

The two first volumes for 2013 have now been published. The print edition is available from Wolf Legal Publishers (the Netherlands) at <www.wolfpublishers.nl>; <sales@wolfpublishers.nl>. All published volumes and indexes from the *Reports*

series may also be downloaded from the Court's Internet site (<www.echr.coe.int> – Case-law).

Annual Report 2014 of the ECHR

The Court has just issued the printed version of its Annual Report for 2014. This report contains a wealth of statistical and substantive information such as the Jurisconsult's overview of the main judgments and decisions delivered by the Court in 2014. An electronic version is available on the Court's Internet site (<www.echr.coe.int> – Publications).

Annual Report 2014: execution of judgments of the Court

The Committee of Ministers' eighth annual report on the supervision of the execution of judgments of the European Court of Human Rights has just been published. 2014 statistics confirm the positive trend noted

since 2011. They reveal a continuing decrease in the total number of pending cases, as well as a historical record number of cases closed by the Committee following the adoption of necessary execution measures by national authorities.

The report can be downloaded from the Internet site of the Council of Europe's Directorate General of Human Rights and Rule of Law (<www.coe.int> – Protection of human rights – Execution of judgments of the Court).

Annual Activity Report 2014 of the Commissioner for Human Rights

In April 2015 Mr Nils Muižnieks, Commissioner for Human Rights, presented his Activity Report 2014 to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe. This report can be downloaded from the Internet site of the Council of Europe (<www.coe.int> – Commissioner for Human Rights).

The Commissioner for Human Rights is an independent and impartial non-judicial institution established in 1999 by the Council of Europe to promote awareness of and respect for human rights in the member States. The activities of this institution focus on three major, closely related areas: country visits and dialogue with national authorities and civil society; thematic studies and advice on systematic human rights work; and awareness-raising activities.